

PARALEGAL HANDBOOK

Module I: An Introduction to Law

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ABOUT THIS HANDBOOK

This handbook has seven chapters, each of which relates to a distinct area of law:

- 1: The paralegal profession in Zimbabwe
- 2: The law
- 3: The structure of the courts
- 4: The legal profession in Zimbabwe
- 5: An outline of civil court procedures
- 6: Statutory interpretation
- 7: Contract law

This text is the first of a series of training manuals and introduces trainee paralegals within the Zimbabwe Congress of Trade Unions to the broad principles of law. Its overall aim is to assist trainees with navigating the legal landscape and carrying out their day-to-day duties. It will facilitate an understanding how the legal system operates and, ultimately, how labour law is affected by other branches of the law.

It is not intended to be a scholarly or academic text, nor should it not be relied upon as a substitute for legal advice. No warranty is made as to the accuracy; currency or completeness of its content at any time and no liability is accepted for any loss arising as a result of reliance upon the information at any time.

Trainee paralegals are strongly advised to refer to the key text for this course: *An Introduction to Zimbabwean Law*, by Professor Lovemore Madhuku (Harare: Weaver Press, 2010).

1: THE PARALEGAL PROFESSION

Introduction

Accessing legal services in Zimbabwe can be very expensive, especially if a lawyer needs to be consulted. Not only are the legal fees charged by most lawyers beyond the reach of the average worker in Zimbabwe, but the law itself and the accompanying legal procedures are also generally expressed in technical legal language that is difficult for most people to understand without specialised legal assistance. This results in a situation where most ordinary citizens, low-paid workers in particular, are unable to access justice because it is unaffordable. If a litigant has to go to court, they must also pay court fees, which can be a further prohibiting factor. Courts themselves are few and far between, resulting in many litigants having to travel long distances to access legal services and thus the additional financial burden of transport costs. The concept of training paralegals emerged within the Zimbabwe Congress of Trade Unions (ZCTU), with a view to assisting workers who need legal advice, as a means of redressing this situation.

What is paralegal training?

The use of the half-word 'para' is common. Two other words where it appears and which immediately come to mind are 'paramedic' and 'paramilitary'. Its loose translation is 'semi' or 'assisting' in relation to roles considered ancillary or subsidiary to those requiring more training. This sense fully captures the meaning of the ZCTU/FES paralegal training programme since it trains trade unionists to become 'semi' lawyers. A paralegal is not a qualified or licensed lawyer but someone who is trained and authorised to provide a limited number of basic legal services. The training they undergo imparts those basic legal skills considered appropriate for the most common aspects of trade union work. It is not a training programme in labour/industrial relations, although a broad reference to this is unavoidable when dealing with some aspects of labour law. In essence, it is a miniature

legal training programme that focuses on labour law and the structure and operation of the legal system. Training to be a lawyer requires a minimum of five years at a tertiary institution, while training to be a paralegal needs no more than five weeks in an environment that need not be a tertiary institution.

What does it mean to be a paralegal?

A paralegal is a person qualified through education and training to perform substantive legal work that requires knowledge of the law and procedures. Paralegals may work for, or be retained by, lawyers within the legal profession or in a legal environment in commerce, industry or the public sector.

Paralegals trained by ZCTU may be either full-time union employees or members of other professions who are trained legally to assist their fellow union members on a part-time or voluntary basis.

The essential qualities of a paralegal

To be a successful paralegal requires certain qualities. These include:

- Knowledge of the local language of the community in which they are operating
- Good working English
- The ability to communicate effectively and simply
- A willingness and ability to volunteer, as unpaid hours are at the core of paralegal work
- Having an objective and analytical mind
- Being trustworthy
- Having integrity
- Being patient as well as a good listener
- Being gender-sensitive, adhering to basic human rights principles such as non-discrimination
- Being self-confident yet humble
- Striving for personal and professional excellence – All paralegals should be dedicated to improving and expanding their role in the delivery of legal services.

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As a paralegal you can expect to do work that includes:

- Legal research using law books and the Internet
- Investigating facts
- Undertaking administrative tasks such as filing and organising data and documents
- Drafting basic legal documents and correspondence
- Analysing data and undertaking data-inputting tasks
- Speaking to witnesses and taking statements
- Carrying out due diligence work, assisting with disclosure and preparing trial bundles
- Preparing basic reports for clients
- Representing clients at hearings, conciliation and at the Labour Court

The functions of a paralegal mentioned above should always be exercised in the full knowledge that some forms of legal work are reserved for legal practitioners. Any unregistered person who performs such work may be liable to prosecution.

2. THE LAW

DISCUSSION TOPICS:

- The definition of law
- The divisions of law
- The sources of law

PROCEDURES:

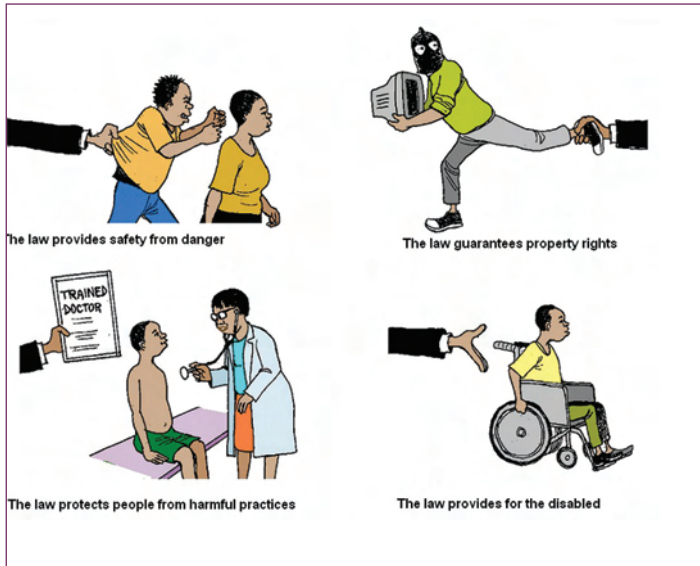
- Analysing the different meanings of the law
- Recognising the nature of the law
- Locating the various sources of law
- Understanding and explaining the divisions of the law

Introduction

We live in a society where our every action affects other people in one way or another. There is therefore a need to regulate our conduct so that its effects on other members of society are controlled.

Societies have laws in place in order to protect its citizens from the actions of others. It is clearly impossible for everybody in any society to have absolute freedom: if one person exercised that freedom, it may trample upon somebody else's. For example, if my neighbour plants pineapples in my garden, I am not free to use my piece of land for myself. It is for this reason that societies have property laws.

This example justifies the existence of rules and the different types of rules each society has in place. For our purposes, we categorise the rules into one of two sets. The first category comprises those rules that have the force of law, i.e. legal rules. The second category does not have force of law, i.e., they are non-legal rules. Legal rules are backed by the state's enforcement mechanisms and are thus referred to as 'law'. Non-legal rules might include norms and morals. For example, not greeting others may be frowned upon by society but it is not illegal.



2.0 Defining the Law

'Law' refers to rules and regulations that govern human conduct or other societal relations. Both are established and enforced by the state and should be obeyed by all. Failure to do so leads to the state having to apply sanctions such as arrest or imprisonment.

In other words, the law is used to control human behaviour. It defines:

- What you are entitled to
- What you must do
- What you must not do
- What others may not do to you
- What your rights are against the state and others
- What your responsibilities are as a member of society

The traditional approaches to the role and function of law are chiefly (i) to do justice, and (ii) to preserve peace and order. Box 2.1 (right) demonstrates the differences between the law and other behavioural norms. After studying it, come up with examples for various scenarios.

Box 2.1: The differences between 'law' and 'morality'

| | <i>To whom are the rules applicable?</i> | <i>What is the sanction for non-compliance?</i> | <i>Who enforces the sanctions?</i> |
|----------------------------|--|--|------------------------------------|
| <i>The law</i> | Norms a community regards as binding and must be obeyed | Prosecution/punishment. Compensation is paid to the injured party | State organ |
| <i>Religion</i> | A set of rules followed by those who practice that particular religion | Each religion has its own sanction or punishment | Each separate religion |
| <i>Individual morality</i> | Norms or standards that every individual sets for his or herself | The sanction is personal and self-imposed | The individual |
| <i>Community mores</i> | Norms of a community or group within that community | Degrees of disapproval / rejection / discrimination by other members | The community |

Source: UNISA Introduction to Law Module, 2009.

2.1 Principles of Law

Just application

The law should conform to the prevailing sense of what is fair and just according to the community's system of values and norms. This is known as 'just application'.

Equality

The law applies equally to all people in the same condition, provided they come under the same category. For example, if Paul walks along a road, Dick cycles and Harry drives a car, they all fall into different categories applicable to road users, and the rules pertaining to one do not necessarily apply to the others. Each will be subject to the laws governing the activity he is engaged in doing.

Uniformity

The law should apply uniformly to all persons, regardless of their professional qualifications or geographical origin.

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Box 2.2: The two theories of law

| <i>Natural Law</i> | <i>Positivist</i> |
|---|--|
| Law cannot be separated from the precepts of morality, justice or fairness. | Law is law, regardless of its moral content or whether it is just or unjust. |
| Any man-made law that contradicts pre-existing moral principles that have validity and authority independent of any human authority is invalid. | It distinguishes law as it is from law as it ought to be. |
| The Latin maxim ' <i>lex iniusta non est lex</i> ' ('an unjust law is no law at all') aptly underscores the main idea of natural law. | There are such things as unjust laws, bad laws and immoral laws. |

Authority

It may appear that only the proper authority is allowed to make law. In Zimbabwe, the main laws are created by the legislature. However, certain statutory bodies have legislative powers delegated to them, for example, municipal by-laws defined by local authorities and statutory instruments drawn up by the relevant government Minister.

Certainty

Persons should be informed of the existence of the law and must conduct their affairs in sure anticipation of the consequences of failing to comply. Legal rules must be clear and unambiguous and declared and made known before they are applied, In Zimbabwe, this is done through publication in the *Government Gazette*. This process is known as 'gazetting'.

If the legal machinery is unreliable, the law itself loses its purpose. If, for example, the police force is corrupt, the judiciary is biased, or the prison service becomes inhumane, no one will seek the protection of the law and nor bother to set the wheels of the legal machine in motion.

2.2 Theories of Law

There are two theories of law: 'Natural' and 'Positivist'. These are explained in Box 2.2 (above). Without laws there would be confusion, fear and disorder. However, this does not mean that all laws are fair. This is the positivist view and it is the prevailing theory in our legal system.

It is a fact that every society agrees that laws are necessary, but they all should be made in a democratic way to ensure that they are just and fair. In Zimbabwe, a law must be tested against the Constitution to see if it is fair.

2.3 *Laws and Rights*

The law has to balance different interests of different individuals, and this is where 'rights' come into play. Besides being a system of norms regulating human conduct, the law is also a system of rights. A citizen who is under the law is known as a 'legal subject' and is entitled to certain rights. Under labour law, for example, in an employment relationship, the employee is entitled to remuneration for services rendered, while the employer has rights to the services of the employee.

2.4 *Divisions of the Law*

Law can be classified into several opposing categories. These include:

- Domestic law versus international law
- Public versus private law
- Criminal versus civil law
- Statutory versus non-statutory law
- Principal versus subsidiary law (legislation)
- Substantive versus procedural laws

2.4.1 *Domestic and International Law*

Laws made in one country to regulate conduct in that country are referred to as 'domestic' law. Since a country is sovereign within its borders, such laws apply to all those within its boundaries, whether citizens or foreigners. National laws are applicable only within Zimbabwe, unlike international law. 'International' law refers to laws developed by the general body of nations and are applicable in two or more countries. Traditionally, such laws could only be made by and apply to states and not individuals. Most international law is developed under the umbrella of the United Nations.

2.4.2 *Public Law and Private Law*

Public law comprises those rules that regulate various public aspects of life and concern the operations of the state and states relations with

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its citizens. A typical example is criminal law. If an individual commits a crime, he or she is acting against society and as such, the crime is a matter of public law. **Private law**, on the other hand, deals with regulating the relationship between private individuals. Examples include laws dealing with contracts and marriage. As issues of marital law concern husbands and wives they are governed by private law.

Here, it is useful to note the uniqueness of labour law as it has aspects that relate to both public and private law. For example, the relationship between employee and employer is governed by private law, while instances when workers seek to register a trade union belong to public law. It is thus difficult to place labour law wholly in private or public law.

2.4.3 Civil and Criminal Law

Criminal law deals with the definition and punishment of crimes. A crime is an offense against the state and society. When criminal law is violated, it is the duty of the state to arrest and prosecute the offender. The victim is a complainant and witness in the case. If found guilty, the offender is punished by the state in accordance with the relevant criminal law. Typical crimes dealt with by **criminal law** include rape, theft, assault and murder.

A **criminal case** can be brought against anyone, including a person who works for the state, such as a member of the police or defence force. If, for example, you are unlawfully assaulted or shot by a member of the police or defence force, you can bring a criminal case against them.

When a **criminal case** is brought before a magistrate, the prosecutor must prove beyond a reasonable doubt that the accused committed the offence. 'Beyond a reasonable doubt' is the standard that must be met by the prosecution's evidence in a criminal prosecution. This means that that no other reasonable explanation can be drawn from the facts except that the defendant committed the crime, thereby overcoming the presumption that a person is innocent until proven guilty.

Civil law regulates disputes between individuals that are of a non-criminal nature. The affected parties refer the matters to court and the party who violated the law is normally required to compensate the other. A **civil case**

is usually brought by a person (the plaintiff) who feels that he or she was wronged by another person (the defendant). If the plaintiff wins the case, the court usually orders the defendant to pay compensation (money). The court may also order a defendant to do (or no longer do) something. For example, the defendant may be asked to stop damaging the plaintiff's property if this was the reason that the case came to court. The state may be involved in a *civil case* if it is suing or being sued for a wrongful act, such as government property being damaged or a government official injuring somebody without good reason.

When a case is brought before the magistrate the plaintiff must prove 'on a balance of probabilities' that the defendant is wrong. Put simply, this means that one side has more evidence in its favour than the other, even if by the smallest degree.

Sometimes a person's act may lead to *criminal and civil* actions. For example, if an employer a worker it is a crime of assault. The state will prosecute him or her in a criminal court if the worker lays a charge. If there is enough proof to show that the employer is guilty, he or she may be punished by the state. If this same employer *also* causes pain to the worker, the worker could sue him or her for damages, forcing him or her to pay compensation for medical expenses, lost wages and pain and suffering. This would be a civil claim for damages pursued through the civil court.

The law can also be divided into *substantive* and *procedural* law. *Substantive* law consists of major areas of law that confer rights to and obligations on people. One example is the law of marriage, which confer rights and obligations on a married couple.

Procedural law, on the other hand, refers to laws that enable substantive law to be enforced in courts and other tribunals. Examples of procedural law include the law of evidence, civil procedure and criminal procedure.

2.5 Sources of Law in Zimbabwe

The main sources of Zimbabwean law are as follows:

- Legislation/Acts of Parliament
- Common law (court decisions/precedent/case law)

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- Custom
- African customary law
- Law textbooks/authoritative texts

2.5.1 Legislation/Acts of Parliament

Legislation refers to the rules made by Parliament. These are also known as **Acts of Parliament**, hence Parliament is referred to as the Legislative Authority as it has the power to make laws. Parliament can, however, delegate its lawmaking function to the Executive, which can make **Statutory Instruments (SI)**, or to local authorities, which make what are commonly known as council by-laws. All must be compliant with the relevant parent legislation, namely an **Act of Parliament**.

In Zimbabwe, although the Constitution is the supreme law of the land, it is also an Act of Parliament. All **Acts of Parliament** should be consistent with the Constitution. Failure to be consistent with leads to such an Act or a part thereof being rendered unConstitutional and thus ineffective.

2.5.2 Case law

Legislature passes laws, but courts determine out what they mean in practice. Laws are interpreted and tested by a succession of trials, over a period of time, and under a variety of circumstances.

An important part of any legal training is to learn what judgments have been made in the past in order to understand the details of each law. Collectively, these judgements are known as **case law**, and lawyers will quote examples in court in order to show how they believe the law should be applied in reference to the person on trial (**Box 2.3**, right).

Any **case law** that comes from a court of equal or higher rank to the one where a case is being heard will normally take precedence over common law, should they differ. In addition, a decision by a higher court (for example, a Court of Appeal or the Supreme Court) is binding upon a lower court. The decisions of the High Court are thus binding on a Magistrate's Court, although the Magistrate's Court does not create precedent.

A lower court must follow what the judges in a higher court have decided

Examples of Judicial Precedent

- i. Definition of a managerial employee:
Zimbabwe Tourist Investment Company vs Gwinyai SC 105/95
- ii. Varying the work to be performed by an employee:
Muchakata vs Netherburn Mine 1996 (1) ZLR 153
Taylor vs Minister of Higher Education and another 1996 (2) ZLR 772 (S)
- iii. Legitimate expectation:
Kanonhuwa vs Cottco 1998 (1) ZLR 68 (H)
- iv. Promotion:
Muwenga vs PTC 1997 (2) ZLR 483 (S)
- v. Protection from discrimination:
Wazara vs Belvedere Teachers College and another 1997 (2) ZLR 508 (H)
- vi. Freedom of assembly and association:
In re Munhumeso and others 1994 (1) ZLR 49 (S)
- vii. Freedom of conscience:
In re Chikweche 1995 (1) ZLR 235 (S)

in reference to cases with similar circumstances or facts. The decisions of the Constitutional Court are binding on all courts on Constitutional matters.

There are also *obiter dicta* (*obiter dictum* singular) or 'remarks in passing'. *Obiter dicta* do not form precedent but they can have persuasive value in some instances.

Cases in Zimbabwe are recorded and published in the *Zimbabwe Law Reports*. Law reports capture the facts of a case, and more importantly the reason upon which the court based its judgement. This is what is known as the *ratio decidendi* ('the reason for the decision'). It is important to note that you will not find instances within the text of a particular case in law reports where the authors expressly mention: 'this was the *ratio decidendi* of the case'. You will have to determine this for yourself!

2.4.3 Custom

'Custom' is generally defined as unwritten rules that have become binding over the course of time through observance by the community in question. The rules incorporate both *general custom* and *African customary law*. As regards *general custom*, a custom is legally binding if it satisfies four requirements:

1. It is reasonable.
2. It is long-binding, i.e., clearly established.
3. It is uniformly observed.
4. It is certain.

General custom applies fields of law such as as banking, commercial law and international trade law. For example, the custom of bankers charging interest on overdrawn accounts is one that has been given the force of law.

2.4.4 Customary Law

In developing countries that have been decolonised since the 1940s and 1950s, the law is generally a mixture of that introduced by the former colonial power and the customary law in force before the advent of colonisation. Zimbabwe has what is termed a dual legal system, being comprised of general law (*Common Law* and *Statute*) and *African customary law*. Often, *customary law* still takes priority in certain areas of life. Typically, *customary law* applies in those areas of life least affected by colonisation. These may include land ownership, customary titles and family relationships.

There are special courts to deal with these matters, and they are conducted according to tradition and presided over by a customary chief or group of elders. Such matters may be dealt with by an ordinary court instead, but customary law may take precedence. It is important to note that *customary law*:

- Does not apply in criminal cases applies
- Only applies when the parties agree to its use
- Applies when the court decides that it is just and proper to do so, even if the parties do not agreed to its use

2.4.5 Authoritative texts

Authoritative texts refer to writings by leading authorities in the field of law. For example, treatises written by Roman Dutch jurists are authoritative sources of Roman Dutch law and are treated as such in the courts. They are regarded as sources under the heading of common law because of their special nature. Although modern textbooks and scholarly articles or publications are without inherent authority of their own, they may be regarded as very persuasive sources of law where neither legislation nor case law is in point, or where they explain a legal point which is not clearly covered in legislation or case law. Among other things, the persuasive ability of an author's opinion depends on his or her standing in the field of law in question, their professional reputation, the scholarly standing of the text involved and the degree to which the nature of its presentation is convincing.

Exercises

1. State and explain the purpose of law in society.
2. Explain the difference between public law and private law.
3. Read the case of *United Bottlers vs Murwisi 1995 (1) ZLR 246* and complete the following:
 1. What was the issue put before the court?
 2. List all the sources of law upon which the court relied.
 3. What was the *ratio decidendi*?
 4. Identify any *obiter dictum* in the judgement.

Further Reading

Madhuku, *An Introduction to Zimbabwean Law*, Chapters 1 and 2.
 D.A. Reynolds and J.A. Russell (1983) *An Introduction to Law* (Government of Zimbabwe: Ministry of Justice).
Constitution of Zimbabwe, 2013 (Zimbabwe Government Printers).

3: THE STRUCTURE OF THE COURTS

DISCUSSION TOPICS:

- Hierarchy, functions, composition and nature of Courts in Zimbabwe.
- The Judicial Service Commission.
- Appointment of judges and magistrates.

OBJECTIVES:

- To analyse the different functions, the composition and the hierarchy of the various courts in Zimbabwe.
- To gain an understanding of the composition and role of the Judicial Service Commission (JSC).

Introduction

Zimbabwe's court system is derived from *Section 162* of the *Constitution of Zimbabwe, Amendment (no. 20) Act 1 of 2013*, which vests judicial authority in Zimbabwe in the courts. These are the:

- Constitutional Court
- Supreme Court
- High Court
- Labour Court
- Administrative Court
- Magistrates' Courts
- Customary Law Courts
- Other courts established by or under an Act of Parliament

3.0 The Hierarchy, Functions, Composition and Nature of the Courts

In order to determine the precise functions, composition and the nature of the judicial officers who adjudicate in each of the courts, it is necessary to refer to the Constitution and to the specific Acts that govern each one.

Courts in Zimbabwe are divided into *criminal* and *civil* courts. For the purposes of this handbook, which has been prepared for use primarily by paralegals within the labour and commercial law sectors, focus will, for the most part, be on *civil courts*.

3.0.1 The Constitutional Court

This is the highest court in Constitutional matters and its functions are described in *Section 166* of the *Constitution*. Its decisions bind all other courts – see *Section 167 (1)(a)* of the *Constitution* and it deals only with Constitutional matters or related issues. It has the powers to determine whether Parliament or the President has failed to fulfil a Constitutional obligation. It also hears and determines disputes relating to the election of a President and Vice-President. It must also confirm as invalid any order made by another court which is not in accordance with the Constitution, which specifies that it must do so before that order has any force.

The *Constitutional Court* is a superior court and consists of the Chief Justice, the Deputy Chief Justice and five other judges. If an acting judge is required, the Chief Justice may appoint an existing judge or former judge to act for a period. Cases concerning the violation of fundamental human rights or freedoms or concerning the election of a President or Vice-President must be heard by all the Constitutional Court judges. All other cases need only be heard by three judges. Referrals to the *Constitutional Court* can be made by other courts.

3.0.2 The Supreme Court

This is the last court of appeal, unless the Constitutional Court has jurisdiction over the matter. It has no power to hear Constitutional matters and is headed by the Chief Justice, who is appointed by the President. It has ‘appellate jurisdiction’, which means it decides on disputes when parties have appealed to it from lower courts. Its function and composition is defined in *Sections 168* and *169* of the *Constitution*. An Act of Parliament may confer additional powers and jurisdiction on the Supreme Court. (See also the *Supreme Court Act [Chapter 7:13]*).



It is duly constituted when it consists of the Chief Justice and the Deputy Chief Justice and no fewer than two other judges of the **Supreme Court** and any other additional judges or former judges as appointed by the Chief Justice for a limited period. The Constitution does not specify a maximum number of judges. It is important to note that **Section 26** of the **Supreme Court Act** says there shall be no appeal against any judgment or order of the **Supreme Court** and that it shall not be bound by any of its own judgments, rulings or opinions, nor by those of any of its predecessors, should it have to deal with similar cases.

3.0.3 The High Court

The **High Court** has original jurisdiction over all civil and criminal matters. This means that all matters that can be heard in a lower court such as a Magistrate's Court can also be heard in the **High Court** as a court of first instance, i.e., a court where legal proceedings are initiated. The **High Court** may decide any Constitutional matters other than those that can only be heard by the Constitutional Court. It supervises lower courts and has appellate jurisdiction to receive matters on appeal from Magistrates' Courts and other lower courts. It also has powers of review over all other inferior courts' actions. (A review relates to a challenge on the decision-making process that was taken to arrive at a decision by a judge or magistrate. **Section 170**

of the *Constitution* stipulates that it must consist of the Chief Justice, the Deputy Chief Justice and the Judge President of the High Court and such other judges of the High Court as may be appointed from time to time.)

3.0.4 The Labour Court

This is a specialist court, i.e, one that deals with matters of a specific kind, in this case labour and employment cases as provided by law. *Section 172* of the *Constitution* sets out how the court is constituted. It consists of a Judge President and such other judges of the Labour Court as appointed from time to time. An Act of Parliament provides for the jurisdiction of the Labour Court – the *Labour Act [Chapter 28:01]*. The Labour Court has the same status as the High Court and thus an appeal from the Labour Court goes to the Supreme Court, but only on a question of law.

3.0.5 The Administrative Court

The Administrative Court is a specialist court that hears administrative issues. *Section 173* of the *Constitution* sets out how this court is constituted. It has a Judge President and such other judges as may be appointed from time to time. It decides on matters allocated to it in terms of various pieces of legislation, such as issues involving local planning authorities. It is also constituted as a Water Court to decide on disputes related to water use and is the only court to which disputes related to public water may be referred. Appeals from the Administrative Court go to the Supreme Court – see *Section 19* of the *Administrative Court Act*. *Section 173* of the *Constitution* states that an Act of Parliament may provide for its jurisdiction. At present, it is set up in terms of the *Administrative Court Act (Chapter 7:01)*.

3.0.6 Magistrates' Courts

Section 174 of the *Constitution* says that an Act of Parliament may provide for the establishment composition and jurisdiction of Magistrates' Courts to adjudicate over both civil and criminal matters. For the purposes of this course, this handbook mostly deals with its civil jurisdiction. The relevant piece of legislation that governs their establishment is the *Magistrates' Court Act [Chapter 7:10]*.

Jurisdiction

All magistrates in the civil courts have the same **jurisdiction** regardless of seniority, unlike those in criminal courts, who have different sentencing authorities dependant on their level of seniority. In terms of **Section 11** of the **Magistrates' Court Act**, Magistrates' Courts have jurisdiction to apply civil law and customary law.

The monetary jurisdiction of the **Magistrates' Courts** is determined by the fact that are only allowed to decide on disputes which fall below a specified monetary limit, which is adjusted periodically. In addition, their jurisdiction is also dependant on the geographical residence of the defendant and by the nature of the case. **Magistrates' Courts** cannot decide on cases involving crimes such as treason, murder or any statutory offence for which the death sentence is mandatory.

Constitution of the court

A magistrate sits alone to decide on cases in a civil matter, but in terms of **Section 16** of the **Magistrates' Court Act**, he/she can have assessors with relevant skills and experience sit with him/her. Such assessors only have an advisory capacity and do not help decide on the dispute.

Appeals and Reviews

For the most part, the Magistrates' Courts are courts of first instance. This means that they are courts where legal proceedings first commence. However, they also have limited civil **appeal and review** jurisdiction from lower courts such as Local Courts and Community Courts – see **Sections 24** and **25** of the **Customary Law and Local Courts Act [Chapter 7:05]**.

3.0.7 Customary Law Courts

These only administer **customary law** disputes and are set up in terms of **Section 174(b)** of the **Constitution**. The Act that governs them is the **Customary Law and Local Courts Act (Chapter 7:05)**. **Section 11** of the same Act provides for Primary Courts (over which a headman presides) and Community Courts (over which a Chief presides). Their jurisdiction is limited

– see *Section 16*. They are not permitted to deal with disputes related to issues such as wills, marriages, guardianship of minors, maintenance and disputes relating to immovable property. However, they can make orders for compensation or specific performance in relation to matters within their jurisdiction.

3.1 *The Judicial Service Commission (JSC)*

The information relating to the *Judicial Service Commission (JSC)* is provided in this section as background information relating to how judges are appointed. It is not a court.

The *JSC* is responsible for appointing judges and consists of the Chief Justice, Deputy Chief Justice, Judge President of the High Court, a judge nominated by judges of the higher courts, the Attorney General, three lawyers with at least seven years' experience nominated by the Law Society, the Chief Magistrate, the Chairperson of Civil Service Commission, a person with seven years experience as a human resources practitioner nominated by the President, a person with seven years experience as public accountant or auditor nominated by their professional association and one professor or senior lecturer in law nominated by their association. Salaries and other benefits for judicial officers are fixed by the *JSC* after consultations with the Minister of Justice and obtaining the approval of the Minister of Finance.

3.2 *Appointment of judges*

Judges are *appointed* by President. When a vacancy has been advertised and public interviews held, the *JSC* provides a list of three names. The commission can put forward a further list of three names if the President is not satisfied with those on the first list. The Constitution specifies that the *appointments* are to be diverse and should reflect a gender composition. Judges of the Constitutional Court are appointed for a non-renewable term of 15 years and can move to the Supreme Court or High Court after that term, if they are eligible and under the age of 70, which is the mandatory retirement age for all judges.

3.3 Appointment of Magistrates

Since 18 June 2010, when the *Judicial Service Act [Chapter 7:18]* came into effect, the JSC has been fully responsible for appointing Magistrates.

Exercises

1. Explain the composition and the function of the Constitutional Court in Zimbabwe.
2. Research and confirm the current upper/maximum monetary limit for cases that can be heard by a Magistrates' Court. (*The answer is not contained in this handbook. Further research is required*).
3. Explain the role of the Judicial Service Commission.

Further reading

Madhuku, *An Introduction to Zimbabwean Law*, Chapter 5.

Constitution of Zimbabwe Amendment (No. 20) Act 2013

Supreme Court Act [Chapter 7:13].

High Court Act [Chapter 7:06].

Magistrates Court Act [Chapter 7:10].

Administrative Court Act [Chapter 7:01].

Customary law and Local Courts Act [Chapter 7:05].

Water Act [Chapter 20:24]. (Read only those specific references to the Administrative Court acting as a Water Court – Sections 113, 114 and 125.)

Judicial Service Commission website: www.jsc.org.zw.

N.B. Some information in the textbooks written prior to 2013 and on the JSC website regarding the hierarchy of the courts may be out of date. This is especially important in terms of changes made by the 2013 Constitution relating to the Constitutional Court. Please double-check the content of these sources against current legislation and relevant sections of the Constitution).

4: THE LEGAL PROFESSION IN ZIMBABWE

DISCUSSION TOPICS

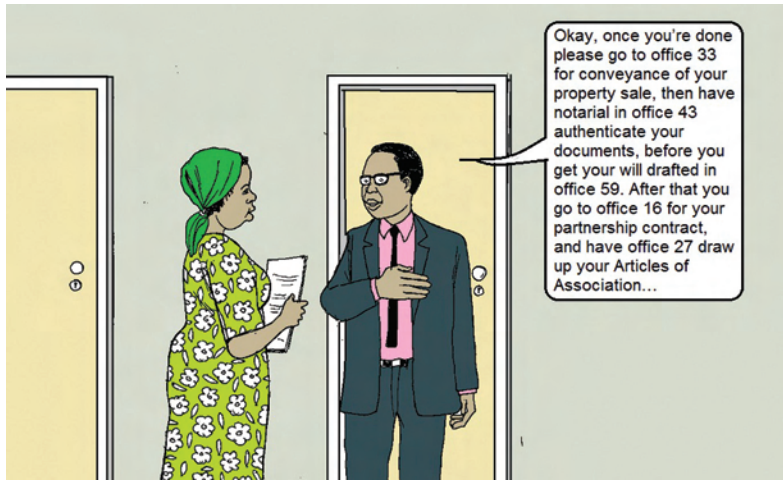
- Hierarchy, functions, composition and nature of the courts in Zimbabwe.
- The Judicial Service Commission.
- Appointment of judges and magistrates.

OBJECTIVES

- To gain an understanding of the history of the legal profession in Zimbabwe.
- To explain the legal profession in Zimbabwe today.
- To explain the nature of reserved legal work
- To set out the requirements for admission as a legal practitioner.

Background

In most countries – and Zimbabwe is no exception – there are strict laws and regulations about who can call themselves a lawyer or who can hold themselves out to be a lawyer. This is to ensure that the latter has achieved the necessary standards of education and legal training and are regulated by a professional body such as a Law Society or a Bar Association that has powers to discipline its members, hold a register of members and arrange ongoing training for them. The ultimate aim is to create safeguards to ensure that the public is protected against dishonest practitioners and/or the untrained. Lawyers either work in private law firms as legal practitioners (attorneys and advocates) or in the public sector as prosecutors, magistrates and judges. The wider definition of the legal profession includes legal advisers in both the private and public sectors. In the private sector, most legal advisers are employed by large companies, and in the public sector in government departments such as ministries and parastatals.



4.0 Key Elements of the Legal Profession

The key elements of the legal profession are the ability of its members to appear on behalf of a client (including the state) in courts; adhere to high ethical standards; be regulated as a member by a body such as a Law Society; and have a duty to their clients. They must also take personal responsibility as a professional for their actions and for any advice they give to clients.

4.1 The Legal Profession in Zimbabwe

In Zimbabwe, lawyers are termed 'legal practitioners' and the legal profession as a whole is governed by the *Legal Practitioners Act (Chapter 27:07)* and the accompanying regulations. It sets out the conduct expected of legal practitioners as well as the necessary academic and character requirements to become a registered legal practitioner.

4.2 Reserved Legal Work

There are also legal regulations about specific categories of legal work that can *only* be carried out by individuals who are registered as legal practitioners. These special categories of legal work are often referred to as 'reserved legal work'. The Act also sets out penalties against individuals carrying out reserved legal work when they are not authorised to do so. Any breach of these regulations is an offence which may be punishable by a prescribed fine or imprisonment.

Box 4.1: Examples of reserved legal work

| | |
|--|---|
| <i>Conveyancing</i> | This relates to drawing up documents relating to the sale of land or property where such documents are to be filed with the Deeds Registry Office. |
| <i>Notarial work</i> | Notarially executing, attesting or authenticating documents. Examples include Trust deeds and other such deeds that must be filed with the Deeds Registry Office. This can only be done by a legal practitioner who is registered as a Notary Public. |
| <i>Drafting wills for payment</i> | Drafting and preparation of documents related to distribution of property upon death. |
| <i>Issuing process in another's name</i> | Issuing summons/process or instituting/defending proceedings in court in another person's name (directors or employees of companies, or partners, may do so on behalf of their companies or partnerships). |
| <i>Preparing partnership agreements</i> | Preparing contracts relating to the creation or dissolution of a partnership. |
| <i>Preparing specified company documents</i> | Preparing Memorandums or Articles of Association of a company (this does not apply to chartered accountants or members of the Chartered Institute of Secretaries). |
| <i>Advocacy in court</i> | Representing clients and making oral submissions in court on behalf of clients (with the exception of the Labour Court, where paralegals may make oral submissions on behalf of the party concerned). |

For paralegals, this is particularly important, since many of the legal tasks that they perform (such as interviewing clients, drafting legal documents and giving advice) overlap with tasks carried out by lawyers. As paralegals are not registered legal practitioners, they cannot carry out any form of reserved legal work. See *Sections 8, 9 and 10* of the *Legal Practitioners Act [Chapter 27:07]* for further information. Examples of reserved legal work as gleaned from *Section 10* of are set out in Box 4.1 (above).

4.3 Legal Practitioners and Advocates

In Zimbabwe, the term 'legal practitioner' refers to advocates and to legal practitioners.

4.3.1 The Position Prior to 1981

Before 1981, the legal profession in Zimbabwe was divided into two separate branches – attorneys and advocates – and was thus a **divided system**. (This arrangement is still practised in other parts of the world, in Great Britain, for example.)

The main distinction between the two branches within the **divided system** was that attorneys dealt directly with clients and had no right to appear and make oral submissions before superior courts (i.e. the High Court and the Supreme Court). Advocates, on the other hand, appeared before superior courts and made oral submissions. They did not receive instructions to act directly from the public, only from another lawyer, and worked in groups of offices known as Chambers.

The two professions were fused in 1981 by virtue of provisions in the ***Legal Practitioners Act***. The main reasoning for so doing was political. Before independence, most advocates were persons of European heritage (i.e., white persons), in line with the colonial segregation policies of that era. In post-independent Zimbabwe, the two professions were fused as part of a wider drive to give black lawyers (who were mostly practising as attorneys) the right to appear before superior courts.

4.3.2 The Position Today

The profession in Zimbabwe today is fused, and both advocates and former attorneys are jointly referred to as legal practitioners and have rights of audience before the superior courts (**Box 4.2**, right).

That said, there are advocates who practise voluntarily in chambers in a similar manner to advocates in a divided system. You may come across a term that is often used to refer to these advocates as the **'de facto bar'** or **'de facto'** advocates, meaning that they do this as a matter of practice, even though there is no longer any law that officially establishes advocates as a separate class.

4.4 Admission as a Legal Practitioner

There are regulations that set out the conduct and character traits expected of a legal practitioner. There are also detailed academic requirements for

Box 4.2: The differences between Advocates and Attorneys

| | <i>Advocates</i> | <i>Attorneys</i> |
|---|--|--|
| <i>Before Independence : The 'divided system'</i> | <p>Could not receive instructions from the public to act directly. Instructions had to come from an Attorney.</p> <p>Had the exclusive right to appear before the superior courts and made oral submissions.</p> | <p>Attorneys dealt directly with clients.</p> <p>They had no right to appear and make oral submissions before the superior courts.</p> |
| <i>Post-Independence</i> | Both referred to as Legal Practitioners with rights of audience in superior courts. | |

becoming a registered legal practitioner. For the purposes of this handbook, only key aspects relating to the requirements need be given.

In his book *An Introduction to Law*, Professor Lovemore Madhuku lays out six requirements to be admitted as a legal practitioner. The following concepts were gleaned from Section 5 of the Legal Practitioners Act.

1. Comply with the formalities prescribed by law.

This means an applicant must adhere to all the guidelines provided in the Act and Regulations which include the following:

1. The timescales for notifying the Law Society about their intention to be registered as a legal practitioner
2. The court to which they should make the application
3. The paying of any relevant fees
4. The manner and specific steps an applicant must take to submit his/her application for registration.

2. Possess the educational qualifications prescribed in rules made by the Council for Legal Education.

A person must have a law degree in order to register as a legal practitioner in Zimbabwe. This must be obtained from an institution in Zimbabwe or an approved foreign university (a list of the recognised countries is set out in the legislation). In addition to this requirement, they must pass (or be exempted

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from) professional legal exams set by the Council of Legal Education. These include the Common Law of Zimbabwe, Civil Practice and Procedure, Law of Evidence, the interpretation of Statutes and Book-Keeping.

The Council of Legal Education was set up under the Legal Practitioners Act to regulate the quality and provision of legal training in Zimbabwe.

3. Be normally resident in Zimbabwe or a reciprocating country.

They must live in Zimbabwe as their permanent home. Alternatively, they must live in a **reciprocating country**, in other words, a country that has an agreement with Zimbabwe in which the citizens of both are allowed privileges to practice law in each other's countries. Often, such countries will have a similar legal system. If this is not the case, the applicant must obtain authority exempting them from this residence requirement.

4. Be of or above the age of 21.

The applicant must be an adult with sufficient maturity and life experience. This ties in with the need for a lawyer to be an independent professional who takes personal responsibility for their actions and for any advice they give to clients.

5. Be not an unrehabilitated insolvent.

This means that the applicant must not be an individual who has been declared by a court to be unable to repay his debts. This requirement ties in with the need to have legal practitioners who are financially prudent and will not put the public they serve at risk if they are to be entrusted with clients' funds.

6. Be a 'fit and proper' person.

These aspects relates to character traits such as honesty, trustworthiness and reliability. It would, for example, exclude applicants with criminal convictions with an element of fraud for instance. It is important to note that the courts have held that this requirement does not allude to the physical appearance of an applicant. See, for example, *In re: Chikweche 1995 (1) ZLR 235 (S)*

4.5 The Law Society of Zimbabwe

This is a statutory body, i.e., it was set up by operation of law. Its main function is to regulate the legal profession in Zimbabwe. It holds a register of all lawyer members, investigates complaints against its members and disciplines them for professional misconduct where necessary. It also arranges for their ongoing training.

All legal practitioners who practice in Zimbabwe must apply to be on its register and, upon payment of an appropriate fee, they are issued with a practising certificate that is renewable annually, subject to maintenance of good professional conduct and adherence to the Law Society's requirements for continuing legal education. This certificate entitles legal practitioners to undertake reserved legal activities such as appearing before courts.

In certain circumstances a practising certificate can be withdrawn. For example, **Section 78** of the *Legal Practitioners Act* stipulates that:

(1) If, after due inquiry, the Council of the Society is satisfied that a legal practitioner has not complied with any term or condition of a practising certificate held by him, the Council of the Society may withdraw the practising certificate and, if it does so, shall direct the secretary of the Society to advise the legal practitioner accordingly.

As a paralegal, it is important to remember that it is an offence for any individual to undertake reserved legal activities without a practising certificate. If in doubt about whether any specific type of work is reserved, it is prudent to confirm the position by referring to the *Legal Practitioners Act* before carrying out the assignment.

Exercises and further reading

Overleaf.

Exercises

1. What is 'reserved legal work' and which piece of legislation sets out what constitutes reserved legal work? What are the penalties for carrying out unauthorised reserved legal work?
2. Explain the term '*de facto bar*'.
3. What are the requirements for an applicant seeking registration as a legal practitioner in Zimbabwe?
4. True or false? In relation to an applicant seeking registration as a legal practitioner, the expression '*fit and proper person*' relates to an applicant's physical appearance. Explain your answer.

Further Reading

Madhuku, *An Introduction to Law in Zimbabwe*, Chapter 6.
Legal Practitioners Act [Chapter 27:07].

5: AN OUTLINE OF COURT PROCEDURES

DISCUSSION TOPICS

- Civil procedures.
- Action and application procedures.
- A brief introduction to criminal procedure as it relates to arrest, bail and securing the presence of the accused.

OBJECTIVES

- To gain an understanding of the civil procedures of Magistrates' Courts and the High Court in Zimbabwe.
- To gain an understanding of the difference between an 'action' and an 'application'.
- To gain a brief understanding of criminal procedure as it relates to arrest, bail and securing the presence of the accused.

5.1 Civil Procedures

Civil procedures are governed by Rules of Court. There are separate procedures for Magistrates' Courts and the High Court. Magistrates' Courts Rules deal with **civil procedures** in the Magistrates' Court and High Court Rules set out rules and procedures for the High Court. This section deals with procedures common to both courts.

5.1.1 Action and Application

The difference between an 'action' and an 'application' is that an **application** is used in straightforward cases where there is no dispute of fact between the parties, yet the parties require a court's ruling in circumstances where they are in substantial agreement on the facts in dispute. The evidence is presented to a judge on the papers filed either in court or in his chambers and he makes an order, often without the need for oral evidence or with limited oral evidence.

An **action**, (also referred to as civil trial procedure), is where legal proceedings are issued and commenced by way of a Summons when there is a dispute of fact between the parties and where the matter will proceed to trial. Oral evidence will be led by both parties before a judge issues his judgment.

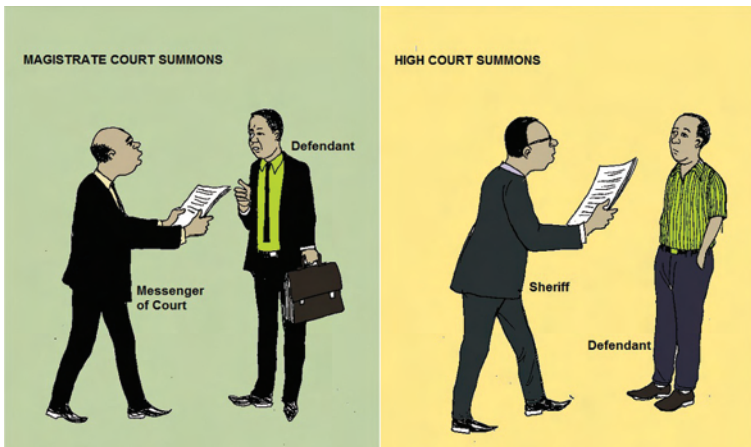
5.1.2 Steps in a Court Action

Letter of Demand

A **Letter of Demand** sets out the plaintiff's case. A plaintiff is the party making the claim and a defendant is the party against whom the claim is made. This document is often the first piece of correspondence received by the defendant notifying them that the plaintiff intends to take legal action against them. In Zimbabwe, the **Letter of Demand** is only a legal requirement for the issue of legal proceedings if the parties have previously contracted and made this a pre-requisite.

In recent years, the trend in other legal jurisdictions (notably the United Kingdom and other European jurisdictions) is that a **Letter of Claim**, Great Britain's equivalent) is a pre-requisite for issuing legal proceedings. There are strict requirements as to its format and the information it should contain as part of a pre-litigation/pre-action process. These stipulations attempt to force parties to set out the important details of their claim at the earliest stage before spending huge sums of money on issuing a claim. This also allows the defendant to fully understand the plaintiff's claim and to settle, if appropriate.

In Zimbabwe, if a **Letter of Demand** is issued there is no prescribed format as to its length or content. It often contains enough information to enable the defendant to understand the nature of the claim, any monetary sum being claimed (and how much) or the conduct the plaintiff requires the defendant to follow or to desist from doing, a date by which the required action should be taken and the consequences for the failure by the defendant to pay up or act in accordance with the demands of the plaintiff. See **Appendix A** for an example of a **Letter of Demand**.



Pleadings

Various documents are exchanged between the parties from the start of the matter until the date of the trial. They set out the basis of the plaintiff's case and the defendant's defence and are known as 'pleadings'.

Time limits

There are also **time limits** within which the documents have to be served. Every practitioner should be familiar with the limitations. Failure to comply can be fatal to a party's case, resulting in a judgment in default being obtained against them. They are exchanged in the order set out below.

1. The Summons

In both the High Court and the Magistrate's Courts, a **Summons** is the first pleading the plaintiff issues to notify the defendant of a claim. In a Magistrate's Court, it contains the plaintiff's Particulars of Claim. In the High Court, the **Summons** contains the plaintiff's Declaration. These two documents set out the particulars of the plaintiff's claim in more detail. The **Summons** is usually signed by a legal practitioner or by the plaintiff himself, if he is not represented by a lawyer. The **Summons** needs to be issued by the court, i.e., stamped as having been received by the Clerk of Court or Registrar, who are officials responsible for receipt of documents filed in a Magistrates' court and the High Court, respectively, and then they are served

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(delivered) on the defendant. In a Magistrate's court they are served on the defendant by an official known as a Messenger of Court; in the High Court this is done by a Sheriff. Once this has been done, the Messenger of Court/Sheriff will obtain a Return of Service, which confirms when and where the **Summons** was served and to whom. **Appendix B** provides an example of a **Summons**.

2. Appearance to Defend

An **Appearance to Defend** is a document issued by the defendant indicating their intention to defend the matter. If it is not filed with the court within the stipulated timescale, the plaintiff may obtain a judgment in default against the defendant. The term '**judgment in default**' simply means that the court can award the plaintiff a judgment in his/her favour because the defendant did not file the document within the time stipulated by court rules. If the defendant does not wish to defend his or her position, he/she may admit the claim at this stage and pay the sum claimed. The term '**admitting a claim**' refers to the defendant acknowledging or conceding that he/she is indebted to the plaintiff in the manner claimed. He/she may also be liable for (have to pay) the plaintiff's costs in pursuing the claim up to the date of its admission.

3. Summary Judgment

If the plaintiff believes that the defendant does not have a valid defence and has only served an Appearance to Defend to delay matters, he/she may apply for a summary judgment. This is a request to the court to make a judgment on the available facts without proceeding to trial. As the burden of proof in a summary judgment is very strict, the plaintiff will usually only make an application for **Summary Judgment** when he/she is very certain that they have the evidence to convince the court of the fact that the defendant has no defence at all.

4. Request for Further Particulars

Before filing their Plea (Defence), a defendant can file a pleading requesting further clarification from the plaintiff to enable him/her to file a detailed

defence. It will often contain questions requiring specific responses from the plaintiff, for example, '*When was the contract between the Plaintiff and the Defendant entered into?*' All questions must be answered. See Appendix C for a copy of a sample request for further particulars.

5. *The Defendant's Plea*

After this, the defendant will file his/her defence in response to the plaintiff's claim. This is known as a '*Plea*' and contains the defendant's version of events. It should respond to every issue raised in the plaintiff's Summons and Particulars of Claim or Declaration as the case may be and be very carefully written. If the defendant does not deny certain/all allegations made by the plaintiff, the court may assume that they have been accepted. At this stage, the defendant may file a counterclaim, if appropriate. A counterclaim is a claim filed in turn by the defendant against the plaintiff. The *Plea* must be filed with the court within the stipulated timescale and served on the plaintiff. See Appendix D for a copy of a sample *Plea*.

6. *Request for Further Particulars*

Following receipt of the defendant's *Plea*, the plaintiff may also request a clarification of issues in the *Plea* by filing their *request for further particulars*.

7. *Plaintiff's Replication*

This is the plaintiff's reply/response to the issues/allegations raised by the defendant in his/her *Plea*. The plaintiff may also issue a '*Plea in reconvention*', i.e., a defence to the issues raised by the defendant in their counterclaim.

8. *Close of Pleadings*

This signals the end of the exchange of the pleadings. At this point, the parties '*join issue*', i.e., confirm the issues in dispute and request a trial date from the court.

9. *Discovery*

This is a process through which the plaintiff and the defendant simultaneously *disclose* (reveal) the documents and exhibits that they each intend to rely on at trial. The purpose is to ensure that neither party is taken by surprise

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at the trial. This is an opportunity for both parties to establish the strength of their cases and choose to settle, if appropriate. Documents that are not presented to the other side during the process of **Discovery** may not be used at the trial.

10. Pre-trial Conference

A **pre-trial conference** is a meeting before the trial between the parties and the judge/magistrate, where the latter attempts to define the issues in dispute and to ‘case manage’ the trial. Here, the judge/magistrate will attempt to get the two sides to agree on certain issues, such as to confirm the number of days the trial is likely to take, whether the parties will call witnesses and/or experts to give evidence and other such important matters related to the trial. Once the court has issued a trial date, the first party to receive notification of it must file and serve on the other parties a notice of ‘set down’ (see **Appendix E**), i.e., making everyone involved aware of the trial start date.

11. Trial

The witnesses for each party will give oral evidence and they will be cross-examined by the lawyer(s) representing the other side. Cross-examination involves asking questions to ascertain the truthfulness of witnesses’ evidence. The purpose is to draw attention to the deficiencies/irregularities in the other side’s case. Each party will also attempt to put forward evidence that supports their case and to show why judgment should be made in their favour. However, the burden of proof is on the plaintiff to prove his/her case beyond a balance of probabilities.

12. Judgment

At the end of the trial, the judge/magistrate will give a **judgment** on the matter, including any order for the payment of legal costs by the parties. After this is done, if the party against whom **judgment** has been made (the judgment debtor) fails to make payment within the stipulated timescale, the successful party (the judgment creditor) can attempt to enforce judgment by executing against (requisitioning) the property of the other party or

by obtaining a garnishee order, which is an order made against wages or salaries and directs the employer of the judgment debtor to pay the judgment creditor directly. Alternatively, the judgment creditor may obtain an order for civil imprisonment, which will force the debtor to pay upon the threat of being imprisoned.

13. Appeal and Review Procedure

If the unsuccessful party is dissatisfied with the judgment, he/she may decide to **appeal** to a superior court for the decision to be overturned or to apply for review. Here, the main difference is that an appeal is a request that the superior court revisit the findings/decision of the lower court. This approach deals with what is known as the 'merits' of the judgment. A review, on the other hand, is a challenge to the procedure that was adopted by the judge. In a **review**, the person making the application (the Appellant) challenges the decision and asserts that there were irregularities in the way the judge reviewed the evidence or conducted the trial.

5.1.3 Steps in Application Procedure

As mentioned earlier, **application procedure** is the method a party can use to bring a claim to court where there is no dispute of fact.

Application and Founding Affidavit

When a party commences an application, he/she is known as the Applicant. He/she files an application and a founding affidavit, which is a witness statement setting out his/her version of events and confirms the order that he/she wishes the court to make. Here, an 'order' is an official proclamation by a judge that defines the legal relationships between the parties in court proceedings. It may require or authorise the carrying out of certain steps by one or more parties to a case. The proposed order that the applicant seeks from the court is attached as a draft as part of the application. This 'draft order' will enable the judge/magistrate to ascertain what relief/assistance the applicant is seeking from the court. At the end of the proceedings, after reviewing the draft order, the judge/magistrate will issue his/her final order.

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Here, he/she can either:

- Confirm and adopt as the final order in its entirety
- Amend and then issue the final order
- Replace it entirely by the insertion of his/her own proclamation and then issue the final order.

The Opposition and Opposing Affidavit

In response, the respondent files their **opposition** and an **opposing affidavit** that sets out his/her version of events and disputes or accepts the facts and allegations in the **applicant's Affidavit**. The respondent indicates whether he/she denies or agrees with each of the assertions in the applicant's pleadings and gives supporting reasons.

The Applicant's Answering Affidavit

This is the applicant's **response** to the issues in the opposing affidavit.

Heads of Argument, Oral Hearing and Judgment

The parties then file their legal **arguments**, citing case law to support their respective cases. In doing so, they attempt to sway the judge to their viewpoint and to show how the law should be applied in this case. After this, a **hearing in court** may take place, at which the lawyer for each party may submit their legal arguments orally. Once this has been completed the judge **issues his/her order**.

5.3 Criminal Procedure – Arrest, Bail and Securing the presence of the Accused

What follows is a brief introduction to the basics of **criminal procedure** and the **process of arrest and bail**. It is important to get legal representation and correct legal advice if someone is arrested.

An **arrest** is the act of depriving a person of their liberty and usually takes place in relation to a purported investigation or prevention of crime.

In general, when a person is **arrested**, the police will:

- Identify themselves to them as the police
- Tell them **why** they are being arrested

Box 5.1: The three main methods of securing the presence of the accused

| | |
|---------------------------|---|
| <p><i>Arrest</i></p> | <p>An arrest may be carried out with or without a warrant. An arrested person must be taken to a police station as soon as possible and may only be detained at the police station for a maximum of 48 hours before being brought to court. The 48-hour period may be longer where it is over a weekend or if it expires after 4 p.m. on a working day. If the police intend to detain a person beyond 48 hours, they must obtain a warrant from a judge or magistrate.</p> |
| <p><i>Summons</i></p> | <p>The issue of a summons to appear in court is initiated by a prosecutor. It is issued by the clerk of court and served by a messenger of court.</p> |
| <p><i>Extradition</i></p> | <p>This is where one country transfers a suspected or convicted criminal to another country. It may be effected through treaties between countries or through ad hoc arrangements. The relevant legislation in Zimbabwe is the Extradition Act [Chapter 9:08].</p> |

- Tell them what crime they think they have committed
- Explain why it is necessary to arrest them
- Explain to them that they are not free to leave

See **Section 70** of the **Constitution** on the rights of accused person for further information.

The next step in their investigation is to decide whether they have a strong enough case to go to court, i.e., prosecute an accused person.

Criminal prosecutions in Zimbabwe are carried out by the Prosecutor General, who is the head of the National Prosecution Authority (NPA) or his/her representatives, who are officials of NPA. The decision about whether to prosecute or not rests with the Prosecutor General. This is done by considering factors such as:

- If there is sufficient evidence
- The nature of the offence
- Whether the accused has any immunity. (Certain diplomats, for example, are immune from prosecution.)

In Magistrates' Courts, prosecutions are conducted by prosecutors who represent the Prosecutor General. The prosecutor is the legal party

Box 5.2: Key deciding factors for granting bail following arrest and detention

| | |
|---|--|
| 1 | The likelihood that the accused will abscond – the type/nature of the offence has a bearing on the likelihood of absconding. Usually, the more serious the offence, the greater the chance that the prosecution will decide this is likely to happen. |
| 2 | The likelihood of interference with witnesses or evidence. Examples of interference include violence, bribery, threats or improper pressure to get a witness to get them to change their evidence. It may, for example, be considered whether the witnesses live in the same home as the accused. In those circumstances, there is a chance that this will happen. |
| 3 | The likelihood that the accused will commit another offence – the accused's previous criminal history will be examined, which help determine whether the accused is likely to commit another crime. |

responsible for presenting the case in a criminal trial against the individual who has been accused of breaking the law. His/her role is to assist the court with arriving at the correct verdict. Prosecutions in the High Court are usually conducted by law officers from the Prosecutor General's office who are registered legal practitioners.

Securing the presence of the accused

Criminal proceedings are preceded by securing the presence of the accused. The three main methods of doing this are shown in Box 5.1:

Bail

In certain circumstances following arrest and detention, the accused may be released on bail. Bail may also be granted after conviction pending appeal. Depending on the severity of the offence, bail may be granted by the police, a magistrate or the Prosecutor General. It is important to get advice from a lawyer (if at all possible) when appearing at a bail hearing.

The main factors that are taken into account when deciding whether bail can be granted are shown in Box 5.2.

Where bail is sought pending an appeal, the two key factors the magistrate will consider are the likelihood of the accused absconding and the prospects of success on appeal.

Exercises

1. What is the determining factor in deciding whether to use action procedure or an application when commencing legal proceedings?
2. What is your understanding of the term 'Defendant's Plea'?
3. What steps can a party who has obtained judgment/order against another take if the judgment debtor refuses to pay him?
4. What does a magistrate consider in relation to deciding whether to grant an accused bail?

Further Reading

Madhuku, *An Introduction to Zimbabwean Law*, pp. 107-25.

Section 70 of the Constitution of Zimbabwe, Amendment No. 20 (2013).

6: STATUTORY INTERPRETATION

DISCUSSION TOPICS

- Rules of statutory interpretation
- Maxims of statutory interpretation
- Presumptions of statutory interpretations
- Aids to statutory interpretation

OBJECTIVES

- Identify and explain the rules of statutory interpretation
- State the circumstances when these rules are applied by the courts
- Understand the presumptions and maxims of statutory interpretation

Introduction

Suppose that every morning you woke up and made yourself a pot of filter coffee... but... did YOU really make that coffee? You put the coffee grounds into the dispenser, then you poured the water in and finally you turned on the machine. The water was then siphoned through the coffee grounds and brown (coffee) water inevitably ended up in the pot. You had to be the one who that made the coffee, right? Technically, however, someone could argue that it was the coffee machine that made the coffee and you simply helped it through the process.

Typically, if you look up a verb such as 'do' in a dictionary, there will be a long list of sentences explaining its meaning, each based upon the context that the word is used within the English language. What is in question here is the meaning of 'make'? This may seem trivial, but if someone faced a jail term depending of whether or not they made coffee, it would be an extremely serious matter.

Parliament passes many statutes each year. The meaning of the law in these statutes should be clear and explicit but this is not always achieved. Statutory interpretation concerns the role of a judge when he/she is trying to apply an Act of Parliament to an actual case. The wording of the Act may



seem clear when it is drafted and checked by Parliament, but it may still be problematic in the future. The objective of interpretation is to arrive at the legal meaning of a statutory provision, i.e., the meaning intended by the legislature.

Rules of interpretation

When determining the meaning of words and phrases used within a statute, courts rely on the **rules of statutory interpretation**. As already mentioned, the objective of interpreting a statute is to ascertain and decipher the legislature's intent. The first step in interpreting any statute is to review and read the language it uses, and if the language is clear or unambiguous then no further analysis is needed. If the meaning of a word or phrase is unclear, the court will resort to the **rules of interpretation**. It is important to note that the rules of statutory interpretation are only a guide for the judiciary .

Judges in Zimbabwe generally apply three basic rules of statutory interpretation, and similar rules are also used in other common law jurisdictions. These are the literal rule, the Golden rule and the mischief rule. Although judges are not bound to apply them, they generally use one of the three approaches, and the approach chosen often reflects the judge's own viewpoint.

The Literal Rule

Under the **literal rule**, which is sometimes referred to as the ‘ordinary meaning’ rule or the ‘plain meaning’ rule), it is the task of the court to give the words of a statute their literal or ordinary everyday meaning, regardless of whether the result seems sensible.

The **literal rule** is often applied by conservative judges who believe that their Constitutional role is limited to applying laws enacted by Parliament. Such judges are wary of being seen as creating law, as they see this as being strictly limited to the elected legislative branch of government. In determining the intention of the legislature in passing a particular statute, this approach restricts a judge to the so-called ‘black letter’ of the law. The **literal rule** is the approach taken by most judges, and an example case in Zimbabwean law is that of *Kuvarega v Registrar General*, where the court consulted dictionaries to establish the meaning of the word ‘utter’.

There are a number of disadvantages in using this rule. It is often called the ‘dictionary rule’, but dictionaries show that there are several meanings to one word, which can complicate things. It also restricts judicial creativity and holds back the development of the law by not allowing it to keep up with changing social conditions.

The Golden Rule

The **Golden rule** is an alternative rule to the literal rule is used where the literal rule produces a result where Parliament’s intention would be circumvented rather than applied. In the British case of *Grey v. Pearson, 6 ER 60 (1857)*, quoted with approval in *Bilawchuk v Blomberg, 2000 ABQB 824*, the Golden rule was defined as follows:

In construing all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no further.

For example, in *S v Takawira 1965 RLR 162*, the statute made it an offence

to be in possession of subversive material. If interpreted literally, the police officer who took possession of the subversive material, the public prosecutor who tendered it as evidence and the judicial officer who examined it at the trial would all be guilty of the offence!

The **Golden rule** is therefore most often applied in order to resolve ambiguity in statutory language in favour of the meaning that will best achieve the intention of the legislature revealed by the statute as a whole.

The Mischief Rule

The final rule of statutory interpretation is the **mischief rule**, which a judge uses to try to determine the legislator's intention, namely the 'mischief and defect' that the statute in question has set out to remedy, and the ruling that would effectively implement this remedy. The classic statement of the mischief rule is that given by the Barons of the Court of Exchequer in **Heydon's Case (1854)**, which stated:

for the sure and true interpretation of all statutes in general, four things are to be discerned and considered:

1. *What was the common law before the making of the Act?*
2. *What was the mischief and defect for which the common law did not provide?*
3. *What remedy the Parliament hath resolved and appointed to cure the disease of the Commonwealth?*
4. *The true reason of the remedy; and then the office of all the judge is always to make such construction or shall suppress subtle inventions and evasions for continuance of the mischief, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act.*

Applying this rule allows the Courts to ascertain the reason behind the promulgation of the Act by establishing the 'mischief' (or defect) in the common law that the Act was attempting to remedy. In other words, it looks at what the statute set out to accomplish. Here, the courts want to fulfil the intention of the legislature.

The Presumptions of Statutory Interpretation

To aid interpretation, there are several **presumptions** (assumptions) that guide the judiciary in interpreting Acts. Judges make presumptions about the wording of a Statute. They know that:

- The common law has not been changed unless the Act clearly states otherwise.
- A criminal offence requires *mens rea* (a guilty mind).
- The law should not act retrospectively. (*This means that the law should not apply to conduct that occurred before the law was promulgated.*)
- Statutes do not interfere with legal rights already vested. (*This means that the law should not take away rights that accrued to an individual before the law was promulgated.*)
- Statutes should not undermine Constitutional law.
- The legislature does not mean to be harsh or unjust.

Parliament does not legislate in such a way that Zimbabwe would be in breach of its international obligations.

Aids to Statutory Interpretation

Finally, there are a number of **intrinsic** (internal) and **extrinsic** (external) **aids to statutory interpretation**. Put simply, these are instruments that assist judges in drawing logical conclusions about the meanings of statutes.

Intrinsic (Internal) Aids to Statutory Interpretation

These are things found within a statute that help judges understand its meaning more clearly.

The long and the short title

The **title** is the formal heading which appears at the beginning of an Act or legislative instrument. The '**long title**' should be read as part of the context, as it is the plainest of all the guides to the general objectives of a statute. It provides a summary description of the scope and purpose of the Act. The '**short title**', on the other hand, is merely intended to provide a convenient name for referring to it. For example, the **short title** of the Administration of

Estates Act is the *Administration of Estates Act [Chapter 6:01]*, but its long title is as follows: ‘

AN ACT to consolidate and amend the law relating to the administration of the estates of deceased persons, minors, mentally disordered or defective persons and persons absent from Zimbabwe, and to provide for the control of moneys belonging to persons whose whereabouts are unknown.’

The preamble

When there is a **preamble**, it will generally state the mischief to be remedied and the scope of the Act. It is therefore clearly permissible to use it as an aid to establishing the enacting provisions.

- Definition sections
- Schedules
- Headings

Headings, side-notes and punctuation may also be considered as part of the context, although these elements of grammar may not have been discussed in Parliament.

Extrinsic (External) Aids to Statutory Interpretation

These are books and publications found **outside** of the actual statute that judges may consult to help them understand its meaning more clearly. They include:

- Interpretation Act
- Dictionaries
- Historical setting
- Previous statutes
- Earlier case law
- *Hansard* (the official edited report of proceedings of the House of Commons and the House of Lords (UK))

Hansard may be used where a) legislation is ambiguous or obscure, or leads to an absurdity, b) the material relied on consists of one or more statements by a minister or other promoter of the Bill, together with (if necessary) other

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parliamentary material necessary to understand such statements and their effect and c) the statements relied on are unclear.

Latin Rules of language (Maxims of Statutory Interpretation)

There are many Latin rules of language that can aid interpretation, but only three need to be discussed in detail here. These are:

1. *Ejusdem generis* (of the same kind).
2. *Expressio unius est exclusio alterius* (known from associates).
3. *Noscitur a sociis* (the express mention of one thing is the exclusion of another).

Ejusdem generis (of the same kind)

General words following particular words will be interpreted in the light of the particular ones. For example, in the South African case of *Powell v Kempton Park Racecourse [1899] HL*, the court had to decide on a case where the act made it an offence to use a 'house, office, room or other place for betting'. The defendant was operating from a place outdoors. The court held that 'other place' had to refer to other indoor places because the words in the list were 'indoor places' and thus he was not guilty.

Noscitur a sociis (known from associates)

A word will be interpreted in the context of surrounding words. For example, in the British case of *Muir v Keay (1875) QBD*, all buildings kept open at night for 'public refreshment, resort and entertainment' had to be licensed. The defendant argued that his café did not need a licence because he did not provide entertainment. The court held that 'entertainment' did not mean musical entertainment but the reception and accommodation of people and thus the defendant was guilty.

Expressio unius est exclusio alterius (the express mention of one thing is the exclusion of another)

The express mention of things in a list excludes those things not clearly spelt out or mentioned. For example, in the British case of *Tempest v Kilner (1846) 3 CB 249*, a statute required that contracts for the sale of 'goods, wares and merchandise' of £10 or more had to be evidenced (listed) in writing. The

court had to decide if this applied to a contract for the sale of stocks and shares. The court held that the statute did not apply because stocks and shares were not mentioned. See the main reference text, *An Introduction to Zimbabwean Law*, for other examples.

Exercises

1. Explain each of the three rules of statutory interpretation.
2. How do Latin rules of language aid statutory interpretation?
3. Do judges make law?
4. Read the case of *Masasi PTC 1991(2) ZLR 73* and state the rules of interpretation that the judge used.

Further Reading

Madhuku, *An Introduction to Zimbabwean Law*, pp. 144-82.

7: CONTRACT LAW

DISCUSSION TOPICS

- Definition of a contract.
- The essentials of a contract.
- The capacity to contract.
- Illegality.
- Void and voidable contracts.
- Breach of contract.
- Remedies for breach of contract.

OBJECTIVES

- To be able to understand the nature of a contract.
- To be able to state the circumstances when a contract may be unenforceable.
- To be able to understand what 'breach of contract' entails.
- To be able to understand remedies for breach of contract.

What is a Contract?

A **contract** is an agreement between two or more parties with legal capacity that creates obligations that are enforceable and recognised by law. The starting point for establishing whether there is an agreement is to confirm if an offer was made which was validly accepted.

The Essentials of a Contract

Meeting of the minds of parties, i.e., mutual consent or consensus ad idem (the parties must be in agreement in relation to what they are contracting).

Offer and Acceptance

- i) Terms should not be vague or unclear.
- ii) The intention(s) of both parties should be communicated.

The serious intention to contract and to create legal relations.

- Capacity – that is both parties are able to fulfil the terms of the contract
- Legality
- Performance – it should be possible to fully carry out.

A contract can be either oral (verbal) or written. It does not necessarily have to be in writing unless there is a specific statutory requirement that states that it must be on paper. Oral and written contracts are equally valid so long as the party claiming the existence of the contract can prove it was agreed on certain terms. A written contract is only important if evidence may be needed, although it is not a requirement. The presence of an agreement is determined by there being an offer and an acceptance.

Meeting of the minds of parties – mutual consent or consensus ad idem

One of the essentials for a valid contract is that there must be mutual agreement or a common understanding by the parties on what they are committing themselves to do.

Offer and Acceptance

Offer

This is a statement by a person, called the offeror, indicating his/her willingness to contract. It is made on the understanding that it will be binding when accepted by the other person, who is known as the offeree.

- An offer can be made to a particular individual, to a group of persons or to the whole world. It can be made to the owner of the item you intend to purchase or to anybody willing to sell that particular item.
- The offer must be clear and certain and define all the terms on which agreement is sought, without any vagueness. If the offer is vague, it will be impossible to ascertain the intentions of the offeror. What this means is that a valid contract does not materialise even if the offer is accepted.
- The offer must be consistent with all the essentials of the contract and the parties must fully agree with all aspects relating to the contract.

In other words, there must be ‘consensus ad idem’, i.e., a union of minds.

- The offer must be communicated to the offeree, i.e., the offeree must have full knowledge of the offer. For example, in the case of *Bloom v The American Swiss Watch Co. 1915 AD100* a person gave information to the police about a crime, without knowing that a reward had been advertised for supplying information. When he later became aware of the reward money and tried to claim it, the court held he could not. Their reasoning was that since he was unaware of the offer of the reward at the time of providing the information he couldn't have had the intention of accepting the offer.

The intention to create legal relations

A contract must be made with the intention of being accepted and a serious intention to create legal relations. The parties must have the relevant *animus contrahendi*, which literally means ‘the intention to create a contract’:

- The party making the offer must not make the offer in jest or as a social arrangement without intending to create a legally binding agreement. For example, in the case of *Balfour v Balfour [1919] 2 KB 571* (a leading contract law case), the British defendant (husband) was a civil engineer employed in Ceylon (now Sri Lanka). His British wife was living with him. When they returned to England on leave, the plaintiff (the wife) was diagnosed with a medical condition which would not be helped by the weather in Ceylon and she chose to stay in England. The defendant offered to pay her £30 as maintenance from time to time. After a while, the parties grew apart and the defendant no longer honoured his promise. The wife sued him to keep up with the monthly payments on the basis of the arrangement they had made. The courts dismissed her claim on the ground that this was a social arrangement which did not create an intention to be legally bound.
- By contrast, in *Merritt v Merritt [1970] 2 All ER 760*, another British law case, Mr Merritt and his wife were joint owners of a house. When Mr

Merritt moved out of the marital home to live with another woman they reached agreement and signed a document to the effect that Mr Merritt would give Mrs Merritt £40 every month. They also agreed that the house would be transferred to Mrs Merritt if she paid off the mortgage in full. However, after she had done this, Mr Merritt refused to transfer the deeds. The court held that nature of their dealings, together with the fact that the Merritts had separated when they signed their contract, enabled it to assume that their agreement was more than a domestic arrangement. Hence, it was a valid contract and the Court held that the house belonged entirely to the wife.

- The offer may be verbal, written or implied. An example of an implied offer is if a person boards a taxi, the owner of the taxi makes an implied offer to the person to ride in his vehicle for a specific purpose. The passenger accepts the offer by taking a seat and tending his fare.
- The offer must not have been withdrawn by the offeror. If the offer is revoked, cancelled, terminated or retracted, then even if an offeree professes to accept it after it has been withdrawn, no contract comes into being.
- An offer can be terminated if it is rejected by the offeree, and in more than one way. It may terminate on the expiration of a fixed period within which it was meant to be accepted or, if there is no such fixed period within which an offer should be accepted, it may lapse after a reasonable amount of time has passed. (What is 'reasonable' is determined on the facts of each case.) It can also be terminated by the death of the offeror.

Invitation to treat

- A party merely making an initial statement of the terms upon which he intends to contract does not amount to making an offer. It is only an invitation to 'treat', i.e., declaring a willingness to enter into negotiations.
- As is not an offer it cannot be accepted as forming a valid contract. For example, in the South African case of *Crawley v Rex 1909 TS 1105*,

the court held that goods priced and displayed for sale in a shop were not firm offers but simply invitations to treat. The court held that a customer only makes a firm offer when presenting goods at the till and a valid contract ensues when the person at the till accepts the offer on behalf of the shop. A firm offer should be unconditional and unqualified.

See also the cases of *Carlill v Carbolic Smoke Ball Co [1893] 1 QB 25* and *Lee v American Swiss Watch Company 1914 AD 12*.

Acceptance

An acceptance of an offer is an indication, whether express or implied and made while the offer remains open, of the offeree's willingness to be bound unconditionally to the terms stated in the offer.

- The term 'unconditional' means the acceptance of an offer must result in a binding contract with no further negotiations. In accepting an offer, the offeree must not attempt to insert new conditions.
- Acceptance must be unconditional/unequivocal and sufficiently clear so that there is no doubt about the offeree's intentions in accepting it. Acceptance must also be communicated to the offeror, i.e., it must be brought to the attention of the offeror.

Counter-Offer

A counter-offer is where the offeree, instead of unconditionally accepting the offer, makes his/her own offer to the offeror. It is not a valid acceptance. Instead, the offeree is taken to have made a new offer which can be accepted or rejected by the offeror. For example, in the case of *Hyde v Wrench [1840] 3BEAV 334*, one party offered to sell another an estate for £1000. The offeree subsequently made an offer for £950 pounds, which the seller turned down. The offeree then contacted the seller to say he was now prepared to buy the estate at the full price. The court held that there was no valid contract as the first offer had been rejected. Instead, the offeree had made a new offer – a counter-offer – for the offeror to accept or reject.

Here, it is important to note that a request for further clarification of the

terms of the offer is not necessarily a counter-offer and it does not destroy/terminate the original offer. If there is a dispute in a litigated matter as to whether it is one or the other, the answer is usually determined by the courts, based on the facts of the case.

The Contract Should Be Capable Of Performance

An agreement cannot be deemed to be a contract if performing (carrying out) the obligation is impossible or outside human capability. In other words, the obligation must be capable of performance.

Illegality

- The contract should not be illegal
- The parties involved should not agree upon anything unlawful.

(The court will not enforce an illegal contract.)

'Statutory illegality' occurs when an agreement contravenes a piece of legislation, either in the form of a statute or statutory regulation or by-law. This type of contract is null and void.

'Common law illegality' occurs when the contract is contrary to good morals – such as a contract for gambling or prostitution. A court will not uphold a contract that is contrary to public policy.

Capacity

Capacity to contract

A key element of a valid contract is that the parties should have the capacity to contract. This means the legal ability to enter into a contract.

Both natural persons (human beings) and fictional legal persons (such as companies, co-operatives, and societies) can enter into contracts. Having said that, there are certain classes of person who, in the eyes of the law, have what is known as diminished capacity to contract or no capacity at all.

In respect of minors (those below the age of 18), insolvents (financially bankrupt), the insane, intoxicated persons (those under the influence of alcohol or mind-affective drugs), persons married in community of property (everything each spouse owns and all their debts are included in a joint

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estate), and prodigals (financially reckless) may be considered to have either diminished or no **capacity to contract** in certain situations.

Historically, as far as fictional legal persons (companies, for example) are concerned, the general rule under common law is that its **capacity to contract** is determined by the contents of its governing documents, documents which define the objects of the company (i.e., what a company is empowered to do). Governing documents are a company's Memorandum of Association and Articles of Association. Under common law, a company is unable to contract in relation to a subject matter that falls outside the conditions set out in its governing documents.

N.B: The position in Zimbabwe has been changed by legislation, namely Section 10(1) of (the Companies Act, Chapter 24:03). Contracts made outside the objects of a company as set out in its governing documents are now no longer void.

Minors

The general rule is that a **minor** (child under the age of 16-18) does not have contractual capacity unless he/she is assisted by a guardian, who is always an adult. There are exceptions, however, and these are explained below.

Children under the age of 7 have no contractual capacity at all and the only contract that can bind them is one made by their guardians on their behalf. For children aged between 8 and 16, the general rule applies, although there are certain circumstances where the law recognises exceptions to the child's right to contract without the assistance of a guardian. Typically, these are circumstances where the law recognises that the minor is tacitly emancipated, i.e., having his/her own profession or means of generating his/her own financial resources fully independent from his guardians'. This usually applies to teenagers (13-18 years of age). Upon marriage, a minor can also be said to be tacitly emancipated. In Zimbabwe, marriage is allowed for females from the age of 16 and so if a girl is married at that age, the law will consider her tacitly emancipated.

Where an adult enters into a contract with a **minor**, the adult is bound by the contract but the child can choose to 'escape' the contract in certain circumstances. The court will uphold the obligations of the adult but the

child may repudiate (reject) the contract on the basis of lack of legal capacity.

The contract may be void or voidable by the child, provided that he/she does this before reaching the age of 18 or very soon thereafter. The main purpose of having restrictions on the capacity of minors is to protect them from unscrupulous adults who choose to take advantage of their naivety.

Married women and community of property

A married woman's capacity is diminished if she is married in 'community of property'. In this type of marriage, the husband and the wife jointly own all property. The wife cannot enter into a contract in respect of their joint estate without the consent of the husband. The only exception is when the wife enters a contract concerning basic necessities, such as the purchase of food.

Most marriages in Zimbabwe are 'out of community of property', and in these types the spouse's respective property is separately owned and the wife is at liberty to enter into contracts without the consent of her husband. There is a presumption that a marriage is out of community of property unless the parties elect to sign a contract before marriage (an 'ante-nuptial' contract) confirming their intention to be married in community of property.

Insane Persons and mental incapacity

Insanity means mental illness, and the general rule is that a person who is insane has no contractual capacity. As an insane person will not necessarily understand or appreciate the nature of the matter a contract he/she is entering into, the contract will be void. Whilst this is the general rule, a court deciding on a dispute where a party claims that a contract should be void because of mental incapacity will consider the facts of each individual case to determine whether or not the person was capable of managing the particular affairs in question before declaring a contract void or valid. On page 488 of *Pheasant v Wame 1922 AD 481*, Chief Justice Innes made the following observation:

And a court of law called upon to decide a question of contractual liability depending upon mental capacity must determine whether the person concerned was or was not at the time capable of managing the particular affair in question – that is to say whether

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his mind was such that he could understand and appreciate the transaction into which he purported to enter.

In the more recent case of *Executive Hotel (Private) Limited v Bennet NO [2007] ZWSC 103*, the Supreme Court upheld a decision on appeal that an agreement of sale that was signed on behalf of a company by a company director who lacked contractual capacity by reason of mental illness be set aside.

It is clear, then, that a court will look at all the circumstances surrounding a case in order to determine whether at the time of signing the contract the person could fully understand or appreciate what was going on.

Intoxicated Persons

Intoxication refers to the consumption of alcohol or drugs to such an extent that they lose control of their faculties and behaviour. The general rule is that an **intoxicated person** lacks contractual capacity. In deciding whether a person had contractual capacity at the time of entering into the contract, the courts will consider whether the person was so **intoxicated** as to be incapable of appreciate what was taking place. If the person was only mildly drunk and appreciated the import of what he was doing, then the court may decide that he/she had contractual capacity.

Insolvents

An **insolvent** is a person who is subject to a court order because of his inability to discharge his debts. As a general rule, **insolvents** do not have contractual capacity and can only contract through the trustees who are appointed to run his/her estate.

Prodigals

A **prodigal** is a person who has a court order against him and declares him to be incapable of managing his financial affairs. In other words, he/she spends money in a recklessly extravagant way. A **prodigal** has diminished contractual capacity since he cannot enter into a contract without the consent of his curator (an official appointed to take charge of a prodigal's financial matters).



Void and Voidable Contracts

Void Contracts

A **void contract** is unenforceable at law, because it lacks one or more essentials of a valid contract. For example, a contract to carry out an illegal act such as drug dealing or a contract incapable of performance would automatically be **void**, as it is unenforceable at law and *void ab initio* (void from the start).

Voidable Contracts

Unlike a void contract, a '**voidable contract**' is a valid contract in that it satisfies all the requirements of a valid contract. However, one party to a **voidable contract** is obliged to perform his/her obligations under the contract, whilst the other party has the right to set aside the contract if he/she so chooses, in certain circumstances. Examples of such circumstances are described in more detail below. The contract only becomes void when the party entitled to choose to set the contract aside does so.

Examples of **voidable contracts** are those where there is mistake, undue influence, duress or misrepresentation.

Mistake

A **mistake** may also make a contract voidable. A **mistake** in the realm of contract law is an erroneous (incorrect) belief held by one or both of the

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parties at the time of contracting that certain facts are true. The error causes the party to enter into a contract that they might not otherwise have done.

There are two types of mistake: a **mistake of law** and a **mistake of fact**.

A **mistake of law** is when a party enters into a contract on the basis of a mistaken belief/understanding relating to the law. Some jurisdictions such as South Africa now accept that, in some circumstances, a **mistake of law** can invalidate a contract. However, Zimbabwe's courts of law consider that a **mistake of law** does *not* excuse a party from a contract. For more detail, see ***Ncube v Ndhovhu 1985 (2)ZLR 281***, where a contract was upheld although it was entered into on the basis that one of the parties was ignorant of the law. Under Zimbabwean law, then, a **mistake of law** does not make the contract voidable. The position is encapsulated in the often used legal maxim 'ignorance of the law is no excuse'.

A **mistake of fact** is when there is an incorrect belief about facts that are essential to the contract or about its terms. This will make the contract void – or voidable – depending on the exact circumstances. The mistake must relate to a material (essential) aspect of the contract.

The three sub-categories of mistake: unilateral, mutual and common.

A **unilateral** mistake is when only one of the parties involved is mistaken about a material (essential) aspect of the contract. In legal writings this concept is often referred to as 'only one party labours under the mistake'. The general rule is that the party that is mistaken must be bound by the contract, (i.e. must perform his/her obligations under the contract). This is based on the doctrine of 'quasi-mutual assent'. In a nutshell, this means that because he has led the other party to believe that he/she was binding himself to the formal agreement, the contract must remain in place. This principle derives from the historic British case of ***Smith v Hughes (1871) LR 6 QB 597***.

During the trial, the judge said:

If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters

into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.

There are exceptions to the general rule that the mistaken party will remain bound. Examples of circumstances when a **unilateral mistake** can make a contract voidable are where the other party knew about the mistake at the time of contracting, where the other party induced the mistake by a misrepresentation and where the mistake is reasonable.

Mutual mistake

This occurs where **each party is mistaken** about the other party's intentions. If the parties' mistake is reasonable, then the contract between the parties is voidable. The mistake must be in relation to a material term, i.e., an essential part of the terms of the contract. For example, say two parties contract to put their goods on a ship to Birmingham, but one party is thinking of Birmingham, Alabama, in the United States of America, and the other is thinking of Birmingham, in the United Kingdom. This is a reasonable mistake. However, if a party's mistake is unreasonable which means, it is a mistake which no reasonable person in his circumstances would have made and X gave a certain impression to Y which induced (persuaded) Y to contract, then X will be held to have agreed in accordance with the impression given. This is in accordance with the doctrine of quasi-mutual assent explained above.

Common mistake

Here, both parties to the contract are labouring under the same error. The courts will normally rule that if the **common mistake** leads to a situation where the contract is impossible to fulfil – an 'initial impossibility' – the contract is void. An example of initial impossibility is where the parties' contract for the sale of property that does not exist although both parties believe the opposite. In this instance the contract is void from the start. If there is no initial impossibility, then either party is entitled to set aside the contract if the mistake is sufficiently serious. Therefore it is voidable if the mistake relates to a material term of the contract.

Duress

Duress occurs when a person is forced to enter into a contract by fear induced either by the immediate threat of violence, or the threat of future violence, on his/her person, or family or property. A contract obtained under *duress* is voidable by the innocent party.

Undue Influence

This relates to any influence used to force another party into a contract that weakens the innocent party's powers of resistance. Such *undue influence* results in a contract that would otherwise not have been agreed. It is also voidable by the innocent party. An example would be a person in a position of influence, such as an employer, using their power to force an employee to enter into an agreement by threatening the employee with the loss of his/her job if he/she refuses.

Misrepresentation

Misrepresentation is a false statement of fact that induces (influences) a person or party to enter into a contract. It must relate to a material fact, i.e., an important fact related to the parties' contract. It is possible to make a *misrepresentation* by words or conduct. There are three types of *misrepresentation*: *fraudulent*, *negligent* and *innocent*:

1. *Fraudulent misrepresentation* is a representation with the intention to deceive in the full knowledge that the statement of fact being made is false.
2. *Negligent misrepresentation* is a statement made by a person who has no basis to believe that the statement of fact they make is true.
3. *Innocent misrepresentation* is when a person makes a statement that he/she genuinely believes to be true but is actually false.

All three types of *misrepresentation* may make a contract 'voidable'. The contract is not automatically voided, instead it allows the innocent party to have the contract set aside on the basis of the *misrepresentation*. He/she may either choose to rescind the contract or seek an award for damages. Rescission means he/she is entitled to treat the contract as cancelled;

'damages' here means a compensatory sum of money calculated to represent the type(s) of loss incurred. An example of a loss for which a party may be compensated by an award of damages is the loss of profits from sales of goods lost by a shopkeeper that he/she would have obtained had the other party performed his obligations in accordance with the terms of the contract. The level of damages awarded may differ based on which type of **misrepresentation** has occurred. For example, while damages are not available for **innocent misrepresentation**, they may be available for **negligent and/or fraudulent misrepresentation**.

Terms of a contract

The **terms of a contract** are the promises, duties and obligations agreed upon by the parties and such terms may be '**express**' or '**implied**'.

Express terms are either said orally or written down whereas **implied** terms are incorporated into the contract by virtue of its context. They may be **implied** by the law, which means that terms are incorporated into the agreement from either statute law or common law. They may be **implied** from the facts of the case, which means terms can be incorporated into the agreement based on the circumstances of the matter. Alternatively, they can be **implied** from trade usage. Trade usage relates to commonly observed rules relating to a trade or profession. In this instance, see *Golden Cape Fruits (Pty) Ltd v Footplate 1973 (2) SA 642*.

Termination of a Contract

A contract is considered terminated by one of the following:

1. After it is performed (finished)
2. By mutual agreement between the parties.
3. By operation of the law, i.e., if a law is passed that makes it impossible to perform.
4. If it is absolutely impossible to perform all of its components. In such circumstances, the court will discharge the promissory to the extent of the impossibility but not of the part that can be executed.
5. By novation, i.e., when both parties agree to a new or revised contract that supersedes the earlier version.

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6. By breach of contract, i.e., the failure to perform in accordance with (meet) the terms of a contract.

Points 1 to 5 are self-explanatory, but point 6 – **breach of contract** – requires further explanation. A **breach of contract** is when a party fails to perform all or part of its obligations under a contract without legal justification. This non-performance of the obligations set out in the contract and entitles the innocent party to cancel the contract.

Different types of breach

Material/Fundamental Breach

A breach can be ‘**material**’ or simply minor. A **material (fundamental)** breach goes to the root of the contract and is so serious that it undermines the contract. It also amounts to non-performance. A minor breach is self-explanatory, referring to a small aspect of the obligations not being performed. An example is when an item contracted to be delivered is not delivered on time in respect of a contract where time is absolutely crucial. Failure to deliver on time in that scenario is a minor breach and does not go to the root of the contract.

Remedies for Breach of Contract

There are context-specific remedies for breach of contract. Examples are discussed in the following paragraphs.

Repudiation and Rescission

‘**Repudiation**’ means the innocent party is entitled to cancel the contract, thereby formally bring it to an end. This can only be done if the breach is of a material term of the contract. ‘**Rescission**’ means the innocent party may treat the contract as cancelled and it seeks to return the parties to their respective positions before they entered the contract. This can be done if the contract is voidable, for example, due to misrepresentation or duress or some other such factor. In both cases, the contract is effectively cancelled.

Damages

Damages are the most common form of remedy **Damages** are financial compensation, i.e., an award of money calculated to compensate a party for

breach of contract. The aim of damages is to place the relevant party in the position he/she had would have obtained if the contract had been performed. Damages are payable from the date that the performance of an obligation was due. There are two points to bear in mind in relation to damages:

i) A party must take steps to mitigate damages accruing, i.e., ensuring – where possible – that the damage or loss arising does not continue to increase if it is within the power of a party to minimise the loss. An example of when this might occur is where a party is claiming damages for destruction to his/her property in circumstances where a tenant left a tap running. If he had seen water running and it was within his power to turn off the tap but failed to do so, the court might hold that he failed to mitigate his loss and only award him partial damages, to cover reasonable loss.

ii) A court will not award damages that are 'remote'. The concept of remoteness relates to whether the loss was in the contemplation of the parties. In simple terms, this means that the loss must have been reasonably foreseeable by the party who caused it. If there is no direct link between the events that caused the loss and the loss itself, the court will not award damages. For example, party X breaches a contract that results in financial loss for party Y. When the news of this breach reaches Party Y, he/she is sitting with his grandmother, who is frail, takes the news badly and immediately has a fatal heart attack. As a result, Party Y incurs funeral expenses in order to bury the grandmother. When party Y seeks to recover the cost of the funeral from Party X, the court will not award damages as the death could not have been foreseen by Party X.

Specific performance

This is a demand from the court (a court order) directing the defaulting party to meet its obligations by a specified date. If this does not happen he/she can be said to be in 'contempt of court'. However, the court will only award specific performance if there are compelling factors, preferring to award monetary damages as compensation where possible. Specific performance

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is unlikely to be awarded for contracts of personal service or employment and more likely to be awarded in relation to contracts for sale of land. For an example, see *Zvoma v Amalgamated Motor Corporation (Pvt) Ltd 1988 (1) ZLR 60 (HC)*.

Interdict

An *interdict* is an order from the court directing a party to desist from (stop doing) certain conduct that jeopardises another party's rights under the contract. It can be final or temporary, pending the outcome of litigation.

Exceptio non adimpleti

This is a Latin term that refers to the remedy where one party states that its obligation to perform does not arise because the other party has not performed its own obligations.

Exercises

1. Explain the distinction between void and voidable contracts.
2. Explain the concept of *consensus ad idem*.
3. What are the remedies for breach of contract?

Further reading

Christie, R.H. (1985) *Business Law*, Cape Town: Juta and Co.

Kerr, A.J. (1989, 4th edition) *The Principles of The Law of Contract*, Durban: Butterworths.

Manase, A.J. and L. Madhuku (1996) *A Handbook on Commercial Law in Zimbabwe*, University of Zimbabwe Publications.

Madhuku, L. (2010) *An Introduction to Zimbabwean Law*.

APPENDICES

Appendix A
Letter of Demand

DATE

[address of debtor]

FINAL DEMAND

Dear Sirs,

RE: PLAINTIFF V NAME OF DEBTOR

We refer to the above matter.

On [x date] you bought [description of goods] at a total cost of \$1000.00. The [item purchased] was delivered to you on the [x date]. You have made several payments towards your credit account leaving a total outstanding balance of \$650 as of [x date] inclusive of interest which amount is due and payable. Despite demand you have neglected to make payment of the said amount.

We hereby demand immediate payment of the amount due within 7 days of receipt of this letter failing which we will issue summons for the amount due and interest thereon without further notice to you. Any and all costs incurred in the recovery of the debt are for your account.

Be guided accordingly.

Yours faithfully,

XX

APPENDIX B

SUMMONS

No. CIV.4 - SUMMONS COMMENCING ACTION

Issued by CLERK OF THE COURT

CASE NO:

/2012

IN THE MAGISTRATES COURT

FOR THE PROVINCE OF
HELD AT

PLAINTIFF:

Address:

TO DEFENDANT:

Address for Defendant:

YOU ARE HEREBY SUMMONED that you do within (7) seven days after the service of this Summons upon you, enter or cause to be entered with me and also the Plaintiff at the address specified herein an Appearance (i.e. file a notice of intention to defend) to answer the claim of the Plaintiff's herein for

(a) USDS xxxx for unpaid electricity consumed on the property for the period

TAKE NOTICE THAT

- 1) In default of your doing so you will be held to have admitted the said claim and the Plaintiff may proceed therein and Judgment may be given against you in your absence, but that on payment of the said claim and costs to me within the said time, Judgment will not be given against you herein, and that if, before the expiration of the said time you so pay or lodge with me and the Plaintiff, a consent to Judgment, you will save Judgment charges.
- 2) If you allege any exception, defence or counter-claim you must within seven days after an Appearance, deliver to me and to the said Plaintiff a Statement in writing of the nature and grounds thereof.

PARTICULARS OF CLAIM

SEE PARTICULARS OF CLAIM ANNEXED HERETO

WHEREFORE Plaintiff hereby prays for Judgment against the Defendant in the said sum of \$xxxx, interest thereon a tempore morae and costs of suit.

\$

Costs if the action is undefended :

LESS \$

| | |
|------------------------------|-------|
| Summons Charges | x |
| Judgment Charges | x |
| Court Fees | x |
| Messenger's Fees | x |
| Messenger's Fees on re-issue | x |
| TOTAL | XXXXX |

.....
Plaintiff

Address
P O Box XYZ
HARARE

DATE

CONSENT TO JUDGMENT

- TO: 1) The Clerk of the Court
- 2) The Plaintiff's Legal Practitioners

I admit that I am liable to the Plaintiff as claimed in this Summons (or in the amount of \$.....) and costs to date and I consent to Judgment accordingly.

DATED THIS DAY OF 2014

.....
DEFENDANT

APPEARANCE TO DEFEND

- TO: 1) The Clerk of the Court
- 2) The Plaintiff

Enter an Appearance for the Defendant who intends to defend action.

DATED THIS DAY OF 2014

.....
DEFENDANT or
DEFENDANT'S LEGAL PRACTITIONER

Address for service:

Postal Address:

NOTES (1) In terms of the Rules where Defendant wishes to Consent to Judgment or to enter an Appearance to Defend, a notice in the appropriate form shown above must be filed on record with the Clerk of Court and a copy served on the Plaintiff's Legal Practitioner.

(2) In terms of the Rules the Defendant is required to give an address for service within fifteen kilometres of the Courthouse from which the summons has been issued.

REQUEST FOR DEFAULT JUDGMENT

The Plaintiff hereby applies that -

- (1) the Defendant having been duly served;
- (2) the time for appearance by the Defendant having expired;
- (3) the Defendant not having entered an appearance to defend;

Judgment may be entered against the Defendant, as claimed in the Summons, together with \$ for interest at per cent from the date of Summons.

Capital
Interest
Summons costs
Judgment costs

DATED THIS DAY OF NOVEMBER 2014

.....
Plaintiff
HARARE

APPENDIX C

**IN THE MAGISTRATE'S COURT
FOR THE PROVINCE OF X
HELD AT HARARE**

CASE NO. XYZ/14

In the matter between: -

XYZ

PLAINTIFF

And

**ABC COMPANY
ZIMBABWE (PRIVATE) LIMITED**

DEFENDANT

DEFENDANT'S REQUEST FOR FURTHER PARTICULARS

In order to plead to the Plaintiff's claims Defendant requests the following further particulars:-

1. Ad Paragraphs 5

When is it alleged that the Plaintiff experienced '*severe headache, coughing and convulsions*'?

DATED AT HARARE THIS DAY OF NOVEMBER 2014.

.....
A AND ANOTHER LAWYERS
Defendant's Legal Practitioners
X Avenue
HARARE

TO: THE CLERK OF COURT
Magistrate's Court
HARARE

And

TO: MESSRS RST LAWYERS
Plaintiff's Legal Practitioners
Y Avenue
HARARE

APPENDIX D

PLEA

IN THE HIGH COURT OF ZIMBABWE

CASE NO./14

HELD AT HARARE

In the matter between: -

NM

PLAINTIFF

And

XYZ

DEFENDANT

DEFENDANT'S PLEA

The Defendant pleads as follows to the Plaintiff's declaration:-

Ad Paragraphs 1-2

1. No issues arise.

Ad Paragraph 3 to 4

2. It was an implied term of the agreement that the Defendant would not make payment until x date.

Ad Paragraph 5

3. This is denied.

Ad Paragraph 8

4. The Defendant has no knowledge of the damages that the Plaintiff has suffered. The Plaintiff is put to proof of all his damages.

WHEREFORE the Defendant prays for the dismissal of Plaintiff's claims with costs.

DATED at HARARE this day of December 2014.

.....
Defendant
Address
HARARE

TO THE REGISTRAR
High Court of Zimbabwe
HARARE

AND TO:
Plaintiff
Address
HARARE

**APPENDIX E
NOTICE OF SET DOWN**

**IN THE HIGH COURT OF ZIMBABWE
HELD AT HARARE**

CASE NO. H.C. /14

In the matter between :

XYZ

PLAINTIFF

and

MNOP

DEFENDANT

NOTICE OF SET DOWN

BE PLEASED to set down the above matter for hearing before this Honourable Court on Thursday, 27 November 2014, at 10.00a.m. or so soon thereafter as the matter may be heard.

DATED at **HARARE** on this the day of **NOVEMBER**, 2014.

Plaintiff
Address
HARARE.

TO: **THE REGISTRAR,**
High Court of Zimbabwe,
HARARE.

The Friedrich-Ebert-Stiftung is a private, non-profit cultural institution committed to the ideas and values of social democracy founded in 1925 as a political foundation. The aim of its international activities is to promote democracy and sustainable development in a socially just economic system to contribute to peace, human security and solidarity around the world. Through its projects in over 100 countries, the FES supports the building and strengthening of civil society, trade unions and public institutions. Its support for the publication of this book emanates from its long-standing partnership with the trade union movement in Zimbabwe.

For further information contact info@fes-zimbabwe.org

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