Latest update: 30 May 2016 (4th edition)

CASES DECIDED JULY – DECEMBER 2015

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

Administrative law – *audi alteram partem* rule – embodied in Administrative Justice Act [*Chapter 10:28*] – effect of rule – requirement to give notice of proposed action and to allow affected person to make representations – allegations made against person but not clearly refuted – not necessarily admission of such allegations

A-G v *Mudisi & Ors* S-48-15 (Patel JA, Malaba DCJ & Garwe JA concurring) (Judgment delivered 28 July 2015)

See below, under LEGAL PRACTITIONER (Prosecutor-General – control over prosecutors).

Agency – agent – who is – distinction between employee, agent and independent contractor

Masango & Ors v *Kenneth & Anor* S-41-15 (Gwaunza JA, Gowora & Patel JJA concurring) (Judgment delivered 20 July 2015)

See below, under EMPLOYMENT (Employee – who is).

Appeal – Constitutional Court – appeal to – from decision of Supreme Court – no right of appeal existing unless Supreme Court has made decision on a constitutional matter

Nyamande & Anor v *Zuva Petroleum (Pvt) Ltd (2)* CC-8-15 (Ziyambi JCC) (Judgment delivered 1 August 2015)

See below, under CONSTITUTIONAL LAW (Constitution of Zimbabwe 2013 – Constitutional Court).

Appeal – criminal matter – from High Court to Supreme Court – High Court making ruling in relation to application for review of proceedings in magistrates court – no appeal lying against such ruling

Nyambo v *Mahwe NO & Anor* HH-736-15 (Bhunu J) (Judgment delivered 16 September 2015)

The applicant, who was on trial at the magistrates court, applied for discharge at the close of the State case. The magistrate refused the application, so the applicant brought the matter on review before the High Court, which dismissed the application. The applicant then sought leave to appeal to the Supreme Court, in terms of s 44(5)(a) of the High Court Act [*Chapter 7:06*]. This section allows a dissatisfied party (the accused or the Prosecutor-General) to appeal against an interlocutory order or judgment in relation to any criminal proceedings before the High Court. Leave must be obtained for such appeal.
Held: the ruling dismissing the application for review was not an interlocutory ruling, but a final one. In any event, the ruling did not relate to proceedings in the High Court, but to proceedings in the magistrates court. The applicant had no right of appeal at this stage, though the right of appeal to the High Court remained, once the proceedings in the magistrates court were complete.

Appeal – Labour Court – appeal to – grounds – raising of new grounds on appeal – when appeal court should allow point to be raised

Appeal – labour matter – observance of procedural requirements – stringency required in other civil matters not necessarily ousted because matter is a labour dispute

Gazi v *NRZ* S-60-15 (Gwaunza JA, Ziyambi & Mavangira JJA concurring) (Judgment delivered 19 October 2015)

The appellant was employed by the respondent. He was dismissed for absenteeism. He did not attend the disciplinary hearing, although he had been advised of the date, time and venue. The decision of the disciplinary committee was, in effect, a default one. The appellant nonetheless appealed to the General Manager of the respondent, who disregarded the fact that the appellant had been in default, and heard the matter on the grounds raised by the appellant. He upheld the dismissal. The appellant then appealed to the Labour Court, but on new grounds which related to the reasons for his absence from duty. In effect, the enjoined the Labour Court to determine matters which had not been placed before the General Manager and which the respondent had not had the opportunity to respond to. He argued that new points of law can be raised at any time. The respondent argued that to consider these new points would seriously prejudice the respondent in particular, and employers in general, in that employees would bring flimsy grounds before internal hearings and then bring "real" grounds and evidence before an appellate court.

Held: (1) In principle a court of appeal is disinclined to allow a point to be raised for the first time before it. Generally it will decline to do so unless (a) the point is covered by the pleadings; (b) there would be no unfairness to the other party; (c) the facts are common cause or well-nigh inconvertible; and (d) there is no ground for thinking that other or further evidence would have been produced that could have affected the point. Here, (i) the point of law was not covered in the pleadings; (ii) it was unfair to the respondent to raise the point of law in question for the first time on appeal, in that the respondent argued its case on the basis that the appellant was absent from duty without reasonable excuse and the General Manager was not confronted with the argument that the bedrock of its case was being challenged; (iii) the facts of the matter were not common cause; and (iv) the appellant, if he had chosen to appear before the disciplinary committee, could have led evidence on the points he relied on.

(2) As to the appellant's argument that, this being a labour matter, a less strict approach should be followed, labour matters are civil in nature and, while the same standards of procedural stringency as are required in ordinary civil matters may not always apply, those standards are not necessarily ousted merely because the matter is a labour dispute. This is particularly so where serious legal principles are at issue and where, as *in casu*, a party who belatedly clamours for such procedural relaxation is the author of the very predicament that he finds himself in. But for his own default, the appellant could have properly raised the new legal point he sought to raise on appeal, and adduced evidence on it, during the disciplinary proceedings. Parties in labour disputes should remember that it is important to show respect for laid down formalities in the adjudication of disputes that concern them. Showing disdain for such formalities and later expecting the court to turn a blind eye to such conduct smacks of double standards and a lack of seriousness on the part of the litigant concerned.

Appeal – Labour Court – appeal to – from decision of arbitrator – appeal only lying on point of law – appeal relating to facts – what must alleged in grounds of appeal – not essential to allege that misdirection on facts is so unreasonable that no sensible person could have reached impugned conclusion – necessary that grounds of appeal are disclosed in clear and concise manner

Zvokusekwa v *Bikita RDC* S-44-15 (Garwe JA, Ziyambi & Hlatshwayo JJA concurring) (judgment delivered 22 July 2015)

An appeal to the Labour Court from the decision of an arbitrator, like an appeal to the Supreme Court from the Labour Court, must be based on a point of law. What constitutes a point of law has been stated and restated in a number of decisions of the Supreme Court. If an appeal is to be related to the facts, there must usually be an allegation that there has been a misdirection on the facts which is so unreasonable that no sensible person who had applied his mind to the facts would have arrived at such a decision. And a misdirection of fact is either a failure to appreciate a fact at all, or a finding of fact that is contrary to the evidence actually presented. However, to constitute a point of law, in all cases where findings of fact are attacked, it is not essential that there be an allegation that there was a misdirection on the facts which was so unreasonable that no sensible person properly applying his mind would have arrived at such a decision. The court should look at the substance of the grounds of appeal and not the form. Legal practitioners often exhibit different styles in formulating such grounds. What is important is that the grounds must disclose the basis upon which the decision of the lower court is impugned in a clear and concise manner. If it is clear that an appellant is criticising a finding by an inferior court on the basis that such finding was contrary to the evidence led or was not supported by such evidence, such a ground cannot be said to be improper merely because the words "there has been a misdirection on the facts which is so unreasonable that no sensible person would have arrived at such a decision" have not been added thereto. If it is evident that the gravamen is that an inferior court mistook the facts and consequently reached a wrong conclusion, such an attack would clearly raise an issue of law and the failure to include the words referred to above would not render such an appeal defective.

Appeal – leave – when required – interlocutory rulings – leave generally required – grant or refusal of interdict – leave not required – provisional stay of execution – whether a form of interdict – distinction between normal interdict and stay of execution – requirements for each

Gold Reef Mining (Pvt) Ltd & Anor v *Mnjiya Consulting Engineers (Pty) Ltd & Anor* HH-631-15 (Mafusire J) (Judgment delivered 20 July 2015)

The first respondent obtained a default judgment against the applicants. It went on to issue a writ of execution. The applicants' property was attached. The applicants applied for rescission of the default judgment and simultaneously applied, on an urgent basis, for a stay of execution pending the determination of their application for rescission. The judge reserved judgment but directed that the *status quo ante* would subsist until she had given her ruling. Despite that directive, the respondent sought to execute. The applicants' lawyers sought clarification from the judge, who responded that she had indeed issued a directive during the hearing to the effect that the respondent would stay execution pending her determination. In due course the judge issued a provisional stay of execution of the default judgment, pending the determination.

A few weeks later the respondent noted an appeal to the Supreme Court against the provisional order. The notice of appeal claimed that leave to appeal was not required. Soon after the noting of the appeal, the respondent instructed the sheriff to proceed with execution. The applicants, within a few days, applied on an urgent basis for a stay of execution. This was opposed *in limine* on the grounds that the matter was not urgent and that the applicants were aware, when the appeal was noted, that the operation of the provisional order was suspended and that the respondent would proceed to execution. The second ground was that the court was *functus officio* as the present application was essentially the same as the earlier one. On the right to appeal without leave, the respondent argued that this was permissible in terms of s 43(2)(d)(ii) of the High Court Act [*Chapter 7:06*], as this was a matter where an interdict had been granted or refused.

The applicants argued that the appeal was a nullity, being in respect of an interlocutory ruling which was not appealable without leave.

Held: (1) The first point *in limine* had no merit. The purpose of the appeal was not, and could not have been, to enable the respondent to proceed with execution. The purpose of the appeal to the higher court must have, or ought to have been, a genuine desire to correct a perceived wrong by the High Court. An appeal noted solely or essentially to allow execution to proceed, when the reason for the stay was still there, would have been brazenly contemptuous and *mala fide*. The applicants acted as soon as they became aware that the respondent was proceeding to execution.

(2) On the *functus officio* argument, the matter dealt with by the first judge was an application for stay pending resolution, by the High Court, of the application for rescission of judgment. The present matter was an application for stay pending the determination, by the Supreme Court, of the respondent's appeal. It was a new matter, which had not been the issue before the first judge.

(3) The principle is now settled as to where to draw the line between decisions which are purely interlocutory and therefore not appealable without leave, and those which are final and having a definitive sentence and therefore appealable as of right. The term "interlocutory" refers to all orders pronounced by the court, upon matters incidental to the main dispute, preparatory to, or during the progress of, the litigation. Orders of this kind fall in two classes: (i) those which have a final and definitive effect on the main action; and (ii) those that are simple, purely and properly interlocutory. A simple interlocutory order, i.e. a preparatory or procedural order, is not appealable without leave. The provisional order was classically interlocutory because it did not decide the issue or dispute between the parties. The main dispute was the claim by the respondent against the applicants; in respect of that, the application for rescission of judgment was itself an interlocutory matter. The application for stay was even more removed from the main dispute. It was an application within another application. In no way would it decide the application for rescission, let alone the dispute pending in the main action.

(4) It is every litigant's right to appeal to the highest court in the land, but that right in certain situations is removed or restricted. Section 43 of the High Court Act begins, in subs (1), by granting a blanket right of appeal to the Supreme Court in all civil cases from any judgment of the High Court, but subject to what the rest of the section says. The rest of the section, in subs (2)(a) to (c), takes away altogether the right of appeal in the situations specified therein. For example, no appeal lies from an order of the High Court given by consent of the parties; or from an order refusing summary judgment. Then in subs (2)(c)(ii) and (d) the right of appeal is restricted. Leave is required in the situations specified therein. An interlocutory order or judgment given by a judge is not appealable without leave. In respect of the grant or refusal of an interdict no leave is required to appeal.

(5) In a broad sense, to grant or refuse a stay of execution is to grant or refuse an interdict, an interdict being a remedy by a court, either prohibiting somebody from doing something (prohibitory interdict), or ordering him to

do or carry out a certain act (mandatory interdict). But the focus of s 43(2)(d)(ii) is not about applications for stay of execution as a species of an interdict. Otherwise every order of court, for instance, one directing someone to pay another a sum of money, would always be an interdict. The distinction between ordinary interdicts and stays of execution in particular is more apparent when one considers the separate requirements for each remedy. With an interdict, the applicant must show a clear right in his favour, or, in the case of an interim interdict, a *prima facie* right having been infringed, or about to be infringed; an apprehension of an irreparable harm if the interdict was not granted; a balance of convenience favouring the granting of the interdict, and the absence of any other satisfactory remedy. On the other hand, in an application for a stay of execution the requirements are real and substantial justice. Where injustice would otherwise be caused, the court has the power to, and would, generally speaking, grant relief. The requirements for an application for a stay of execution, admittedly a species of an interdict, are less onerous than those for an ordinary interdict.
(6) The sole object of the provisional order was to preserve the *status quo ante* so as to allow for the determination of the application for rescission of the default judgment. The judge obviously considered that real and substantial justice would be achieved by granting a stay of execution. To allow that order to be suspended and execution to take place would render any judgment in favour of the applicants in the application for rescission a *brutum fulmen*. In addition, the object of the provisional order would be rendered nugatory. That would be manifestly intolerable. Execution would be stayed.

Arbitration – award – labour matter – registration – procedure to be followed – courses open to party seeking to register award

ANZ Ltd v *Nyarota* HH-591-15 (Muremba J) (Judgment delivered 1 July 2015)

The applicant was formerly employed by the respondent. Following his dismissal, he obtained an arbitral award which was subsequently quantified. He applied in terms of s 98(14) of the Labour Act [*Chapter 28:01*] to register the award and did so as a chamber application. The respondent objected, pointing out that both s 98(14) of the Labour Act and art 35 of the Model Law contained in the Second Schedule to the Arbitration Act [*Chapter 7:15*] refer to an application for registration being made to the High Court as opposed to a judge in chambers.
Held: as this award arose from a labour dispute, the Labour Act applied. Section 98(14) does not say that an application must be made to register an arbitral award; it says that a party may "submit for registration" the copy of the award submitted by the arbitrator to the party. To submit something is to present it; and presenting can be effected in various ways. The word "court" in s 98(14) refers to the institution. The subsection does not stipulate the procedure to be used; a party seeking registration of an arbitral award in terms of s 98(14) can simply hand over the award to the registrar of the High Court for registration, or may make either a chamber application to a judge or a court application. It is entirely up to the party seeking registration to elect the procedure to adopt. In any event, in terms of r 229(c) of the High Court Rules (which deals with the adoption of incorrect form of application) the use of an incorrect form of application shall not in itself be a ground for dismissing the application unless the judge or court considers that an interested party has been prejudiced by the wrong form of application and that such prejudice cannot be remedied by directions for the service of the application on that party, with or without an appropriate order for costs. Here, there was no prejudice because the application was made on notice.

Arbitration – award – registration of – supply of original or certified copy of award – when must be supplied – award partially sounding in money, with part not quantified – quantified potions not severable – need for award as a whole to be registered

Matthews v *Craster Intl (Pvt) Ltd* HH-707-15 (Mafusire J) (Judgment delivered 19 August 2015)|

An application for the registration of an arbitral award is largely an administrative process. Whilst in such an application the court is not really being called upon to rubber stamp the decision of an arbitrator, nonetheless, it is largely giving that decision the badge of authority to enable it to be enforceable. If the court is satisfied that the award is regular on the face of it, and that it is not deficient in any of the ways contemplated by articles 34 and 36 of the First Schedule to the Arbitration Act [*Chapter 7:15*], then the court will register it.
Article 35 of the First Schedule is clear: a party wishing to register an arbitral award with the High Court does so through an application. The application procedure is governed by the High Court Rules, which say in Order 32, among other things, that an application must consist of the written document signed by the party; an affidavit filed together with that application and to which may be attached documents verifying the facts or averments set out in the affidavit. The Rules say nothing about the nature of the documents to be attached to the

affidavit, i.e. whether or not they should be originals, certified copies or otherwise. Article 35 says an authenticated original or certified copy of the award is what must be "supplied". As to when these may be "supplied" is not specified. It would be sufficient compliance with the law for the applicant to have attached to his application a copy of the arbitration award that had been filed with the registrar, and to have tendered the original in court.
Section 98(14) of the Labour Act [*Chapter 28:01*] and art 35 of the First Schedule to the Arbitration Act are *in pari materia*. On the face of it, both provisions facilitate the registration of arbitral awards with the conventional courts for the purpose of enforcement.
If an award is one that must sound in money and it does not, then it is incapable of registration. It is incomplete. Here, the parties went for arbitration to determine the nature and quantum of the terminal package due to the applicant, but they came out of that arbitration with only two-thirds of the award having been quantified. The arbitral award did not specify the period of leave due to the applicant. It did not specify the number of those leave days. It did not specify the quantum. It did not state what the respondent's leave policies were. An order that an employer must pay his ex-employee cash-in-lieu of the leave due to him and not taken for the period in question is not complete.
As to whether the quantified portions of the award could be registered, the governing legislation does not provide for divisibility of awards made elsewhere when they are submitted for registration with the High Court. To split the award in that manner would amount to transforming the arbitral award of the arbitrator. The applicant would have to come back to court later for the registration of the rest of the award, if it were eventually quantified. The arbitration award as a whole was therefore not capable of registration.

Arbitration – award – setting aside of – failure by arbitrator to give adequate reasons for award – not a ground to set aside award – dissatisfied party should seek court order compelling arbitrator to furnish reasons

Soft Drinks Mfg Employers' Assn v *Soft Drinks Mfg Workers' Union & Ors* HH-744-15 (Matanda-Moyo J) (Judgment delivered 23 September 2015)

In an industrial arbitration over wage claims, the two arbitrators made an award which they intended should give the employees a raise while at the same time not overburdening the employer with increases that could not be met. The employees' association applied to have the award set aside on the grounds, *inter alia*, that the arbitrators failed to give reasons for their award. It was argued that the arbitrators engaged in a mediation exercise and did not adjudicate. They did not explain how the figure for the pay rise was arrived at.
Held: article 31(2) of the Model Law requires that an arbitral tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given, but does not provide for the setting aside of an award for inadequate reasons. Where the arbitrator has legal training, the scope of an arbitrator's obligation to give reasons is logically the same as that of a judge. Where an arbitrator is chosen due to his expertise in a particular trade or calling and has no legal training, all that is expected is nothing more than basic identification of issues and reasoning from the evidence to the facts and the facts to the conclusion. Reasons of a judicial standard are not required. An award simply requires a statement of factual findings and other reasons which led the arbitrator to make such finding. Where the award does not comply with art 21(2), the appropriate remedy is to approach the court for an order to require the arbitrator to give detailed reasons. Failure to give reasons should not result in a nullification of the process.

Associations – co-operative society – proof of existence – what is required – such proof not required in order for society to institute legal proceedings – legal proceedings – *locus standi* to represent members – must show a direct and substantial interest in outcome of litigation

Tirivepano Housing Co-op v *TSL Ltd & Ors* HH-756-15 (Dube J) (Judgment delivered 23 September 2015)

The applicant, a co-operative society, brought an application to restore it and its members (who were not named in the writ) to a piece of land from which the members were evicted following a declaratory order obtained by the first and second respondents. The order, which was granted in default, declared that the first respondent was the registered owner of the land. The respondents raised two preliminary points: (a) the applicant, being a co-operative society, should have furnished proof of its registration as such, as well as its articles or constitution; (b) the applicant had no *locus standi*, as it had no direct and substantial interest in the right which was the subject matter of the litigation and in the outcome of the litigation. The respondent also submitted that the applicant has failed to show that its members resolved that it represented them and brought the application on

their behalf. The applicant could only bring the application in respect of its own direct harm; it could not bring it on behalf of people not before the court and who had not authorised it to do so.
Held: (1) Section 19 of the Co-operative Societies Act [*Chapter 24:05*] provides that a cooperative register and certificate shall be proof of registration. In other words, any party wishing to prove the existence of a co-operative can do so by producing the cooperative's register and certificate of registration to prove such fact. The purpose of the section is merely to underline what suffices as proof of registration of a cooperative. The section does not dictate that proof of registration of a co-operative is a requisite which ought to be met by a co-operative instituting proceedings in order to establish the co-operative's status and powers, nor did it preclude cooperatives who fail to produce a certificate of registration, its constitution or articles of association at the commencement of proceedings to be precluded from bringing any proceedings. It is not peremptory for every co-operative bringing litigation to produce proof of registration.
(2) There is no legal requirement for a party instituting proceedings to file proof of authority to bring proceedings on behalf of another at the commencement of every proceeding. It is only in instances where a party's authority has been challenged that it may be required to produce such proof. The respondent did not in its opposing affidavit challenge the applicant's authority to bring this application on behalf of its members. Had it done so, this could have alerted the applicant of the requirement.
(3) The applicant had not filed any proof to support the assertion that that it was mandated by members of its co-operative to bring these proceedings. A litigant can only bring proceedings where it is able to show that it has a direct and substantial interest in the subject matter and outcome of the proceedings. It is not sufficient simply to establish a financial interest in the right sought to be addressed. A financial interest amounts to an indirect interest in the proceedings. Where a party seeks to represent the interest of its members, it is incumbent upon such litigant to outline in its application, its affairs or business which justify its participation in the proceedings in order to vindicate the rights of its members. It had not been shown how the issue regarding whether its members should remain in occupation of the land in issue was of interest to the applicant and it would be adversely affected by a judgment of the court.

Aviation – Air Zimbabwe Holdings (Pvt) Ltd – successor company to Air Zimbabwe Corporation – a private company even though shares owned by the Government – employees not in service of the State

S v *Chikumba* HH-724-15 (Mafusire J) (Judgment delivered 9 September 2015)

See below, under CRIMINAL LAW (Offences under Criminal Law Code – criminal abuse of public office)

Company – judicial management – purpose of – principles – company seeking judicial management in order to prevent execution against property which had been mortgaged as security for a debt – not an acceptable ground for placing company under judicial management – application an abuse of court process

In re *Stand Five Four Nought (Pvt) Ltd* HH-767-15 (Mathonsi J) (Judgment delivered 30 September 2015)
The applicant company, through one of its directors, sought an order placing it under judicial management. The reasons for so doing were that the company registered a mortgage bond over its sole immoveable property as security for a loan extended to an affiliate company, in which the director held a 20 percent shareholding. The affiliate company had been placed under provisional judicial management through inability to pay its debts, including the loan in question. When the creditor failed to obtain satisfaction, it turned to the applicant, which was the surety and co-principal debtor for the debt. The applicant claimed that it would be just and equitable for it to be placed under provisional judicial management as this would prevent execution against its property and its inevitable liquidation. The creditor opposed confirmation of the provisional order for judicial management, which order had been obtained without notice to the creditor. The creditor argued that to grant such relief would be contrary to all notions of security for a debt and the principles of freedom and sanctity of contract. In addition, the application constituted an abuse of court process in order to frustrate and/or delay a just claim while not laying out a proper case for the grant of a judicial management order.
Held: in terms of s 300 of the Companies Act [*Chapter 24:03*], a provisional judicial management order may be granted if it appears to the court that (a) by reason of mismanagement or for any other cause the company is unable to pay its debts or is probably unable to pay its debts and has not become or is prevented from becoming a successful concern; and (b) there is a reasonable probability 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 (c) it would be just and equitable to do so.
In terms of s 305, the court may grant a final judicial management order if it appears to the court that there is a reasonable probability that the company concerned, if placed under judicial management, will be enabled to

became a successful concern and that it is just and equitable to grant such an order. Here, the main reasons for seeking judicial management were to obtain a moratorium to prevent execution against the mortgaged property of the applicant. This had nothing to do with the acceptable grounds provided for in the Act. It had nothing to do with enabling the applicant to become a successful concern. It had not even been shown that the applicant was not a successful concern or that whatever problems it faced were a result of mismanagement to be cured by the involvement of a judicial manager. All that the applicant relied on was the "just and equitable" provision. The reality was that the applicant simply did not want to pay a debt which has benefited its shareholders, who appeared to have taken a loan in the name of one company in which they had beneficial interest, secured it by virtue of a property of another company in which they had beneficial interest. When the time came to pay, they did not do so, but rushed to shelter under judicial management both for the principal debtor and the surety. It was an abuse to use court process for the purpose for which it was never meant. The provisional order would be discharged.

Company – liquidation – creditor – secured creditor – who is – holder of mortgage bond issued as security for loan – bond issued by one company as security for loan to another company – both companies effectively a single economic unit -- intention of parties – bond valid – holder of bond a secured creditor

CBZ Bank Ltd v *Ndlovu NO & Anor* HB-137-15 (Makonese J) (Judgment delivered 9 July 2015)

The first respondent was the liquidator for two companies, A and L, which had the same shareholders and the same executive structure. Before both companies were placed under liquidation, the applicant bank advanced certain sums of money to company A in terms of a banking facility. Under that facility, the company was required to register a mortgage bond to secure applicant's exposure. The managing director of A forwarded title deeds to a stand in Bulawayo, and a mortgage bond was registered, but against company L. The respondent refused to treat the bank as a secured creditor against A, saying that the loan had not been made to the L and that the bank should have registered a security bond against A.
The applicant argued that the mortgage bond was valid and that the applicant ought to be regarded as a secured creditor, at least in relation to L. It argued that the manner in which A and L had been operating and the manner in which they dealt with the question of security in this matter justified a rejection of the façade of separate personality. The two companies were in essence a single economic entity.
Held: (1) L handed the title deed for the registration of the mortgage bond in the first instance. There was nothing to show that L did this erroneously. At all materials times, L was well aware that its property was being used as security and that monies were indeed advanced to A by the applicant on that understanding.
(2) A mortgage bond evidences a debtor and creditor relationship. The principles applicable in the construction of a contract also apply to a mortgage bond. In the generation of the mortgage bond in this matter, the parties were involved in a commercial transaction. Where parties intend to conclude a contract, think they have concluded a contract, and proceed to act as if the contract were binding and complete, the court ought rather to try to help the parties towards what they both intended rather than obstruct them by legal subtleties and assist one of the parties to escape the consequences of all that he has done and all that he has intended. There could be no doubt that, on this approach, the parties intended the validity of the mortgage bond as providing real security for the debt.
(3) The natural and intended consequences of the events was the provision of real security by A. L provided its title deed in full knowledge that a bond would be registered in favour of the applicant for the facilities extended to A. The fact that the intentions of the parties were probably not adequately set out was irrelevant and the placing of reliance on the perceived defects bordered on dishonesty. If there was a defect, it would be a defect of the debtor's own making.
(4) The clear intention of the parties was that a bond be registered against the title deed. The fact that the principal obligation had not been properly expressed did not detract from the validity of the bond. The court had power to order rectification of the bond to indicate its real nature, a security bond. That was what L intended to achieve. The applicant held real security to the extent that it was a secured creditor.

Company – liquidation – legal proceedings brought by liquidator of company in liquidation – liquidation occurring after proceedings have been initiated – leave of court required to continue action

Zimbabwe Allied Bank Ltd v *Dengu & Anor* HH-583-13 (Muremba J) (Judgment delivered 1 July 2015)

The plaintiff bank issued summons against the defendants, who had signed as sureties and co-principal debtors in respect of a loan advanced by the bank to a company. The proceedings had past the pre-trial conference stage,

but before the matter could be set down for trial the bank was placed in liquidation in terms of a court order. The court order provided that the liquidator would have the powers set out in s 221(2)(a) to (h) of the Companies Act [*Chapter 24:03*]. The bank's legal practitioners filed a notice of change of status in terms of r 85A of the High Court Rules, to include the words "in liquidation" after the bank's name. The matter was set down for trial, but the defendants' legal practitioners stated that the matter could not proceed to trial without the liquidator having obtained the leave of the court. In saying so, they relied on s 213 of the Act. The plaintiff's legal practitioners argued that that section only applies to an action brought against a company on liquidation, not to one brought by such a company.

The defendants also argued that since the liquidator did not obtain the court's leave to continue with the proceedings in terms of s 221(2), the plaintiff, which was a company under liquidation, had no *locus standi* to litigate. It was also argued that the notice of change of status was invalid, in that r 85A only relates to natural persons.

The plaintiff argued that in terms of s 221(2) of the Act the liquidator only requires the leave of the court in a situation where he intends to commence proceedings on behalf of the company. Where proceedings commenced before placement in liquidation, as happened here, the liquidator does not require the leave of the court to continue with the proceedings.

Held: (1) s 213 only applies to actions brought against a company in liquidation, not to those brought by the company. The purpose of seeking leave to proceed against a company in liquidation is to ensure that when a company goes into liquidation, the assets of the company are administered in a dignified and orderly fashion for the benefit of all the creditors. No creditor should be able to obtain an advantage over other creditors by bringing proceedings against the company.

(2) Rule 85A that states that if a party to the proceedings has a change of status, a notice of change of status may be filed with the Registrar and served on all other parties to the proceedings. Nothing in the rule says that the rule is only confined to natural persons. At law the definition of a "person" includes both natural and juristic persons.

(3) The effect of a winding up order is to freeze the company's affairs in a number of respects and this includes legal proceedings, attachments and executions (s 213(a) and (b) of the Act). Dispositions of property and share transfers of the company may only be made with the leave or permission of the court (s 213(c)). The purpose of seeking the leave of the court is to preserve the assets of the company for the benefit of the creditors. The powers of the directors cease (s 253). A liquidator is appointed to run the affairs of the company instead. In terms of s 221, which sets out the powers of the liquidator, there are powers that the liquidator exercises without further authority. There are some powers that he exercises with the authority of a joint meeting of creditors and contributories. There are some powers which require him to exercise with the leave of the court. In every case where a liquidator intends to initiate legal proceedings which have not commenced at all on behalf of the company, be they of a civil or criminal nature, he cannot do so without seeking the leave of the court.

(4) As to whether leave is required to continue an action that has already started, if he wants to bring any legal proceedings to court on behalf of the company, be they fresh legal proceedings or proceedings which commenced before liquidation, he has to seek the leave of the court. When an application for leave to bring an action is made by the liquidator, the court will exercise its judicial discretion on whether or not to grant it. It will consider various factors such as the amount and seriousness of the claim; the degree and complexity of the legal and factual issues involved; the stage to which the proceedings may have progressed; whether the claim has arguable merit; and whether the proceedings will result in prejudice to the creditors among other factors.

Editor's note: in terms of s 221(1) of the Companies Act, the liquidator has the power, either –

- with the leave of the court *or*
- with the authority of a resolution of creditors and contributories, duly passed at a joint meeting thereof, *or*
- when authorised by the Master in terms of s 218(4)(a)

to bring or defend in the name and on behalf of the company any action or other legal proceeding of a civil nature.

The Master may also, in terms of the proviso to s 221(2)(a), authorise upon such terms as he thinks fit legal proceedings for the recovery of any outstanding accounts, the collection of which appears to him to be urgent.

The judgment does not disclose whether the liquidator was authorised in either of those ways. It seems implicit that he was not so authorised.

Constitutional law – Constitution of Zimbabwe 1980 – Declaration of Rights – s 24(2) – application for matter to be referred by lower court to Supreme Court – requirement by applicant in criminal matter to give notice to prosecutor – need for applicant to give evidence in support of application – duty of lower court to consider whether a constitutional issue has been raised and whether application is frivolous or vexatious

S v *Mwonzora & Ors* CC-9-15 (Garwe JCC, Chidyausiku CJ, Malaba DCJ, Ziyambi, Gwaunza, Gowora, Hlatshwayo, Mavangira & Guvava JJCC concurring) (Order given 11 June 2014; reasons made available 15 October 2015)

The applicants had been charged in the magistrates court with public violence. A number of complaints were raised by them about the manner of their arrest and subsequent treatment. The matter was postponed on a number of occasions to enable the court to deal with the matters raised. The applicants then, without giving notice to the prosecution, applied to the magistrate for the matter to be referred to the Supreme Court in terms of s 24(2) of the 1980 Constitution, which was then still in force. They tendered a written application in which they chronicled various violations of their constitutional rights at the instance of the State and other persons. No evidence was led in support of these allegations. Although the prosecutor opposed the application, the magistrate held that the issues raised deserved the attention of the Supreme Court, which court, he said, would need to make a proper enquiry.

Held: the matter was not properly before the Supreme Court. A judicial officer faced with an application for referral has no option but to refer, unless, in his opinion, the raising of the question is frivolous and vexatious. The magistrate did not, as he should have, ask himself whether the issues raised were not frivolous and vexatious; he made no finding that the application was not frivolous or vexatious.

Before permitting an accused person to raise the question whether his constitutional rights have been violated, it is a requirement that ample written notice of such an application should be given to the State. The prosecution is entitled to be afforded the time and opportunity to investigate the complaint and to be ready to adduce evidence, if necessary.

It is insufficient to make a statement from the bar. The applicants should have been called to testify under oath in order to substantiate their complaints that their rights had been violated. Had that happened, the prosecutor would then have had the opportunity to cross-examine the applicants and, thereafter, to adduce such evidence as he may have considered necessary to contradict the allegations made by the applicants. Only after hearing evidence from both sides would the magistrate have been in a position to make findings of fact, which findings he would have been bound to take into account in deciding whether or not to refer the issues raised to the Supreme Court. It is the responsibility of the court referring a matter to resolve any disputes of fact before making such a referral. The absence of oral evidence can be fatal to an application of this nature because it completely disables findings to be made on the complaints raised. It is on the basis of those findings that the Supreme Court is called upon to deal with the allegations raised and, where necessary, afford appropriate relief.

Constitutional law – Constitution of Zimbabwe 2013 – Constitutional Court – appeal to – from decision of Supreme Court – when party has right of appeal to Constitutional Court against such decision – need for Supreme Court to have made decision on constitutional matter

Nyamande & Anor v *Zuva Petroleum (Pvt) Ltd (2)* CC-8-15 (Ziyambi JCC) (Judgment delivered 1 August 2015)

The applicants sought leave to set down an appeal from the Supreme Court on an urgent basis. It was argued that they had such a right of appeal, in view of the wording of s 167(5)(b) as read with s 169(1) of the Constitution. The applicants submitted that s 167(5)(b) granted a right of appeal in a case where the alleged violation, by the Supreme Court, of the applicants' constitutional right only became apparent after the judgment was handed down. They argued that it was not necessary to have requested the Supreme Court to refer the matter to the Constitutional Court in terms of s 175(4).

The respondent argued that an appeal invites a superior court to determine the correctness of the lower court's decision on issues which were placed before it. There were no constitutional issues placed before the Supreme Court for determination, or determined by the Supreme Court. There could, therefore, be no right of appeal since no decision was made by that court on constitutional matters. The proper recourse available to the applicants was to bring an application in terms of s 85 of the Constitution if it was felt that a breach of their fundamental rights had occurred.

Held: the applicants had not established any right to approach the Constitutional Court by way of appeal. Section 167(5) relates to rules of procedure regulating the manner of approach to the Constitutional Court on appeal from lower courts. It does not confer a right to appeal on a litigant who has no right of appeal. For this right, the litigant must look elsewhere in the Constitution. Such a right may be read into s 175(3), which applies where an order of constitutional invalidity of any law has been made by a court. Failing that, a right of appeal could only arise where the Supreme Court makes a decision on a constitutional matter.

Constitutional law – Constitution of Zimbabwe 2013 – Constitutional Court – reference of cases to – ways in which matters may be brought before Constitutional Court – appeal from lower court – only permissible where lower court has ruled on a constitutional issue – direct application in terms of s 85(1) – may only be made in respect of alleged breach of Declaration of Rights

Prosecutor-General v *Telecel Zimbabwe (Pvt) Ltd* CC-10-15 (Gwaunza JCC, Chidyausiku CJ, Malaba DCJ, Gowora, Mavangira & Guvava JJCC, Chiweshe, Makoni & Bhunnu AJJCC concurring) (Judgment delivered 8 October 2015)

The applicant had been ordered by the Supreme Court to issue a certificate of *nolle prosequi* to the respondent in terms of s 16 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The applicant had argued before the Supreme Court that he had a discretion as to whether or not to do so. He did not raise with the Supreme Court the issue of whether the requirement to issue a certificate interfered with the independence of his office, as guaranteed by s 260 of the Constitution*. Dissatisfied with the Supreme Court's decision, he purported to bring the matter before the Constitutional Court on the issue of whether the requirement to issue the certificate interfered with the independence of his office. His application was purportedly in terms of s 167(1)(a) as read with s 176 of the Constitution. At the hearing, the applicant's counsel conceded that he had no basis for bringing the matter before the court, and sought to withdraw the application. The respondent sought an order for costs on the higher scale.

Held: (1) All that s 167(1) does is state that the Constitutional Court is the highest (and final) court in all constitutional matters, and that it decides such matters only. The reference in the subsection to "all constitutional matters" refers to matters properly brought before the Constitutional Court in accordance with the Constitution. The subsection does not elaborate as to how or on what conditions a party may approach the court for it to exercise the jurisdiction conferred upon it by that provision. These details are to be found in other provisions of the constitution. Apart from references and applications under s 131(8)(b) and para 9(2) of the Fifth Schedule (which were not applicable here), the subsection does not confer on anyone the right to approach the Constitutional Court directly, even if they have, or perceive themselves to have, a constitutional matter needing the court's determination. Section 167(1) must be read in conjunction with the various provisions that do confer a right to approach the constitutional court directly or indirectly through another process. Section 176 is not one of such provisions.

(2) Direct applications to the Constitutional Court are to be made only in terms of the provisions referred to above, as well as in terms of and as provided for in s 85(1). The relief sought and to be granted by the court in terms of s 85(1) must relate to fundamental rights and freedoms enshrined in the relevant Chapter, and nothing else. Such relief may include a declaration of the rights said to have been or about to be violated. The applicant did not allege that the right he alleges was violated by the Supreme Court was an enshrined fundamental right.

(3) Section 176 gives the Constitutional Court inherent powers inherent power to protect and regulate its own process and to develop the common law or the customary law, taking into account the interests of justice and the provisions of the Constitution, but does not vest the court with the power to arrogate to itself jurisdictional authority that reaches outside and beyond the limits imposed in the Constitution.

(4) The present application was neither a referral by the Supreme Court in terms of s 175(4), nor an appeal, as no constitutional issue was raised or determined in the Supreme Court. This matter was really an appeal brought under the guise of an application.

(5) The application was indeed not brought properly before the court, and further, it purported to be an application when in reality it was meant to be an appeal against a final order of the Supreme Court. The applicant engaged counsel and must have instructed him on the nature of the application to place before the court. The respondent was put to the unnecessary cost of preparing opposing papers to the application, and appearing before the court for the hearing. In the light of this, an order of costs on the higher scale was justified.

*See *Telecel Zimbabwe (Pvt) Ltd* v *A-G* S-1-14 (reported in 2014 (1) ZLR 47 (S)) – Editor.

Constitutional law – Constitution of Zimbabwe 2013 – Constitutional Court – reference of matter to – constitutional question arising in lower court – question may only be referred to Constitutional Court by lower court – grounds on which lower court may refuse to refer question – not open to party to bring matter directly to Constitutional Court except in limited circumstances

Chihava & Anor v *Mapfumo NO & Anor* CC-6-15 (Gwaunza JCC, Chidyausiku CJ, Malaba DCJ, Ziyambi, Garwe, Gowora, Hlatshwayo & Guvava JJCC & Chiweshe AJCC concurring) (Judgment delivered 15 July 2015)

The applicants were the subject of criminal proceedings in the magistrates court. They complained that certain of their rights under s 70(1) of the Constitution (which sets out the rights of accused persons) had been breached and sought an order that the proceedings be quashed and a trial *de novo* ordered. The matter was placed before the Constitutional Court directly, the applicants taking advantage of a postponement, granted by consent in the magistrates court, to do so. The respondents took the point *in limine* that the applicants were not properly before the court, and that they should have approached the court through a referral of the matter to it by the lower court in terms of s 175(4) of the Constitution. The applicants argued that under s 85(1) any person acting in his own interest is entitled to approach "a court" alleging that a fundamental right enshrined in the Constitution had been breached. The Constitutional Court being "a court", there was no restriction on approaching that court directly.

Under s 24(1) of the old Constitution, a person alleging a breach of his constitutional rights could approach the Supreme Court directly for redress. However, under s 24(2) and (3), if a constitutional issue arose in a lower court, it had to be referred to the Supreme Court by the lower court, and not directly. The only grounds on which the lower court could refuse to refer the matter was if it considered the raising of the constitutional question to be frivolous and vexatious. While a litigant could approach the Supreme Court directly if the lower court denied the application on other grounds, initially an application for referral had to be made to the lower court. Section 175(4) of the present Constitution is an exact replica of s 24(2) of the old Constitution, but there is no equivalent in the present Constitution to s 24(1) or 24(3) of the old Constitution.

Held: (1) it was possible to interpret the new Constitution as evincing an intention by the legislature to remove any bar that an applicant under s 24(1) might have confronted, arising from the fact that the issue arose in proceedings in a lower court, and that the options for redress that were open to an applicant envisaged in the old ss 24(2) (now s 175 (4)) and 24(3) had been widened. Whether this was correct could only answered on a proper consideration of relevant rules governing the interpretation of statutes generally and of the constitution in particular. In this respect, it is pertinent to note that a constitution is itself a statute of Parliament. Therefore, any rules of interpretation that are regarded as having particular relevance in relation to constitutional interpretation, can only be additional to the general rules governing the interpretation of statutes.

(2) The general rules could be summarized thus: (a) the legislature is presumed not to intend an absurdity, ambiguity or repugnancy to arise out of the grammatical and ordinary meaning of the words that it uses in an enactment; (b) therefore, in order to ascertain the true purpose and intent of the legislature, regard is to be had, not only to the literal meaning of the words, but also to their practical effect. (c) In this respect, (i) the words in question must be capable of an interpretation that is "consistent" with the rest of the instrument in which the words appear; (ii) the state of the law in place before the enactment in question is a useful aid in ascertaining the legislative purpose and intention, and (iii) where an earlier and a later enactment (or provision) deal with the same subject matter, then, in the case of uncertainty, the two should be interpreted in such a way that there is mutual consistency. In addition, in interpreting the rights provisions in a constitution, the interpreter should follow the submitted triple synthesis of literalism, intentionalism and purposiveness principle, as is done in the interpretation of any other statute. The court should give a generous and purposive construction to the constitution's provisions, particularly the entrenched fundamental rights and freedoms. In this process, the purpose of the provision in question is to be given particular attention.

(3) Applying these principles to the present situation, there was no gainsaying the fact that a literal and grammatical meaning ascribed to s 85(1) would be inconsistent with s 175(4). Such meaning would give room to litigants in proceedings under way in a lower court to abandon such proceedings midstream and without any ceremony, in order to approach the Constitutional Court directly in terms of that section. Such a meaning would thus introduce an absurdity and possible chaos to a process that, in terms of the more expansive s 24 of the old Constitution, was free of such anomalies. The purpose of the old s 24 was to inject order and certainty into the process by which constitutional issues arising during proceedings before the lower courts were referred to the Supreme Court: "order" in the sense that the lower court had the opportunity to call and hear evidence on, and consider, the issue so as to determine whether or not it was frivolous or vexatious. Only if it was not did the court refer the issue to the Supreme Court. Through this process, the Supreme Court was shielded from a situation where frivolous and undeserving cases might have been directly brought to it. The effect of the referral would be a formal deferment of the proceedings in the lower court, pending determination of the constitutional issues referred to it. More importantly, the risk of parallel proceedings being pursued in the constitutional and the lower courts, on different aspects of the same case but based on the same facts, was obviated.

(4) The present case was an example of the absurdity that could arise through a literal construction of s 85(1). There was nothing to show that the lower court was made aware of the approach to the Constitutional Court. Evidence should have been led in the lower court to enable the magistrate to determine whether to refer the matter, evidence that might enable the Constitutional Court to properly determine the matter. There could be no doubt that the certainty and order referred to above would be completely eroded were the courts to operate on the basis of a literal and grammatical interpretation of s 85(1). This circumstance is not only highly undesirable, but it would also constitute an affront to the time honoured common law principle that a superior court should be slow to intervene in ongoing proceedings in an inferior court, except in exceptional circumstances. It was not

the intention of the legislature to oust a procedural regime that ensured order and certainty in the administration of justice in the courts, and to introduce, in its place, one that would result in absurdity, disorder and ambiguity. Clearly, the anomalies that would flow from a literal meaning of s 85(1) (a) could not have been intended by the legislature.

Constitutional law – Constitution of Zimbabwe 2013 – Declaration of Rights – enforcement of rights – may be subject to time limitations

Ngoni v *Min of Home Affairs & Ors* HH-658-15 (Tsanga J) (Judgment delivered 29 July 2015)

See below, under POLICE (Actions against).

Constitutional law – Constitution of Zimbabwe 2013 – Declaration of Rights – right to equal protection of the law (s 56) – right to fair, speedy and public hearing (s 69(2)) – right to fair trial (s 86(3)(e)) – such rights not breached by provisional sentence procedure

Constitutional law – Constitution of Zimbabwe 2013 – determination of constitutional issue – High Court having right to determine any constitutional issue other than those reserved for determination by Constitutional Court – no requirement for High Court to consider whether raising of issue is frivolous or vexatious – entitled to determine matter on merits

Tetrad Invstm Bank Ltd v *Largedata Entprs (Pvt) Ltd* HH-730-15 (Chigumba J) (Judgment delivered 17 September 2015)

The High Court has its own constitutional jurisdiction, which it exercises subject to confirmation by the Constitutional Court of any declaration of constitutional invalidity of an Act of Parliament. Litigants should be cognizant of the fact that the High Court has its own jurisdiction to declare a statutory provision to be *ultra vires* the Constitution. It is not every case of alleged constitutional invalidity of a statute which must be referred to the Constitutional Court for determination. Section 167(2) of the Constitution sets out clearly those issues that only the Constitutional Court has exclusive jurisdiction over.

It is not necessary for the High Court to consider whether a constitutional question that has arisen before it is frivolous or vexatious before dealing with the question on its merits. It is only in contemplation of referral of a constitutional matter to the Constitutional Court that it becomes mandatory that there be a consideration, by the court in which the question will have arisen, of the frivolity or vexatiousness of the question that will have arisen.

The parties in this case agreed to the matter being disposed of as a stated case, the issue being whether the provisional sentence procedure provided for in Order 4 of the High Court Rules 1971 breached the defendant's right under s 69(2) of the Constitution to a fair, speedy and public hearing within a reasonable time before an independent and impartial court, tribunal or other forum established by law, as well as the right under s 86(3)(e) to a fair trial.

Held: provisional sentence is a special procedure which is designed to give a plaintiff with a liquid document and *prima facie* proof of its claim a speedy judgment without the expense and delay that an ordinary trial action entails. The essence of the procedure is that it provides a creditor, who is armed with sufficient documentary proof, with a quick remedy for the recovery of money due to him without resorting to the expensive, cumbersome and often dilatory machinery of an illiquid action. The key elements of this constitutional provision are that one must be afforded a hearing, which is fair, and quick. Rule 21 provides that a debtor be allowed to appear on the set down date in order to acknowledge or deny the signature to the liquid document or the validity of the claim. Rule 25(1) provides that a defendant may file a notice of opposition together with supporting affidavits, prior to the date of the hearing. On the date of the hearing, the plaintiff bears the onus, which must be discharged on a balance of probabilities, to prove that an authentic liquid document exists. The defendant bears the onus of convincing the court that the balance of probabilities does not support the plaintiff's claim. This is the very cornerstone of the constitutionally guaranteed right to a fair hearing, with the emphasis being on fairness, which implies a strict adherence to the *audi alterem partem rule,* the right to be heard. The defendant has two opportunities to be heard in terms of the provisional sentence procedure: (a) on the date of the hearing of the application for provisional sentence, where it may appear in person to confirm or deny its signature on the liquid document; and (b) he may enter appearance to defend within one month after any attachment pursuant to a writ issued as a result of provisional sentence, or, where there is no attachment, within one month of having satisfied the judgment.

Order 4 of the Rules provides the debtor with the right to file opposing papers, the right to appear in court even without having filed papers, the right to file heads of argument and the right to argue the matter. The defendant's right to a fair trial within a reasonable time is not abrogated by the summary nature of provisional sentence because there is a right to enter appearance to defend and to have the matter determined on the merits. The reasonableness of the time is related to the nature of the issues to be determined. If a litigant owes and has no defence it would contravene the rights of the plaintiff to go through a protracted trial process which may be concluded after a lengthy period. The provisional sentence procedure also allows the defendant the right to insist that the plaintiff give *security de restituendo,* against payment by the defendant.
The respondent's contention that the provisional sentence procedure also violates s 56(1) of the Constitution (the right to equal protection of the law) was entirely devoid of merit, for some of the reasons already stated in relation to the right to a fair trial. The law protects both debtors and creditors, as it should, because that is the essence of equality before the law.

Constitutional law – Constitution of Zimbabwe 2013 – Declaration of Rights – right to equal protection of the law (s 56(1)) – right to fair trial within reasonable time (s 69(1)) – accused person charged with multiple offences, including murder – State proceeding against accused on lesser charges before indicting him on murder charge – State having valid reasons for proceedings as it did – accused always aware that he faced murder charge – rights not breached – no entitlement to stay of prosecution on grounds of abuse of process

S v *Mashayamombe* HH-596-15 (Zhou J) (Judgment delivered 2 July 2015)

The applicant had been placed on remand on charges of escaping from lawful custody, unlawful entry, theft of a motor vehicle, rape and murder. He had been in custody, from which he escaped. He gained unlawful entry into the premises of the deceased. He raped the deceased, and then, it was alleged, murdered her. After murdering the deceased, the accused stole the deceased's motor vehicle which he drove from the deceased's premises.
He was tried before a provincial magistrate on the first two charges; he pleaded guilty and was sentenced to a term of imprisonment. Two months later he was tried before a regional magistrate on the charges of theft of a motor vehicle and rape. Again, he pleaded guilty and was sentenced to lengthy periods of imprisonment.
He was then indicted for trial before the High Court on the murder charge. His counsel applied for a permanent stay of proceedings on the grounds that the manner in which the charges against him were instituted contravened his rights as enshrined in s 56(1) and s 69(1) of the Constitution of Zimbabwe 2013. These provisions respectively give the right to equal protection and benefit of the law and the right to a fair and public trial within a reasonable time before an independent and impartial court. It was argued that that a single transaction underpinned all the charges, yet the State started by prosecuting him on the least serious of the charges, and had now indicted him for the most serious of them, murder. That approach was immoral and calculated to, and did, prejudice the applicant and so rendered the proceedings before the High Court unfair.
Held: (1) a stay of criminal proceedings could be granted where there is an unreasonable delay in the prosecution of a matter or where, in the circumstances of a case, it is not possible for an accused to be guaranteed a fair trial by reason of some other factors, such as abuse of criminal procedure, where criminal proceedings are instituted to achieve a purpose other than that which they are by law designed to achieve. An abuse of process application should only be granted on an exceptional basis. It is a measure of last resort, to be adopted where all other possible measures have been exhausted. The abuse of process doctrine is ordinarily concerned with serious prosecutorial misconduct or with serious breaches of the rights of an accused by state authorities. It is undesirable to join in the same indictment a murder count and other offences, except where it is convenient because the facts arise out of one course of conduct. In this instant case the facts did not arise out of one course of conduct. While the offences were committed by one person, each offence was distinct with its own elements separate from the others.
(2) The equality provision enshrined in s 56(1) should be given broad, substantive content in order to ensure that substantive rather than merely formal equality is realised. To that end, equality before the law should entail entitling everyone to equal treatment by courts of law or equality in the legal process. The section protects against arbitrary and irrational State action. The impact of the State action must be considered in the assessment of whether the equality provision was contravened, but if the State has a defensible purpose, together with reasons for its actions that bear some relationship to the stated purpose, then the action cannot be irrational.
(3) As regards the right to a fair trial protected in s 69(1), the fairness of the trial must be judged by reference to the specific instances of fairness given in s 70(1) to (5), as well as other notions of fairness and justice which are not necessarily listed in that section. Those other notions of fairness and justice must reflect the normative value system upon which our constitutional order is founded. In this case the accused was aware from his initial remand that he was facing allegations of murder in addition to the other offences which he has been convicted

of. It is not as if he was misled into thinking that the murder allegations would not be proceeded with once the other charges had been completed. It would be a subversion of justice for him to escape prosecution on the basis that he had already been convicted of lesser charges. The offences were totally different from each other and did not arise from one "transaction". There was no duplication of charges.

Constitutional law – Constitution of Zimbabwe 2013 – Declaration of Rights – right to fair trial (s 69(1)) – criminal trial – trial judge descending into arena – extent to which he did so violating accused's right to fair trial

S v *Konson* CC-7-15 (Gowora JCC, Chidyausiku CJ, Malaba DCJ, Gwaunza JCC, Garwe JCC, Hlatswayo JCC, Patel JCC, Guvava JCC & Mavangira AJCC concurring) (Judgment delivered 22 July 2015)

The applicant was convicted of murder in the High court and sentenced to death. In his appeal before the Supreme Court, the applicant alleged that the High Court had violated his right to a fair trial, as guaranteed under s 69(1) of the Constitution, by the extent to which the trial judge had descended into the arena. It was alleged that the record of proceedings showed that the court was not impartial. It is argued the questioning of the applicant by the trial judge was such that, because of its frequency, length, timing, form, tone, content, it was apparent that the trial judge was hostile to the applicant. The trial judge asked more questions of the applicant during cross-examination and re-examination than did the prosecutor.
Held: The object of a criminal trial is for the truth surrounding the commission of the offence to be established. The role of the judge is therefore an onerous one, as his task is to see that justice is not only done, but that it is seen to be done. In this exercise he should conduct himself in such a manner that he is not viewed or perceived to have aligned himself with either the prosecution or the defence. He is not precluded from questioning the witnesses or the accused person but such questioning must not be framed in such a manner as to convey an impression that he is conducting a case on behalf of one of the parties. The judge must avoid questions that are clearly biased and show a predisposition on the part of the judge. The judge should neither lead nor cross-examine a witness. He should so conduct the trial that his open-mindedness, his impartiality and his fairness are manifest to all those who are concerned in the trial and its outcome, especially the accused.
In this case, the inescapable conclusion that emerged from the record is that the judge descended into the arena and as a consequence he deprived himself of the detached impartiality required of a judicial officer. The fairness of the trial was clearly undermined. He had prejudged the issues of the trial that was before him. In view of the stance assumed by the trial judge, the defence proffered on behalf of the applicant was not properly evaluated thus further undermining the trial. His right to a fair hearing was clearly violated. The proceedings would be set aside and a trial *de novo* before another judge would be ordered.

Editor's note: at the re-trial, the applicant was convicted and sentenced to 25 years' imprisonment. See *S* v *Konson* HB-18-16.

Constitutional law – Constitution of Zimbabwe 2013 – Declaration of rights – rights of accused persons – right of appeal against conviction (s 70(5)) – allows police officer to appeal from ruling of Commissioner-General to the High Court

Sadengu v *Board President & Anor* HH-712-15 (Dube J) (judgment delivered 26 August 2015)

See below, under POLICE (Discipline – trial of member by single officer).

Constitutional law – Constitution of Zimbabwe 2013 – Declaration of rights – rights of accused persons – right of appeal against conviction (s 70(5)) – does not confer right of appeal where an Act of Parliament does not provide for it

Tamanikwa v Board President & Anor HH-676-15 (Mathonsi J) (Judgment delivered August 5 2015)

See below, under POLICE (Discipline – trial of member by single officer).

Constitutional law -- interpretation of Constitution – general rules relating to interpretation of statutes applicable – additional considerations in interpreting rights provisions in Constitution

Chihava & Anor v *Mapfumo NO & Anor* CC-6-15 (Gwaunza JCC, Chidyausiku CJ, Malaba DCJ, Ziyambi, Garwe, Gowora, Hlatshwayo & Guvava JJCC & Chiweshe AJCC concurring) (Judgment delivered 15 July 2015)

See above, under CONSTITUTIONAL LAW (Constitution of Zimbabwe 2013 – Constitutional Court).

Contract – formation – quasi-mutual consent – what must be shown – failure by one party to respond to proposal by other to alter terms of existing suretyship agreement – not an indication of assent to proposal

KHM Société Anonyme v *G Mobile (Pvt) Ltd & Ors* HH-785-15 HH-785-16 (Mathonsi J) (Judgment delivered 7 October 2016)

The third defendant entered into a deed of suretyship in respect of a loan granted by the plaintiff to the first defendant. He was at the time a director and shareholder of the first defendant though later he resigned as director and relinquished his shareholding. Another director was appointed in his place. In the deed, he renounced all the usual benefits and exceptions and specifically agreed that he could only be released by a written release signed by the plaintiff. When the first defendant failed to service the loan, the defendants were sued. A deed of settlement was reached between the plaintiff and the first and second defendants, which reduced the debt slightly, but the first and second defendants thereafter defaulted and action was brought against the third defendant. He claimed that the plaintiff did not have a cause of action against him because he had signed the deed of suretyship in his capacity as a director of the first defendant. He had since retired from that position, as a result of which the suretyship had expired. He also submitted further that, upon retiring, he had made a proposal to the plaintiff that the person who was taking over directorship from him be substituted as surety in his place. A notice to that effect was given to the plaintiff, which was asked in correspondence to sign a deed of cancellation. The plaintiff did not respond to such correspondence. By its silence, the third defendant argued, the plaintiff acquiesced to the release of the third defendant as surety. It was argued that this was a case of quasi-mutual assent.
Held: reliance on that doctrine was misplaced. Quasi-mutual assent would not set in simply because the parties did not enter into a new agreement. A creditor holding on to the security of a suretyship does not lose that security merely because the surety, in a bid to be released, sends a proposal, complete with a deed of cancellation of the suretyship demanding his release and the substitution of a third party not approved by the creditor, which the creditor does not respond to. The liability of the third defendant as surety and co-principal debtor was premised, not on his position as director of the first defendant, but upon the deed of suretyship that he signed. It was that written document which became the true memorial of the relationship between the parties and not some other issues, imagined or real, not recorded therein.

Contract – breach – remedies – specific performance – discretion vesting in court – compliance with order for specific performance not possible – such order should not be issued

Contract – validity – agreement to contract in the future – not enforceable – cannot be treated as substantive contract – contract in breach of statutory provision – such contract void

Hativagone & Anor v *CAG Farms (Pvt) Ltd & Anor* S-42-15 (Gowora JA, Garwe & Patel JJA concurring) (Judgment delivered 16 July 2015)

The appellants were owners of a farm. The first respondent had made a written "final offer" to the appellants for the acquisition of the farm. The appellants accepted the offer and the parties then drew up an "irrevocable memorandum of understanding" (MOU) in relation to the farm. The MOU specifically provided that its purpose was to set out the basis upon which the transaction should be concluded and to set out the rights and obligations upon each party leading to the signing of a sale agreement between the parties.
In view of the statutory legal requirement attendant upon the sale of rural land, the appellants immediately made an application to the Ministry of Lands for the issuance of a "certificate of no present interest". The application was acknowledged and the certificate was issued some time in the same month. In the meantime, in anticipation of the issuance of the certificate, the respondent had prepared a written agreement of sale. However, the agreement was not signed due to alleged unwillingness to co-operate on the part of the appellants. A few months later, the respondent became aware that the farm was being advertised for sale as subdivided plots. Being of the view that a valid sale agreement had been concluded between itself and the appellants, it approached the High Court seeking an order declaring that a valid agreement of sale of the farm had been concluded between the

parties and, consequent thereto, an order for specific performance of the sale agreement in its favour. The court *a quo* found that an agreement of sale had been entered into and it ordered specific performance in favour of the respondent.
The appellant argued that (a) the respondent was not entitled to an order for specific performance because the property had already been subdivided by the time the matter came to court and because there was no valid and binding agreement between the parties; (b) the MOU did not constitute a valid and binding agreement; (c) the offer and acceptance and the MOU were both void *ab initio* having been entered into before the issue of a certificate of no interest by the Ministry; and (d) the *dies induciae* of the offer and acceptance and the MOU had lapsed before the parties could sign, so there was no valid and binding agreement between them.
Held: (1) there were two contracts envisaged after the offer for the purchase of the farm was accepted. The first was the MOU itself, which would lay the basis for the conclusion of the agreement of sale of the land, the second was the contract of sale itself. The MOU was a vehicle through which the agreement of sale would be concluded. The MOU specifically provided that a contract would be concluded upon the obtaining of a certificate of no present interest. The sale agreement was to be effected at a later date, subject to the terms and conditions set out in the MOU and, subject also to further negotiations by the parties. The wording of the MOU itself lent support to an interpretation which was only consonant with a finding that the MOU was not the agreement of sale in itself. The sale of the farm had not been concluded by the signing of the MOU.
(2) Agreements akin to the one *in casu* are not enforceable primarily due to the uncertainty which accompanies such contracts. In agreements to agree in the future, the parties thereto retain a discretion as to whether or not to agree or disagree in the future. The court *a quo* prematurely found that an agreement of sale had been entered into when both parties agreed that the agreement of sale had not yet been concluded and would only be executed at a later stage.
(3) By the time the application was brought to the High Court, the MOU had expired and there were no rights arising from the MOU which could be enforced by any of the parties. The respondent had no cause of action.
(4) In terms of s 3 of the Land Acquisition (Disposal of Rural Land) Regulations (SI 287 of 1999) a holder of rural land cannot sell such land to any other person without having approached the State to exercise its statutory right of first refusal. If the State is not interested in the land, the relevant Minister will issue a certificate of no present interest and only then may a party proceed to enter into an agreement of sale with any other party. A seller has no discretion and must comply with the statutory condition. Where a contract is proscribed by statute, it is invalid and non-compliance with the condition invalidates the whole contract. The "agreement" which the court *a quo* found to exist between the parties was illegal. A sale of rural land before the relevant Minister has expressed his disinclination to buy the same is prohibited. It is, in addition, an established principle of the law of contract that an agreement of sale that is subject to the fulfilment of a condition precedent that has not been fulfilled is not a valid sale.
(4) A whole piece of land is a different entity to subdivided portions of the same. The subdivision of land is not a matter of form, it is one of substance. Once the appellants obtained a subdivision permit in respect of the farm, the *merx* as it originally stood and offered to the respondent had ceased to exist. The grant of an order of specific performance is discretionary. The principle *lex non cogit ad impossibilia* states that specific performance should never be ordered if compliance with the order would be impossible, as it would be here.

Editor's note: decision of DUBE J in *CAG Farms (Pvt) Ltd* v *Hativagone & Ors* HH-157-14 (delivered 2 April 2014) reversed. See the summaries for 2014(1) for a summary of that judgment.

Costs – *de bonis propriis* – against legal practitioner – making application knowing it was inappropriate and obtaining judgment by misrepresentation

Mashingaidze v *Chipunza & Ors* HH-688-15 (Chitakunye J) (Judgment delivered 6 August 2015)

See below, under PRACTICE AND PROCEDURE (Default judgment – rescission)

Costs – higher scale – misconceived litigation – constitutional appeal brought in guise of an application – respondent put to unnecessary expense – costs on higher scale justified

Prosecutor-General v *Telecel Zimbabwe (Pvt) Ltd* CC-10-15 (Gwaunza JCC, Chidyausiku CJ, Malaba DCJ, Gowora, Mavangira & Guvava JJCC, Chiweshe, Makoni & Bhunnu AJJCC concurring) (Judgment delivered 8 October 2015)

See above, under CONSTITUTIONAL LAW (Constitution of Zimbabwe 2013 – Constitutional Court – reference of cases to).

Court – Constitutional Court – appeal to – from decision of Supreme Court – no right of appeal existing unless Supreme Court has made decision on a constitutional matter

Nyamande & Anor v *Zuva Petroleum (Pvt) Ltd (2)* CC-8-15 (Ziyambi JCC) (Judgment delivered 1 August 2015)

See above, under CONSTITUTIONAL LAW (Constitution of Zimbabwe 2013 – Constitutional Court).

Court – High Court – jurisdiction – appellate jurisdiction from inferior tribunals – decision of Commissioner-General of Police dismissing appeal of member of police force convicted by a single officer – appeal lying to High Court against such decision

Sadengu v *Board President & Anor* HH-712-15 (Dube J) (judgment delivered 26 August 2015)

See below, under POLICE (Discipline – trial of member by single officer).

Court – High Court – jurisdiction – appellate jurisdiction from inferior tribunals – decision of Commissioner-General of Police dismissing appeal of member of police force convicted by a single officer – no appeal lying to High Court against such decision

Tamanikwa v *OIC ZRP Beatrice & Ors* HH-616-15 (Tagu J) (Judgment delivered 15 July 2015)

See below, under POLICE (Discipline).

Court – High Court – jurisdiction – constitutional – High Court's jurisdiction to determine any constitutional issue other than those reserved for Constitutional Court

Tetrad Invstm Bank Ltd v *Largedata Entprs (Pvt) Ltd* HH-730-15 (Chigumba J) (Judgment delivered 17 September 2015)

See above, under CONSTITUTIONAL LAW (Constitutional of Zimbabwe 2013 – Declaration of Rights – right to fair trial).

Court – High Court – jurisdiction – extraterritorial – rape committed outside Zimbabwe – has harmful effects in Zimbabwe – court has jurisdiction

S v *Matunga* HH-706-15 (Tagu J) (Judgment delivered 19 August 2015)

An application for bail pending appeal was instituted by a man who had been convicted of rape and sentenced to 18 years by the regional court. The rape had taken place in South Africa, but had only been reported to the police in Zimbabwe, where the perpetrator was arrested, tried and convicted. His application for bail pending appeal did not raise the issue of lack of jurisdiction by the Zimbabwean court. The court stated that it was not an issue to be determined by the appeal court, but then proceeded to address it in assessing whether the bail application was likely to succeed.
The court cited s 5 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] and concluded that a Zimbabwean court can have jurisdiction over a crime committed wholly outside the country which has produced harmful effect in Zimbabwe; a rape can have harmful effect even if it is committed outside Zimbabwe. There is no justification for rigid adherence to the principles of basing jurisdiction upon the place of impact or intended impact in a global village. The appeal court would not conclude there was lack of jurisdiction. (MN)

Editor's note: On where the "harmful effects" of a crime are felt, see *S* v *Nkomo* 2007 (1) ZLR 357 (S) and the cases there cited. Whether "harmful effects" would include, for example, ongoing psychological trauma arising out a rape is yet to be decided by the Supreme Court.

Court – judicial officer – conduct of trial – manner in which judicial officer should conduct trial – extent to which may question accused person in criminal trial

S v *Konson* CC-7-15 (Gowora JCC, Chidyausiku CJ, Malaba DCJ, Gwaunza JCC, Garwe JCC, Hlatswayo JCC, Patel JCC, Guvava JCC & Mavangira AJCC concurring) (Judgment delivered 22 July 2015)

See above, under CONSTITUTIONAL LAW (Constitution of Zimbabwe 2013 – Declaration of Rights – right to a fair trial).

Court – judicial officer – duties – to create environment conducive to fairness and to be seen to uphold rights of accused person – duty to guard against excesses of power and abuse of judicial authority

Mukwemu v *Sanyatwe NO & Anor* HH-765-15 (Mathonsi J) (Judgment delivered 23 September 2015; reasons furnished 30 September)

The applicant urgently sought a stay of the criminal proceedings brought against him in the magistrates court. He had enlisted the services of a legal practitioner to represent him, but the practitioner could not appear on the date on which the trial had been set down and sent an associate to appear and apply for a postponement. The magistrate would have none of it. Although the associate had been recalled from leave to do make the application and had no prior knowledge of the case, the magistrate dismissed the application for a postponement and directed that the trial commence immediately. He would not hear of a referral of the matter to the Constitutional Court on the ground that the applicant's right to a fair trial and to be represented by a legal practitioner of his choice was being violated. The trial began and at the end of the day it was remanded to until a week later for continuation of trial, a date unilaterally set by the magistrate. The lead counsel could not appear on that date either and sent his associate back to the court. There he made another bid to have the matter referred to the Constitutional Court on the same grounds as before. He also made an application for the magistrate to recuse himself on suspicion of bias. The magistrate not only dismissed the application, but also ordered the practitioner's immediate arrest for contempt of court even as the legal practitioner was busy addressing the court. The practitioner was handcuffed by a prison officer and detained until his release at lunch time. The applicant launched an application for review, which application was still pending. He requested the magistrate to defer the trial until the review application had been determined. The magistrate nonetheless set a date for resumption, so the applicant launched the present application.

Held: (1) A judicial officer must create an environment in his court which is not only conducive to fairness, a fair trial and justice, but also be seen to be upholding the rights of accused persons. In his court, justice must not only be done, it must also be seen to be done. Where legal practitioners performing their duties of representing accused persons in court, no matter how tenacious they are in the pursuit of their client's rights, are arrested while sheltering under court privilege, then all pretensions at fairness are thrown out through the window. In fact, the whole process of the administration of justice is turned into a mockery and in its place is substituted the law of the jungle, that only might prevails. A judicial officer must always guard against the excesses of power, against the abuse of judicial authority to settle personal scores.

(2) We live in a tolerant society that recognises the constitutional right of accused persons to be represented by counsel of their choice in defence of criminal charges. There should never come a time when the business of representing others becomes a hazardous exercise because a legal practitioner may be dragged away from the bar at the whim of a judicial officer while conducting a defence. We must be able to draw the line somewhere and say: this cannot be done.

(3) The dispassionate manner in which a judicial officer is supposed to conduct proceedings was missing in this matter. In fact, the magistrate appeared determined to try the applicant without further ado and would pull out all the stops to achieve that, as if an accused person has no rights at all and as if life itself depends on the trial proceeding. There had been no delay whatsoever and as such one wonders what informs the decision of the judicial officer to proceed with the trial with indecent haste at the expense of justice and fairness. A stay would be granted pending the determination of the review proceedings.

Court – judicial officer – *functus officio* – matter previously disposed of – requirements – need for cause of action and relief sought to be the same

Golden Reef Mining (Pvt) Ltd & Anor v *Mnyiya Consulting Engrs (Pty) Ltd & Ors* HH-722-15 (Mangota J) (Judgment delivered 7 September 2015)

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

Court – judicial officer – impartiality – duty of – meaning of impartiality – recusal – apprehension of bias – must be based on reasonable grounds – circumstances must be such that a reasonable person would apprehend bias

Zhou v *Katiyo NO & Anor* HH-774-15 (Hungwe J) (Judgment delivered 22 September 2015)

When faced with an application for recusal, a judicial officer must consider and weigh up two important obligations; namely the duty to hear every case that comes before him or her and the duty to apply the law impartially, without fear, favour or prejudice. Impartiality does not require the magistrate to be neutral; rather, it is a state of mind in which the magistrate is disinterested in the result and is open to persuasions by the evidence and submissions. It is that quality of open-minded readiness to persuasion – without unfitting adherence to either party or to the judge's own predictions, preconceptions and personal views – that is the keystone of a civilised system of adjudication. In contrast, bias denotes a state of mind that is in some way predisposed to a particular result or that is closed with regard to the issues. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or would not bring an impartial mind to bear upon the adjudication of the case, that is, a mind open to persuasion by the evidence and submissions of counsel. The perception of bias must be reasonable in two respects: (a) the perception must be reasonable: it must be based on reasonable grounds and there must be a reasonable apprehension that the judicial officer will be biased; an apprehension that the judicial officer may be biased is not sufficient. (b) In addition, the person apprehending the bias must be a reasonable and objective person in the position of the litigant who is informed of the facts.

Court – jurisdiction – *peregrinus* – how jurisdiction may be established – options open to court

Bulgargeomin Ltd v *Govt of Bulgaria & Ors* HH-732-15 (Chigumba J) (Judgment delivered 17 September 2015)

See below, under PROPERTY AND REAL RIGHTS (Ownership – acquisition).

Court – jurisdiction – *peregrinus* – need for defendant to be present or have property within the jurisdiction – not necessary to arrest such person or attach property – jurisdiction may be founded by issuance of process

Gwisai v *Shamuyedova & Ors* HH-623-15 (Uchena J) (Judgment delivered 15 July 2015)

Under s 15 of the High Court Act [*Chapter 7:06*], the court may exercise jurisdiction over a *peregrinus* (a) founded on or confirmed by the arrest of any person or attachment of any property; (b) who is or which is in Zimbabwe, and (c) can permit or direct the issue of process, for service in or outside Zimbabwe (d) without ordering such arrest or attachment. This means that if the property or person is outside the country it or he cannot be attached or arrested. The absence of a person who can be arrested or property which can be attached to found or confirm jurisdiction is a critical consideration in deciding whether or not the court has jurisdiction and can issue process. The absence of a person who can be arrested or property that can be attached has the effect of defeating the principle of effectiveness, which is central to the issue of whether or not a court has jurisdiction. However, if the court believes that there is a person to be arrested or property to be attached to found or confirm jurisdiction within Zimbabwe, it can grant an application for edictal citation. The issuance of that process will, because of the presence of a person or property to be arrested or attached to found or confirm jurisdiction, itself found or confirm the court's jurisdiction.

Editor's note: see also *Fairdrop (Pvt) Ltd* v *Capital Bank Corp Ltd & Ors* HH-305-14 (a judgment of Mathonsi J, delivered 18 June 2014, contained in the summaries for 2014(1)).

Court – recusal – grounds for recusal – bias – reasonable grounds for apprehension of bias sufficient – need for a real likelihood of bias to appear – onus on person alleging bias

S v *Nhire & Anor* HH-619-15 (Hungwe J) (Judgment delivered 15 July 2015)

The trial magistrate requested a judicial review of a part-heard trial, after the complainant in the matter alleged that the accused person was a friend of or related to the magistrate and that magistrate should recuse himself. Although the magistrate denied the allegation, he nonetheless considered that at the heart of the test for recusal lies the principle that justice should not only be done but be seen to be done; on this basis, justice would not be seen by the complainant to be done if the trial magistrate were not to recuse himself.
Held: All too often judicial officers are faced with allegations of bias, some justified, but most not borne out by the facts. It is important that judicial officers handle this criticism with utmost sensitivity as the perception of bias might, unfortunately, crystalize into fact. Various tests have been proposed, which are to the effect that in considering whether there is a real likelihood of bias, the court does not look at the mind of the judicial officer himself. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless, if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit, and if he does sit, his decision cannot stand. Nevertheless, there must appear to be a real likelihood of bias. Surmise or conjecture is not enough; there must be circumstances from which a reasonable man would think it likely or probable that the judicial officer would, or did, favour one side unfairly at the expense of the other. The court will not enquire whether he did, in fact, favour one side unfairly. The principle enshrined in the authorities is that no reasonable man should, by reason of the situation or action of a judicial officer, have grounds for suspecting that justice will not be administered in an impartial and unbiased manner. A judicial officer should therefore so conduct the trial that his open-mindedness, his impartiality and his fairness are manifest to all those who are concerned in the trial and its outcome, especially the accused.
Two considerations are built in. The first is that in considering the application for recusal, the court as a starting point presumes that judicial officers are impartial in adjudicating disputes. This in-built aspect entails two further consequences. On the one hand, it is the applicant for recusal who bears the onus of rebutting the presumption of judicial impartiality. On the other, the presumption is not easily dislodged. It requires "cogent" or "convincing" evidence to be rebutted. The second in-built aspect of the test is that "absolute neutrality" is something of a chimera in the judicial context. This is because judges are human. They are unavoidably the product of their own life experiences, and the perspective thus derived inevitably and distinctively informs each judge's performance of his or her judicial duties. But colourless neutrality stands in contrast to judicial impartiality. Impartiality is that quality of open-minded readiness to persuasion – without unfitting adherence to either party, or to the judge's own predilections, preconceptions and personal views – that is the keystone of a civilised system of adjudication. Impartiality requires, in short, "a mind open to persuasion by the evidence and the submissions of counsel"; and, in contrast to neutrality, this is an absolute requirement in every judicial proceeding.
Courts considering recusal applications asserting a reasonable apprehension of bias must accordingly give consideration to two contending factors. On the one hand, it is vital to the integrity of our courts and the independence of judges and magistrates that ill-founded and misdirected challenges to the composition of a bench be discouraged. On the other, the courts' very vulnerability serves to underscore the pre-eminent value to be placed on public confidence in impartial adjudication. In striking the correct balance, it is as wrong to yield to a tenuous or frivolous objection as it is to ignore an objection of substance.

Criminal law – offences under Criminal Law Code – criminal abuse of public office (s 174(1)) – public officer – who is – employee of private company wholly owned by Government – not an employee of the State

S v *Chikumba* HH-724-15 (Mafusire J) (Judgment delivered 9 September 2015)

The applicant sought bail pending appeal. This was his second application, the first having been refused. He was the former chief executive officer of Air Zimbabwe, employed by Air Zimbabwe Holdings (Pvt) Ltd. He and another former employee had been convicted of criminal abuse of duty as a public officer, in contravention of s 174(1)(a) of the Criminal Law Code [*Chapter 9:23*], arising out of insurance contracts which they sought without going through the proper procedures.
The appeal was against conviction and sentence. In respect of the former, the grounds of appeal were essentially factual.

This being a second application, it was necessary, in terms of s 123 of the Criminal Procedure and Evidence Act [*Chapter 9:07*], to show that there were facts which were not placed before the judge who determined the previous application and which had arisen or been discovered after the determination. The facts relied on were that it was only when counsel had been briefed to give advice on the way forward that it was discovered that the applicant was wrongly convicted, as Air Zimbabwe was not one of the entities envisaged by the Code and that he was not a public officer as defined in s 169, not being a person holding or acting in a paid office in the service of the State, a statutory body or a local authority. This aspect had been completely overlooked by both the prosecution and the defence. It was overlooked in the first bail application. The applicant sought to amend his grounds of appeal by adding these averments to the grounds previously filed.
The State argued that the fact that the applicant's counsel "discovered" that he was not a public officer was not a discovery. This was a fact that was always in existence right from the beginning. It had never been an issue.
Held: (1) It may be that mere remissness or negligence or lack of diligence in failing to place all relevant facts before the court would not ordinarily amount to new facts, or changed circumstances, where a person, or somebody on his behalf, eventually becomes aware of those facts. If, with the exercise of due diligence, such facts would have been made available, the court should not too readily accept them as new facts amounting to changed circumstances. The test whether in a subsequent bail application there are changed circumstances or not, may be compared to an application for leave to introduce fresh evidence on appeal. The factors to consider should include whether or not the fresh evidence could reasonably lead to a different verdict, and whether there is a reasonable explanation why such facts were not placed before the court. In exceptional cases, relief may be granted if the court is satisfied that a reasonable probability exists that a conviction would not stand if the further evidence were accepted. The court should only decline to receive further evidence where it would not be in the interests of justice to do so. The ultimate determinant therefore is the interests of justice.
(2) If the applicant had been bringing a new bail application purely and solely on the same set of facts as those considered previously, that would have been irregular and in violation of s 123 of the Criminal Procedure and Evidence Act. But he was bringing the second bail application on the basis of a new point which was both a point of fact and a point of law. This point was fundamental to the prospects of success of the applicant's appeal and was so profound as to strike at the root of the very conviction in respect of which the applicant was serving time.
(3) In an application for bail pending appeal, it is not the function of the judicial officer to satisfy himself beyond any measure of doubt whether or not the grounds of appeal are doomed to fail. If the applicant has some fighting chance on appeal, then, all the other relevant factors being neutral, the applicant must be entitled to relief. The question, then, is not whether the appeal will succeed. The standard is much lower. It is whether the appeal is free from predictable failure.
(4) Air Zimbabwe Holdings and Air Zimbabwe (Private) Limited were private companies formed by shares and registered in terms of the Companies Act [*Chapter 24:03*]. Air Zimbabwe (Pvt) Ltd was designated as the successor company to the defunct Air Zimbabwe Corporation, which was a statutory body. The Corporation was dissolved. The fact that the Government was a shareholder in the airline did not make it the employer and did not make the applicant a public officer.

Criminal law – offences under Criminal Law Code – theft of trust property – what constitutes trust property – money paid is deposit on purchase price – not trust property – debtor-creditor relationship only established

S v *Mugandani* HH-635-15 (Hungwe J) (Judgment delivered 29 July 2015)

Only property held under a deed of trust; or by agreement; or under any enactment; or on terms requiring the holder to hold the property on behalf of another or account for it to another; or hand over the property to a specific person; or deal with it in a particular way, constitutes trust property for the purposes of s 112 of the Criminal Law Code [*Chapter 9:23*]. Money handed over as a deposit for the purchase of goods is not trust property. In that situation, a debtor-creditor relationship is created. The money paid is a fungible which may be used by the recipient as his own, as long as he acknowledges his debt to the depositor.

Criminal procedure – bail – pending appeal – principles – should be positive grounds for granting bail – not necessary that exceptional grounds should exist – prospects of success – approach to be taken to – should be arguable or have substance

S v *Pfumbidzayi* HH-726-15 (Zhou J) (Judgment delivered 10 September 2015)

Where bail after conviction is sought, the onus is on the applicant to show why justice requires that he should be granted bail. The proper approach is not that bail will be granted in the absence of positive grounds for refusal but that in the absence of positive grounds for granting bail it will be refused. First and foremost, the applicant must show that there is a reasonable prospect of success on appeal. Even where there is a reasonable prospect of success, bail may be refused in serious cases, notwithstanding that there is little danger of the applicant absconding. The court must balance the liberty of the individual and the proper administration of justice and where the applicant has already been tried and sentenced it is for him to tip the balance in his favour. It is also necessary to balance the likelihood of the applicant absconding as against the prospects of success, these two factors being interconnected because the less likelihood are the prospects of success the more inducement there is to abscond. Where the prospect of success on appeal is weak, the length of the sentence imposed is a factor that weighs against the granting of bail. Conversely, where the likely delay before the appeal can be heard is considerable, the right to liberty favours the granting of bail.
It is not a requirement that "exceptional circumstances" should exist to justify release on bail. What are required are positive grounds to show that bail must be granted.
Where the High Court is faced with an appeal against refusal to grant bail pending appeal, the court will consider whether the magistrates court misdirected itself, having regard to the above principles. The court does not deal with the matter as if it is the court of first instance in an application for bail.
In relation to prospects of success, the High Court is not sitting as the appellate court to consider the appropriateness or otherwise of the conviction and sentence. The approach in assessing the prospects of success is not to ask whether the appeal will or should succeed but whether it is arguable or has substance, in the sense of it not being manifestly doomed to failure. If the appeal is not a predictable failure or the inquiry as to whether it has prospects of success is reached only after what approximates a hearing of the appeal itself then the court must be inclined to conclude that the appeal has prospects of success.

Criminal procedure – bail – pending appeal – second application – need to show facts which have arisen or been discovered since last application – realisation of point of law striking at root of conviction – may be considered in decision as to whether to grant bail – not necessary for judicial officer to consider appeal doomed to failure – appeal must be free from predictable failure

S v *Chikumba* HH-724-15 (Mafusire J) (Judgment delivered 9 September 2015)

See above, under CRIMINAL LAW (Offences under Criminal Law Code – criminal abuse of public office)

Criminal procedure – prosecution – stay of – grounds – abuse of process – accused person charged with multiple offences, including murder – State proceeding against accused on lesser charges before indicting him on murder charge – State having valid reasons for proceedings as it did – accused always aware that he faced murder charge – constitutional rights not breached – no entitlement to stay of prosecution on grounds of abuse of process

S v *Mashayamombe* HH-596-15 (Zhou J) (Judgment delivered 2 July 2015)

See above, under CONSTITUTIONAL LAW (Constitution of Zimbabwe 2013 – Declaration of Rights – right to equal protection of the law).

Criminal procedure – trial – conduct of – role of judicial officer – extent to which judicial officer may question accused person – if fairness of trial undermined, accused's constitutional right to fair trial may be violated

S v *Konson* CC-7-15 (Gowora JCC, Chidyausiku CJ, Malaba DCJ, Gwaunza JCC, Garwe JCC, Hlatswayo JCC, Patel JCC, Guvava JCC & Mavangira AJCC concurring) (Judgment delivered 22 July 2015)

See above, under CONSTITUTIONAL LAW (Constitution of Zimbabwe 2013 – Declaration of Rights – right to a fair trial).

Criminal procedure (sentence) – transfer of case to High Court for sentence – referral of matter to Prosecutor-General by magistrate – need for Prosecutor-General to make his own decision as to what sentence would be appropriate and not rubber-stamp magistrate's opinion

Criminal procedure (sentence) – offences under Criminal Law Code – kidnapping – matters which should be considered – normal factors should be taken into account

S v *Makunike* HH-770-15 (Chigumba J) (Judgment delivered 16 September 2015)

The accused was convicted of kidnapping by a senior magistrate. She had pleaded guilty. She admitted to abducting a small boy aged 3-4 years from his parents and taking him to Botswana where he was kept for at least 3 years. Her reason for doing so was that she was barren. Desperate to save her marriage, she stole the minor and presented him to her husband as his biological child borne by her. The magistrate considered that the offence was committed in aggravating circumstances and that a sentence well above his sentencing jurisdiction was appropriate. He referred the record to the Prosecutor-General in terms of s 225 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The Prosecutor-General ordered that the matter be transferred to the High Court for sentence.
Held: (1) before transferring a matter for sentence, the Prosecutor-General has a duty to carefully consider any request by a trial magistrate to have a matter referred to the High Court for a higher penalty. He should consider (a) the relevant provisions of the law in terms of which the accused was charged and convicted; (b) the aggravatory and mitigatory factors; and (c) relevant case law and determine whether if in fact the trial magistrate is correct that a stiffer penalty is appropriate. The Prosecutor-General must decide for himself what the appropriate sentence would be in the circumstances instead of rubber stamping the opinion of the trial magistrate. It is not every case in which a trial magistrate forms the opinion that a stiffer penalty would be more appropriate which must be referred to the High Court for sentencing unless the circumstances of the case, and the law, support such an opinion. A careful analysis of the issues to be taken into consideration in assessing sentence should be undertaken by the Prosecutor-General.
(2) The nature and seriousness of the crime ought to take precedence in awarding punishment. Kidnapping is always a serious offence, since it involves deprivation of liberty, particularly freedom of movement, freedom to be where one wants to be, and so on. Kidnapping for the purpose of rape or ransom has generally attracted stiffer penalties, whereas offenders who have altruistic or other non-violent motives have been treated with leniency. Kidnapping is a serious offence which occasions emotional trauma on the victim and on those left behind who assume the worst and fear that they will never see their loved one again. It is important, however, that the process of sentencing be a rational and objective one and trial magistrates must strive to balance the interests of society and the need to deter other would be offenders. The court must have regard to the rights of the accused to be punished in accordance with the circumstances of the case, and the need to rehabilitate the victim, while appeasing the anger and despair of the victim's loved ones. Magistrates should not allow their emotions to cloud their judgment as to which sentence is appropriate in the circumstances. Without evidence in the record on the point, it was a misdirection by the magistrate to allude to the current prevalence of kidnappings for ritual purposes. The appropriate sentence here was 4 years' imprisonment, of which one year would be suspended.

Criminal procedure (sentence) – suspended sentence – failure by accused to comply with conditions of suspension – actions which court may take – once court has acted, may not revisit decision, even of circumstances have changed

S v *Chinyemba* HH-629-15 (Musakwa J) (Judgment delivered 17 July 2015)

In terms of s 358(2) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] a court may pass sentence in respect of any offence other than in respect of an offence specified in the Eighth Schedule and order the suspension of the operation of the whole or any part of the sentence for any period not exceeding five years on conditions the court may specify in the order. The condition may relate to compensation for pecuniary loss. If, in terms of s 358(4), the accused fulfils the conditions of suspension the suspended sentence shall not be enforced.
In terms of s 358(5), if a magistrate has reason to believe that a condition of any postponement or suspension made in terms of subs (2) has been contravened, he may, whether before or after the expiration of the period of postponement or suspension, order the offender to be brought before the court. The court may commit him to undergo the sentence which may then be or has been lawfully passed or, in its discretion, the reasons for which must be recorded, on good cause shown by the offender, grant a further postponement or suspension, subject to such conditions as might have been imposed at the time of the original postponement or suspension.

Once a magistrate decides to commit an accused person to serve a suspended sentence or to grant a further postponement, he becomes *functus officio*. He cannot revisit his decision other than in terms of s 201(1), which allows a wrong judgment or sentence to be amended. The correction of a decision cannot be premised on changed circumstances.

Employment – arbitration – award – registration in magistrates court – notice to other party not required

Josam Enterprises (Pvt) Ltd v *Svenhe & Anor* HH-714-15 (Dube J) (Judgment delivered 26 August 2015)

The respondent was the former employee of the applicant. Following arbitration of a labour dispute, the respondent registered the award made with the magistrates court in 2014. In 2015 the applicant's property was attached. In June 2015 the applicant secured a rule *nisi* for a stay of execution, but confirmation was refused in July. The applicant then filed this application with the High Court for a stay of execution and simultaneously filed an application for review. Its argument was based on the fact that the award should not have been registered without an application for notice to the other party, thus giving an opportunity for a challenge to be made. The issuing of the writ of execution was irregular since the registration was irregular. The respondent argued that the award was registered under the Labour Act [*Chapter 28:01*], not the Arbitration Act [*Chapter 7:15*], and hence notice to the other party was not required for registration.
Held: s 98(14) of the Labour Act makes it clear that an arbitral award can be registered in the magistrates court without giving notice to the other party; no procedure is outlined as registration is a purely administrative process. Article 35 of the First Schedule to the Arbitration Act, which provides for a notice to the other party on registration, covers registration in the High Court only and Articles 34 and 36 of the Act do not apply to labour disputes. Hence no review would find any irregularity. The balance of convenience favoured the respondent and the application to stay execution was denied. (MN)

Employment – collective bargaining agreement – interpretation of – need to read agreement as a whole – salary increases to be "based on" inflation rate – other factors not to be considered – inflation rate not merely a starting point for wage negotiations

Banking Employers' Assn of Zimbabwe v *Zimbabwe Bank & Allied Workers' Union* S-34-15 (Guvava JA, Ziyambi & Garwe JJA concurring) (Judgment delivered 9 July 2015)

The appellant was the employers' association for the banking industry, while the respondent was the union which represented the workers for that industry. Following protracted negotiations, they signed an agreement which was later reduced into a Collective Bargaining Agreement (published as SI 150 of 2013). It was agreed that the CBA resolved the dispute over salaries then pending in the Labour Court and that the parties withdrew all pending disputes relating to salary reviews. The clause dealing with salary reviews stated that the parties had agreed to "base salary reviews on year-on-year inflation figures prevailing at the relevant time", and stipulated the source of such figures. A later clause (clause 9) provided that "the issue of actual(s) will be dealt with by individual institutions".
A disagreement about how to interpret the Agreement led to the matter being referred to arbitration. The appellant's stand was that any salary increment which would be in line with the inflation figures for that year (4.9%) in order to stop any further disputes, while the respondent was of the view that the inflation figure would form the starting point of any future negotiations that they would have with the employer. The union's demand was for 23.5%. The arbitrator awarded a 10% increase, and this was upheld by the Labour Court, which held that the inflation figure was a starting point, not the end point and that the arbitrator was not bound by it.
Held: In order to give a proper interpretation to the intention of the parties, it was incumbent upon the lower court to examine the whole agreement and not just to rely on a single word. The decision to award a 10% salary increase completely defeated the intention of the parties in coming up with a formula to implement future salary increments. If the parties had intended to introduce other factors in determining future salary reviews, they would have said so in no uncertain terms. The fact that they agreed on a unitary yardstick to determine future salary reviews meant that they had no intention of introducing other factors, which would introduce uncertainty in the determination of their salary reviews. Having regard to the wording of the CBA, an interpretation which would include other factors, such as cost of living, the prevailing wage and the take home pay, would be doing violence to the ordinary grammatical meaning of the word "base" and would be clearly out of context with the other provisions of the agreement. There was no basis for the figure of 10%, which was a "thumb suck". A proper reading of clause 9 was that individual institutions which were performing better than the others financially and were in a position to pay a salary increment higher than the one agreed to by the appellant and the respondent could do so. Workers who had evidence that their institution were performing better than the

others could then negotiate with their employers for a salary increment which was higher than the basic inflation rate.

Employment – collective bargaining agreements – who may be parties thereto – what may be included in such agreements – benefits not included in agreement cannot be imposed by arbitrator or court – dispute relating to interest only – arbitrator's role merely conciliatory

NRZ v *Zimbabwe Rlys Artisans Union & Ors* S-46-15 (Ziyambi JA, Gwaunza & Guvava JJA concurring) (Judgment delivered 27 July 2015)

Collective bargaining agreements are governed by Part X of the Labour Act [*Chapter 28:01*. They are to be negotiated by the parties mentioned therein: registered trade unions, employers and employers' organizations or federations thereof. They may relate to any conditions of employment which are of mutual interest to the parties thereto, including any or all of the items listed in s 74(3) of the Act. Among these items are benefits for employees and housing and transport facilities or, in their absence, an allowance for the same. The statute does not confer a right on any of the parties, without agreement of the others, to have included in their collective bargaining agreement any of the subjects on the list, because a collective bargaining agreement is a contract between the parties to it and only they can set the terms by which they will be bound. It follows that any benefits to be included in the collective bargaining agreement must be agreed by the parties. They cannot be imposed by an arbitrator, or indeed any court, in the same way that a court cannot write a contract for the parties.
Allowances, not having been negotiated by the parties and therefore not forming part of their collective bargaining agreement, are not a right or entitlement available for appropriation by the employees. This would be a matter for the parties to bargain and reach agreement on. It is not a matter where a court could intervene. A court can only intervene to enforce any agreement the parties have concluded.
Under s 93(1) of the Act, a labour officer to whom a dispute or unfair labour practice has been referred, or to whose attention it has come, is required to attempt to settle it through conciliation or, if agreed by the parties, by reference to arbitration. However, where there is no legal right which is being sought to be enforced, the dispute being one of interest only, the arbitrator's role in such circumstances would merely be a conciliatory one.

Employment – dismissal – constructive – what must be shown – requirement for employee to act promptly – failure to do so indicating election to continue in employment – employee – transfer of to another town – employer's right to transfer employees – need for employee to show good cause why should not be transferred

Rainbow Tourism Group v *Nkomo* S-47-15 (Ziyambi JA, Garwe & Hlatshwayo JJA concurring) (Judgment delivered 27 July 2015)

The respondent was "head hunted" by the appellant and appointed as general manager of the appellant's leading hotel in Harare. He was initially appointed, at the beginning of 2011, for a three month probationary period; the letter of appointment stated that he would then be on a 5 year "executive employment" contract, which was to be negotiated. In the event, this contract was never negotiated and the respondent became an employee on a contract without limit of time. Within the first year of his employment, an audit team reported violations of the respondent's motor vehicle loan scheme and other irregularities. When tasked with these, the respondent did not reply directly, but complained about his conditions of services. Nonetheless, he continued in service, but in August 2012 the appellant expressed its dissatisfaction with the respondent's performance, as the hotel was running at a loss instead of the expected profit.
Despite the concerns expressed, the situation did not change, and the appellant told the respondent in late November 2012 that it proposed to transfer him to a hotel at Victoria Falls, at the same salary and remuneration, to expose him to the operation of a resort hotel. The following day, the respondent's legal practitioners wrote to the appellant, saying that the respondent had been specifically appointed as general manager of the hotel in Harare and that no provision was made therein for transfer within the group. In addition the appellant, it was alleged, was aware that the respondent's wife required specialist medical care and facilities which were not available in Victoria Falls. Accordingly, the respondent could not accept the transfer. The appellant replied that its assessment of the business was such that there was need for the transfer and that the respondent would be required to transfer on 1 January 2013. Reference was made to the respondent's conditions of employment which it was said were contained in a booklet referred to the respondent's letter of appointment.

The respondent lodged a claim of constructive dismissal with a labour officer and the matter was referred to arbitration. He did not report for duty on 1 January 2013 and the appellant notified the respondent of a disciplinary hearing for being absent without leave for 5 days or more. His legal practitioners said that he had ceased to be an employee because he was constructively dismissed, and the respondent did not attend the hearing. At the hearing, the respondent was found guilty of misconduct and invited to tender submissions in mitigation. The arbitration hearing took place subsequently, and the arbitrator ordered the respondent's reinstatement. The Labour Court upheld the arbitrator's award.

The main issue on appeal to the Supreme Court was whether the respondent was constructively dismissed in terms of s 12B(3) of the Labour Act [*Chapter28:01*], on the basis that the appellant deliberately made continued employment intolerable for the respondent. The appellant took the stance that the respondent had remained in employment and had drawn a salary up to the end of January 2013, and that like all other executive employees, was bound by the transferability clause in the code of conduct governing the appellant and its employees. The respondent contended that because he was not given the booklet referred to in the letter of appointment, he was not bound by its terms and was not transferable.

Held: (1) the letter of transfer stated in clear terms why the respondent was being transferred. In view of the respondent's failings, the appellant might have been justified in terminating the employment contract on notice, but chose transfer instead. There being no reduction of benefits, there was nothing to make the respondent's continued employment intolerable. Since the respondent's employment contract had become one without limit of time, he was bound by the general rules of transferability in the organization. Since no further contract was negotiated, there could not be read into that contract an appointment to a specific post, for a specific period and at a specific place only.

(2) The right to transfer an employee from one place to another is the prerogative of the employer. It is the employer who knows better where the services of an employee are required. The employer's discretion in determining which employee should be transferred and to which point of the employer's operations is not to be readily interfered with except for good cause shown.

(3) The respondent was the general manager of the Harare hotel and it was childish to submit that he was ignorant of the code because it was not given to him. In his position, he would have been responsible for drawing the attention of subordinate employees to the code of conduct. It would be an affront to intelligence to say that he remained, and was content to remain, blissfully unaware of its contents throughout the period of his employment with the appellant which spanned two years. The same would apply to any code applicable to executives if that were applicable to the respondent.

(4) There was nothing in the record, either of the respondent's recruitment or in his employment with the appellant, to suggest that the respondent's wife was an invalid and, still less, that the appellant was aware of it. In any event, unless his contract specifically provided (which it did not) for his employment in Harare and nowhere else, because of his wife's medical condition, that condition could not restrict the appellant in the exercise of its right to transfer the respondent as it deemed fit. The respondent, as an employee, was bound by the transferability clause in the appellant's code of conduct. Any difficulties which he had with the transfer should have been discussed with the appellant when he was given an opportunity to do so. Instead, when asked for his views, he chose to correspond through legal practitioners. The respondent had not discharged the onus of showing that the appellant's conduct was such that it made his employment with the appellant intolerable.

(5) Where an employer commits a breach which goes to the root of the employment contract the employee is entitled to treat himself as discharged from further performance. He is constructively dismissed. However, he must act promptly. If he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract. The respondent did not leave at the instant nor did he give notice and say he would be leaving at the end of the notice. He continued to attend at work and to do as he was instructed in the letter of transfer. He continued to receive his salary and benefits right up to the end of January 2013. His was not the conduct of one constructively dismissed. He was properly dismissed for absenteeism. The appeal would be allowed.

Employment – dismissal – grounds for – breach of conduct of conduct – disclosure by employee of confidential company information without authority – employee a member of workers' committee and disclosing such information during reconciliation proceedings – employee's first duty is to employer – status as member of workers' committee not exempting him from duty to comply with code of conduct

Chidembo v *Bindura Nickel Corp Ltd* S-35-15 (Gwaunza JA, Hlatshwayo JA & Mavangira AJA concurring) (Judgment delivered 2 July 2015)

The appellant was employed by the respondent and was chairman of a workers' committee. He was dismissed from employment for disclosing confidential information during conciliation proceedings. The code of conduct provided that "Information with respect to any confidential product, plan or business transaction of the group, or

personal information regarding employees, including their salaries, or any business information must not be disclosed by any employee unless and until proper authorisation for such disclosure has been obtained". In the course of the conciliation proceedings, which were attended by both employer and employee representatives, a request was made to the appellant who was present as the workers' committee chairman, for a list, if he had it, of employees affected by alleged salary anomalies. The appellant duly submitted the list, except that it showed employees' salaries, in addition to their names. His defence was that the information was disclosed during a lawful conciliation hearing and in the appellant's capacity as a worker representative, not as an employee. This was done as a *bona fide* step to prove the workers' case. It was not an act done in the normal course and scope of the contract of employment of the appellant. Since the disclosure of the list was clearly done in the pursuit of the employees' interest, it was lawful.
Held: The distinction between confidential information required by an individual worker and that required by a workers' representative is a useful and indeed critical one, but it was questionable whether divulging of such information would nevertheless be lawful, even if it is done in blatant violation of an express provision of the code of conduct. In spite of his position as chairman of the workers' committee, the appellant was an employee of the respondent, to whom at all times he bore the duty of trust and loyalty. His conduct in relation to the respondent was regulated and governed by the code of conduct. An act of misconduct committed by a worker outside the workplace and in his (also work related) capacity as a workers' committee member would be unlawful as long as it impacted directly on the employer's private interests and, in addition, constituted a violation of the employer's code of conduct. A worker's status as a workers' committee member would not clothe him with a cloak of immunity against misconduct charges. The appellant's status as a workers' committee chairman did not turn what was unlawful into a lawful act. His conduct became unlawful the moment he disclosed the information without the authority of the respondent.

Employment – dismissal – grounds for – conduct inconsistent with the fulfilment of the express or implied conditions of his employment – penalty – employer's general discretion as to whether to dismiss employee guilty of such conduct – when appeal court may interfere – conduct causing no real prejudice – dismissal unreasonable – appeal court entitled to interfere

Celsys Ltd v *Ndeleziwa* S-49-15 (Gwaunza JA, Hlatshwayo & Patel JJA concurring) (Judgment delivered 29 July 2015)

The respondent was employed by the appellant as a stores foreman. He ordered some sheet board for the appellant, but the supplier sent board of a smaller size. The respondent altered the copy of the receipt voucher to reflect the size actually received. This was contrary to the appellant's standard operating procedures, which required that defective goods be returned to the supplier. The respondent did not tell the relevant machine operator about the incorrect size of board; the operator reported the matter to the respondent's superiors, who took the view that the respondent had, by altering the voucher, been trying to conceal his defective work or inefficiency. He was charged with an act or omission inconsistent with the fulfilment of the express or implied conditions of his employment, found guilty and dismissed. A domestic appeal failed, but the national employment council for the industry ruled that dismissal was too harsh and ordered his reinstatement, coupled with a monetary penalty. The Labour Court upheld the NEC's finding.
The respondent did not deny the charge but argued that the penalty was too harsh. He said that the reason for acting as he did was to clarify the real position for accounting purposes, so that the appellant would not pay more than it needed to.
The issues on appeal were whether the appellant exercised its discretion reasonably in dismissing the respondent, and whether the Labour Court was correct in interfering with that discretion.
Held: (1) it is well established that the court will not interfere with the discretion of an employer to dismiss an employee found guilty of misconduct, provided that the alleged misconduct goes to the root of the employment contract, unless there has been misdirection or unreasonableness on the part of the employer. In the absence of a misdirection or unreasonableness on the part of the employer in arriving at the decision to dismiss an employee, an appeal court will generally not interfere with the exercise of the employer's discretion.
(2) The standard operating procedures required the respondent to act in a certain way when a wrong order was delivered. To that extent and notwithstanding what the respondent considered, on his own, to be the best way to rectify the error, he clearly acted contrary to the express or implied conditions of his contract of employment. Such conduct is generally regarded as going to the root of the employment contract. Where an employer takes a serious view of an employee's misconduct, it has a clear discretion as to what penalty to impose after finding such employee guilty of the misconduct in question.
(3) Here, though, the misconduct in question, having been committed for the reasons given by the respondent, and not having caused the appellant any real prejudice, financial or otherwise, was so trivial, so inadvertent, so

aberrant or otherwise so excusable, that the remedy of summary dismissal was not warranted. The appellant acted unreasonably in dismissing the respondent from employment, and therefore misdirected itself, so entitling the NEC and the Labour Court to interfere.

Employment – dismissal – unfair – fixed term contract – dismissal at conclusion of contract – dismissal not in terms of employment code – only unfair if employee had legitimate expectation of re-engagement and another person was engaged instead – damages in lieu of reinstatement – time within which dismissed employee could reasonably expect to find employment – evidence essential

Diamond Mining Corp v *Tafa & Ors* S-70-15 (Ziyambi JA, Gowora & Bhunu JJA concurring) (Judgment delivered 16 October 2015)

The respondents had been engaged by the appellant on fixed term contracts. Two weeks before the expiry of their contracts, they were relieved of their duties and paid their terminal benefits, including notice pay, cash in lieu of leave and their salaries for the last month of service. They brought proceedings alleging unfair dismissal and seeking reinstatement without loss of salary or benefits. The matter went to arbitration, and the arbitrator found that the respondents had not been dismissed in terms of a code of conduct. He found their dismissals to be unfair and ordered the payment of various sums of money. The Labour Court, on appeal, held that the dismissals were not in terms of a code of conduct and were *ipso facto* unfair. It held that the respondents were entitled to damages for a period of twelve months.
Held: (1) the notice given to the respondents was in compliance with the provisions of s 12(4)(d) of the Labour Act [*Chapter 28:01*]. All that was owed to the respondents at the time of the termination of the contracts was payment for the unexpired portion of their contracts and any benefits which may have accrued to them by virtue of the conditions of their employment.
(2) Not every termination of employment made outside a code of conduct is, in terms of the Act, unfair. Although under s 12B(2), an employee is unfairly dismissed if the employer fails to show that the employee was dismissed in terms of a code of employment, but this is subject to subs (3). In the case of a fixed term contract, the dismissal is unfair only if the employee had a legitimate expectation of being re-engaged and another person was engaged instead of the employee. The respondents, not having alleged or established that the provisions of subs (3) were applicable in their circumstances, consequently failed to establish that they were unfairly dismissed. The Labour Court therefore erred in upholding the arbitrator's finding that the respondents were unfairly dismissed.
(3) No evidence was led by the respondents before the arbitrator of the details of their claims for overtime and terminal benefits. There were, however, before the arbitrator, the letters of termination signed by the respondents and containing detailed calculations of the terminal benefits awarded to, and accepted by, them. What the respondents did was simply to set out what they believed was owing to them. The arbitrator ought to have heard evidence in support of the claims because the onus lay on the respondents to establish them.
(4) With regard to the award of damages by the Labour Court, since the respondents were not unfairly dismissed they had no claim against the appellant who had already paid them all that they were lawfully entitled to. Secondly, the Labour Court could not, without hearing evidence, arbitrarily decide how long it would reasonably take the respondents to find employment. This was a matter on which the Labour Court was required to hear evidence from both parties, after which it could arrive at a conclusion based on that evidence.

Employment – dismissal – wrongful – damages in lieu of reinstatement – assessment of – evidence – need for tribunal to have evidence to show when employee could reasonably have expected to find alternative employment

Delta Beverages (Pvt) Ltd v *Murandu* S-38-15 (Gwaunza JA, Hlatshwayo JA & Chiweshe JJA concurring) (Judgment delivered 2 July 2015)

The respondent was employed by the appellant company and had been suspended from work in 2000 for alleged misconduct. A labour officer found that there were no grounds for the respondent's dismissal and ordered his reinstatement, alternatively that he be paid an agreed exit package is cash in lieu of reinstatement. A dispute arose over the payment and quantification of the damages. The matter was heard by an arbitrator, who died before it was resolved. In 2011 it was placed before another arbitrator who, in 2012, ordered back pay from the date of suspension until the date of reinstatement. He also ordered 36 months' salary as damages in lieu of reinstatement. The total amount was denominated in local currency, which was in use at the time of the respondent's dismissal. The arbitrator then converted the amount to US dollars, at the official rate that prevailed

at the time. The Labour Court upheld the arbitrator's award. On appeal to the Supreme Court, the appellant argued that (1) there was no evidence in the record to support the arbitrator's award of 36 months' salary; and (2) the respondent was not entitled to damages and back pay in US dollars, when the lawful currency at the date the order of reinstatement or payment of damages was made (July 2002) was Zimbabwe dollars, and, when the cause of action arose, and the alleged damages were suffered, the Zimbabwe dollar was the currency in use. The appellant did not take issue with the award, *per se*, of back pay and damages to the respondent. Its main concern was with on the period of 36 months awarded in terms of damages and the conversion of both amounts from Zimbabwe to United States dollars. The arbitrator had held that considering his age, health and qualifications, the respondent could have obtained reasonable alternative employment within 36 months. No evidence was led before the arbitrator was to the respondent's age, health and qualifications, though the Labour Court assumed that the arbitrator would have received evidence.

Held: (1) the arbitrator erred by awarding the respondent 36 months' salary as damages in lieu of reinstatement without hearing any evidence as to his age, health and qualifications. The Labour Court, being none the wiser concerning whether or not the arbitrator had direct knowledge of these issues, resorted to speculation. There was no basis for the court to make, much less rely on, this particular speculation. Even assuming that the court's speculation was correct – that the arbitrator must have had before him the details in question – this did not absolve the court from its obligation to assess the evidence in question and satisfy itself that the decision of the arbitrator was justified on such evidence. The Labour Court, as an appellate court, abdicated its responsibility in this respect.

(2) The arbitrator compounded his error by not, additionally, considering other factors normally taken into account in making assessments of this nature. Specifically, he did not consider whether or not the respondent made any effort to mitigate his loss, nor the economic environment prevailing in 2002 and the prospects, if any, that such environment offered in terms of alternative employment. He should have heard evidence as to how long it would reasonably take a person in the position of the dismissed employee to find alternative employment.

(3) The respondent took no effort to secure alternative employment, but simply decided to settle into a life of subsistence farming. He therefore neglected to discharge the duty, as was incumbent upon him, to mitigate his loss.

(4) The court could take judicial notice of the fact that in 2002 the prospects of obtaining alternative employment were much better than four years later, when the economic meltdown of the country began. The respondent could, if he had wanted, found alternative employment in a much shorter period than the 36 months assessed by the arbitrator. Six months' salary would have adequately compensated him.

(5) The Labour Court, as a court of equity, is the only court vested with jurisdiction to compute and convert of various Zimbabwe dollar amounts into US dollars. Not being vested with such jurisdiction, the arbitrator fell into an error of law by seeking to convert the back pay, benefits and damages awarded to the respondent from Zimbabwe dollars into US dollars. The arbitrator compounded his error by settling on a conversion rate whose validity was in doubt. Equity would demand that a formula be found to give effect to the employee's entitlement to payment of, and the employer's obligation to pay, the debt in question. Failure to award him the damages in a currency that would realistically compensate him for the harm suffered would undermine the Labour Act's purpose of advancing equity, social justice and democracy at the workplace.

Editor's note: *Madhatter Mining Co* v *Tapfuma* S-51-14 is summarised in the summaries for 2014 (2), and will appear in the Law Reports for that period.

Employment – employee – who is – distinction between employee, agent and independent contractor – tests – control and supervision – liability of employer for delicts of servant but not for those of agent or contractor – contractor not able to bind employer in contract

Masango & Ors v *Kenneth & Anor* S-41-15 (Gwaunza JA, Gowora & Patel JJA concurring) (Judgment delivered 20 July 2015)

The difference between an agent and an independent contractor is that an agent is bound to act in the matter of the agency subject to the directions and control of the principal, whereas an independent contractor merely undertakes to perform certain specified work, or produce a certain specified result, the manner and means of performance of production being left to his discretion, except as far as they are specified by the contract. This distinction cannot be ignored, because the contract between master and servant is one of letting and hiring of services (*locatio conductio operarum*), whereas the contract between the principal and a contractor is the letting and hiring of some definite piece of work (*locatio conductio operis*). In the former case the relation between the two contracting parties is much more intimate than in the latter, the servant becoming subordinate to the master,

whereas in the latter case the contractor remains on a footing of equality with the employer. The crucial difference between these two cases lies in the fact that where a master engages a servant to work for him the master is entitled under the contract to supervise and control the work of the servant. He is entitled at any time to order the servant to desist, and if the matter is sufficiently serious may even dismiss him for disobedience.
"Control" in this context includes the right of an employer to decide what work is to be done by the employee, the manner in which it is to be done by him, the means to be employed by him in doing it, the time when and the place where it is to be done by him. Supervision implies the right of the employer to inspect and direct the work being done by the employee.
An independent contractor is his own master, free of his employer's control and representing no one else, when performing the obligations he is called to perform under the contract which he has entered into with his employer, such obligations not being those of contracting legal relations with third parties on behalf of his employees.
A principal is liable for the delict of his agent where such agent is a servant, but not where he is a contractor or sub-contractor or their servant. Similarly, an agent has authority to bind his principal in contract whereas the independent contractor has no such power.
Remuneration by commission, although not by itself decisive, is a strong indication against a relationship of master and servant.
The fact that the principal provides a motor vehicle is not in itself proof that the agent is a servant.

Judgment of MAFUSIRE J in *Masango* v *Farmers' Commodity Stock Exchange (Pvt) Ltd & Related Cases* 2013 (2) ZLR 163 (H) upheld.

Employment – Labour Court – appeal to – cannot be changed to review by court without hearing submissions by parties

Triangle Ltd v *Sigauke* S-52-15 (Ziyambi JA, Hlatshwayo JA & Mavangira JA concurring) (Judgment delivered 18 August 2015)

The respondent had been found guilty of theft and dismissed by his employer, the appellant, after a disciplinary hearing in terms of the company's code of conduct. His appeal to the Labour Court was successful and it ordered a new trial within 30 days, failing which he must be reinstated by the employer. The appeal had been grounded on the fact that the disciplinary committee which heard his case was chaired by the departmental manager who had carried out the investigation, constituting an irregularity as he was an interested party. The appellant appealed against the Labour Court's ruling.
The appellant argued that there had been no irregularity since the hearing by the same person who carried out the investigation was provided for in the code of conduct. Nevertheless the Labour Court found that there was an irregularity and allowed the appeal, ordering the retrial. However, where there is an irregularity the correct procedure is to follow a review process, not an appeal. The Labour Court in effect converted the appeal into a review process, but did so not before or during the hearing, but afterwards, when making its judgment. This did not allow for the parties to make submissions on the change of process. The appellant also raised further objections to the improper content of the Labour Court's order, and claimed that it erred in not bringing the matter to finality when it had in fact found that on a balance of probabilities the theft had been committed. The respondent claimed that r 12 of the Labour Court Rules in effect allows for informality and setting aside of the rules, hence the Labour Court's approach was acceptable.
Held: the Labour Court is bound by rr 15 and 16 which provide for appeals and reviews respectively. It has no general power to dispense with its own rules. Rule 26 allows it to dispense with rules before or during a hearing, not after the hearing is concluded. The Labour Court's conduct in proceeding to convert the appeal into a review, and doing so after the hearing, was not supported by and was therefore *ultra vires* its powers as set out in the Act and Rules. The failure to allow submissions from the parties before its decision to convert the appeal to a review was an infringement of natural justice. (MN)

Employment – Labour Court – appeal to – from decision of arbitrator – appeal only lying on point of law – appeal relating to facts – what must alleged in grounds of appeal – not essential to allege that misdirection on facts is so unreasonable that no sensible person could have reached impugned conclusion – necessary that grounds of appeal are disclosed in clear and concise manner

Zvokusekwa v *Bikita RDC* S-44-15 (Garwe JA, Ziyambi & Hlatshwayo JJA concurring) (judgment delivered 22 July 2015)

See above, under APPEAL (Labour Court appeal to – from decision of arbitrator).

Employment – Labour Court – application of equitable principles – court's duty to secure equity and social justice – debt owed in currency no longer in use – court having jurisdiction to find formula to give effect to employee's entitlement

Delta Beverages (Pvt) Ltd v *Murandu* S-38-15 (Gwaunza JA, Hlatshwayo JA & Chiweshe JJA concurring) (Judgment delivered 2 July 2015)

See above, under EMPLOYMENT (Dismissal – wrongful).

Employment – termination – on notice – not a breach of Labour Act – common law right to terminate employment on notice not limited or abolished

Nyamande & Anor v *Zuva Petroleum (Pvt) Ltd (1)* S-43-15 (Chidyausiku CJ, Gwaunza, Garwe, Hlatshwayo & Guvava JJA concurring) (Judgment delivered 17 July 2015)

The appellants' employment was terminated on notice, as provided in their contracts of employment, and were paid cash in lieu of notice. An arbitrator considered that the termination was unlawful because it had not been in terms of a code of conduct, but the Labour Court allowed an appeal by the respondent, the employer. It held that neither s 12(4) nor s 12B of the Labour Act [*Chapter 28:01*] abolished the employer's right to terminate employment on notice. On appeal to the Supreme Court, it was agreed that at one time both the employer and the employee had a common law right to terminate an employment relationship on notice.
Held: (1) That common law right in respect of both the employer and the employee could only be limited, abolished or regulated by an Act of Parliament or a statutory instrument that is clearly *intra vires* an Act of Parliament. It is also a well-established principle of statutory interpretation that a statute cannot effect an alteration of the common law without saying so explicitly. Applying the golden rule of statutory interpretation – that words be given their primary meaning – there were no words in s 12B of the Act that either expressly or by necessary implication abolished the employer's common law right to terminate an employment relationship by way of notice. Section 12B, as the main heading of that section reveals, deals with dismissal and the procedures to be followed in those instances where an employment relationship is to be terminated by way of dismissal following misconduct proceedings. The section also sets out in some detail what constitutes unfair labour practice, which it outlaws. Termination of employment on notice is not among the conduct that s 12B of the Act outlaws as unfair labour practice.
(2) Section 8 of the Act sets out in some detail conduct that is outlawed as unfair labour practice. Termination of employment on notice is not among the conduct outlawed by s 8.
(3) Section 12B deals with the method of termination of employment known as "dismissal". While dismissal is one method of termination of employment, it is not the only method; it is one of several methods of terminating employment. Another is retrenchment. Where the relationship between the employer and the employee has deteriorated to untenable levels through no fault of either party the relationship can be terminated. Section 12B of the Act does not deal with the general concept of termination of employment. It concerns itself with termination of employment by way of dismissal in terms of a code of conduct. It sets out that which must be followed or done in terms of either an employment code of conduct or a national code of conduct. It does not concern itself with termination of employment by ways other than dismissal.
(4) Section 12(4) deals with the concept of termination of employment on notice in terms of a contract of employment. It regulates the period of notice, setting out the time periods that apply when employment is being terminated on notice. The notice periods do not apply when an employee is dismissed, as in such event no notice is required. Section 12(4) explicitly applies to both the employer and the employee. There was no possible reason why, despite the explicit language of the section, it should apply to the employee only and not to the employer; or why the section should exist to regulate a non-existent right. The subsection could only have meaning if there was a substantive right, in this case the common law right to terminate employment on notice, to which it pertained. This is especially so when one considers that all that s 12(4) does is to facilitate the exercise of an existent common law right.

Editor's note: s 12 of the Act was amended by Act 5 of 2015 (which came into effect on 26 August 2015, but with retrospective effect to 17 July 2015, the date of this judgment) to state that no employer shall terminate a contract of employment on notice except where (a) the termination is in terms of an employment code; or (b) both parties

mutually agree; or (c) the contract is for a fixed duration or for the performance of some specific service; or (d) pursuant to retrenchment. An urgent application by the employees to appeal to the Constitutional Court was dismissed on 1 August on the grounds of lack of urgency and because there was no right to appeal from a decision of the Supreme Court, no constitutional issues having been placed before that court.
Other litigation as to the effect and constitutionality of the amendment is pending.

Employment – wrongful dismissal – damages in lieu of reinstatement – punitive damages – when may be awarded – untenable employment relationship – such untenability arising from unlawful dismissal – quantum of punitive damages – evidential basis must exist for figure awarded – award of punitive damages in addition to damages in lieu of reinstatement – not permissible

Mvududu v *ARDA* S-58-15 (Patel JA, Malaba DCJ & Gwaunza JA concurring) (Judgment delivered 20 October 2015)

The appellant was employed by the respondent as its CEO/general manager. A little over a year after his appointment he was sent on special leave and three months after that was notified by the respondent that it had decided to terminate his employment. The matter was then referred to an arbitrator, who found that the appellant had been unlawfully dismissed and ordered his reinstatement with effect from the date of his purported dismissal. Thereafter, negotiations for reinstatement having failed, the matter was again referred to the arbitrator for quantification of damages in lieu of reinstatement. He ordered back-pay and benefits to the date of his first award, cash in lieu of leave, 60 months' salary as damages for loss of employment and 60 months' salary as punitive damages for failure to reinstate, together with interest. In awarding punitive damages, the arbitrator sought to reinforce the primacy of reinstatement as the most appropriate remedy for unlawful dismissal. He considered that the respondent had not given any cogent reason why reinstatement was not possible. This stance could not be condoned and that was why he decided to award punitive damages over and above damages in lieu of reinstatement, in order to protect the primary remedy of reinstatement from being eroded by errant employers like the respondent.
On the question of reinstatement, correspondence between the parties' legal practitioners showed that the respondent opted to pay damages in lieu of reinstatement because there was an irretrievable breakdown of the relations between the parties. The appellant's legal practitioners, in a "without prejudice" letter, did not challenge this assertion and indicated that the issue would be what damages should be paid. Three months later, after other correspondence had been exchanged without reaching an agreement, the appellant reversed his position and disagreed that reinstatement was not a viable option.
The appellant appealed to the Labour Court on several grounds pertaining to the question of his reinstatement, the date of termination of his employment, his correct monthly salary and his entitlement to contractual benefits. The respondent in turn cross-appealed, defending the propriety of its decision not to reinstate the appellant, and challenged the arbitrator's award of punitive damages and his failure to deduct certain amounts allegedly owed by the appellant to the respondent. The Labour Court dismissed the appeal and partially allowed the cross-appeal. It found, having regard to the relevant correspondence, that the possibility of reinstatement was not part of the arbitrator's mandate. It also set aside the arbitrator's award of punitive damages.
On appeal to the Supreme Court, the grounds of appeal were largely identical to those before the Labour Court.
Held: (1) It was clear that the appellant had initially accepted the respondent's election and taken the position that his reinstatement was not in issue. He was content to proceed with the matter on the basis that his entitlement to the payments due should be quantified, either by agreement or by arbitration. The fact that this position was taken in a letter written without prejudice did not detract from its significance. The ambit of protection from the admissibility of evidence conferred by the "without prejudice" rule is not unqualified. An admission made in "without prejudice" correspondence is admissible where the facts sought to be established thereby do not relate to the substance of the negotiations contained in such correspondence. Here, what was being negotiated "without prejudice" by the parties was not the appellant's reinstatement but his back-pay and benefits and the quantum of damages payable in lieu of reinstatement. Further, the notice from the arbitrator about the second arbitration was that the hearing would be about the quantification of damages in lieu of reinstatement. Other notices from the arbitrator were to the same effect. The appellant's legal practitioners did nothing to disabuse the arbitrator or the respondent of the notion that quantification was the sole issue.
(2) Different considerations apply under provisos (ii) and (iii) to s 89(2)(c)(iii) of the Labour Act in determining the untenability of the employment relationship in question. Where the question to be decided is whether to award damages or reinstatement, the onus is on the employer to prove such untenability, taking into account the size of the employer, the preferences of the employee, the situation in the labour market and any other relevant factors. These criteria relate to the practicability of reinstatement and the continuation of the employment relationship as assessed from an objective economic or commercial standpoint. However, once it is decided that

reinstatement is no longer feasible by dint of any one or more of the specified factors and that damages should be awarded instead, the sole criterion to be applied is whether the untenable employment relationship arose from the unlawful or wrongful dismissal of the employee by the employer. What is relevant at that stage is the employer's fault in the manner or circumstances in which he dismissed the employee and the extent of his blameworthiness in causing the irretrievable breakdown of the employment relationship. It is only in this situation that the question of punitive damages comes into play and where the discretion to award such damages may be exercised in order to penalise the employer for his culpable conduct. Provisio (iii) does not envisage the award of double damages, i.e. punitive damages in addition to damages in lieu of reinstatement. Rather, what may be imposed is an award of damages in lieu of reinstatement that is punitive in nature and effect. In other words, what is contemplated is a single award of punitive damages that exceeds what would ordinarily be awarded as damages in lieu of reinstatement, i.e. in the absence of any aggravating circumstance occasioned by the manner in which the employer dismissed the employee.
(3) Finally, there was no evidence produced to computing the punitive damages in the sum equivalent to 60 months' salary. While damages need not be quantified with mathematical precision, there must be some evidentiary basis for calculating damages, even if they be punitive damages.

Estate agents – discipline – striking off register for disgraceful conduct – reinstatement – no provision in legislation allowing for reinstatement – power to reinstate could not be read into legislation

Stevenson v *Estate Agents Council & Anor* S-7-16 (Gowora JA, Ziyambi & Mavangira JJA concurring) (Judgment delivered 2 October 2015)

The appellant was, in 1993, struck off the register of estate agents after having been found guilty of disgraceful conduct by the first respondent, the Estate Agents Council. Her appeal against that penalty was dismissed and the penalty upheld by the Supreme Court in 1996. In December 2014, the appellant applied to the Council to be reinstated to the register, but the Council refused the application on the grounds that once a member has been deregistered, he or she cannot be reinstated. An appeal to the Administrative Court failed, that court holding that it had no jurisdiction to grant the order sought.
On appeal to the Supreme Court, the appellant's counsel accepted that the Estate Agents Act [*Chapter 27:17*], did not not confer power of restoration of an estate agent to the register of estate agents after deregistration, but argued that the court *a quo* should have read that power into the Act since it was an obvious omission. He submitted that the court should read into the Act a provision which enabled the appellant to be restored onto the register of estate agents. The Act did not prevent reinstatement and, as a consequence, the court had the power to restore the appellant onto the register. He argued further that it could not have been intended that, once an estate agent had been deregistered, such deregistration was for all time. However, he accepted that for a court do so would be tantamount to legislating for Parliament.
Held: whilst the Act provided for deregistration, it did not provide for a situation where an agent in the appellant's situation could be reinstated. It was not for the court to assume a power where none is provided for in the enabling legislation. It was not within the province of the courts to legislate for Parliament, whose intention is to be deduced from the clear wording of the statute. There was no an ambiguity in the relevant sections providing for disciplinary actions and the sanctions attendant on a finding of guilt. Any suggestion that the court should import provisions from statutes wherein the reinstatement of professionals in similar circumstances as the appellant was provided for would be misplaced. If the legislature had intended to make provision for deregistered estate agents to be reinstated on the register, it would have done so. It chose not to do so and the court could not read into the Act what was not provided for.

Editor's note: for the original Supreme Court judgment, see *Mitchell* v *Estate Agents Council* 1996 (1) ZLR 222 (S).

Evidence – cautionary rule – evidence of a trap – dangers inherent in relying on evidence of a trap – evidence from police traps – temptation for such witnesses to ensure success of trap

S v *Jecheche* HH-781-15 (Hungwe J, Chiweshe JP concurring) (Judgment delivered 7 October 2015)

A "trap" has been defined as a person who, with a view to securing a conviction of another, proposes certain criminal conduct to him, and ostensibly takes part therein. In other words, he created the occasion for someone else to commit the offence. The concept of "trap" should not, though, exclude a person who did not propose the

criminal conduct but who, after someone else proposed it, participated in the planning and execution of the proposed criminal offence with a view to convicting the offender.
The evidence of traps needs to be approached with caution, and there are dangers inherent in police trap cases. They have every reason to ensure that the trap succeeds and could go to any extent to ensure this at the expense of the truth. This may result in failing to resist the temptation to embellish evidence. The evidence of a police trap should be treated with caution because such persons may have a motive in giving evidence which may outweigh their regard to the truth. In the case of persons who have previously been convicted, trapping has the undesirable feature that it puts temptation in the way of those least able to resist. In any case, such persons might not have offended but for the fact that a trap was used.

Evidence – judicial notice – matters of which judicial notice may be taken – economic state of country

Delta Beverages (Pvt) Ltd v *Murandu* S-38-15 (Gwaunza JA, Hlatshwayo JA & Chiweshe JJA concurring) (Judgment delivered 2 July 2015)

See above, under EMPLOYMENT (Dismissal – wrongful).

Evidence – privilege – document – written communication endorsed as being "without prejudice" – admission made in such communication – admissible when facts sought to be established thereby do not relate to substance of negotiations contained in such correspondence

Mvududu v *ARDA* S-58-15 (Patel JA, Malaba DCJ & Gwaunza JA concurring) (Judgment delivered 20 October 2015)

See above, under EMPLOYMENT (Wrongful dismissal)

Evidence – privilege – document – written communication endorsed as being "without prejudice" – when may regarded as privileged – court's discretion to admit such communication

Kazingizi & Anor v *Equity Properties (Pvt) Ltd* HH-797-15 Mathonsi J) (Judgment delivered 14 October 2015)

The plaintiffs, who were husband and wife, signed a written undertaking to enter into a sale agreement in respect of a piece of land. The undertaking was countersigned by representatives of the defendant, a firm of estate agents. The plaintiffs agreed to, and did, pay a deposit on the property. It was part of the undertaking that the defendants undertook to repay any money paid with delay, if the agreement of sale did not eventuate. When the defendant produced its standard agreement of sale, the plaintiffs did not agree with the terms. They decided not to enter into the sale agreement and demanded a refund of their deposit. In reply, the defendant wrote a "without prejudice" letter agreeing to refund the deposit within 90 days, in instalments. It paid back less than half, in dribs and drabs, but when the plaintiffs brought an action, the defendant entered appearance to defend, prompting the plaintiffs to seek summary judgment. The defendant asserted that it was not obliged to refund the balance (a) because its "without prejudice" offer to refund was not accepted; (b) because the plaintiffs refused to sign a cancellation agreement; and (c) because in the undertaking letter, the plaintiffs gave up any right to negotiate the terms of the sale agreement and as such were bound by the standard agreement even though it was never agreed. No direct claim was made to privilege except what was raised by the defendant's counsel from the bar.
Held: The expression "without prejudice" is often written across the face of a document or communicated expressly to convey the message that the party communicating the document will not be prejudiced by the subsequent communications which are conducted with a view to the settlement of a dispute. Parties who do not know what they are doing or why they are doing it often inscribe the maxim on correspondence out of fear of being held to account for what they would have communicated, but there would be no reason for a party who accepts liability to refund money and is making a payment plan to then send the payment plan on a "without prejudice" basis. Documents do not necessarily have to be marked "without prejudice" for them to be protected. Conversely, merely labelling a document "without prejudice" does not necessarily confer any privilege on the contents. What is important is whether the communication is considered privileged from an objective point of view.

As a general rule, statements that are made expressly or impliedly on a "without prejudice" basis in the course of *bona fide* negotiations for the settlement of a dispute will not be allowed in as evidence. The resolution of a dispute with a genuine view to settlement appears to be the main consideration. If the settlement is thereafter reached, the negotiations leading up to it should be available to the court since the whole basis of the non-disclosure would have fallen away. The parties to negotiations may also consent to the admission of "without prejudice" communications. Exceptional circumstances, such as the use of such communications to prove certain things, e.g., that it contains a threat, may permit a departure from the general rule.
It is always in the discretion of the court to determine whether to admit or not to admit without prejudice communications. In exercising its discretion the court may remove the privilege attaching to such communication if it deems that the admissibility of such communication is essential in proving certain things, such as the credibility of a witness, or if it considers that the upholding of the privilege would be contrary to public policy, for instance where the communication contains a threat or an act of insolvency.
There is nothing privileged in a payment plan. This one was a classical case for the removal of the privilege attaching to the letter.
On the merits, the defendant did not even begin to set out any defence which, if established, would entitle it to succeed. Where a person has two courses of action open to him, as the defendant had, to either refuse to refund the money on lawful grounds or refund it, and he unequivocally elects to take one of them, he cannot afterwards take the other course of action. The defendant agreed to repay. It commenced repayments. It must therefore repay and could not be allowed to twist and turn. It simply had no defence to talk about.

Family law – child – guardianship and custody – when may be taken from biological parent and transferred to another person – child's best interests primary – parent neglecting children and their welfare – appropriate to transfer guardianship and custody to relative who had taken care of them

Mukundu v *Chigumadzi & Ors* HH-818-15 (Uchena J) (Judgment delivered 15 September 2015)

The applicant sought an order granting her guardianship and custody of her late daughter's two minor children. She did so because she wanted authority to obtain a passport for one of the children, who had been granted a scholarship to attend a college in Ghana.
The first respondent was their biological father, who had separated from their mother some 5 years before her death and was now living abroad. He had remarried and had a child from the second marriage. After her daughter's death, the applicant looked after the children but had to seek the assistance of a charity to help pay their school fees. The first respondent objected, on the grounds that he wanted the children to continue their education in Zimbabwe and that he could fund it. The evidence was that he had done very little to support the children and paid nothing in the way of maintenance or for education.
Held: (1) The disposition of a litigant is judged from his conduct as demonstrated by what he has done or not done and not by what he promises to do in the future. The first respondent had in the past neglected his children to the extent of their having to drop out of school until the applicant had to seek assistance. He neglected them and their mother to the extent of denying them education, health care services, nutrition and shelter. He left them in that condition until the applicant came to their rescue. He therefore has demonstrated his attitude towards his children.
(2) Any determination which affects the rights of a child should be guided by the child's best interests. This is demanded by s 81(2) of the Constitution, as well as by international instruments, such as art 3 of the United Nations Convention on the Rights of the Child and art 4 of the African Charter on the Rights of and Welfare of the Child. The court as upper guardian of all minors, had a duty to adequately protect the rights of a child. In appropriate cases the court may have to protect the children from harmful conduct by the child's own biological parent. The case was therefore not a contest between the applicant's and the first respondent's rights over the minor children. It was about the best interests of the children.
(3) Section 81(1)(d) to (f) of the Constitution entitles every child to family or parental care, or to appropriate care when removed from the family environment to be protected from economic and sexual exploitation, from child labour, and from maltreatment, neglect or any form of abuse; and to education, health care services, nutrition and shelter. These rights should be assessed in order to determine whether it would be appropriate to grant custody and guardianship to the applicant. Ordinarily, custody and guardianship should be reserved for a child's biological parents, but s 81(1)(d) envisages circumstances which may lead to a child being removed from the family environment. Here, the father's neglect of the children and their welfare justified the removal of the children from the custody and guardianship of the biological parent to that of the maternal grandmother who had consistently been there for them and took care of their best interests.

Interpretation of statutes – ambiguity or omission – power to read words into legislation where ambiguity or omission exists – no ambiguity – court not entitled to legislate for Parliament by reading in words to cover apparent omission

Stevenson v *Estate Agents Council & Anor* S-7-16 (Gowora JA, Ziyambi & Mavangira JJA concurring) (Judgment delivered 2 October 2015)

See above, under ESTATE AGENTS (Discipline).

Interdict – interim – requirements for – *prima facie* right – applicant seeking interdict preventing disposal of property – applicant relying on as yet unregistered order of foreign court following divorce – order awarding her property in Zimbabwe – respondent also claiming rights in property – interim interdict granted pending litigation over property

Makoni v *Makoni & Anor* HH-820-15 (Mwayera J) (Judgment delivered 22 October 2015)

The applicant and the first respondent were a married couple. They had obtained a divorce in England, and a decree *nisi*, which was later confirmed by the English Court, was granted. It was essentially for the dissolution of the marriage and the transfer of all the immovable matrimonial assets in England and Zimbabwe to the applicant, the wife. Among other properties, the respondent was to transfer all of his legal estates and beneficial interest in all of a property in Harare. To protect the rights conferred by the decree *nisi*, the applicant sought an interdict to stop the respondent from disposing of the property, as well as an interdict stopping the respondent from transferring the property unless ordered by a court of competent jurisdiction. She also sought an interdict barring the respondent from removing her belongings from the property without her written permission. At the hearing she sought to amend the relief to reflect that she was not relying on a decree *nisi* but on a decree absolute since the decree *nisi* had been confirmed at the time of hearing. She argued that she had a clear right by virtue of the English court order.

The respondent opposed the application on the basis that the applicant failed to establish the requirements for a final interdict. He also argued that no clear right existed or had been established, given that the applicant was relying on an unregistered foreign court order, that order not having registered in Zimbabwe in terms of the Civil Matters (Mutual Assistance) Act [*Chapter 8:02*]. He, in other proceedings, was seeking a declaratur in respect of the property, to establish his rights over it.

Held: (1) before registration, which is at the discretion of the court concerned, there is no judgment to talk about insofar as enforcement is concerned. However, there was an extant English court order. The facts of the matter did not establish a clear right but a *prima facie* right, which emanated from the rule *nisi* which was confirmed by the decree absolute of the English Court. Even in the absence of registration of that order or in absence of the order, the applicant, by virtue of marriage to the respondent, would have a claim to the property in question. A *prima facie* right, even if open to doubt, would work in favour of establishment of a right entitling the applicant to an interim relief.

(2) Based on the normal requirements for the issue of an interim interdict, the applicant had established a *prima facie* right to the property. Given the existence of the English court order and the pending litigation, the applicant's fears, that her rights would be detrimentally affected if an interim interdict were not granted, were well founded. She need not wait for the harm to be occasioned. An interim interdict in the face of pending litigation involving the property in question was the only available remedy which will avert injustice either way. Such relief would preserve the rights of the parties until the rights were fully ventilated.

Interpretation of statutes – general principles – establishing meanings of words – applicability of general rules to interpretation of constitutions – additional considerations in interpreting rights provisions in a constitution

Chihava & Anor v *Mapfumo NO & Anor* CC-6-15 (Gwaunza JCC, Chidyausiku CJ, Malaba DCJ, Ziyambi, Garwe, Gowora, Hlatshwayo & Guvava JJCC & Chiweshe AJCC concurring) (Judgment delivered 15 July 2015)

See above, under CONSTITUTIONAL LAW (Constitution of Zimbabwe 2013 – Constitutional Court).

Land – acquisition – preliminary notice of acquisition issued – notice not withdrawn in accordance with requirements of legislation although acquiring authority abandoned attempt to confirm acquisition – notice remaining in force – land subsequently included in Schedule 7 of 1980 Constitution – former owner not entitled to order declaring acquisition unlawful – original owner a black Zimbabwean – not a reason why land should not be acquired

Naval Phase Farming (Pvt) Ltd & Ors v *Min of Lands & Ors* HH-768-15 (Chigumba J) (Judgment delivered 30 September 2015)

The applicant companies were owned by the third applicant, a black Zimbabwean. He had acquired the companies and the farms that the companies owned. The first respondent, the Minister of Lands, purported to acquire the farms and to allocate them to the remaining respondents. The Minister then applied to the Administrative Court for confirmation of the acquisitions, as was then required by law, but then withdrew the applications. The court held that the effect of the withdrawal was to nullify the notices of acquisition. In spite of this, the farms were later gazetted for acquisition and subsequently listed in Schedule 7 of the former Constitution. Offer letters were thereafter issued to the second to fourth respondents.

The applicants sought an order declaring that the acquisition was invalid and ordering the ejectment of the second to fourth respondents. They contended that; in order for the land reform programme to comply with the provisions of the former and the current Constitution, it must not target the replacement of some indigenous owners or settlers on agricultural land with others. Land reform must not be a tool of patronage or nepotism. Agricultural land already owned or occupied by indigenous Zimbabweans could not be said to be land required for resettlement purposes within the meaning of s 16A of the former Constitution as read with ss 72, 289 and 290 of the current Constitution of Zimbabwe.

Held: (1) section 16B(3) of the former Constitution precluded an aggrieved party from challenging in court the compulsory acquisition of agricultural land. Further, once the land was listed in Schedule 7, its acquisition could not be challenged by reference to the Land Acquisition Act. A litigant cannot challenge the fact of acquisition of agricultural land on the basis of a perceived violation of rights conferred on the litigant by the Declaration of Rights in Chapter III of the former Constitution, such as ss 18 and 23. However, the process of acquisition could be challenged on the grounds that it was not in accordance with s 16B(2) of the 1980 Constitution, and it would be necessary to determine whether the state of facts on the existence of which s 16 B (2) (a) provided that the acquisition of agricultural land must depend, existed, in the circumstances of this case.

(2) For a spoliation order to be granted, it had to be shown that the the first respondent and/or any of the second to fourth respondents deprived the applicants of possession forcibly and wrongfully. There was no admissible evidence to controvert their denials of such wrongdoing. The issue that remained to be determined was whether, the first respondent, by causing the listing of the applicants' farms in Schedule 7 of the former Constitution, did so wrongfully, such as to constitute dispossession of the applicants of their property, and to entitle them to a spoliation order.

(3) A declaratory order, if issued, would not found a cause of action to evict the respondents. The applicants would first have to show that the second to fourth respondents did not hold valid title which authorized them to occupy the farms. Even then, it is only the Minister, pursuant to Schedule 7 of the former Constitution, who could cancel the fourth to sixth respondents' offer letters and offer the land to the applicants. If the court were to declare that the acquisition of their farms was contrary to the stipulated procedure, the applicants would have to approach the court again, on notice to the Minister, for an order de-listing their farms from Schedule 7. Such an order would be subject to confirmation by the Constitutional Court, being an order which purportedly alters the former Constitution in its Schedule 7. Having been found to have fallen short of establishing the requirements of spoliation, the applicants were not entitled to restoration of the *status quo ante*, especially ten years later, as spoliation is by its nature, a remedy which must be granted as a matter of urgency, to discourage litigants from taking the law into their own hands. What remained to be seen is whether the applicants were entitled to the *declaratur* that they were seeking.

(4) Under s 5(7) of the Land Acquisition Act, a notice of acquisition could be withdrawn by publishing a notice in the Gazette and serving it on the persons on whom the notice had been served. This was not done, and the withdrawal of the application for confirmation did in itself not result in the nullification of the preliminary notice, which remained in force for ten years. The Administrative Court could have ordered the Minister to withdraw the notice, but did not do so. The land remained validly identified in terms of s 5 of the Act and so were duly itemised in Schedule 7.

(5) Neither the former nor the current Constitutions entrenched a policy that agricultural land must not be taken away from a black African Zimbabwean and given to another black African Zimbabwean. It is not correct to say that land that is already owned or occupied by "indigenous" (meaning black) Zimbabweans could not be said to

be land required for resettlement purposes within the meaning of s 16B of the former Constitution. The section had no reference at all to race or colour. Whether acquisition and distribution of agricultural land is to continue, from whom land is acquired and to whom it is allocated are questions for the executive and are not justiciable.
(6) The applicants had not produced sufficient or admissible evidence that the any of the respondents forcibly or wrongfully deprived them of their farms, by threats, intimidation or violence or by wrongful application of the law, whether in terms of the Land Acquisition Act or s 16B of the former Constitution. They were not entitled to the declaratur that they sought. They lost all rights in the farms to the first respondent except the right to compensation.

Legal practitioner – Prosecutor-General – control over prosecutors – authority to prosecute – when may withdraw such authority – need to observe principles of natural justice and provisions of Administrative Justice Act [*Chapter 10:28*]

Legal practitioner – public prosecutor – status of – delegate of Prosecutor-General – authority to prosecute – when may be withdrawn – requirement for Prosecutor-General to observe principles of natural justice and provisions of Administrative Justice Act [*Chapter 10:28*]

A-G v *Mudisi & Ors* S-48-15 (Patel JA, Malaba DCJ & Garwe JA concurring) (Judgment delivered 28 July 2015)

The respondents were public prosecutors employed as such by the Public Service Commission (now the Civil Service Commission). They were assigned by the Commission to the Attorney-General's Office (now the Prosecutor-General's Office). They were all members of the Zimbabwe Law Officers Association (the Association) and were elected as office-bearers of its executive committee in July 2011. In September 2011, acting under the auspices of the Association, the respondents, together with a majority of their colleagues, resolved to embark on a work stoppage in order to redress their salary related grievances. The appellant wrote to the respondents asking them to respond within 7 days to various allegations of unbecoming conduct not befitting a law officer. The respondents, in a letter from the Association, purported to reply to some of the allegations, but subsequently, through a letter from their current lawyers, challenged the legal basis for the appellant's letter. His reaction was to withdraw their authority to prosecute and, through his deputies, to direct them not to carry out their duties as prosecutors, not to deal with any dockets in their offices, to vacate their respective offices and to hand over their office keys. They complied, under protest, and brought an urgent application in the High Court alleging that the appellant had breached their rights to administrative justice. The High Court held that the Attorney-General had committed a material error of law by withdrawing his authority to prosecute and referring the respondents to the Commission for further processing according to law. The proper procedure was to suspend them pending a full inquiry, leading either to their discharge from the Commission or their full reinstatement. Accordingly, the letter from the appellant to the respondents, as well as all the consequential instructions issued by his deputies, were declared to be null and void and were set aside. The court ordered that the respondents should be restored to their positions without any loss of rights.
On appeal, the appellant argued that the court *a quo* erred at law in nullifying the appellant's letter withdrawing the delegated prosecutorial authority given to the respondents. He also argued that the court erred at law in nullifying the decision of his deputies to stop the respondents from carrying out their prosecutorial duties and using their offices.
Held: (1) By virtue of s 11(1) of the Criminal Procedure and Evidence Act [*Chapter 9:07*], all public prosecutors are charged with the duty of prosecuting in the magistrates courts to which they are attached. Proof of such delegation is ordinarily evidenced by a certificate to prosecute signed and issued by the Attorney-General. This is clearly recognised in s 180(1)(g) of the Act which enables every accused person to challenge the authority of any prosecutor appearing at his trial, by pleading that he has no title to prosecute. It follows that a certificate to prosecute is a legal requirement that extends to all public prosecutors. It constitutes formal evidence of the Attorney-General's delegated authority to prosecute and its withdrawal or expiry carries the legal effect of terminating that authority. Section 76(5) of the Constitution empowers the Attorney-General to exercise his prosecutorial functions under s 76(4) "through other persons acting in accordance with his general or specific instructions". This position is replicated in s 11(1) of the Criminal Procedure and Evidence Act which designates public prosecutors as "representatives of the Attorney-General and subject to his instructions". Public prosecutors thus carry out their prosecutorial duties as delegates of the Attorney-General and in that capacity are subject to his general or specific instructions. To put it differently, the Attorney-General, as the principal repository of prosecutorial authority, is empowered to supervise, direct and instruct every public prosecutor in the performance of his functions and, conversely, the latter is required to obey and comply with every lawful order or instruction given by the former. In the event that a prosecutor fails to carry out his

mandate in accordance with any such order or instruction, the Attorney-General is entitled, subject to the dictates of due process, to withdraw the prosecutorial authority delegated to that prosecutor.
(2) This must be so not only as a matter of administrative efficacy but also as a matter of legal principle. In terms of s 114(1a) of the Constitution, every power conferred by the Constitution includes any other powers that are reasonably necessary or incidental to its exercise. Section 24(1) of the Interpretation Act [*Chapter 1:01*] provides to the same effect in relation to every power to do any act or thing conferred upon any person or authority under any enactment. In addition, there is the time honoured common law principle that the power to do or create a particular thing *ipso jure* encompasses and carries with it the power to undo or abolish that thing.
(3) A prosecutor who is divested of his prosecutorial functions can no longer be deployed as a prosecutor. While this may be inevitable, it is a matter that falls outside the Attorney-General's remit and squarely within the purview of the Commission. The latter may opt either to institute disciplinary measures against its officer or redeploy him to such other duties as he may be deemed suitable for and qualified to perform.
(4) One of the fundamental precepts of natural justice, encapsulated in the maxim *audi alteram partem*, is the right of every person to be heard or afforded an opportunity to make representations before any decision is taken that might impinge upon his rights, interests or legitimate expectations. This precept of the common law forms part of the larger duty imposed upon every administrative authority to act legally, rationally and procedurally and is now codified in s 3(1)(a) of the Administrative Justice Act [*Chapter 10:28*] as the duty to "act lawfully, reasonably and in a fair manner". The obligation to act in a fair manner is further expanded in s 3(2) to require the giving of "adequate notice of the nature and purpose of the proposed action" and "a reasonable opportunity to make adequate representations" as well as "adequate notice of any right of review or appeal where applicable". The Attorney-General was an administrative authority as defined in s 2 of Act and was subject to the requirements of s 3(1)(a) as read with s 3(2). An employer, whether under a contract of employment or under a secondment arrangement, has the common law right to summarily dismiss an employee who is insubordinate or wilfully disobedient to the extent of undermining or destroying the very core and substratum of their relationship. However, the appellant reacted with undue haste by immediately withdrawing the respondents' prosecutorial mandate. He took a massive leap from the inchoate letters penned by the respondents and their lawyers to the conclusion that they had admitted all the allegations against them. He made no attempt to substantiate the allegations against them or have these allegations investigated by means of disciplinary inquiry, as he could have done by instructing the Director of Public Prosecutions, *qua* head of department, to institute disciplinary proceedings in terms of the applicable Public Service Regulations.
(5) As for the unquestionably insubordinate conduct of the respondents, the appellant was perfectly entitled to withdraw their prosecuting authority as an appropriate and necessary disciplinary measure. However, he could only do so in accordance with the governing tenets of natural justice embodied in s 3 of the Administrative Justice Act. The respondents were professionals engaged in the business of prosecuting criminal cases on behalf of the State. They had a legitimate expectation of continuing to prosecute in that capacity and could not be deprived of the right to do so without just cause. What the appellant should have done, at the very least, was to write to each of the respondents, identifying with greater particularity the specific allegations levelled against them individually, indicating that their open defiance of his authority justified the withdrawal of their prosecutorial mandate, and warning that he intended to withdraw that mandate unless they were able to persuade him otherwise. The unavoidable conclusion was that the appellant acted precipitately and in breach of the requirements of s 3 of the Administrative Justice Act. A strict standard of compliance with those requirements was expected of him in his dealings with the respondents, particularly in his capacity as the legal supremo of the Government at the relevant time.

Editor's note: the judgment appealed against was *Mudisi & Ors* v *Tomana NO & Ors* 2012 (1) ZLR 305 (H), a judgment of HLATSHWAYO J (as he then was).

Police – actions against – time limitations applicable – reasons for such limitations – time limitations not necessarily unconstitutional – action against police officer for delict committed while on duty – action in personal capacity – time limitation still may be applicable

Ngoni v *Min of Home Affairs & Ors* HH-658-15 (Tsanga J) (Judgment delivered 29 July 2015)

The plaintiff issued summons claiming damages arising out of an assault upon him by the third defendant, a police officer, and his unlawful detention. The third defendant had gratuitously assaulted him and detained him for 30 minutes after he went to the police station in question to investigate the alleged arrest of members of the party to which he belonged. The assault took place on 24 May 2014. Summons was issued on 17 February 2015 and served on 24 February 2015. It was not clear why there was such a delay in bringing the claim.

Section 70 of the Police Act [*Chapter 11:10*] requires that any civil proceedings instituted against the State or a member in respect of anything in relation to the Police Act must be commenced within eight months after the cause of action arose. In view of this provision, the plaintiff withdrew his claim against the Minister of Home Affairs and the Commissioner-General of Police, the first and second defendants, but continued with his action against the third defendant, in his personal capacity. He argued that the third defendant was not acting in terms of the Police Act and that the provisions of the State Liabilities Act [*Chapter 8:14*] and the Police Act should not remove liability from police officers who act outside the ambit of their professional duties. He argued that the third defendant was acting over zealously and abusing his powers and functions as a police officer and had forfeited the protection of the law in that he did not act reasonably or in good faith and without culpable ignorance or negligence. As such, he did not enjoy the protection granted by the Police Act in terms of the necessity for the action to be brought within a specified time period.

The third defendant argued that civil suits arising out of action by public officials acting in their official capacities and within the scope of their employment are claims against the State. He argued that he was acting within the scope of his employment and his action was carried out in terms of the Police Act. He argued the proceeding against him in his personal capacity were equally out of time, as there was a nexus between acts done by members of the police force and the State, even if these acts were contrary to the performance of their duties.

Held: (1) rights guaranteed by the Constitution are not necessarily immune from being time barred, even though the right itself remains otherwise unaffected. Constitutional rights can be subject to time barring in terms of the time frame during which proceedings are to be brought. Thus, the time limit placed by the Police Act was not of necessity in violation of the constitutional right to seek compensation for unlawful arrest and detention effected by another person. The underlying reasons for limiting the time frame within which a remedy is to be sought may still be pertinent where an officer is sued in his personal capacity, given the link to his work in general.

(2) There are three reasons for limiting the time within which to bring an action against the police: (1) to afford the State the opportunity of investigating the incident and considering whether it should meet the claim instead of incurring costs; (2) to allow the State, which can incur vicarious liability on behalf of its employees, to identify the individual responsible for the delict; and (3) the public interest served by the notice and shortened prescription period in that the State is enabled thereby to take prompt action against an employee who might be abusing his authority or wide discretionary powers.

(3) The first and second reasons were not applicable, but the plaintiff's efforts to pursue the same action against the third defendant in his personal capacity would nonetheless still embroil his employers in the matter outside the time limits. Granted, not all situations where one is a police officer automatically result in vicarious responsibility or the risk of unlawful harm to others. Much depends on the facts. Here, however, when the plaintiff instituted his legal proceedings, his action was against the police officer in question in his official capacity. He regarded the police officer's employers as vicariously liable for his actions. What changed the plaintiff's mind about his original standpoint was that he was out of time with his claim. It was solely on this basis that he now purported to proceed against the officer in his personal capacity on the understanding that the time limit would be in terms of the Prescription Act. The third defendant's plea in bar on the grounds of prescription would be upheld.

Police – discipline – trial of member by single officer for disciplinary offence in terms of s 34 of Police Act [*Chapter 11:10*] – appeal to Commissioner-General in terms of s 34(7) of Act – Commissioner-General dismissing such appeal – constitutional right of appeal to High Court against Commissioner-General's decision

Sadengu v *Board President & Anor* HH-712-15 (Dube J) (judgment delivered 26 August 2015)

The applicant, a police constable, was charged under para 35 of the schedule to the Police Act [*Chapter 11:*10], tried by a single officer and sentenced to 14 days in detention. On appeal to the Commissioner General, the conviction and sentence were confirmed. He then lodged an appeal with the High Court. While the appeal was pending, the ZRP called a suitability board to determine the officer's fitness to remain in the police service. He then sought a provisional order to stay procedures of the Board until his appeal was heard by the High Court.

The court had to determine whether the applicant had a right of appeal to the High Court, and whether he satisfied the requirements for an interdict. The court noted that s 171(1)(d) of the Constitution provides that the High Court enjoys appellate jurisdiction only when it is provided by an Act of Parliament, and the Police Act does not so provide. However, the appeal had been brought in terms of s 70(5) of the Constitution which confers a general right of appeal to a higher court. The Commissioner-General was not a higher court, thus the applicant's right of appeal had not yet been exercised. By not providing for an appeal to the High Court, the

Police Act was out of alignment with the Constitution and the applicant should not be deprived of his constitutional right simply because the laws have not yet been aligned.
The court also relied on the concept of inherent jurisdiction developed from the common law. The judge adhered to the maxim that it is the duty of a good judge to interpret his jurisdiction liberally (*est boni judicis ampliare jurisdictionem)* and reached the conclusion that jurisdiction is only ousted when an Act of Parliament specifically provides that it is ousted. Hence the High Court does have jurisdiction to hear appeals arising from trials by a single officer, when they are confirmed by the Commissioner-General.
However, *in casu,* the applicant was unable to establish the requirements for an interdict, and the interdict was not granted. (MN)

Editor's note: see *Tamanikwa* v *Board President & Anor* HH-676-14 (summarised below), where MATHONSI J concluded that s 70(5) does not give a right of appeal unless one is provided by elsewhere.

Police – discipline – trial of member by single officer for disciplinary offence in terms of s 34 of Police Act [*Chapter 11:10*] – appeal to Commissioner-General in terms of s 34(7) of Act – Commissioner-General dismissing such appeal – constitutional right of appeal to High Court against Commissioner-General's decision

Tamanikwa v Board President & Anor HH-676-15 (Mathonsi J) (Judgment delivered August 5 2015)

The applicant, a police constable, had been convicted and sentenced to 10 days under para 34 of the Schedule to the Police Act [*Chapter 11:10*]. Both conviction and sentence were confirmed by the Commissioner-General of Police. The constable then lodged an appeal to the High Court under s 70(5) of the Constitution. When the Police called for a suitability board to assess his suitability for continued employment in the ZRP, the applicant then applied to the High Court for an interdict preventing the board from being held until after the appeal could be heard.
The case hinged on the question whether or not the applicant had a clear right of appeal from the Commissioner-General's ruling. The court examined two recent conflicting judgments on the matter where a similar issue of its appellate jurisdiction was raised: *Chatukuta* v *Nleya NO & Ors* HH-705-14, where the court held that a right of appeal existed where no Act specifically excluded it: and *Jani* v *OIC ZRP Mamina & Ors* HH-550-15, where the court reached the opposite conclusion, ruling that since there was no provision for an appeal in the Police Act, there was no right to an appeal. *In casu*, the court preferred to follow the *Jani* precedent and held that it had no appellate jurisdiction in the matter. Section 70(5) did not confer such jurisdiction. Both the High Court Act [*Chapter 7:06*] and the Constitution s 171(1)(d) made it clear that the court's appellate jurisdiction exists only where an Act provides for it. The appellate jurisdiction could not be imposed merely because it is not excluded. (MN)

In *Mubanga* v *OIC ZRP Suburban District HQ & Ors* HH-815-15 Hungwe J also concluded that since there was no provision for an appeal in the Police Act, there was no right to an appeal. – *Editor*.

Police – discipline – trial of member by single officer for disciplinary offence in terms of s 34 of Police Act [*Chapter 11:10*] – appeal to Commissioner-General in terms of s 34(7) of Act – Commissioner-General dismissing such appeal – no appeal lying to High Court against Commissioner-General's decision

Tamanikwa v *OIC ZRP Beatrice & Ors* HH-616-15 (Tagu J) (Judgment delivered 15 July 2015)

The applicant was a police constable who had been tried on a disciplinary charge before a single officer and sentenced to a short period of imprisonment in the police detention barracks. He appealed to the Commissioner-General of Police in terms of s 34(7) of the Police Act [*Chapter 11:10*]. His appeal was dismissed and he was ordered to undergo the period of detention. He filed an appeal to the High Court, relying on s 70(5) of the Constitution, which gives the right to "[a]ny person who has been tried and convicted of an offence … subject to reasonable restrictions that may be prescribed by law, to … appeal to a higher court against the conviction and sentence." He also sought an interdict restraining the respondents from detaining him. The respondents argued that the application was not properly before the court, as the Police Act does not provide for a further appeal to the High Court against the decision of the Commissioner-General. They also argued that the appellate powers of High Court are conferred to it in terms of s 34(1) of the High Court Act [*Chapter 7:06*].
Held: (1) other than what is provided for in terms of s 34(7) of the Police Act, there is no provision for an appeal to the High Court from a decision of a single officer. A right of appeal to the High Court is given under s 33, which allows a person convicted by a board of officers to appeal to the High Court and sets out the procedure to

be followed. If the legislature wanted to allow the decision of the Commissioner General to be appealed to the High Court it would have expressly said so. It followed that once the Commissioner General has dismissed the appeal from the single officer that would be the end of the matter.
(2) Section 171(1)(d) of the Constitution gives the High Court has such appellate jurisdiction as may be conferred on it by an Act of Parliament. The applicable Act here was the Police Act, which did not give such jurisdiction. It only conferred jurisdiction where a member has been tried, convicted and sentenced by a board of officers. In respect of a single officer, the High Court could only be involved where the Commissioner-General has referred the case to it through the Prosecutor-General because of the perceived inadequacy of the sentence.

Editor's note: in *Chatukuta* v *Nleya NO & Ors* HH-705-14 (judgment delivered 19 December 2014), MAWADZE J reached the opposite conclusion. See also *Sadengu* v *Board President & Anor* HH-712-15, above.

Practice and procedure – application – chamber application – procedure when application is opposed – must be treated like court application – need for applicant to file heads of argument and to apply for set down – failure to do so may result in opposing party applying to dismiss matter for want of prosecution

Permanent Secretary, Ministry of Higher & Tertiary Education v *College Lecturers' Assn & Ors* HH-628-15 (Mathonsi J) (Judgment delivered 22 July 2015)

A chamber application that is opposed is treated like a court application and must be allocated to a judge for set down on the opposed roll. Such an application cannot be disposed of without the parties filing heads of argument and seeking a set down of the matter on the opposed roll. That would infringe the *audi alteram partem* rule. An applicant must prosecute his application in terms of the rules relating to court applications because it is, for all intents and purposes, a court application. Where the applicant does not file heads of argument when represented by a legal practitioner or bother setting down the matter for hearing, the opposing party can apply to have the matter dismissed for want of prosecution.

Practice and procedure – application – form in which application must be made – need for application to be in format provided by rules of court – failure to use such format – need for application for condonation – application otherwise a nullity

Marick Trading (Pvt) Ltd v *Old Mutual Life Assurance Co (Pvt) Ltd & Anor* HH-667-15 (Mafusire J) (Judgment delivered 31 July 2015)

In terms of r 341(1) of the High Court Rules, a chamber application must, if served on an interested party, be in Form 29, with appropriate modifications. In other circumstances, it must be in Form 29B. Legal practitioners are frequently using a completely different format. All that is required of litigants is simply to copy and paste either Form 29B or Form 29, the latter with appropriate modifications. Form 29 is for use in ordinary court applications, or those chamber applications that require to be served. One of its most important features is that it sets out a plethora of procedural rights. It alerts the respondent to those rights. For example, in notifying the respondent of the court application, the form also notifies the respondent of his right to oppose the application and warns him of the consequences of failure to file opposing papers timeously. Form 29B, for simple chamber applications, requires that the substantive grounds for the application be stated, in summary fashion, on the face of that form. Nothing can be more elementary.
The courts, both in this jurisdiction and elsewhere, have repeatedly drawn attention to the need to follow the rules on this matter. An application, like a summons commencing action, is the founding process by which a matter is brought to court for determination. Where there is a non-compliance with the Rules, the applicant must apply for condonation and give reasons for its failure to comply. There must be a plausible reason why there has been a failure to comply. If the application is incurably defective, then there cannot be anything before the court to sit over in judgment.

Practice and procedure – court order – execution – out-of-court agreement subsequent to the order – cannot be executed on the basis of the original order – a new order required

Goldsearch Technical Services (Pvt) Ltd v *Mukonoweshuro & Anor* HH-711-15 (Tsanga J) (Judgment delivered 26 August 2015)

The applicant owed the respondent a sum of money which had been made the subject of a court order providing for payment of the capital amount plus interest. Subsequently, the applicant approached the respondent and they reached an agreement privately on altered terms of payment at a higher interest rate and including collection costs. The applicant then paid off the amounts included in the original order, and neglected to pay the extra amounts agreed on. The respondent then used the order to execute against the applicant's property. The applicant obtained a provisional order preventing the sheriff from proceeding.
This case was a hearing to confirm the provisional order. The applicant claimed that the original order could not be used by the respondent to execute on the basis of the agreement, which was not enforceable, and to execute the respondent would have to obtain a new court order.
Held, that the original court order could not be used to execute since the amounts it provided for had already been paid. A new order would be required. (MN)

Practice and procedure – default judgment – rescission – when can be applied for by a person not party to the action

Mashingaidze v *Chipunza & Ors* HH-688-15 (Chitakunye J) (Judgment delivered 6 August 2015)

A person not a party to a default judgment, but affected by the order given, applied for rescission of that judgment. The applicant had purchased a property which had been transferred several times from the original owner, the respondent in this case, who was residing in the property. Title had been transferred to the applicant, after which he charged the respondent rent. When the respondent stopped paying rent after some time, the applicant issued summons for eviction. A pre-trial conference was held, at which there was an attempt to determine whether the respondent had any defence. However, before the trial took place, the respondent initiated process to cancel the transfer of the property from him to the second respondent, and all subsequent transfers, including that to the applicant. There were five defendants, including the applicant. The applicant entered a plea, but none of the other defendants entered appearance to defend.
The first respondent then applied for a default judgment against the other four defendants, but did not notify the applicant, nor was the applicant notified when a default judgment was issued nullifying his title to the property. The first respondent's legal practitioner did not respond to the applicant's lawyer's request for a reply regarding the eviction process, and when she did, failed to mention that a default judgment had been obtained. Only two days before the trial for the eviction, six months later, did the applicant become aware of the default judgment and the respondent's legal practitioner refused to disclose the order until the trial was in progress. Due to the ambush nature of the disclosure, that trial was adjourned.
The applicant then applied for rescission of the default judgment. The respondent argued that since the applicant was not a party to the application for default judgment, he had no *locus* standi to apply for rescission. The applicant claimed that under r 449 (1) (a) of the High Court Rules 1971 he was entitled to apply for rescission as the order affected his interests even though he was not a party to the case. He was also applying for rescission on the basis of fraud.
Held: (1) under r 449(1)(a) a court can grant rescission of an order erroneously sought or erroneously granted in the absence of any party affected, and in order to correct an injustice. (2) The court erred in making the default order as it proceeded in spite of the absence of the applicant, resulting in his title being surreptitiously being taken away from him without his participation in the process. (3) The default judgment was obtained by misrepresentation because the respondent's legal practitioner made an application which she knew was not appropriate as the relief sought affected a party who had entered appearance to defend. (4) The default judgment was rescinded. (5) Costs *de bonis propriis* were awarded against the respondent's legal practitioner personally as she was guilty of dishonest and unethical behaviour. (MN)

Practice and procedure – exception – letter to other party before formally filing exception – failure to write such letter – letter not a pre-requisite to filing of exception – may affect any subsequent order of costs – request for further particulars – when may be appropriate instead of exception

Kotze v *Parham & Anor* HH-733-15 (Chigumba J) (Judgment delivered 16 September 2015)

If a party wishes to except to the other side's pleadings, r 140(1)(b) of the High Court Rules 1971 allows that party, before filing an exception, to address a letter to the other party, pointing out the alleged defect and calling upon the other party to amend his pleading so as to remove the cause of complaint. Such a letter is, however, not a pre-requisite to the filing of an exception, but a rule designed to justify the attendant cost of taking an exception. If an exception is not upheld, then in making an appropriate award as to costs, the court must

consider whether the defendant wrote to the plaintiff and requested that the complaint be attended to, before noting the exception. A more punitive order as to costs would be appropriate where the defendant did not write such a letter prior to filing the exception. The rule, though, is couched in permissive language; there is nothing peremptory about it, which suggests that it is not mandatory that a letter be written.
Similarly r 137, which provides alternatives to pleading to the merits, is couched in permissive terms. It is not a requirement that a defendant must request for further particulars rather than except to the pleadings. Rule 137 may apply to those pleadings capable of being rendered true and concise by the leading of evidence, where the alleged defect in the pleadings which is complained of is one of fact. Where the defect in the pleadings is one of failure to make the necessary averments to found a cause of action, on a question of law, then the defect in the pleadings goes to the root, and is incapable of being cured by a request for further particulars. It is trite that a successful exception under these circumstances results in an amendment.

Practice and procedure – exception to summons – failure to file exception within time limits – effect – need for party to seek condonation – upholding of exception – effect – unsuccessful party entitled to apply for leave to amend pleadings if court does not grant leave *mero motu* – dismissal of action – rarely granted

Sammy's Group (Pvt) Ltd v *Meyburgh NO & Ors* S-45-15 (Ziyambi JA, Hlatshwayo JA & Mavangira AJA concurring) (Judgment delivered 23 July 2015)

While the rules of court do not provide for an automatic bar against a defendant who files an exception outside the prescribed time limits, documents filed in contravention thereof cannot, in the absence of condonation of the non-compliance with the rules, have any legal validity. The sanction must be that the pleading is invalid by virtue of its non-compliance with the rules. There would be no basis on which a court could entertain such pleadings.
For the purposes of an exception no facts (except agreed facts) may be adduced by either party and an exception may thus only be taken when the defect objected against appears *ex facie* the pleading itself, nor can the court rely on any facts or evidence not contained within the pleading excepted to.
The upholding of an exception to a declaration or a combined summons does not carry with it the dismissal of the action. The unsuccessful party may then apply for leave to amend his pleading. It is the invariable practice of the courts, in cases where an exception has been taken to an initial pleading that it discloses no cause of action, to order that the pleading be set aside and the plaintiff be given leave, if so advised, to file an amended pleading within a certain period of time. This practice *a fortiori* applies where an exception is granted on the ground that the pleading is vague and embarrassing, a ground which strikes at the formulation of the cause of action and not its legal validity.
In the rare case in which a departure from this practice may be permissible, the court should give reasons for the departure. An order dismissing the plaintiff's claim is a drastic remedy and the courts have inclined towards the grant, where an exception is upheld, of leave to the plaintiff to amend the offending pleadings.
Leave to amend is often granted irrespective as to whether or not, at the hearing of the argument on the exception, the plaintiff applied for such leave. Where the court does not grant leave to amend when making an order setting aside the pleading, the plaintiff is entitled to make such application when judgment setting aside the pleading has been delivered.

Practice and procedure – execution – attachment of immoveable property – property registered in name of judgment debtor – judgment creditor having *prima facie* right to attach such property – claimant entitled to show special circumstances exist for setting aside of order of attachment – property sold to claimant before issue of summons against judgment debtor – transfer not effected through no fault of claimant – all other necessary steps taken by claimant to effect purchase – special circumstances established

Deputy Sheriff, Harare v *Moyo & Anor* HH-640-15 (Muremba J) (Judgment delivered 22 July 2015)

The claimant in these interpleader proceedings sought an order setting aside the attachment of the property he lived in. He had bought the house from the judgment debtor, a former employee of the judgment creditor, a bank. The bank had subsequently obtained judgment against its former employee following losses caused by the employee's fraudulent activities. The claimant had paid the purchase price for the property. Tax and rate clearance certificates had been obtained and the necessary papers had been lodged with the deeds office for transfer to be effected. The claimant had been given vacant possession of the house and had sold the house he

previously lived in. However, transfer could not be effected because another company had previously obtained judgment against the seller. That company had then obtained a provisional order from the High Court which enabled it to register a caveat against the property, prohibiting transfer of the property from the seller to the claimant or to any third party pending confirmation of discharge of the provisional order. At the time of the hearing of the interpleader proceedings the provisional order in question was still in force. It had neither been confirmed nor discharged.

The judgment creditor argued that the attachment of the house was lawful because the house was registered in the name of the judgment debtor and not in the name of the claimant. It argued that the agreement of sale was not proof of ownership of the house and that the agreement of sale only gave the claimant personal rights as against the seller and not real rights, which remained vested in the seller who still had the property registered in her name.

Held: Whilst it is correct that a judgment creditor has the right to have attached and sold in execution property registered in the name of the judgment debtor, that right is merely a *prima facie* one. The claimant may show that there are special circumstances why such an order should not be granted. Here, there were such circumstances. Equity (fairness and justice) demanded that judgment be entered in favour of the claimant. The claimant had set out facts and allegations which showed that, save for the registration of the property into his name from the judgment debtor and her husband, he did everything else which a purchaser of an immovable property is expected to do. He had the agreement of sale. He paid the purchase price. He was given vacant possession of the property. He paid transfer fees. The judgment debtor was willing to effect transfer of the property to him. Had it not been for the caveat registration would have been effected.

When the judgment creditor issued summons, the claimant had long before bought the property from the judgment debtor. The papers for transfer or registration of the property had already been submitted to the Deeds Office and registration had failed because of the caveat. When the judgment creditor served the summons at the property in question the claimant was already in occupation thereof. The claimant's legal practitioners even advised the judgment creditor not to serve process to do with the judgment debtor on this property but the judgment creditor's lawyers did not take heed, arguing that the property was registered in the judgment debtor's name. So the judgment creditor was well aware that the claimant was saying he had bought the property from the time it served the summons. In these circumstances, to allow execution to proceed simply because the property was still in the judgment debtor's name would be a gross injustice. This was not a case where the judgment creditor obtained judgment before the claimant purchased the property from the judgment debtor.

Practice and procedure – execution – stay of pending appeal – application for – factors to consider – equity and justice, as well as prospects of success, must be considered

Golden Reef Mining (Pvt) Ltd & Anor v *Mnyiya Consulting Engrs (Pty) Ltd & Ors* HH-722-15 (Mangota J) (Judgment delivered 7 September 2015)

Default judgment was entered against the applicants at the instance of the first respondent, which then sought execution. The applicants brought an application for rescission, as well as a stay of execution. The application for rescission was dismissed and the applicants filed an appeal with the Supreme Court against the order for dismissal of the application. Despite the pending appeal, the first respondent made every effort to execute on the applicants' property. The applicants brought an urgent application to prevent the sale in execution until such time as the appeal was heard, arguing that they would suffer irreparable harm. Pending the hearing of the application, the High Court granted a temporary interdict, restraining the sheriffs from selling the applicant's goods.

The first respondent argued that the court did not have jurisdiction, as it was *functus officio* and that the application should have been heard in the Supreme Court, as the High Court could not make an assessment of the applicant's prospects of success on appeal. It also argued that, whilst the principle which states that an appeal suspends execution of a judgment appealed against was or is a correct reflection of the law, the intended appeal was aimed at the dismissal of the application for rescission of judgment and not at the default judgment itself. It submitted that the default judgment was not disturbed by the appeal, and remained intact.

Held: (1) section 171(1) of the Constitution, which gives the High Court full and original jurisdiction over all civil and criminal matters in Zimbabwe, showed clearly and unambiguously that the court had the necessary jurisdiction.

(2) While an application for stay of execution pending the hearing of an appeal does involve an assessment of the applicant's prospects of success, the court's ability to make the assessment is not excluded. At any rate, the assessment is not the only factor which determines the propriety or otherwise of the application. Other matters come into play, including the interests of justice as between the parties. An application for stay of execution, by its nature, falls into the area of equity relief. Where, therefore, equity demands that it be granted in the interests

of justice, the court hearing the application is, as a general principle, enjoined to consider and, where appropriate, grant it. Section 176 of the Constitution of Zimbabwe confers power on the court to regulate its processes as well as to develop the common law or the customary law, taking into account the interests of justice. The writ of execution was a process of the court, and the court had every right and every authority to control that writ in the interests of the attainment of real and substantial justice.
(3) If the Supreme Court dismissed the appeal, the default judgment would remain undisturbed and, therefore, enforceable. However, if the Supreme Court upheld the appeal, the default judgment could not be enforced as it would have been rescinded by an order of that court. The parties would, in that regard, have reverted to the *status quo ante* which prevailed before the default judgment was granted to the first respondent. the appeal is inter-linked to both the dismissal of the application for rescission and the default judgment itself. The Supreme Court's determination of the appeal was a *sine qua non* of the enforceability or otherwise of the default judgment. It followed that the applicants' appeal to the Supreme Court suspended both the dismissal of the application for rescission and the default judgment which the court entered in favour of the first respondent.
(4) The requirements of the common law term *functus officio* are (i) the same parties (*idem actor*); (ii) the same cause of action (*eadem petendi causa*); and (iii) the same thing (relief) demanded (*eadem res*). Here, whilst the parties to the present application were the same, the cause of action was not the same, nor was the relief which the applicants were seeking *in casu* the same as the relief which they sought when they applied for rescission. The application for stay of execution pending appeal was a new matter.
(5) The relief which the applicants were seeking was based on principles of equity. Real and substantial justice must not only be done, it must also be seen to be done. Not granting the applicants the relief which they were seeking would cause them to suffer irreparable harm of a serious magnitude. The balance of convenience favoured the position that execution be stayed until the applicants' appeal had been heard and determined.
(6) The court's sworn duty is to do justice and not injustice to parties who appear before it. The parties should not to take an unfair advantage over each other, as that remains a recipe for a multiplicity of litigation. Parties must, at all times, respect each other's positions and prosecute and/or defend their cases in terms of laid down principles of the court's practices and procedures. They should not be allowed to rush each other into flouting processes of the court or court orders. They must have the necessary patience to exhaust the procedures of court and, at all times, allow due process to take place before they proceed to assert what they say rightly and lawfully belongs to them.

Practice and procedure – judgment – judgment sounding in foreign currency – losses suffered in local currency – how damages to be calculated – labour matter – Labour Court having equitable jurisdiction to find formula to give effect to employee's entitlement

Delta Beverages (Pvt) Ltd v *Murandu* S-38-15 (Gwaunza JA, Hlatshwayo JA & Chiweshe AJA concurring) (Judgment delivered 2 July 2015)

See above, under EMPLOYMENT (Dismissal – wrongful).

Practice and procedure – judgment – validity – court making decision on matters not before it – court granting relief that was not sought or prayed for – irregularity of such decision

Practice and procedure – parties – citation of – parties having interest in matter before court – effect of failure to cite parties – such parties not bound by court's decision

Indium Invstms (Pvt) Ltd v *Kingshaven (Pvt) Ltd & Ors* S-40-15 (Gowora JA, Chidyausiku CJ, Gwaunza & Hlatshwayo JJA & Mavangira JA concurring) (Judgment delivered 16 July 2015)

The appellant company was the owner of a property which was leased by the first respondent, a company effectively owned by the second and third respondents, who were husband and wife. The lease agreement was for a period of one year. The second and third respondents were shareholders in a close corporation in South Africa. This entity owned a property in Johannesburg, which was the subject of a mortgage. When the bank in whose favour the mortgage was registered called up the mortgage, the second and third respondents and the close corporation obtained a loan from one S. A second agreement was for the sale by the second and third respondents of the entire shareholding in the appellant company to S and another person. This agreement gave the second and third respondents the option to re-purchase the shares in the appellant, an option that was not exercised. The third agreement was the lease agreement between the appellant and the first respondent. The appellant sued for cancellation of the contract due to failure to pay rent and later, after the lease expired, sued

for the eviction of the respondents. The High Court dismissed the claims, holding that the agreement to take over the appellant company was a *pactum commissorium* and the transactions were *in fraudem legis* and invalid.
It was argued on appeal that the court *a quo* had not dealt with the case that was placed before it. The matter before the court was principally the cancellation of the lease agreement between and consequential relief. It was essentially an *actio rei vindicatio*. What the court *a quo* did was to turn its focus on a completely different issue which it could not competently determine and to make findings which could not be supported.
Held: (1) neither the close corporation, nor S, nor the other person who bought the shares in the appellant, were cited as parties and the court could not have properly considered the legality of the agreements in their absence. To do so was irregular. The only parties before the court were the appellant and the respondents, and the lease agreement was the only document properly before the court. The only dispute for determination was that arising from the lease agreement in respect of which the court had to determine the respective rights and obligations of the parties before it. In the absence of a counter-claim for declarations of invalidity in respect of the agreements discussed above, the court could not grant relief to the effect that the agreements were invalid. At best the court ought to have granted absolution from the instance. Instead, it gave the respondents far reaching relief which they had neither sought nor prayed for. If the respondents were under the impression that the underlying agreements which gave rise to the lease agreement were invalid, it behoved them to bring proceedings as a pre-emptive attack on the agreements. This they chose not to do, even though in their plea they had indicated that they would. The court accordingly misdirected itself in resolving a dispute that was not before it. Some of the parties to the dispute in question were not before it and they were denied the right to be heard in their own cause. For a party who has a real interest in the matter in dispute before a court to be bound by a judgment of the court such party should be cited.
(2) The respondents having admitted that the appellant was the owner of the property, all that the court *a quo* had to determine was whether the first respondent had any legal right to remain in possession of the same. Therefore, the simple task before the court *a quo* was to decide whether or not a lease agreement existed between the parties as alleged, and, thereafter to determine whether or not the claim for eviction on the lease was well founded. This the court failed to do. It went on to make wider pronouncements on relationships that were not before it. It thereby misdirected itself. Once an owner proves that the property is his and that the defendant originally obtained possession of the *res* pursuant to a contract, the owner is obliged to prove that such a contract has expired or that he was entitled to cancel it and has indeed terminated it. The only defences available to a defendant in the position of the respondent are that he had a right to possess, that he was not in possession, or that the plaintiff is not the owner. None of these defences were pleaded and indeed could not have been. The lease agreement was valid and had expired. The eviction of the respondents would follow.
(3) The appellant's claims for consequential relief, including arrear rentals and holding over damages, had not been properly dealt with by the court *a quo* and would have to be properly ventilated and determined before that court. Those aspects of the matter would be remitted to the court *a quo*.

Judgment of HUNGWE J in *Indium Invstms (Pvt) Ltd* v *Kingshaven (Pvt) Ltd & Ors* HH-157-13 (delivered on 22 May 2013) reversed.

Practice and procedure – parties – company – company in liquidation – action commenced before company placed in liquidation – liquidator must obtain leave of court to continue action

Zimbabwe Allied Bank Ltd v *Dengu & Anor* HH-583-13 (Muremba J) (Judgment delivered 1 July 2015)

See above, under COMPANY (Liquidation).

Practice and procedure – parties – co-operative society – litigation instituted by – proof of registration, etc – not required in order to institute proceedings

Tirivepano Housing Co-op v *TSL Ltd & Ors* HH-756-15 (Dube J) (Judgment delivered 23 September 2015)

See above, under ASSOCIATIONS (Co-operative society).

Practice and procedure – parties – foreign state – action against – citation of government of that state – not fatal – state functions carried out by government of the day

Bulgargeomin Ltd v *Govt of Bulgaria & Ors* HH-732-15 (Chigumba J) (Judgment delivered 17 September 2015)

See below, under PROPERTY AND REAL RIGHTS (Ownership – acquisition).

Practice and procedure – parties – *locus standi* – society bringing proceedings on behalf of members without such members being named or joined – need for society to show it had a direct and substantial interest in outcome of litigation

Practice and procedure – parties – party instituting proceedings on behalf of another – when proof of authority to do so is required

Tirivepano Housing Co-op v *TSL Ltd & Ors* HH-756-15 (Dube J) (Judgment delivered 23 September 2015)

See above, under ASSOCIATIONS (Co-operative society).

Practice and procedure – pleadings – exception and special plea – distinction between – exceptions must be limited to objections or defences that arise *ex facie* declaration itself – matters which should be raised by way of special plea – where averment of some new fact is required, objection should be raised by way of special plea – other party may rebut defence raised

NEC, Construction Industry v *Zimbabwe Nantong Intl (Pvt) Ltd* S-59-15 (Patel JA, Malaba DCJ & Gwaunza JA concurring) (Judgment delivered 20 October 2015)

The appellant had issued summons in the High Court against the respondent claiming various sums of money, plus interest. After the exchange of pleadings, but before filing its plea, the respondent filed an exception to the claim, the objection being that the High Court lacked jurisdiction to entertain the claim as it was a labour matter. The respondent also averred that part of the claim had prescribed by effluxion of time and that the rate of interest claimed exceeded the prescribed rate of interest.

The High Court found that the claim was premised on a collective bargaining agreement, and thus was a labour matter. The court held that it was an abuse of court process for the appellant to approach the High Court after the jurisdictional issue was raised by the respondent and dismissed the appellant's claim with costs on a legal practitioner and client scale.

On appeal, apart from challenging the entirety of the court's ruling pertaining to its jurisdictional competence, the appellant raised the procedural point that the court erred in entertaining a challenge to its jurisdiction by way of an exception as opposed to a special plea. Argument at the appeal hearing was confined to this procedural point. The respondent argued that the distinction between an exception and a special plea was one of form and not of substance. By virtue of r 106 of the High Court Rules, it was argued, no technical objection may be raised to any pleading on the ground of any alleged want of form. Although an objection to jurisdiction is usually raised by special plea, the failure to do so is not necessarily fatal.

Held: in South Africa, the traditional approach, based on the cases, has been to differentiate between an exception and a special plea on the basis the latter raises some special defence not apparent *ex facie* the declaration. However, the trend lately in South Africa is that the courts are inclined to look at the true nature and substance of the matter in question as opposed to its form. The nature of the defence determines whether evidence is required and whether the defence should have been raised at the outset or whether it can be raised on appeal.

In this country, the practice has been to employ the procedure of excepting for those objections which go to the root of the declaration and allege that the declaration does not disclose a cause of action at all. The purpose of a special plea is to permit a defendant to achieve prompt resolution of a factual issue which founds a legal argument that disposes of the plaintiff's claim. There are three kinds of special pleas: (a) the plea in bar, by which a party may interpose a purely formal objection to the jurisdiction of the court; (b) the plea in abatement, which avers some good ground, not disclosed in the declaration, which is otherwise admitted, for denying the plaintiff relief; and (c) the "dilatory" plea, which advances some fact, not disclosed in the declaration, which is otherwise admitted, and which entitled the defendant to a stay of proceedings.

Since a special plea involves the averment of a new fact, it is susceptible of replication and of a hearing at which evidence on this new fact alone may be led.

Rule 106, which precludes technical objections on the ground of any alleged want of form, is confined to the application of r 99, which regulates the form and content of pleadings. It does not extend to the application of r

137, which prescribes alternatives to pleading to the merits and the forms to be utilised for any such alternative. There are two reasons: (a) r 137 is set out in an entirely separate Order 21 dealing specifically with special pleas and exceptions; (b) more importantly, although r 137(2) is concerned with the form of special pleas and exceptions, the more crucial aspect of r 137 is subr (1) which is designed to regulate the procedure to be followed in raising exceptions or special pleas and explicitly differentiates between special pleas on the one hand and exceptions on the other.

As a general rule, then, exceptions taken by a defendant must be limited to objections or defences that arise *ex facie* the declaration itself. These would include averments that the declaration or part thereof does not disclose a valid cause of action or is vague and embarrassing. On the other hand, where the point taken constitutes a special defence, such as absence of jurisdiction, *res judicata* or prescription, the procedure to be followed is by way of special plea. In these instances the defence relied upon is not evident *ex facie* the declaration and involves the averment of some new fact or facts to be proved with fresh matter. The procedure by way of special plea enables the plaintiff to rebut the defence raised by replication and the adduction of further evidence where necessary. In exceptional cases, however, where the special defence in question is apparent *ex facie* the declaration itself, the court may allow the matter to be decided on exception. This is subject to the qualification that the plaintiff has nothing to adduce in rebuttal and will not be prejudiced by a decision being taken on exception.

In this matter, although the issue of the court's jurisdiction should normally have been raised in a special plea, the previous pleadings had fully ventilated the question. There was nothing further that either party might have adduced, whether by way of further pleadings or through fresh evidence, to enable the court to determine the propriety or otherwise of its jurisdiction over the matter. Nor was the appellant prejudiced in any fashion by the matter having been allowed to proceed on exception rather than by way of special plea. Consequently, it could not be said that the court *a quo* erred in entertaining a challenge to its jurisdiction raised through an exception.

The High Court's judgment is to be found in *NEC, Construction Industry* v *Zimbabwe Nantong Intl (Pvt) Ltd* HH-626-14, a judgment of CHIGUMBA J, delivered on 14 November 2014. It will be reported in ZLR 2014 (2), which is currently being typeset. – *Editor.*

Practice and procedure – pleadings – extent to which parties are bound by pleadings – enquiry at trial normally limited to issues raised in pleadings

Makgatho v *Old Mutual Life Assurance (Zimbabwe) Ltd* S-57-15 (Garwe JA, Gwaunza & Patel JA concurring) (Decision announced 13 March 2014; reasons made available 23 October 2015)

See below, under SURETYSHIP (Surety – liability of).

Practice and procedure – provisional sentence – constitutionality of procedure – procedure not in breach of Declaration of Rights

Tetrad Invstm Bank Ltd v *Largedata Entprs (Pvt) Ltd* HH-730-15 (Chigumba J) (Judgment delivered 17 September 2015)

See above, under CONSTITUTIONAL LAW (Constitutional of Zimbabwe 2013 – Declaration of Rights – right to fair trial).

Practice and procedure – *res judicata* – requirements – need for relief sought to be the same

Golden Reef Mining (Pvt) Ltd & Anor v *Mnyiya Consulting Engrs (Pty) Ltd & Ors* HH-722-15 (Mangota J) (Judgment delivered 7 September 2015)

See above, under PRACTICE AND PROCEDURE (Execution – stay of).

Prescription – interruption – occurs when process instituted and pursued to final successful conclusion – does not apply to other defendants joined to the process after the initial prescription period has expired

Gwiriri v *Star Africa Corp Ltd & Anor* HH-674-15 (Dube J) (Judgment delivered August 5 2015)

The plaintiff suffered a workplace accident in 2006 for which he claimed compensation from NSSA and received compensation from the NSSA Workers Compensation Insurance Fund in 2007 as well as a monthly pension. In 2008 he issued summons against his former employer, the defendant, claiming damages for loss of income, pain and suffering, permanent disfigurement, loss of future earnings and future medical expenses; he claimed that the compensation paid by NSSA was inadequate. The High Court awarded damages, but the defendant appealed to the Supreme Court, which, in 2011, set the High Court's judgment aside, apparently on a technicality, without hearing the merits. The plaintiff issued new summons in 2011, claiming compensation on the same basis, but this time joining NSSA as the second defendant.
The defendants raised the issue of prescription, maintaining that the matter had prescribed, this summons having been issued more than five years from the date of the cause of action.
Held, (1) according to s 19(3) of the Prescription Act [*Chapter 8:11*], prescription is interrupted when judicial process is instituted, and remains interrupted until the case is pursued to a successful conclusion by the plaintiff – i.e. until he obtains a judgment in his favour. The plaintiff may continue to pursue his case until successful and prescription remains interrupted. Since the plaintiff did not succeed with his claim, he was entitled to continue with judicial process until he does
(2) Where a suit has been timely filed against one defendant the filing of that suit does not interrupt prescription as against other defendants not served with the process. Since the first summons was issued only against the first defendant and not the second, prescription of any claim against the second defendant was not interrupted. Hence the claim against the second defendant had prescribed and the case fell away. (MN)

Property and real rights – ownership – acquisition – by prescription – requirements – need for possession to be adverse to rights of owner – acknowledgment of owner's rights means possession not adverse to owner

Bulgargeomin Ltd v *Govt of Bulgaria & Ors* HH-732-15 (Chigumba J) (Judgment delivered 17 September 2015)

The applicant was a company registered in Bulgaria. In 2008 it had taken over all the assets and rights of a company with the same name, which had been wholly owned by the State of Bulgaria. The predecessor company had in 1981 entered into an agreement with the Bulgarian Government whereby the company would fund the purchase of two properties in Harare. The properties were bought in the name of the State of Bulgaria and, according to the Ambassador, managed by staff at the Embassy, but were occupied by the company, which used them for its own purposes. The applicant sought to have the properties transferred into its name on the basis of acquisition by prescription, in terms of s 4 of the Prescription Act [*Chapter 8:11*]. It claimed that it had been in uninterrupted possession of the properties for over 30 years and that it or its predecessor was responsible for the management and the maintenance of the properties, as if it owned the properties, during that period. The first respondent was alleged to have acquiesced in the open possession of the properties by the applicant. Finally, it was submitted on behalf of the applicant that the first respondent never used the properties in question or for state related activities, rendering the nature of the transaction commercial, and private, and giving our courts jurisdiction to determine this application.
Four preliminary points were raised in opposition. First, it was said that the applicant had sued the wrong party, the "Government of the Republic of Bulgaria", which is not the state. It should have sued the Republic of Bulgaria. Secondly, the applicant had attempted to sue a *peregrinus* without complying with s 15 of the High Court Act [*Chapter 7:06*]. Thirdly, the court had no jurisdiction to deal with this matter because the first respondent or the state enjoyed immunity from suit and legal proceedings in terms of the Four preliminary points were raised, firstly that the applicant had sued the wrong party, the government of the Republic Of Bulgaria, which is not the state, and secondly that applicant had attempted to sue a peregrines without complying with s 15 of the High Court Act [*Chapter 7:06*]. The third point was that the court has no jurisdiction to deal with this matter because the first respondent or the state enjoys immunity from suit and legal proceedings in terms of the Privileges and Immunities Act [*Chapter 3:02*] and s 326 of the Constitution of Zimbabwe 2013, which incorporates customary international law as part of the law of Zimbabwe. The acquisition, use, management and maintenance of the properties was a "governmental act of the state", so any attempt to determine the application would involve an inquiry or challenge in respect of a sovereign act, or a public act (*jure imperii*). Finally, it was argued that there were material disputes which could not be resolved without doing injustice. With regard to the merits, the first respondent submitted that the applicant was at law a partnership and all the partners should have been joined.
Held: (1) Once an entity becomes a state it acquires international personality and participates in the affairs of the international community. This participation is conducted by the government of the state, which will inevitably change from time to time. The matter could not be defeated by reason of the alleged mis-citation of the first

respondent as "the Government" instead of "the state". Nothing turned on the alleged mis-citation, since it is accepted as a position of international law that state functions are facilitated by the government of the day.
(2) In terms of r 7(b) of the High Court Rules, an "association" is a partnership, a syndicate, a club or any other association of persons which is not a body corporate; and under r 8, associates may sue and be sued in the name of their association.
(3) Section 15 of the High Court Act is couched in permissive language, which denotes a wide discretion. The court has a choice of three options; to order attachment of property; to order arrest; or to order issue of process in order to found jurisdiction. The court has jurisdiction in any case where the subject matter is situated within its territorial jurisdiction, by virtue of being *forum rei sitae*. This is so, whether the action is *in rem* or *in personam.* Leave for substituted service had already been granted, indicating that the court had already exercised its jurisdiction in favour of founding jurisdiction by the issue of process.
(4) A sovereign may claim immunity only in respect of governmental activity or property, but not in respect of purely commercial transactions. Here, the first respondent did not enjoy absolute immunity in the circumstances before the court. This transaction was commercial in nature, which left the first respondent with restrictive immunity.
(5) Neither the applicant nor its predecessor ever had title to the properties. Title to the properties had, from 1981 to date, been vested in the state of Bulgaria. What the applicant "acquired" from its predecessor was "cession of possessory rights in the properties", as expressly stated in the agreement between the parties. The applicant contended that it had occupied the properties for its own benefit for a period in excess of thirty years. It behaved as an owner would, and did not pay rent. The first respondent did not assert any of its rights over the property because the properties were registered in its name purely for convenience and for administrative purposes. In addition to the need to prove uninterrupted possession for thirty years, the party claiming acquisitive prescription has to go further and prove that such possession, by both the party and its predecessors in title, was open and adverse to the rights of the owner. Neither the applicant nor its predecessor possessed the properties "without recognizing the title of the owner". The papers filed of record were replete with admissions that the properties have always been registered in the name of the Republic of Bulgaria. The applicant failed to prove that its possession was adverse to the rights of the state of Bulgaria, even though its possession was open. In the absence of proof that possession was *in dispute of the title of the owner*, the essential elements of adverse possession were simply not established. If the possessor acknowledges the rights of the owner, his ownership *ipso facto* ceases to be adverse to him and his claim must fail.

Revenue and public finance – Commissioner-General of Revenue Authority – advance tax ruling by – procedure required for such ruling to be obtained – opinion issued before 2007 – non-binding private opinion unless Commissioner-General otherwise directs – use which may be made of non-binding opinion – duty of Commissioner-General to collect tax due – not entitled to give unlawful tax break – entitled to rectify errors and collect tax which is due – cannot be estopped from acting lawfully

Revenue and public finance – income tax – taxable income – bonus shares – what are – issue of dividends by company with option given to shareholder either to accept cash or shares in lieu – such shares not bonus shares and liable to withholding tax

Delta Corp Ltd v *ZRA* HH-621-15 (Hlatshwayo J) (Judgment delivered 14 July 2015)

In 1996 a firm of accountants wrote to the Commissioner of Taxes, asking whether, where a company, in declaring a dividend, allows its shareholders the option of accepting cash or shares, those who opt for shares receive "bonus shares", which are not taxable. The Commissioner wrote back to say that in that situation no dividend is paid and the shares are bonus shares. What the company was doing was capitalising a portion of its profits. The appellant company, acting on the strength of that letter, did not pay withholding tax on scrip dividends issued after the letter was written.
Ten years later, the Commissioner-General of the respondent (the successor to the Commissioner of Taxes) wrote to the appellant, requesting it to deduct and account for withholding tax for the previous three years on scrip dividends issued, as these were dividends and not bonus shares. The appellant objected, averring that in 1996 the Commissioner of Taxes had given a ruling upon the strength of which the appellant had acted. Such ruling was binding on the respondent. On appeal, the respondent argued that the letter to the accountants did not amount to a tax ruling, and in any event if any benefit did accrue from the letter, it accrued to the accountants.
Held: (1) an advance tax ruling is defined at length in the 4th Schedule to the Revenue Authority Act [*Chapter 23:11*], which sets out in detail the steps that must be taken to get such a ruling. All those requirements must be present for any enquiry to be classified as an application for a tax ruling. Once the enquiry made is lacking in one or more material respects, it cannot be said to be an application for a tax ruling and in the absence of such

application, any correspondence from the taxing authority cannot be construed as a tax ruling. One cannot obtain one without the other. The letter by the accountants fell woefully short of the requirements set out in the Schedule.
(2) Even if the letter to the accountants could qualify as an advance tax ruling, under s 5(3) of the 4th Schedule any written statement by the Commissioner-General issued before January 2007 was by operation of law a non-binding private opinion unless the Commissioner-General had directed otherwise, which he had not done. Such an opinion may not be cited in court in proceedings that do not involve the person to whom it was issued: in this case, the accountants.
(3) In terms of ss 26 and 28 of the Income Tax Act [*Chapter 23:06*], shareholders are liable to pay tax on their dividends. The company distributing such dividends is at law required to withhold such tax when it distributes the dividends and remit the tax to the respondent. The very act of declaring a dividend is distribution of an amount to the shareholders. At this stage, before any further considerations are made, the amount so declared is a dividend and subject to withholding tax. The fact that the shareholders are then allowed an election after the declaration of the dividend matters not. By then, taxes would already have accrued by operation of law. The act of declaring a dividend is not linked to the choice the shareholders are given in whether to accept cash or take a scrip dividend.
(4) For the shares to be considered bonus shares, it must have been a capitalisation of the undistributed profits at the instance of the company. "Bonus shares" are shares which are given out by the company to its shareholders on a pro-rated basis and they are paid for from the company's undistributed reserve profits. The declaration of a dividend is in its own a distribution of profit. Once a dividend is paid out and the shareholder is given the option to use such cash dividend to buy more shares, such shares so bought are not bonus shares. This was no more than the shareholder electing to use his dividend to purchase more equity in the company. The election to receive shares in lieu of a cash dividend in itself is a purchase of shares. The choice given to the shareholder is that which shows that the profits have been distributed and the shareholder has elected to use his dues to buy more equity. Since a shareholder who accepts the dividend in cash is liable to pay tax, the fact that another has elected to deal with his dividend in a different manner does not make the dividend so received and utilised any less a dividend.
(5) Regarding the retrospective effect of the respondent's measures, the revenue authority is not entitled at law to give anyone unlawful tax breaks and prejudice the fiscus. Where the revenue authority has made an error, it is allowed to rectify it, even retrospectively. The authority is not precluded from assessing a tax legally due only because the taxpayer has relied upon the authority's prior mistaken view of the law. The appellant could not require the respondent to continue acting unlawfully in order that its actions be fair. The main duty on the respondent is to act lawfully and, in demanding the withholding tax, it acted lawfully. There can be no question of the respondent acting unfairly when it acts in accordance with the law, in other words lawfully. Implicit in lawfulness is fairness. Tax law is strict liability law. The fact that the respondent's predecessor made a mistake upon which it relied could not save the appellant. It would be still required to remit all taxes as is required at law.

Revenue and public finance – income tax – allowable deductions – expenditure and losses incurred for the purpose of trade – losses due to theft – when deductible – theft by directors and other persons in control of business – such losses not deductible

M (Pvt) Ltd v *Commr-Genl, ZRA* HH-665-15 (Kudya J) (Judgment delivered 30 July 2015)

The appellant objected to its assessment for income tax on the basis that theft of monies by managerial or subordinate non-managerial employees who were not shareholders was an unavoidable inherent risk sustained in the generation of taxable income that was a deductible loss under s 15(2)(a) of the Income Tax Act [*Chapter 23:06*].
The theft was not perpetrated by a shareholder or any person having a direct interest in the appellant's business. The cash discrepancy was confirmed in the report of an independent firm of accountants; the report established that the systems administrator, the credit controller and the managing director were the only ones with access to the cash stolen.
The appellant's customers were obliged to pay in cash and, therefore, there was a real risk of theft. The theft suffered was incidental to the carrying on of the appellant's business activities and inseparable therefrom.
The respondent ruled that the appellant had failed to exclude managerial employees from the theft.
Held: (1) The statement of agreed facts, as read with the documentation, did not establish that on the balance of probabilities a theft occurred. The appellant had no properly maintained cash book and it was difficult to find that cash payments that constitute the unaccounted funds were not made in the course of business.

(2) The parties' representatives in oral argument removed the appellant's managing director from possible submission, but the basis for doing so was not revealed.
(3) On whether or not an employer who suffers a loss in consequence of a theft of monies which is perpetrated by a person or persons other than a shareholder or an owner, and such theft occasions loss to his business, is entitled to a deduction under s 15(2)(a) of the Act, in terms of s 63 the onus lies on the taxpayer to prove on a balance of probabilities that the Commissioner was wrong in disallowing the deduction of the sum.
(4) The non-exclusion of the managing director from the list of possible defalcators was fatal to the appellant's case as misappropriations by a managing director are excluded from deduction as losses on the ground that they are not regarded as a necessary incident or inseparable from the taxpayer's trading activities.
(5) Deduction is not allowable of losses occasioned by the wrongful acts of a proprietor, including a partner, and through the acts of a managing director, a manager of a company who "is in the position of a proprietor", and a director. Embezzlement by ordinary managers would be deductible.
(6) The onus was on the appellant to establish that the systems administrator and the bookkeeper were not managers. This it failed to do.
(7) The impression left by the conduct of both the systems administrator and bookkeeper was that they were unaccountable independent centres of power and authority in the appellant. They behaved and were permitted to behave as managers in the position of a proprietor. A proprietor, as the owner of the business, especially of a small private business, would appear to have wide latitude to do as he pleases, especially with the money in his business. The making of drawings from the business does not invite opprobrium from anyone and no report is made to law enforcement agents to bring the owner to book for "misappropriating" his funds. The approach to the investigation was lackadaisical. It seems the appellant was not keen to identify the culprits and bring them to book. It behaved as if it was afraid to confront the proprietor of the company. The cumulative impact of these factors was that the managers who stole the money were managers in the position of a proprietor. (DT)

Revenue and public finance – value added tax – whether foreign company liable to pay VAT – evidentiary treatment of public document – importer of the goods – operating a business in Zimbabwe – responsibility for payment of VAT – currency of VAT payment

At Intl Ltd v *ZRA* HH-823-15 (Kudya J) (Judgment delivered 21 October 2015)

The appellant foreign company was a supplier of basic commodities to Zimbabwean companies, including goods falling within the Basic Commodities Supply Side Intervention (BACOSSI) facility unveiled by the Reserve Bank of Zimbabwe in October 2007.
The respondent conducted a tax investigation which revealed non-payment of VAT on supplies made in a 2½ year period. It established that the appellant paid commission to a domestic company, D&T, on invoiced supplies. The respondent demanded that D&T should pay VAT of the invoiced income paid to the appellant.
The appellant objected, arguing that it did not have any tax liability in Zimbabwe as it did not have a self-established presence in the country; did not import the stocks itself; and supplied its stock to agents who operated on a commission basis.
The four issues for determination were: (1) was the appellant the importer of the goods; (2) did the appellant operate a business in Zimbabwe; (3) in terms of s 6 of the Value Added Tax Act [*Chapter 23:12*], who was responsible for the payment of VAT on the imported BACOSSI goods and the imported non-BACOSSI goods; and (4) was the appellant liable to pay any outstanding VAT in foreign currency?
Held: (1) The respondent should have filed the relevant documentation required by r 5(c) of the Fiscal Appeal Court Rules and should do so in all future cases.
(2) The bills of entry relating to the goods did not name the appellant as the importer. In terms of s 12 of the Civil Evidence Act, the contents of such public documents were *prima facie* correct and the evidentiary onus shifted to the respondent to prove otherwise.
(3) On the facts, D&T acted at all times as an agent importer on behalf of the appellant. Accordingly, notwithstanding the contents of the bills of entry and other documents compiled by or at the instance of the appellant to the contrary, the appellant was the owner or possessor of the goods with beneficiary interest in them before they entered Zimbabwe and who brought them into Zimbabwe and thus was the importer of the goods.
(4) In view of the wide definition of "trade" in s 2 of the VAT Act, it was irrelevant, when considering whether the appellant was carrying on business in Zimbabwe, that the appellant had not registered for VAT pursuant to ss 23(4)(b) and 56(1) and (3) of the VAT Act.
(5) The appellant was carrying on the business of supplying goods in Zimbabwe through the agency of D&T. The agent received commission and not the purchase price of the goods sold; it released the goods on the instructions of the appellant after the appellant had received payment.

(6) Both parties accepted that the obligation to pay duty and VAT rested with the importer. As the appellant was the importer, it was responsible in terms of 6 of the VAT Act for the payment of VAT.
(7) The appellant received payment for the goods it supplied in foreign currency. Pursuant to s 69(1) of the VAT Act the appellant was not exonerated from liability by virtue of not being VAT registered as VAT is deemed to be included in the purchase price. The appellant accordingly remained liable for payment of VAT in foreign currency. (DT)

Review – grounds for – bias – magistrate filing opposing affidavit – such affidavit giving impression of supporting one side to dispute – proper approach to be taken by magistrate – error in law – failure by administrative authority to address its mind to question before it – authority misunderstanding issue and considering wrong question

Makandi Tea & Coffee Estate (Pvt) Ltd v *A-G & Anor* HH-595-15 (Makoni J) (Judgment delivered 1 July 2015)

The applicant was a company engaged in farming. The farm had been expropriated. The farm being included in a bilateral agreement between Zimbabwe and Germany, the applicant registered a request for arbitration with the International Centre for Settlement of Investment Disputes (ICSZD), against the Government of Zimbabwe (the State) in relation to the land. The State subsequently defended those proceedings, which were still pending. In terms of s 7 of the Arbitration (International Investment Disputes) Act [*Chapter 7:03*], if there are proceedings pending under the Act a party may apply to have proceedings stayed in any other court in relation to the same matter. The applicant was summoned on charges of occupying gazetted land without lawful authority. In relation to these charges, the applicant had previously applied for referral to the Supreme Court of certain questions relating to the violation of the Declaration of Rights, the issue being whether or not the applicant had been denied the right to the protection of law as guaranteed under s 18(1) of the Constitution. The magistrate (the second respondent) had dismissed the application. In the present proceedings, the applicant sought a stay under s 7 of the Act, arguing that the criminal proceedings were proceedings within the contemplation of section 7 of the Act. The magistrate dismissed the application on the grounds that there was no difference between the two applications.
The applicant sought a review of the magistrate's decision, arguing *inter alia* that the magistrate's decision was one that no reasonable court could have come to. The magistrate chose to file an answering affidavit, in which he took offence at the use of the *Wednesbury* formulation, stating that it was contemptuous of his office and of the entire judicial system. The applicant argued that the magistrate should not have deposed to an answering affidavit, in which clearly supported one side.
Held: (1) the proper approach to be taken by the magistrate would have been to set out facts which he considered would be of assistance to the court and end there. In the alternative, he could have asked a representative of the first respondent to file the opposing affidavit on behalf of the respondents. The use of the Wednesbury phraseology was not uncommon and was not meant to be an attack on the person of the second respondent or his office.
(2) The magistrate failed completely to apply his mind to the question raised by the second application, which was whether s 7 of the Act was applicable. This issue was clearly different from the application under the Declaration of Rights to refer to matter to the Supreme Court. In so doing, he reached a decision that was so unreasonable that no reasonable authority could ever have come to it. The decision would, accordingly, be set aside.

Succession – intestate – heirs *ab intestato* – widow – widow's entitlement to matrimonial home – need for widow to have been living in house immediately before husband's death – widow having left home decades earlier and not having contributed towards purchase thereof – not entitled to more than a child's share of the estate

Chinzou v *Masomera NO & Ors* HH-593-15 (Chitakunye J) (Judgment delivered 9 July 2015)

The applicant and her late husband were married in 1965. In 1972 he was offered tenancy of a house in a suburb of Harare. In about 1977, the couple separated and the applicant left the matrimonial home. In 1981 the house was offered to the applicant's husband for purchase, which offer he duly accepted. Subsequently he purported to marry another woman, with whom he lived at the house and by whom he had children. He died intestate in 2012. The first respondent, the executor dative, accepted the applicant as the surviving spouse, the second marriage not being valid. In considering all the potential beneficiaries, he allocated equal shares to each of the beneficiaries, resulting in the applicant receiving a child's share of the estate. The house was the only major

asset for distribution. The applicant sought to have the distribution account changed to make her the sole beneficiary of the house. The executor had considered this issue and concluded that it could not be said that the applicant was living in the house immediately before the deceased died and so was not entitled to receive the house in terms of s 3A of the Deceased Estates Succession Act [*Chapter 6:02*]. The applicant argued that the interpretation of the term "immediately before the person's death" in s 3A be construed to include her situation since she was the only surviving spouse. A purposive approach would meet the justice of the case.
Held: In considering the matter of the statute, its scope and purpose and the background of the legislation in question, it was appropriate to identify the mischief that was intended to be addressed by the section. The intention of the legislature was that a surviving spouse in an intestate estate should not be uprooted from the house or domestic premises he or she lived in immediately before the death of the deceased person, and provided such property formed part of the deceased person's estate. The applicant had last lived in the premises 37 years before the death of the deceased. That could not by any stretch of imagination be termed "immediately" before deceased's death. It could not have been the intention of the legislature that either of the spouses, who had lived separately for such a long period as 37 years, in a situation which was a *de facto* divorce, would be entitled to come back at the demise of the other spouse and be awarded the house as his or her exclusive property to the exclusion of children of the marriage and subsequent unions who had been born and lived at the house. There should have been links of living as husband and wife prior to the deceased person's death. *In casu*, such links were no longer there but for the marriage certificate. Further, the purchase of the house having been made after the applicant and her husband separated, she could not argued that she had contributed towards the acquisition of the house. She was not entitled to any more than a child's share.

Suretyship – surety – liability of – identical with that of principal debtor – action against surety in event of breach by debtor – no requirement for creditor to advise surety of breach – no requirement to make separate demand on surety nor to proceed against principal debtor first

Makgatho v *Old Mutual Life Assurance (Zimbabwe) Ltd* S-57-15 (Garwe JA, Gwaunza & Patel JA concurring) (Decision announced 13 March 2014; reasons made available 23 October 2015)

The appellant bound himself as surety and co-principal debtor for the due fulfilment of all obligations by his son in relation to funding provided by the respondent to the son for a university degree. He argued that the respondent had an obligation to advise him of the unsatisfactory performance of his son before instituting proceedings. A related issue raised in the grounds of appeal was whether the respondent had an obligation to sue the son first before instituting legal action against the appellant.
Held: the liability of a surety and co-principal debtor is joint and several with that of the principal debtor and is no more, nor less than, nor different from, that of the latter. There is no general legal obligation on a creditor to advise the surety and co-principal debtor of the breach by the principal debtor, because, in law, they become one and the same, once the principal debtor is put *in mora*. There is no requirement for a separate demand and the failure to make demand on a co-principal debtor may only have an effect on the question of costs, in the event that the co-principal debtor makes payment on receipt of summons. There is no requirement in law that a creditor should first proceed against the principal debtor before doing so against the surety and a co-principal debtor. In addition, the appellant specifically renounced the benefits of excussion and division in the surety agreement, so he could not now be heard to argue that his son should have been sued in the first instance.

Editor's note: the judgment appealed against was that of MAKARAU JP (as she then was) in *Old Mutual Life Assurance Co (Pvt) Ltd* v *Makgatho* HH-39-07.