Lecture Notes:

CIVIL AND CRIMINAL PROCEDURE

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Statutes and Recommended Texts:

- High Court Act Cap 27 of the Laws of Zambia
- Subordinate Court Act Cap 28 of the Laws of Zambia
- Criminal Procedure Code
- Penal Code
- Odgers on Civil Court Actions – Practice and Procedures
- Zambia Civil Procedure – Commentary and Cases, Volumes I and II by Dr. Patrick Matibini

Expectations

At the end of the course, students are expected to know how to;

(a) institute court proceedings;

(b) apply for an interim injunction;

(c) enforce a judgement;

(d) prosecute a criminal offence; and

(e) draft documents to be filed in court particularly the following: -

  (i) Writ of Summons;

  (ii) Statement of Claim;

  (iii) Originating Summons;

  (iv) Originating Notice of Motion;

  (v) Default Writ of Summons;

  (vi) Ordinary Summons;

  (vii) Affidavit; and

  (viii) Orders.

INTRODUCTION

This course covers Civil and Criminal Procedure in both the High Court and the Subordinate Court. While drawing on substantive law, the course differs from other courses in that it is concerned with procedure. Thus, as much as you will be required to draw on your knowledge of substantive law, you should always bear in mind this is a course on procedure. This course also differs from other courses in that it involves drafting of court documents. The course is divided into 2 Parts: Part I deals with civil Procedure while Part II relates to Criminal Procedure.

THE ZAMBIAN JUDICATURE AND JURISDICTION

One of the important considerations for a litigant is the forum in which to institute proceedings. This requires knowledge of the structure of the court system and the jurisdiction of the respective courts of law. Jurisdiction is concerned with what matters a court or tribunal can inquire into.

The learned authors of 'Words and Phrases Legally Defined' Volume 3, define jurisdiction as ***'the authority which a court has to determine matters that are litigated before to or to take cognizance of matters presented in a formal way for its decision'*** and that ***'the limits of this authority are imposed by statute, charter or commission under which the court is instituted, and may be extended or restricted by the like means'***. Such limitation in jurisdiction may be with regard to the kind and nature of matters of which the particular court has cognizance, or as to the geographical area over which the jurisdiction extends.

In **Zambia National Holdings Limited and United National Independence Party (UNIP) v The Attorney General (1994) S.J. 22(SC),** the Supreme Court observed thus: -

> *'…….The term 'jurisdiction' should first be understood. In one sense, it is the authority which a court has to decide matters that are litigated before it; in another sense, it is the authority which a court has to take*

cognisance of matters presented in a formal way for its decision. The limits of authority of each of the courts in Zambia are stated in the appropriate legislation. Such limits may relate to the kind and nature of the actions and matters over which the particular court has cognisance or to the area over which the jurisdiction extends, or both…'

Article 120 of the Constitution of Zambia (Amendment) Act 2015 provides that the Zambian judiciary shall comprise of superior courts and the following courts: -

(a) Subordinate courts;
(b) Small claims courts;
(c) Local courts; and
(d) Courts, as prescribed.

Superior courts are the High Court, Court of Appeal, Constitutional Court and Supreme Court. The Constitutional Court is equivalent to the Supreme Court (Article 121). The Supreme Court is the final court of appeal on none constitutional matters (save for those matters over which the high court still retains jurisdiction). It hears appeals from the Court of Appeal upon leave to appeal being granted [Article 131(2)] while the Constitutional Court has original and final jurisdiction in constitutional (until Part III is repealed, with the exception of the Bill of Rights) and election matters.

The Court of Appeal hears appeals from the high court except for constitutional matters. The Industrial Relations court is now a division of the High Court (Article 133(2). Under Article 134, the high court has original and unlimited jurisdiction in civil and criminal matters. In the excise of their judicial authority, courts are bound by the principles laid down under Article 118. Students are expected to familiarise with the entire Part VIII of the 2016 amended constitution.

Regarding the high court's 'original and unlimited jurisdiction', the Supreme Court observed in **Zambia National Holdings Limited and United National Independence Party (UNIP) v The Attorney General (1994) S.J. 22(SC): -**

> *'In order to place the word 'unlimited' in Article 94(1) in its proper perspective, the jurisdiction of the high court should be contrasted with those of lesser tribunals and courts whose jurisdiction in a cumulative sense is limited in a variety of ways. For example, the Industrial Relations Court is limited to cases under a single enactment over which the high court has been denied any original jurisdiction. The local courts and subordinate courts are limited as to geographical area of operation, types and sizes of awards and penalties, nature of causes they can entertain and so on. The jurisdiction of the high court, on the other hand, is not so limited; it is unlimited but not limitless since the court must exercise its jurisdiction in accordance with the law. Indeed Article 94(1) must be read as a whole including phrases like 'under the law and such jurisdiction and powers as may be conferred on it by this constitution or any other law'. It is inadmissible to construe the word 'unlimited' in a vacuo and then to proceed to find that a law allegedly limiting the powers of the court is unconstitutional'.*

PART I
CIVIL PROCEDURE

ESTABLISHMENT AND HIERARCHY OF SUBORDINATE COURTS

Subordinate Courts are established under the Subordinate Court Act Cap 27 of the Laws of Zambia (as amended by the Subordinate Courts (Amendment) Act No. 4 of 2018) and comprise of subordinate courts of the first, second and third class. The Subordinate Court of the First Class is presided over by a Chief Resident Magistrate, Principal Resident Magistrate, Senior Resident Magistrate, Resident Magistrate and Magistrate Class I while Subordinate Courts of the Second and Third Class are presided over by Magistrate Class 1 and 2, respectively. The jurisdiction of these magistrate is stipulated under sections 20 – 23 of the Subordinate Courts Act. Section 20 sets out powers of magistrates in civil matters dealing with liquidated claims.

Section 4 of the Subordinate Courts Act stipulates that the jurisdiction of magistrates ordinarily extends to the limits of the districts under which they are constituted. Thus, a magistrate from Ndola cannot come to Kabwe to hear a case without authority from the Chief Justice. Further to section 24, the chief justice has the power to extend the jurisdiction of a magistrate.

Similarly, unlike the High Court, the amounts that can be awarded by the Subordinate Court are limited. As will be seen when we come to criminal procedure, sentencing powers of magistrates are equally limited. The thresholds for awards in civil suits other that receiver of land were recently adjusted upwards by the **Subordinate Court (Amendment) Act No 4 of 2018** as follows: -

(a) Chief Resident Magistrate – K 100, 000;
(b) Principle Resident Magistrate – K 90, 000;

(c) Senior Resident Magistrate – K 70, 000;

(d) Resident Magistrate – K 50, 000;

(e) Magistrate Class I – K 30, 000;

(f) Magistrate Class II – K 25, 000; and

(g) Magistrate Class III – K 20, 000.

In matters concerning recovery of land, the revised thresholds are as follows: -

(a) value of land in question does not exceed K 200, 000;

(b) rent payable does not exceed K 50, 000 per year;

(c) in the case of a subordinate court presided over by a chief resident magistrate, principal or senior resident magistrate, the rent payable not exceeding K 100, 000 per year.

Further, Subordinate Courts lack jurisdiction over the following matters: -

(a) An application for habeas corpus;

(b) Matters relating to validity of a will;

(c) Matters relating to a person's legitimacy;

(d) Matters relating to entitlement to right, duty or office; and

(e) Dissolution of a marriage.

STANDARD HEADING OF COURT DOCUMENT

High Court documents will generally be headed as follows: -

IN THE HIGH COURT FOR ZAMBIA 2015/HP[1]/XXX
AT THE PRINCIPAL[2] REGISTRY
HOLDEN IN LUSAKA
(Civil Jurisdiction)[3]

Between

JAMES BOTA Plaintiff

And

BEN MUTALE Defendant

Similarly, Subordinate Court documents, will be headed as follows: -

IN THE SUBORDINATE COURT OF 2006/SSP[4]/_ _ _ _
THE FIRST CLASS[5] OF THE LUSAKA[6] DISTRICT
HOLDEN AT LUSAKA

Between

JAMES BOTA Plaintiff

And

[1] This will vary depending on the registry. HP is for the principal registry in Lusaka. For a district registry like the Kabwe, HP will be replaced by HK, Ndola by HN, Kitwe by HK and Livingstone by HL.
[2] The principal registry is the one in Lusaka. Those in provincial capitals are referred to as district registries.
[3] The high court has criminal, civil, divorce and constitutional jurisdiction
[4] SSP is Lusaka, SQ is Choma/Mazabuka etc.
[5] May be Second Class or Third Class is the claims are small.
[6] May be Livingstone, Kitwe etc.

BEN MUTALE Defendant

INSTITUTING CIVIL PROCEEDINGS

Civil proceedings may be instituted either in the Subordinate Court or the High Court. Before instituting proceedings, it is advisable to first attempt an out of court settlement (*ex-curia* settlement). In this regard, it is standard practice to first make a demand that the wrong be remedied and that failure to do so would lead to legal proceedings being instituted. Where an out of court settlement fails, the following should be considered: -

(a) **Cause of Action:** the plaintiff should establish the wrong committed in respect of which redress is required. Thus, the remedy being sought should also be clear.

(b) **Who to Sue (Parties)**: The general rule is that only persons at law can be sued. These may be natural or artificial person. Thus, a company can be sued in its own name while a business name, which lacks separate legal personality, will be sued through the proprietor. Similarly, a political party will be sued through its trustees, usually the secretary general, who will be sued in a representative capacity. Infants, for example, will sue through a *next of kin* and defend an action through a '*guardian ad litem*'. For the State, recourse should be had to the State Proceedings Act. The plaintiff should therefore consider the defendant's capacity to be sued. It is essential that the appropriate party is joined to the action.

A party wrongly joined to the action may take out a mis-joinder application while a party seeking to be joined applies through a non-joinder application. A defendant may also take out a third party notice seeking contribution or indemnity from a part not joined to the action. **Read more on representative actions,**

suing of companies, minors and bodies lacking legal capacity and on third party proceedings in the rules.

When obtaining instructions find out from the client in what capacity the client is giving you instructions.

Examples: -

A Personal Representative

Joke Tembo (suing[7] in his capacity as the administrator Plaintiff
Plaintiff of the estate of the late Peter Banda)

John Tembo (suing as a trustee for XYZ Union) Plaintiff

A Sole Proprietor/Firm (Business Name)

Peter Mainza (trading as Mainza and Company) Plaintiff

A Minor - can only sue through an adult person (mother, father, guardian)

Group Action

John Zulu and 99 other Plaintiffs

Note: The list of the parties should be attached.

Joinder of Parties

As indicated above, a party may apply to be joined to an action. The following cases provide guidance as to when a party can be joined to the action. In ***Mike Hamusonde Mweemba v Obote Kasongo and ZISC (2006) ZR 101,*** the Supreme Court held that;

"A Court can order joinder if it appears to the Court or judge that all parties who may be entitled to or claim some share or

[7] or sued if he is the defendant.

interest in the subject matter of a suit or who may be likely to be affected by the result require to be joined'.

In ***Abel Mulenga and Others v Chikumbi (2006) ZR 33***, it was held that;

'***In order for a party to be joined to an action, the party ought to show that they have an interest in the subject matter of the action. The mere fact that the Applicants may have been affected by the decision of the Court does not cloth them with sufficient interest or Locus Standi entitling them to be joined to the dispute'.***

(c) **Forum**: As earlier observed, proceedings should be instituted in the court with jurisdiction.

(d) **Mode of Instituting Proceedings**: Proceedings should be instituted under the appropriate mode. Order VI of the High Court Rules as amended by ***The High Court (Amendment) Rules, Statutory Instrument No. 58 of 2020***, provides for modes of instituting civil proceedings. High Court rules should be read in the light of Statutory Instrument No. 69 of 1998 which was extensively discussed in the case of **Amber *Louise Guest, Milan Trbonic v Beatrice Mulako Mukinga, Attorney General 2010/HP/0344***. In **Amber *Louise Guest, Milan Trbonic v Beatrice Mulako Mukinga, Attorney General 2010/HP/0344***, Matibini J. clarified how the strict position taken in the ***Joseph Jereta Chikuta v Chipata Rural Council (1974) ZR 241, 243*** has evolved in the light of SI No. 69 of 1998.

In the Chikuta case, the appellant sought a declaration that he was still employed by Chipata Rural Council and brought the matter before the court by way of an originating summon. The court held, inter alia:

(i) That there is no choice in the high court where there is a choice between commencing an action by writ of summons or by an originating summons.

(ii) Where any matter is brought to the high court by means of an originating summons when it should have been commenced by writ, the court has no jurisdiction to make any declarations.

However, the effect of the Chikuta case has been modified and watered down as discussed in case of ***Amber Louise Guest, Milan Trbonic v Beatrice Mulako Mukinga, Attorney General 2010/HP/0344.*** On the other hand, guidance has been provided in the case of ***New Plast Industries v The Commissioner of Lands and Attorney General (2001) SCZ Judgement No. 8 of 2001*** to the effect that the mode of commencement is not determined by the remedy sought but rather the relevant law. The Supreme Court held*: 'it is not entirely correct that the mode of any action largely depends on the relief being sought. The correct position is that the relevant statute generally provides the mode of commencement of any action. Thus, where a statute provides for the procedure of commencing an action, a party has no option but to abide by that procedure'.*

In ***Amber Louise Guest, Milan Trbonic v Beatrice Mulako Mukinga, Attorney General 2010/HP/0344***, Matibini also held, *obiter dicta*, that by virtue of Act No. 14 of 2002 which amended section 2 of the English Law (Extent of Application) Act by insertion of paragraph (e), the entire whole of the 1999 edition of the White Book, including cases, had been incorporated in our rules and procedures. He further held that, as such, by statute, Zambian courts are bound to follow all the rules and procedures followed in England as stated in

the 1999 edition of the White Book. Hitherto, the White Book merely filled in gaps in our practice and procedure.

A similar view was taken by the high court (Per Justice Nigel Mutuna) in ***OTK Limited v Amanita Zambia Limited and 3 Others 2005/HPC/0199.*** Justice Mutuna relied on the decision in ***Ruth Kumbi v Robinson Kaleb Zulu, SCZ No. 19 of 2009*** in which the Supreme Court held that following the amendment to section 2 of the English Law (Extent of Application) Act, the entire White Book (1999 Edition) was applicable in Zambia.

The said amendment to the English Law (Extent of Application) Act under Act Number 14 0f 2002, read (insertion of clause (e): -
"(e) the Supreme Court Practice Rules of England in force until 1999, provided that the Civil Court Practice 1999 (The Green Book) of England or any other Civil Court Practice Rules issued after 1999 in England shall not apply to Zambia except in Matrimonial Causes".

Similarly, Act No. 15 of 2002 had amended the Supreme Court Act with the insertion at the end of paragraph (ii) under section 8 of the following words:
"except the Civil Court Practice 1999 (The Green Book) of England or any Civil Court practice rules issued after 1999 in England shall not apply to Zambia unless they related to Matrimonial Causes".

Section 8 previously read: -
"8 The jurisdiction vested in the Court shall, as regards practice and procedure, be exercised in the manner provided by this Act and Rules of Court. Provided that if this Act or Rules of Court do not make provision for any particular point of practice or procedure, the practice and procedure of the Court shall be (i) in relation to criminal matters, as nearly as may in accordance with the law and practice for the time being observed in the Court of Criminal Appeal in England; (ii) in

relation to civil matters, as nearly as may be in accordance with the law and practice for the time being observed in the Court of Appeal in England".

Section 10 of the High Court was equally amended by Act No. 16 of 2002, b the insertion of the following proviso:

"Provided that the Civil Court practice 1999 (The Green Book) of England or any other Civil Court practice rule issued after 1999, in England shall not apply to Zambia unless they relate to Matrimonial Causes".

Section 10 hitherto provided as follows: -
"The jurisdiction vested in the Court shall, as regards practice and procedure, be exercised in the matter provided by this Act, and the Criminal Procedure Code, or by any other written law or by such rules or directions of the Court as may be made under this Act or the said Code or such written law and in default thereof in substantial conformity with eh law and practice for the time being observed in England in the High Court of Justice:"

However, the position has since reverted the pre-2002 amendments, arising from English Law (Extent of Application)(Amendment) Act No. 6 of 2011, the High Court (Amendment) Act No. 7 of 2011 and the Supreme Court(Amendment) Act No. 8 of 2011. Thus, in ***Isaac Lungu v Mbewe Kalikeka Appeal No. 114/2013*, the Supreme Court held:**
…We wish to state that the position as put by Counsel for the appellant is no longer the same with the passing of the ***English Law (Extent of Application)(Amendment) Act No. 6 of 2011****……English practice and procedure rules only apply in so far as there is a lacuna in our rules or practice and procedure. We do not resort to English practice and procedure when our own rules and procedures are clear and comprehensive. In* ***Chikuta v Chipata Rural Council****, we stated at*

page 243 that the practice and procedure in the high court is laid down in the High Court Rules, and that where the same are silent or not comprehensive, recourse should be had to the English White Book.

Further, in ***Ludwig Sondashi v Godfrey Miyanda (1995-1997) ZR 1,*** the Supreme Court held that instead of being dismissed, wrongly commenced proceedings should be treated as if they had been commenced by Writ of Summons. Also refer to article 118 (2)(e) which provides that justice shall be administered without undue regard to procedural technicalities. In ***Henry Kapoko v The People Selected Judgement No. 43 of 2016***, the Constitutional Court opined**;**

> *'Article 118(2)(e) is not intended to do away with existing principles, laws and procedures, even where the same constitute technicalities. It is intended to avoid a situation where a manifest injustice would be done by paying unjustifiable regard to a technicality'.*

More recently, however, in ***Road Transport and Safety Agency v First National Bank Zambia Limited and Josephine Milambo Appeal No. 127/126***, the Supreme Court (Per Mutuna on behalf of Malila and Mambilima) affirmed the ***Chikuta case***, holding that the High Court lacked jurisdiction to entertain a claim against the Appellant as the claim alleged excess or exercise of unauthorised power and sought an order of mandamus, both of which needed to be commenced by judicial review and thus declared the high court judgement, despite finding it sound on the merits, a nullity. The Supreme Court held that the challenge of the exercise of statutory functions by a public officer should be challenged by way of judicial review.

The matter had been commenced by Writ of Summons and the issue was the failure by the Appellant to seek the consent of the First Respondent bank before transferring ownership of a vehicle in which it was the absolute owner. The Supreme Court nonetheless clarified

that the decision did not imply that all actions against statutory bodies or public officers could only be commenced by judicial review. That claims against statutory duty, for instance, could be instituted by civil action in the private law of tort for breach of statutory duty.

In apparent reference to the ***New Plast Industries Case*** (but wrongly quoting Chikuta), the Supreme Court held that the Chikuta case was not bad law in so far as it stated that what determines the mode of commencing an action is the enabling statute and not the claim or endorsement. But then the Court went on to observe at page J 26, *"Because there is no local legislation which prescribes the mode of commencement for judicial review, we are left with no choice but to look at the claim and relief sought in the Court below to determine the appropriateness or otherwise of the process issued and proceedings".*

It was not clear whether the Act in issue provided for a way of instituting proceedings and whether judicial review would still apply had the law provided for a procedure to be followed.

A Writ of Summons could be said to be the default or primary mode by which civil proceedings are instituted. The rest of the modes are only used where they are provided for. The following are the different modes by which civil proceedings may be commenced: -

(a) Originating Summons – applies to matters which under any written law or rules may be disposed of in chambers. Usually, such matters will not involve substantial dispute on the facts. A good example is interpretation of documents. ***Order 30 of the High Court Rules*** stipulates matters that can be disposed of in chambers. An originating summons should be accompanied by an affidavit in support while the defendant responds by filing an affidavit in opposition. It is important to note that originating summons (which originate or 'give birth' to proceedings) are

different from ordinary summons, which institute interlocutory proceedings. Interlocutory proceedings relate to matters that arise in the course of civil proceedings. An example could be an applicant seeking an interlocutory injunction. They could be likened to a 'trial-within-a-trial' in a criminal trial. However, both originating summons and ordinary summons, are accompanied by affidavits. Check the forms appended to the high court and subordinate court rules for templates. Below is an example of an originating summons.

IN THE HIGH COURT FOR ZAMBIA **2010/HP/1216**
AT THE PRINCIPAL REGISTRY
HELD AT LUSAKA
(CIVIL JURISDICTION)

BETWEEN

CHRISTOPHER SINGONGO **PLAINTIFF**

AND

MBUNJI MUBYANA **2ND DEFENDANT**

ORIGINATING SUMMONS PURSUANT TO ORDER VI RULE 2 HIGH COURT RULES CAP 27

LET THE PARTIES concerned attend before the Hounaourable Justice …… on the ….. day of …… at …… hours on the hearing of the plaintiff's application for: -

(a) Interpretation of the Companies Act No. 10 of 2017.

(b) Determination as to whether section 5 of the Companies Act provides for levying of penalties.

(c) Declaration that the Registrar has misapprehended the said section 5 by demanding for penalties.

(d) Costs of and incidental to this application.

Dated the …… day of ……,……. 2019

Drawn by: Messrs P.C Chamber
Plot 5, Leopards Road
LUSAKA
PatrickChibwe@gmail.com
Advocates for the plaintiff

To: The Defendant and Its Advocates
Mwenya Chibiliti Legal Practitioners
Church Road
Mwenyachibiliti@ami.com
LUSAKA

The above summons could also be drafted as shown below, with minor variations.

IN THE HIGH COURT FOR ZAMBIA **2010/HP/1216**
AT THE PRINCIPAL REGISTRY
AT LUSAKA
(CIVIL JURISDICTION)

BETWEEN

CHRISTOPHER SINGONGO **PLAINTIFF**

AND

MBUNJI MUBYANA **2ND DEFENDANT**

ORIGINATING SUMMONS PURSUANT TO ORDER VI RULE 2 HIGH COURT RULES CAP 27

LET THE Defendant within …… days cause appearance to be entered to this summons and by this summons he plaintiff claims against the defendant for the following: -

(a) Interpretation of the Companies Act No. 10 of 2017.

(b) Determination as to whether section 5 of the Companies Act provides for levying of penalties.

(c) Declaration that the Registrar has misapprehended the said section 5 by demanding for penalties.

(d) Costs of and incidental to this application.

Dated the …… day of ……,…… 2019

Drawn by: Messrs P.C Chamber
Plot 5, Leopards Road
LUSAKA
PatrickChibwe@gmail.com
Advocates for the plaintiff

To: The Defendant and Its Advocates
Mwenya Chibiliti Legal Practitioners
Church Road
Mwenyachibiliti@ami.com
LUSAKA

(b) Petition – A petition is only used where it is prescribed. Osborne's Concise dictionary defines a petition as a statement addressed to the crown (state), a court or public officer, setting forth facts on which the petitioner bases a prayer for remedy or relief. An example is a constitutional petition pursuant to Article 128(3) of the Constitution or an electoral petition under the Electoral Act. Other laws providing for petitions include Companies Act (winding up of a company) and the Matrimonial Causes Act (for dissolution of a marriage). A petition may also be accompanied by an affidavit. The defendant responds to a petition by filing an answer. Also read Statutory Instrument No. 156 of 1969;

(c) Originating Notice of Motion – may be used where it is expressly provided for or where no procedure is prescribed e.g. where the law merely states that you can make an application. Examples include Order 53 Rule 5 of the Rules of the Supreme Court of England (White Book) which provides for an application for judicial review, once leave is obtained, to be made by Originating Notice of Motion. Equally, once leave is granted, an application for committal should further to Order 52 of the White Book be made by motion. Similarly, Rule 3 of the Landlord and Tenants (Business Premises) Rules and Rule 3 of the Rent Rule provide for proceedings under the respective statutes to be instituted by Originating Notice of Motion.

An Originating Notice of Motion should also be accompanied by an affidavit while the defendant responds by filing an affidavit in opposition. It is heard in open court (even though most of the evidence is by affidavit). The hearing is in open court on affidavit evidence and the court may call the deponent to court to be cross-examined.

Below is an example of an Originating Notice of Motion for Judicial Review.

In the High Court for Zambia **2019/HP/0005**
At the Principal Registry
At Lusaka
(Civil Jurisdiction)

Between

Christopher Singongo **Plaintiff**

and

Crispin Nchobeyi **Defendant**

ORIGINATING NOTICE OF MOTION FOR JUDICIAL REVIEW PURSUANT TO ORDER 53 r 5 RSC 1999

TAKE NOTICE that pursuant to the leave granted by the Hon. Mumba Malila on the 10th of January 2019, the High Court will be moved on the 10th day of January 2019 at 09 00 hours in the fore noon as counsel may be heard on an application for: -

(a) ……

(b) ……

Dated the ..... day of 2019

Drawn by: Messrs P.C Chamber
Plot 5, Leopards Road
LUSAKA
Advocates for the plaintiff

To: The Defendant and Its Advocates
Messrs. H. K. Ndhlovu Advocates
Plot 5, Ngweshi Road
NDOLA

(d) Default Writ of Summons: This is only available in the subordinate court and only applies to claims for a debt or liquidated damages. It should be accompanied by an affidavit verifying debt and an Admission Defence and Counterclaim. Read more under Order 6 Rule 4 of the Subordinate Court Rules.

(e) Writ of Summons which, as indicated earlier, is the principal mode by which civil proceedings are instituted. A writ of summons involves pleadings. In the high court, it is mandatory for the writ to be accompanied by a statement of claim. The defendant responds or enters appearance to a writ of summons by filing a Memorandum of Appearance accompanied by a defence. A defendant may also file a counter claim. A judgement in default may be entered where a party fails to enter appearance.

In terms of Order VII Rule 2 of the High Court Rules as read together with Statutory Instrument No. 27 of 2012, it is now a requirement for the writ of summons to be endorsed with plaintiff's place of residence, occupation and postal and electronic address. Statutory Instrument No. 27 of 2012 provides that ***'Advocates of a plaintiff suing by an advocate shall endorse upon the writ of summons the physical, postal and electronic address of the plaintiff' .*** In the case of **Standard**

Chartered Bank (Z) Plc v John C. Banda Appeal No. 94/2015 SCZ/8/108/2015, the plaintiff did not endorse the electronic mail. Consequently, the defendant challenged the writ for being irregular. The High Court set aside the writ, resulting in an appeal to the Supreme Court. The Supreme Court noted that rules of court ought to be complied with and a party who breaches them does so at his or her peril. The Court noted its earlier decision in ***Access Bank (Z) Limited v Group Fire/ZCON SCZ/8/52/2014*** in which it reviewed when and when not a party in breach of the rules may be allowed to proceed as if no breach occurred. It then observed: -

'Yet we are alive to the fact that rules should not be used like minefields for parties who make fairly inadvertent mistakes that translate into no tangible prejudice to the other party. If an irregularity can be cured without undue prejudice then it is desirable that such irregularity be put right subject to an order as to costs against the erring party'.

The Supreme Court cited with approval the case of **Leopold Walford (Z) Limited v Unifreight (1985) ZR 203** in which was held thus: -

'As a general rule, breach of a regulatory rule is curable and not fatal, depending upon the nature of the breach and the stage reached in the proceedings'.

Following this review and noting that it had the inherent power to order a party to amend the writ, the Supreme Court then held:

'...A party in beach of the rules should, however, always take the initiative to prompt the court by way of an application before the other party makes its own application to set aside. In this regard, our approach regarding a party in breach of rule – which is curable by an

order following an appropriate application – is the same as that we have adopted in regard to failure to meet set timelines. A party who sits back until there is an application by the innocent party to set aside process does so at his or her own peril……In case of breach of rules that do not result in real or serious prejudice or negative consequences to any party, the court does surely retain the discretion always as to what order would best meet the justice of the situation…..

In this case, the Supreme Court had gone ahead to set aside the High Court Order which set the Writ of Summons aside for irregularity for its omission of the plaintiff's address.

The following are noteworthy in relation to a default judgement: -

(i) It is entered on account of defendant's failure to enter appearance

(ii) It requires proof of service

(iii) In high court, it can also be entered an account of failure to file a defence

(iv) It is entered upon filing affidavit showing due services of writ and acknowledgement

(v) May be set aside if defendant shows that his action has merit and explains how default occurred

(vi) But must have 'a real prospect of success' and 'carry a degree of conviction'.

Where there are irregularities with a writ, a defendant may enter conditional appearance by inscribed the words 'Enter Conditional' on the Memorandum of Appearance. The condition is that an application is made to rectify the irregularity with the stipulated period.

Steps in Action Commenced by Writ

An action instituted by Writ and Statement of Claim will generally go through the following steps: -

(a) **Step One:** File, uplift and serve the **Writ, Statement of Claim** and other accompanying documents on the defendant.

(b) **Step Two:** the defendant files in a **Memorandum of Appearance** (conditional or unconditional), Defence (and possibly a counterclaim on the plaintiff) and other accompanying documents.

(c) **Step Three:** The Plaintiff files a **Reply** (and possibly a defence to any counterclaim).

(d) **Step Four:** Prepare the Bundles of Pleadings (containing Writ, Statement of Claim, Defence, Reply etc.) and Bundles of Documents (e.g. letters etc.). Both bundles have an index with page numbers.

(e) **Step Five:** Draft the request for setting down the action for trail and file with the bundles of pleadings and documents.

(f) **Step Six:** Court will set a hearing date.

A Writ of Summons involves pleadings and is accompanied by a statement of claim.

Failure to Defend

The Supreme Court has held in several cases that failure by a defendant to defend an action does not entail that a plaintiff should automatically succeed, that the plaintiff should still

prove his case. This was the position the Court took in ***Khalid Mohamed v The Attorney General (1982) Z.R. 49*** and ***Clifford Kananja v CNMC Luanshya Copper Mines PLC Appeal No. 96/2015 SCZ/8/202/2014***. Equally, the Supreme Court has taken the view evidence should be adduced of the relief sought.

Students are expected to know how to draft documents relating to the various modes of instituting proceedings, including accompanying documents and documents filed in response to a suit. In particular, students should know how to draft a Writ of Summons, memorandum of appearance, Statement of Claim and a defence. MORE ESPECIALLY, STUDENTS ARE ENCOURAGED TO PRACTICE HOW TO DRAFT A STATEMENT OF CLAIM AND REVIEWING AS MANY SUCH STATEMENTS AS POSSIBLE.

Students are further implored to read on the lifespan of a writ and a concurrent writ in the high court and subordinate court rules. A key element of the writ is the endorsement of the claim and testing in the name of the chief justice. Further, the high court rules make it mandatory that a writ lodged in the high court be accompanied by a statement of claim.

Students are equally expected to know how to draft an affidavit. Affidavits mostly accompany interlocutory applications. Interlocutory applications may take the form of a motion or a summons. Ensure that you know how to draft these as well.

Where you are the party being sued, it is important to defend the action or risk judgement in default being entered.

PLEADINGS

Pleadings are documents exchanged by the parties to an action which set out the claims made and the defences raised by the parties thereby clarifying the questions of law and fact in issue.The purpose of pleadings is to clearly ascertain the controversy between the parties, that is, the matters to which the plaintiff is seeking relief and the nature of the dispute, as the defendant is entitled to know what it is that the plaintiff is alleging against the defendant. Pleadings are essential as they set the boundaries for a case. Pleadings include the statement of claim, the defence, counterclaim, defence to counterclaim and reply. There are also pleadings that can be served subsequent to reply and defence, namely, rejoinder by defendant, surre joinder by plaintiff, rebutter by defendant, surrebuttal by plaintiff.

The essence of pleadings was clarified in the case of **William David Wise v E.F. Hervey Ltd (1985) ZR 179** in which it was held thus: -

(a) Pleadings serve the useful purpose of defining the issues of fact and law to be decided;

(b) They give each party distinct notice of the case intended to be set up by the other; and they provide a brief summary of each party's case from which the nature of the claim and defence may be easily apprehended;

(c) A cause of action is disclosed only when a factual situation is alleged which contains facts upon which a party can attach liability to the other or upon which he can establish a right or an entitlement to a judgement in his favour.

Study the high court rules on the lifespan of a Writ and a Concurrent Writ.

Statement of Claim

A statement of claim is an example of a pleading which is very critical in proceedings instituted by Writ of Summons. The following are noteworthy in relation to a statement of a claim as a pleading: -

(a) A statement of claim must contain material facts. Material facts have been defined as facts that are necessary in formulating a complete cause of action. Facts may be material in so far as they demonstrate the wrong committed or the injury suffered, thus the extent of condensation required. What determines material facts is the cause of action. Thus, if you are alleging negligence, materials facts will be those that show that a duty of care was owed, breached and that as a result of the breach, injury was suffered.

(b) Paragraphs on a statement of claim and other pleadings must be concise. A statement of claim, in particular, should be written in short, clear paragraphs as the intention is to notify the defendant what wrong he is alleged to have committed. Thus, it should contain particulars sufficient for the defendant to defend himself/herself. For instance, where negligence leading to injury is alleged, the plaintiff should give particulars of how the defendant was negligent and the injury suffered. The latter is critical in assessing damages. For example, where the negligence relates to driving, particulars of negligence could be talking on the phone, failing to look out for oncoming traffic, or over speeding while particulars of the injury could be broken left leg, fracture of the collar bone etc. Further, students

should note that statements of claim for particular applications, may be unique. An example is one for defamation.

(c) More importantly, pleadings must disclose a cause of action. The Osborne's Concise Law Dictionary (8th Edition) defines a cause of action as a fact or combination of facts which gives rise to a right of action. It is essentially the wrong you are alleging. Such a wrong will be one recognized in law - this could be in the law of torts, contract or other branches of law Refer to **William David Wise v E.F. Hervey Ltd** as to when a statement of claim is said to have been disclosed. A statement of claim that does not disclose a cause of action cannot stand.

The test for a good pleading is: "By reading the pleading, can the reader have a clear conception of the case being put before the court? In **Christopher Lubasi Mudia v Sentor Motors Limited (1982) Z.R. 66**. Justice Chirwa observed:

'Where the pleadings are at variance with the evidence adduced in court, the case fails since the plaintiffs case is completely recast without actual amendment of the statement of claim, and not only will the court record be incorrect as a reference thereafter but the other party will be unable to meet the case having had no correct notice'.

(d) The general layout of the statement of claim is that it starts with a description of the parties, followed by the alleged wrong doing, the injury suffered and then the prayer. The parties should be described in the context of the legal suite. The paragraphs should be numbered consecutively. The prayer, which reads, 'AND the plaintiff claims for' is not numbered. T

(CIVIL JURISDICTION)

BETWEEN

CHRISTOPHER SINGONGO **PLAINTIFF**

AND

ATTORNEY GENERAL **1ST DEFENDANT**

CRISPIN NCHOBEYI **2ND DEFENDANT**

STATEMENT OF CLAIM

---

1. The plaintiff is and was at material times a student at University of Lusaka.

2. The 1st Defendant is sued pursuant to the provisions of the State Proceedings Act Chapter 71 of the Laws of Zambia.

3. The 2nd Defendant was at the material time a police officer serving in the Zambia police service holding the rang of inspector.

4. On or about 20th January 2019, the Plaintiff was apprehended and assaulted by the 1st Defendant.

5. The Plaintiff was thereafter detained, initially for three days at the University Teaching Hospital where he was hospitalised as a result of the aforesaid assault and then for a further three days at Chambokaila prison.

6. The Plaintiff was thereafter released without charge.

7. By reason of the foregoing, the plaintiff has suffered personal injury, loss, pain, humiliation, consequential loss and expense.

Particulars of Injury
(a) Fractured left leg
(b) Broken right arm
(c) Loss of consciousness

Particulars of Special Damage
(a) Medical expense - K 5, 000
(b) Loss of business – K 6, 000

AND the plaintiff claims for:
(i) Damages
(ii) Special damages

(iii) Any other relief that the Court may deem appropriate
(iv) Costs

Dated the …… day of …… 2019

Drawn by: Messrs P.C Chamber
Plot 5, Leopards Road
LUSAKA
Advocates for the plaintiff

To: The 1ST Defendant
Attorney General's Chambers
Church Road
LUSAKA

The 2ndDefendant and Its Advocates
Messrs. H. K. Ndhlovu Advocates
Plot 5, Ngweshi Road
NDOLA

In an exam question requesting for a statement of claim to be drafted, the statement of claim should accurately reflect the following:

(a) The particulars of the court and reflect cause number
(b) Parties and caption
(c) Start with a description of parties
(d) Then state the wrong committed - Cause of action
(e) Thereafter indicate injury suffered, including consequential loss, where applicable
(f) Remedies, including special damages, where applicable
(g) Dated
(h) Party drawing the document and to whom addressed.

Students are urged to familiarise themselves with special damages. Unlike general damages which relate to injury that is reasonably foreseeable, special damages should be expressly pleaded for. Special damages arise from consequential loss – loss which was not foreseeable but is nonetheless a consequence of the injury suffered e.g. loss of earnings or medical bills on account of injury suffered.

CONSOLIDATION OF CAUSES

To avoid multiplicity of actions, two or more actions may be consolidated into one provided the parties are the same, there are common questions of law or fact and the respective reliefs arise out of the same transaction or series of transactions**.**

Rationale: If tried by two different courts, there is the possibility of having two different or conflicting judgments. There must be an order by a magistrate or judge consolidating the two matters. Usually the person filing first will be the plaintiff in the consolidated action and the other party the defendant. A defendant with a claim against the plaintiff should file a counterclaim to avoid commencing a separate action which would lead to multiplicity of actions. [Note: the defendant's counterclaim is a separate cause of action from the plaintiff's claim and the defendant can win his counterclaim even if the plaintiff loses his claim].

In ***Development Bank of Zambia and KPMG Peat Marwick v Sunvest Limited and Sun Pharmaceuticals Limited (1995 – 97) ZR 187***, the Supreme Court held that a multiplicity of actions occurs when the same parties litigate the same subject matter before different courts. In this case, the court disapproved of multiple actions between the same parties, over the same set of facts and advised parties to raise whatever issues they wished to raise, between them, in one action. In the case of ***Kelvin Hang'andu & Company v Webby Mulubisha (2008) ZR 82 Vol 2***, it was held:

'Once a matter is before court in whatever place, if that process is properly before it, the court should be the sole court to adjudicate all issues involved, all interested parties have an obligation to bring all issues in that matter before that particular court'.

The Supreme Court had also held in ***Rosalyn Mukelabai and Mongu Meat Corporation Ltd (2003) ZLR*** that common questions of law or fact and rights or relief arising out of the same transaction should be consolidated into one action. Further, in ***BP Zambia Plc v Interlard Motors Limited (SCZ Judgement No. 8 of 2003)***, the supreme stated: -

'A party in dispute with another over a particular subject should not be allowed to deploy his grievances piece meal in scattered litigation and keep on hauling the same opponent over the same matter before various Courts. The administration of Justice would be brought in disrepute if a party managed to get conflicting decisions which undermine each other from two or more different judges over the same subject matter'.

Read more on consolidation of actions in the rules.

SERVICE OF PROCESS

Refer to Order 7 SCR and Order 10 HCR. It is essential that court documents are served in accordance with the laid down rules. Proper service is 'personal service' i.e. serving the documents on the person. Where this is not possible, leave of court should be sought to serve by substituted service. The application is made by summon accompanied by affidavit.

As a general rule, any person is capable of serving documents on a defendant or respondent. An advocate or his legal assistant tin the law firm can serve as can the client. The court bailiff can be asked to serve the process at a fee. The Sub-ordinate Court rules require that the person effecting service to explain the contents of the documents he is serving to the defendant, see r.1(2). Once served it is a legal requirement that an affidavit of service should be filed into court as proof of service. It is advisable that the person on whom the documents are served engrosses the documents (i.e. signs them) and puts on the date of service.

In case the defendant is an individual and the document is a writ or default writ of summons, the documents must be personally handed to the defendant who must acknowledge service by appending signature to the file copy of the document. If personal service on the defendant is not possible, it is permissible to leave the document with any other person who resides with the defendant. The person so receiving must also acknowledge service by

engrossing the file copy. If the defendant refuses to accept service, throw the documents at his feet and in an affidavit state that this happened.

If the defendant is a Limited Liability Co. service should be at the registered office or principal place of business - details can be found at the Company Registry. [Note e.g. if serving on ZANACO you cannot serve at any branch.] Service on a partnership is effected by service on any one of the partners (r.9). Service on a prisoner or one in an asylum – service is on the O-i-C. (r.10). Time of service - between 6 and 18 hours, Monday to Saturday but not on a Sunday, Good Friday or Christmas Day.

Substituted Service

If the address of the defendant is unknown, the plaintiff can apply for leave from court (*ex parte* application by summons with a supporting affidavit where you must explain the efforts made to serve personally and why you are now applying to serve by advertisements) to effect service by any of the following ways:

(a) Advertising in a Newspaper that is in circulation in the area where the defendant is living or working. You need to draft a summary of the case – Times of Zambia calls it a legal notice - notifying the defendant that he has a case at court and give a brief summary of the case against him. Note: you cannot advertise on the TV or radio. No special provision for substituted service by advert in a paper on a blind person.

(b) Registered Post/DHL/UPS - only possible if the P.O. Box of the defendant is known. The letter must be clearly marked "registered mail". You should obtain a receipt from the PO indicating that you delivered a registered letter to the PO for delivery to the defendant. You can also serve by DHL or UPS and in the summons you should indicate that you intend to serve by DHL or UPS. I.e. ….. on the hearing of an application on the part of the plaintiff for leave to serve

writ by DHL (or registered mail, or by advertising once in the Times of Zambia as the case may be).

Along with the summons and the affidavit you need to draft an Order for the magistrate to sign once he gives you leave to serve by substituted service.

If the defendant lives outside Zambia, you need to file a special application to serve the documents outside jurisdiction, even if you know the physical address of the defendant.

Proof of Service

No adverse action shall be taken against a party on account of default of appearance or takin any required action unless proof of service is shown. Proof of service will generally be made through an affidavit of service. In ***Patmat Legal Practitioners (Sued as a Firm) and Chipo Zyamwaika Mudenda Ndele and 2 Others, Appeal No. 68/2015, SCZ 62 of 2017***, a judgement of the Industrial Relations Court, entered following the non-attendance of the Appellant and 3rd Respondents, was set aside due to lack of proof that they had been served the notice of hearing. The Supreme Court held: -

'***The Court should have asked for proof that the notice had in fact been served on the Appellant and the 3rd Respondents. This could have been done by, for instance, filing an affidavit of servicer some other evidence of acknowledgement of receipt of the notice. In the absence of proof of service, we hold that the lower court misdirected itself when it proceeded to hear the matter in the absence of the Appellant'.***

The Supreme Court further held: -

'Applying our decision in the case of John R. Ng'andu (1988 – 1989) ZR 197 and taking a leaf from Lord Denning's Judgement in the case of R v Appeal Committee of County of London Quarter Session, Ex

Parte Rossi (1956) 1 ALL ER 670, we hold that in the instant case, in the absence of proof of service of the notice of hearing for the 3rd September 2014, the lower court should have given the case a fresh date of hearing and ordered service, and proof of service of the notice of hearing for the fresh date. We, accordingly, hold that the lower court misdirected itself when it proceeded to hear the matter in the absence of proof that the Appellant had been notified of the date of bearing'.

INTERLOCUTORY PROCEEDINGS

Several applications may be made after commencement of process and before judgement. Such applications are referred to as interlocutory or chamber applications as they are often head in chambers while the proceedings are interlocutory proceedings. They are proceedings incidental to the settlement of the principle dispute.

An interlocutory application may be made by ordinary summons accompanied by affidavit or made orally by motion. It may be made *ex-partes*, in which case the court renders its decision upon hearing only one party or *inter partes*. Where the summons is *ex-partes*, this will be indicated in the caption. Otherwise, it is an *interpartes* summons. Unlike an *ex-partes* summons, an *inter-partes* summons need not be qualified with the words *inter-partes* in the caption.

Ordinary Summons

An ordinary summons is different from an originating summons which institutes court proceedings. An example of an interlocutory application is an a summons for interim attachment of property. The caption in the summons should indicate what the summon sis for and the authority,

pursuant to which it is made. Below is an example of an *ex-partes* summons for interim attachment of property.

IN THE HIGH COURT FOR ZAMBIA **2010/HP/1216**
AT THE PRINCIPAL REGISTRY
AT LUSAKA
(CIVIL JURISDICTION)

BETWEEN

CHRISTOPHER SINGONGO **PLAINTIFF**

AND

MBUNJI MUBYANA **2ND DEFENDANT**

EX-PARTE SUMMONS FOR AN ORDER FOR INTERIM ATTACHMENT OF PROPERTY PURSUANT TO ORDER XXVI RULE 1 OF THE HIGH COURT RULES CAP 27

LET COUNSEL for the Plaintiff attend before the Honourable Judge Mr/Mrs/Ms (or Mr/Madam) ..... in chambers on the ..... day of ..... 2019 at ..... hours in the ..... noon or soon thereafter on the hearing of an application on the part of the Plaintiff for an order that the defendant's movable property namely a Deep Freezer and Range Rover Registration Number BAD 400 with a total estimated value of K 1, 200 be attached pending determination of summons for an order directing the defendant to show cause why they should not furnish security to fulfil any decree that may be given against the said defendant by this Honorable Court.

Dated the ..... day of ....., ... 2019

Drawn by: Messrs P.C Chamber
Plot 5, Leopards Road
LUSAKA
Advocates for the plaintiff

To: The Defendant and Its Advocates
Mwenya Chibiliti Legal Practitioners
Church Road
LUSAKA

Further, Order 53 Rule 8 of the High Court Rules requires that an interlocutory application be accompanied by skeleton arguments, stating the facts, law and authorities relied upon with copes of such authorities, where possible. In ***Bellamona v Ligure Lombarda Limited (1976) ZR 267 (SC)***, the Supreme Court held:

'***It is always necessary, on the making of an application for the summons or notice of application to contain a reference to the Order or rule or other authority under which the relief is sought'.***

Motion

A mere motion, like an ordinary summons, is different from an originating motion. The word motion refers to an oral application made to a judge in open court. Applications by motion will often also be preceded by a notice of motion accompanied by affidavit. Motions could relate to several different matters, including a motion to adjourn or, like in the example below, to raise a preliminary issue.

IN THE HIGH COURT FOR ZAMBIA **2016/HPA/036**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

IN THE MATTER OF THE COMPANIES ACT CHAPTER 388 OF THE LAWS OF ZAMBIA AND IN THE MATTER OF AN APPEAL FROM THE REGISTRAR AND CHIEF EXECUTIVE OFFICER OF THE PATENTS AND COMPANIES REGISTRATAION AGENCY

BETWEEN

TAHER AMMAR MOHAMED KHALIL **1st APPELLANT**

CLEMENT WONANI **2nd APPELLANT**

AND

REGISTRAR AND CHIEF EXECUTIVE OFFICER OF THE PATENTS AND COMPANIES REGISTRATION AGENCY **RESPONDENT**

NOTICE OF INTENTION TO RAISE PRELIMINARY ISSUE PRUSUANT TO ORDER 14A RULE 1 OF THE RULES OF THE SUPREME COURT OF ENGLAND (1999) EDITION

TAKE NOTICE that at the hearing of this matter, the Respondent intends to raise the following preliminary issues for determination by the Court, namely that: -

(a) Whether the Originating Process - 'Notice Originating Motion of Appeal' is the correct mode for invoking section 379 of the Companies Act No. 10 of 2017.

(b) Whether the Registrar and Chief Executive Officer of the Patents and Companies Registration Agency may be sued as a party in the manner employed by the Appellant.

Dated the ..... day of 2016

Drawn by: The Patents and Companies Registration Agency
PACRA House,
LUSAKA

It is common for exam questions to require the drafting of a summons. The summons should reflect:

(a) particulars of the court and cause number;

(b) parties and appropriately captioned – the authority p[pursuant to which the summons is made should be indicated in the captioned. The caption should also indicate what the summons is for e.g. SUMMONS FOR AN INTERIM INJUNCTION PURSUANT TO ORDER ..... ;

(c) indicate particulars of the alleged wrong doing and remedies;

(d) should be dated and indicate the party drawing the document and to whom it is addressed; and

(e) should generally comply with prescribed format including being dated and showing the party drawing it and at whom addressed.

A summons may be *ex-partes* or *inter partes*. Where it is *inter partes*, the captioned will reflect thus: EX-PARTES SUMMONS FOR ….. On the other hand, the words 'INTER-PARTES….' Are not added. Thus, a summons starting merely 'SUMMIONS FOR …. ' is assumed to be an inter partes summons. The word summons is also used interchangeably with 'APPLICATION'. Thus, instead of 'SUMMONS FOR ….', it could read 'AN APPLICATION FOR …..'.

As observed, interlocutory applications often take the form of summons accompanied by affidavit. For example, if you are acting as counsel for the Defendant and the plaintiff has delayed in prosecuting the case, you may apply to dismiss action for want of prosecution by summons as follows: -

HEADING ACCORDING TO THE COURT

SUMMONS TO DISMISS ACTION FOR WANT OF PROSECUTION

LET ALL PARTIES concerned attend before the Honourable Justice ……on the ……. day of ……..2013 at …….hours as counsel for the defendant can be heard on the application to have this action dismissed for want of prosecution [Can add affidavit and costs].

Dated the .. day of …… 2017

Drawn by: Messrs Chintu Legal Chambers
Plot 5 Lubu Road
Lusaka
Advocates for the Defendant

To: The Plaintiff and his advocates
Knneth Muyambango Chambers
Plot No. 4, Addis Ababa Drive
Lusaka

As observed, summons should generally cite the authority. There will be an affidavit in support of this summons. It important to note that in court documents, the physical address is preferable to a postal address as documents have to be served on the person. The person to be serves has to be located.

Examples of Notices that may be filed into Court

As the name suggests, a notice notifies the other party about an issue. It may be a mere notice about some development or a notice of motion. The latter notifies the other party of an intention to move the court. If, for example, a party intends to seek an adjournment at the next hearing, such party may file a notice of motion to adjourn. Similarly, if you have been retained as counsel, you may file a notice of appointment to notify the other party. The notice will be as follows: -

HEADING ACCORDING TO THE COURT

NOTICE OF APPOINTMENT OF ADVOCATES

TAKE NOTICE that the undersigned Advocates have been appointed to have conduct of this action for the Plaintiff.

Dated the day of 2006

ZIALE Chambers
Plot 1234
Church Road
Lusaka

To: the Defendant and his advocates
Lex Chambers
Lubu Road

Lusaka

Notice of Appointment of Advocates - litigant had no advocates but now he appoints you to represent him once the case proceeds. [E.g. if there is more than one plaintiff or more than one defendant, one of which did not initially appoint an advocate to act on is behalf, but is now appointing one.] Notice of Change of Advocates is filed when a new firm is taking over from another firm who is ceasing to act for a particular client. Note: If there was an advocate and now you have been appointed, you can file a Notice of Appointment but this is frowned upon as it introduces ambiguity i.e. if could be that more than one firm has been appointed to work for the litigant rather than on replacing the other. However, if a second firm is being appointed, then it is correct to file a Notice of Appointment and not a Notice of Change.

Second, file a Notice of Intention to Proceed

HEADING ACCORDING TO THE COURT

NOTICE OF INTENTION TO PROCEED

TAKE NOTICE that 30 days hereafter the Plaintiff intends to proceed with his action.

Dated the day of 2006

ZIALE Chambers
Plot 1234
Church Road
Lusaka

To: the Defendant and his advocates
Lex Chambers

Lubu Road
Lusaka

Other Key Interlocutory Proceedings

Third Party Proceedings [O. 12 SCR]

After commencement, the defendant may want to contend that a third party needs to contribute of indemnify him against his liability under the action. Here, the onus is on the defendant (it is not the task of the plaintiff to do so) to join the third party to the action via Third Party proceedings (instituted by Notice - see below) in order for him to obtain that contribution or indemnity. The defendant t must demonstrate that he has a claim against the third party e.g. where he is sued for causing a road accident and he attributes that accident, in part or fully, to a third party. He can apply via Third Party proceedings to have the third party made a defendant in the action if he believes the party is (partially or fully) responsible for the damages claimed, so that he should contribute or indemnify the defendant for the damages due to the plaintiff. .

IN THE SUBORDINATE COURT OF THE FIRST CLASS FOR THE LUSAKA DISTRICT HOLDEN AT LUSAKA — 2006/SSP/0001

BETWEEN

PETER BWALYA	PLAINTIFF
AND	
FRED BANDA	DEFENDANT
JOHN ZULU	THIRD PARTY

THIRD PARTY NOTICE PURSUANT TO ORDER 12 OF SCR

TAKE NOTICE that this action has been brought by the plaintiff against the defendant for payment of K 20 m being damages arising from a road traffic

accident that occurred on 3rd October 2006 and that the defendant claims against you:

(a) That he is entitled to contribution from you to the extent of K 10 m.
(b) ….
(c) …. [SEE Form 66 Schedule 1 SCR]

The grounds of the Plaintiff's claim are:

That you caused the said accident.

AND TAKE NOTICE that if you dispute the plaintiff's claim against the defendant or the defendant's claim against you, you must within five days after service of this notice upon you inclusive of the day of service, deliver to the clerk of the court, by post or otherwise, a defense together with a copy thereof, and appear on the day fixed for the hearing of the action when the plaintiff's claim against the defendant and the defendant's claim against you will be heard and determined.

In default of your appearing on the day of hearing, you will be deemed to admit:

(a) the plaintiff's claim against you (sic) the defendant; and
(b) The defendant's claim against you; and
(c) Your liability to contribute to the extent claimed or indemnify the defendant; and
(d) The defendant's right to the relief or remedy claimed in paragraph © above; and
(e) The validity of any judgment in the action

And you will be bound by the judgment in the action which may be enforced by execution against your goods.

Amending Proceedings [O.15 r.1 SCR]

Process may be amended by the court on its own motion or on application by a party. Almost everything can be amended. Thus, the pleadings can be amended by changing the relief sought, a paragraph in the Statement of Claim or the Defence, correcting an error on the face of a document e.g. the misspelled name of a party. If the pleadings are not amended and the court proceeds to hear the case, the court is likely to render a judgment based on defective pleadings and it is the lawyer's duty to correct such errors. Proper drafting is imperative. The proper way to amend is by way of Summons, but for simple amendments e.g. correcting spelling or errors that do not go to the root of the case, a viva voce application is fine. Note: If counsel notices errors after uplifting the pleadings but before service he can amend by writing "Amended without leave of the Court" in red at the top corner of the pleading in question and doing the amendment, also in red.]

INTERIM INJUNCTIONS

Refer to Order 27 rules 1 to 5 of the HCR. of Cap 27 (i.e. O.27 r. 1 to 5 HCR. Cap 27), Order 23 SCR and Order 29 of the RSC. 1999.

An injunction may be restrictive or mandatory and interim or perpetual. A restraining injunction restrains a party from doing an act mandatory injunction, compels a particular act to be done. Perpetual injunctions include a Mareva injunction and an Anton Pillar Order. In interim injunction is an equitable and thus discretionary remedy granted pending determination of the matter.

Principles Upon which Injunctions are Granting

It is essential to note that an interim injunction is a remedy that both temporary and discretionary. Its objective is to protect the plaintiff against violation of his or her rights which may not be adequately compensated for in damages. The leading case on injunctions is the British case of **American Cynamide Co. v Ethicon Ltd. [1975] AC 396 or [1975] 2 WLR 316.** In that case, the following principles were laid down: -

(a) there is a serious question to be tried;

(b) damages would be adequate compensation to the plaintiff for his interim loss pending trial and, if so, whether the defendant in a position to pay them;

(c) the plaintiff is able to give an undertaking to compensate the defendant for any interim loss suffered pending trial should the injunction be granted, or at the eventual trial if the court finds that the plaintiff was entitled to an injunction;

(d) where the balance of convenience lies should an injunction be granted.

Lord Dilock put it in the following words at page 509: -

"When an application for an interlocutory injunction to restrain a defendant from doing acts alleged to be in violation of the plaintiff's right is made upon contested facts, the decision whether or not to grant an interlocutory injunction has to be taken at a time when ex hypothesi the existence of the right or the violation of it, or both, is uncertain and will remain uncertain until final judgment is given in the action. It was to mitigate the risk of injustice to the plaintiff during the period before that uncertainty could be resolved that the practice arose of granting him relief by way of interlocutory injunction; but since the middle of the 19th century this has been made subject to his undertaking to pay damages to the defendant for any loss sustained by reason of the injunction if it should be held at the trial that the plaintiff had not been entitled to restrain the defendant from doing what he was threatening to do. The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial. The court must weigh one need against another and determine where 'the balance of convenience' lies."

The principles enunciated in the America Cyanamid case have been adopted in Zambia and applied in several cases, foremost amongst which are **Shell and BP (Z) Ltd. v Conidaris & Others [1975] ZR 174** and **Turnkey Properties Limited v Lusaka West Development Co and Others (1984) ZR 85.**

In the **Shell and BP** case, the Supreme Court held, *inter alia*:

(a) A court will not generally grant an interlocutory injunction unless the right to relief is clear and unless the injunction is necessary to protect the plaintiff from irreparable injury; mere inconvenience is not enough. Irreparable injury means "injury which is substantial and can never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired."

(b) Where any doubt exists as to the plaintiff's rights or if the violation of an admitted right is denied the court takes into consideration the balance of convenience to the parties. The burden of showing the greater inconvenience is on the plaintiff.

(c) The rights of the parties in this case being in dispute, and the potential loss to the defendant being far greater than the inconvenience the plaintiff would suffer if left to rely on its remedy in damages, this was not a proper case for the court of an interlocutory injunction."

Similarly, in the case of **Turnkey Properties v Lusaka West Development Company Ltd, B.S.K. Chiti (Sued as Receiver) and Zambia State Insurance Corporations (1984) Z.R. 85** held thus: -

"(i) An interlocutory injunction is appropriate for the preservation or restoration of a particular situation pending trial.

(ii) It is improper for a court hearing an interlocutory application to make comments which may have the effect of pre-empting the decision of the issues which are to be decided on the merits at the trial.

(iii) An interlocutory injunction should not be regarded as a device by which an applicant can attain or create new conditions favourable only to himself.

(iv) In applications for Interlocutory injunctions the possibility of damages being an adequate remedy should always be considered."

In **Moonga Jane Mungaila- Mapiko (Suing on Behalf on the Traditional Council of the Mungalila Royal of Establishment), John Muchabi v Victor Makaba Chande (2010) Z.R. 416 (7),** Justice Patrick Matibini observed thus: -

(a) In an application for an interim injunction, the primary issue to be considered or assessed at the outset is whether or not there is a serious question to be tried.

(b) The requirement that there must be a serious question to be tried comes to the proposition that the claim must not be frivolous or vexatious and must also have some prospects of succeeding.

(c) The question of damages may however not be relevant in a case where they are not the main issue. For instance, where the use or misuse of property rights is in question

In **Hondling Xing Xing Building Company v Zamcapital Enterprises Limited (2010) ZR, Justice Matibini also held thus: -**

'The question of balance of convenience is considered in three stages. First, the governing principle is that of whether the claimant would be adequately compensated by an award, succeeding at the trial, and whether the defendant would be able to pay for the award, no injunction should be granted, in the absence of these, however strong the claimant's case'.

More recently, in the case of **Law Association of Zambia & Another v Ngosa Simbyakula and 63 Others 2016/CC/0011**, the Constitutional Court, quoted with approval the following from Snell's Equity, 29th Edition summing up the principles under which injunctions are granted as laid down by Lord Diplock: -

'(i) The "governing principle" is that if the plaintiff would be adequately compensated by an award of damages if he succeeds at the trial, and the defendant would be able to pay them, no injunction should be granted, however strong the plaintiff's case. In appropriate cases the court may refuse interlocutory relief if the defendant undertakes to keep proper accounts of his receipts from the activity in respect of which the injunction was sought and to pay a proportion of such receipts into court or a joint account.

ii) If the claim survives the previous head, the court must consider whether, if an interlocutory injunction is granted but the defendant succeeds at the trial, the defendant would be adequately compensated in damages which then would have to be paid by the plaintiff and whether the plaintiff would be able to pay those damages. If such damages would be an adequate remedy and the plaintiff would be in a position to pay them, then the defendant's prospects of success at the trial would be no bar to the grant of the injunction."

Also look at the case of **Tommy Mwendalema v Zambia Railways Board (1978) Z.R**. Further, in **Hillary Bernard Mukosa v Michael Ronalson (1993-1994) ZR 26, the court held: -**

"An injunction will only be granted to a plaintiff who establishes that he has a good and arguable claim to the right he seeks to protect".

In ***Meanwood Property Development Corporation Limited v History Makers Zambia Registered Trustees 2017/HP/1135***, the high court declined to grant an injunction on grounds that there was no serious question to be tried. The plaintiff, in its writ of summons, did not allege any wrong doing but merely sought an injunction to restrain construction works. The high court further held that an application for an injunction could not be made in isolation, It was noted thus: -

"..having examined the statement of claim and the affidavits for an order of prohibitory injunction, I have failed to appreciate the basis for this application for an order of prohibitory injunction. I say so because it is trite law that an application for an order of interlocutory injunction is not in itself a cause of action but is dependent on a pre-existing cause of action. Lord Diplock in the case of Siskina (Owners of Cargo Lately Laden on Board) and Others v Distos Compania Naviera (1979) A.C. 210 at 256 put it aptly when he

held that "A right to claim an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court". What this holding means, which I fully subscribe to, is that injunctions are only remedies and should only be granted if the applicant has a substantive cause of action. In other words, an injunction cannot exist in isolation but is incidental to and dependent on the enforcement of a substantive right.

The principles governing injunctions could be summarised as follows:

(a) There must be a serious question of law to be determined in the main action.

(b) The court will look at the balance of convenience between the parties.

(c) The court will consider I\whether damages are a sufficient/adequate remedy (if the party will receive sufficient money in damages as redress, the court will refuse injunction).

(d) The court will consider if the right to relief is clear. I.e. there must be a solid case on which you are basing your case. The case must not be vague.

In summary, the following can be said about interim injunctions: -

(i) An order compelling or restraining some action.

(ii) In an interim relief pending determination of matter and equitable, thus discretionary,

(iii) Instituted by summons accompanies by affidavit and usually accompanied by certificate of urgency and an order.

(iv) There must be a serious question of law to be determined in the main action.

(v) The court will look at the balance of convenience between the parties.

(vi) The court will consider I\whether damages are a sufficient/adequate remedy (if the party will receive sufficient money in damages as redress, the court will refuse injunction).

(vii) The court will consider if the right to relief is clear. I.e. there must be a solid case on which you are basing your case. The case must not be vague.

(viii) **Authorities:** American Cynamide Co. Ethicon Ltd. [1975] AC 396 or [1975] 2 WLR 316. Shell and BP (Z) Ltd. v Conidaris & Others [1975] ZR 174, Turnkey Properties and Lusaka West Development Co. etc.

(ix) Applicant should make an undertaking to pay damages

Refer to the Rules and Dr. Patrick Matibini's article published in Volume 40 of the Zambia Law Journal of 2009 under the title *'The need for the Remedy of an Injunction in the Protection of Fundamental Rights and Freedoms'*.

Applying for an Injunction

The application for an interim injunction is made by summons accompanied by affidavit. It is also standard practice to file an Order to be signed by the Court in the event that the injunction is granted. Considering that injunctions are by nature applications that require urgent action, the

application for an injunction is often accompanied by a certificate of urgency. **Students are should familiarise with how to draft the summons, affidavit, order and certificate of urgency**.

An Order will;

(a) have a statement of the order sought;

(b) have a "**Penal Notice**" i.e. the defendant must be made aware of what he may suffer if he ignores the order; and

(c) must contain an "**undertaking"** i.e. where the party requesting the order undertakes to pay damages if, in the opinion of the court, the injunction ought not to have been applied for.

An order will look like this: -

Heading

Ex Parte Order for an Interim Injunction

UPON HEARING counsel for the plaintiff and UPON READING the affidavit in support of the application and the plaintiff by his counsel having undertaken to pay the defendant damages in the event that the court finds that the injunction ought not to have been granted:

IT IS HEREBY ORDERED that the defendant either by himself, his servants, agents or whosoever be is restrained from evicting the plaintiff from House No. 123 Roma Lusaka until the hearing of the application *inter parte*[8] on the day of 2006 at hours.

Dated this day of 2013

_____

[8] Injunction will not be permanently granted until affording the other side a chance to be heard.

Magistrate

This order was drawn by: MWP Chambers
Lex House
Cairo Rd.
Lusaka
Advocates for the Plaintiff

To: The Defendant[9]
Mr. XYZ
House 123
Roma
Lusaka

Penal Notice

TAKE NOTICE THAT in the event that you the within named defendant and agents or servants elect to disobey this order (or injunction) you will be cited and imprisoned for contempt of court.

An Order of Court should generally reflect the following:

(a) The particulars of the court and reflect cause number
(b) Parties and caption
(c) Provide provision for judge to sign
(d) Undertaking as to damages
(e) To whom directed
(f) Penal notice

It is important to note that the order will vary depending on whether the application was made *inter partes* or *ex-partes*. An *ex-partes* order will generally indicate when the *inter-partes* hearing will take place.

Where an application requires urgent action to be taken, (e.g. an injunction) it is standard practice to also lodge a certificate of urgency. A certificate of

[9] MUST be directed and served on the DEFENDANT personally and NOT his advocates otherwise the Penal Notice will not apply.

urgency is generally lodged by counsel seised with the conduct of a matter. Below is an example of such a certificate.

IN THE HIGH COURT FOR ZAMBIA **2016/HPA/036**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN

TAHER AMMAR MOHAMED KHALIL **1st APPELLANT**

CLEMENT WONANI **2nd APPELLANT**

AND

REGISTRAR AND CHIEF EXECUTIVE OFFICER PATENTS AND COMPANIES REGISTRATION AGENCY **RESPONDENT**

CERTIFICATE OF URGENCY

I, Clavel Hachimama, a Zambian Advocate of Messrs. N. Ngabo Legal Practitioners and Counsel seised with the conduct of this matter on behalf of the Plaintiff hereby certify that this is a matter of extreme urgency and must be heard immediately as the Defendant is about to sell Lot 20/k to unknown people

Dated the ..... day of 2016

Drawn by: Messrs. N. Ngabo Legal Practitioners
1st Floor, Godfrey House
LUSAKA

INTERIM ATTACHMENT OF PROPERTY

Refer to Order 26 of High Court Rules. Interim attachment of property is sometimes confused with interim injunctions. It restrains disposal of property with the aim of obstructing or delaying the execution of order. The objective is to prevent a defendant from disposing off assets that may be relied upon in executing a judgement against him. The property to be attached has to be identified and its value ascertained. The concerned property is only attached upon failure to furnish security. The property is attached pending the determination of the suit. The application is made by summons accompanied by affidavit.

AFFIDAVITS

Affidavits constitute one of the modes for adducing evidence. As already seen, affidavit generally accompany affidavit evidence. In chamber matters, witnesses do not adduce oral evidence, but through affidavits. An affidavit is sworn by a person referred to as the deponent. Apart from the opening paragraph which starts 'I, ……", each and every paragraph of an affidavit is written in the first person and starts with 'That..' Where an affidavit contains exhibits, it will be accompanied by a certificate of exhibits. An affidavit end with a jurat and closes with a 'jacket'.

Jurat

Every affidavit ends with a jurat as shown below".

SWORN by **PETER BWALYA**[10])
At Lusaka this 6th day of)
June 2006)

Before me:_____

Commissioner for Oaths

[10] SWORN and DEPONENT'S NAME in capitals and Bold.

Certificate of Exhibit(s)

Where documents are exhibited to an affidavit, then the affidavit should be accompanied by a certificate of exhibits. A certificate of exhibits looks like this: -

IN THE SUBORDINATE COURT OF THE FIRST CLASS FOR THE LUSAKA DISTRICT HOLDEN AT LUSAKA	2008/SSP/0001
BETWEEN	
PETER BWALYA	PLAINTIFF
AND	
FRED BANDA	DEFENDANT

CERTIFICATE OF EXHIBITS

These are the exhibits referred to in the affidavit of the said Peter Bwalya, marked "PB1" to "PB6"

Dated this day of 2008

Before me: _____

Commissioner for Oaths

ABC and Associates

10th Floor, Nyumba House

Njila Avenue

LUSAKA

Advocates for the Plaintiff

The exhibits will be marked by the initials of the deponent i.e. “PB1”, “PB2”, “PB3” etc. A Certificate of Exhibits is not signed by a deponent but must be commissioned. The Certificate of Exhibits comes after the page that the deponent signs. The last document is called the “jacket”.

Jacket

IN THE SUBORDINATE COURT OF THE FIRST CLASS FOR THE LUSAKA DISTRICT HOLDEN AT LUSAKA — 2008/SSP/0001

BETWEEN

PETER BWALYA — PLAINTIFF

AND

FRED BANDA — DEFENDANT

AFFIDAVIT IN SUPPORT OF .....

ABC and Associates
10th Floor, Nyumba House
Njila Avenue
LUSAKA
Advocates for the Plaintiff

The “jacket” is attached last with it “facing out”.

Rule 19 - if an exhibit is hand written it must be accompanied by a type document which must perfectly correspond with the hand written document. The typed copy must be certified as correct in the affidavit.

ABC and Associates
10th Floor, Nyumba House

Njila Avenue
LUSAKA
Advocates for the Plaintiff

The first four paragraphs and the last paragraph in the affidavit are fairly standards. Students are required to farmiliarise with how an affidavit and a certificate of exhibits are drafted and subordinate or high court rules pertaining to affidavit. Both the High Court and Subordinate Court Rules provide guidance on how affidavits should be drafted.

Under Rule 20 of both Rules:

(a) affidavit to be headed in the court and in the cause or matter. Caption will read e.g. AFFIDAVIT OF SERVICE, AFFIDAVIT IN SUPPORT OF …..

(b) Full name, trade/profession, residence and nationality of the deponent i.e.
The Affidavit will start:

I, Peter Bwalya, of the City and Province of Lusaka in the Republic of Zambia do hereby make OATH[11] and say as follows:

1. That my full names are as stated above.
2. That I reside at Plot No. 1234; Cairo Road, Lusaka as aforesaid.
3. That I am a Zambian national (or a Zambian by nationality).
4. That I am an accountant by profession, employed by Zambia Breweries.

(a) The affidavit must be written in the first person i.e. "I" and in consecutively numbered paragraphs.

[11] OATH in capitals. Can say AFFIRMED is deponent on religious grounds refused to swear.

(b) Alterations, erasures etc. must be attested by the commissioner for oaths. For example: I am a Zambian by nationality

(c) The commissioner may refuse to swear witnesses and require that the affidavit be re-written e.g. if illegible. [But don't as a lawyer draw up an affidavit as such or one with many alterations etc. Do another one!!]

(d) Deponent can mark with his thumb. The commissioner must witness.

(e) Jurat format – the jurat must not be on a separate sheet If the last paragraph of the affidavit is at the end of the page push it to the next so that the jurat appears under it. The jurat must state where and when it was sworn or affirmed. If sworn outside Zambia it must be sworn before a Notary Public (i.e. a lawyer of over ten years who, in Zambia applies to the High Court to be a Notary Public and is appointed as such by the High Court). And not just a Commissioner for Oaths. E.g.

SWORN/AFFIRMED by PETER BWALYA
At Pretoria this 6th day of
June 2006

Before me:_____
Notary Public

A notary public has a "seal" and the affidavit is sealed with this seal.

In summary, an affidavit should reflect: -

(a) Particulars of the court and cause number
(b) Parties and caption
(c) Accurately reflect details of deponent
(d) Capacity of deponent

(e) Start with 'That…'

(f) Possibly exhibit alleged defamatory articles

(g) Should have a jurat; and,

(h) Should generally comply with prescribed rules on affidavits

In summary, the following are noteworthy in relation to affidavit: -

(a) A form of adducing evidence

(b) Sworn statement deposing facts or written statement in the name of a person, called the deponent, by whom it is voluntarily signed and sworn to or affirmed

(c) Option to viva voce evidence

(d) Relied upon in interlocutory applications

(e) Must bear the same name as a Summons

(f) Must state the full name, residential address, nationality and capacity of the deponent

(g) Paragraphs should be numbered and must be written in first person i.e. 'That I reside at …'

(h) Should not contain legal arguments, conclusions etc but rather facts from personal knowledge of the deponent or facts from a named source

(i) Ends with a jurat

(j) Sworn before a commissioner for oaths who has no interest in the matter

(k) May be accompanied by certificate of exhibits and jacket

REVIEW OF JUDGEMENT

A judge or magistrate may review his or her judgement in accordance with the Rules. In ***Lewanika and Others v Chiluba (1998) ZR 79***, the Supreme Court held thus: -

"***Review under Order 39 is a two stage process. First, showing or finding a ground or grounds considered to be sufficient, which then opens the way to the actual review. Review enables the court to put matters right. The provision for review does not exist to afford a dissatisfied litigant the chance to argue for an alteration to bring about a result considered more acceptable'.***

As for the grounds upon which a reviewed judgment may be set aside, it was thus held in Robert Lawrence ***Roy v Chitakata Ranching Company Limited (1980) ZR 198***:

"Setting aside a judgement on fresh evidence will lie on the ground of the discovery of material evidence which would have a material effect upon the decision of the court and has been discovered since the

decision but would not with reasonable diligence have been discovered before".

Relying on the above cases, the Supreme Court held in ***Fearnought Systems Ltd v Fearnought Systems (Z) Limited and Another SCZ/8/018/2015*** that review was a very crucial stage that required the following to be established: -

(a) That fresh evidence has been discovered which would have had a material effect on the judgement or decision;
(b) That evidence has been discovered since the judgement or decision;
(c) That such evidence could not, with due diligence, have bene discovered before; and
(d) That such evidence does not comprise events that have occurred for the first time after delivery of the judgement.

ENFORCEMENT OF JUDGMENTS

Reinforcement of judgment is concerned with the realization of the fruits of one's judgement. After judgement, the successful party becomes the 'judgement creditor' while the losing party becomes the 'judgment debtor'. The mode of enforcement depends on the nature of the judgment made by the court[12].

1. **Writ of Fieri Facias (Writ of Fifa)**

(a) If the judgment is for the **recovery of money** it can be enforced by a writ of Fieri Facias (Fifa) directed to the sheriff and his bailiffs and is executed by the seizure of the defendant's <u>movable</u> assets, except beddings, clothes, pots and plates. The amount of movable assets seized will depend on the amount to be recovered. If it is e.g. K 5m, it would be unreasonable to seize goods worth K 10m.

(b) Once the bailiffs have seized the goods, the sheriff will give the defendant <u>five</u> clear days to pay from the date of seizure. If he does

[12] Note: after judgment is entered the plaintiff must give the defendant three days grace period before he can apply to enforce the judgment.

not, the sheriff will proceed to advertise in the papers and in the advert he will indicate the auction date.

(c) Auction sale is usually done by a government auctioneer and the proceeds of the sale are remitted to the plaintiff's lawyers less the bailiff's commission, which is 15% of the amount realized from the sale. Note: if the defendant pays within five days and before the advert is published, the commission is 2.5% of the amount owed plus interest, if he pays after the advert goes out but before the auction, the sheriff's commission is 7.5% of the amount owed plus interest.

(d) Once the Sheriff has executed a Fifa, his bailiff will render a report indicating how far the execution was effective and if execution failed, the report will still be made and a copy will be sent to the plaintiff's lawyer and a copy sent to the court registry.

2. Writ of Elegit

If the execution of the Fifa fails, and the plaintiff has information that the defendant has immovable property, i.e. a house or warehouse etc. he can proceed to apply for **a writ of elegit.** That enables him to take possession of the property, again through the office of the Sheriff, put the property on rent (note: he cannot sell the property) and get the rents and apply them to extinguishing the judgment debt.

3. **Judgment Summons**

(a) If the defendant has no immovable property, and there is nothing to seize, apply for a **judgment summons** before the same magistrate that entered the judgment.

(b) A judgment summons is supported by an affidavit that discloses/attests that judgment was in favour of the plaintiff in the

sum of K x amount and that execution of the judgment has failed as the defendant has no goods or property worth seizing.

(c) The purpose of the judgment summons is to examine the defendant on oath as to his means, which is done by placing the judgment debtor in the witness box, and the plaintiff's lawyer will cross-examine him as to his capacity to pay the judgment debt. E.g. from his monthly salary in installments, if he is employed.

(d) The Court will proceed to make an attachment order that he pays K x a month until the debt is paid. If the examination shows that he has no capacity or means to liquidate the debt, the plaintiff may proceed to declare him bankrupt (but this will be costly - it is a High Court action with no prospect of any recovery of money) or alternatively the Court may send the defendant to prison for e.g. a week at the plaintiff's expense (as he is sent there to force the defendant to pay to the plaintiff what is owed to him and not by the State upon conviction of a crime), until he indicates how he intends to pay the amount owed. I.e. sent to prison and after a week brought back to court to see if he can make an offer e.g. by getting money from relatives and/or friends.

4. Writ of Possession

(a) This writ is used where judgment is entered for possession of immovable property in the nature of a dwelling house, warehouse, agricultural land or undeveloped land that is on title (or in the process of being on title).

(b) Like a Fifa, this writ is directed to the Sheriff for enforcement or execution that is done by the Sheriff taking physical possession of the property minus the contents. After securing the property (e.g. locking it up), the Sheriff hands it over to the plaintiff and he is then entitled to his commission (of 5% of the current market value

of the property) from the plaintiff. [In practice the plaintiff's lawyers will negotiate with the Sheriff a rough value as using a professional valuer is expensive.]

(c) If the writ is against a dwelling house, the case will usually be:

(i) one where the landlord is trying to regain possession of his property from a tenant e.g. who has defaulted on paying rent; or

(ii) where, in a conveyance of the property, the purchaser has paid the full purchase price but the vendor is refusing to give up vacant possession; or

(iii) bank or other mortgagee is trying to obtain possession in a mortgage action when the mortgagor of the property defaults on paying the amount due to the bank (commenced by an Originating Summons under O. 30 of the HCR in the High Court as the value is invariably above K 30m). In this latter example, the bank will not just take possession but will also proceed to sell the property (a mortgage action is about recovery and sale of land) in order to get back the money owed to it by the mortgagor. The bank will not use the Sheriff to sell, but will advertise in the press for interested parties to bid. There are several SCZ rulings stating that the bank is obliged to sell at the "best price" and as if the property was its own. Thus if the mortgagor owes K 90m and the bank has bids of K 90m, K 120m and K 150 m, the bank is obliged to accept the K 150m and pay the K 60m surplus to the mortgagor.

5. Writ of Delivery

(a) This is not very common. It empowers the Sheriff to deliver movable property from A to B.

(b) The judgment must specifically state that the defendant must surrender a particular item to the plaintiff. If so, the plaintiff can use a writ of delivery to enforce this judgment.

6. Charging Order

(a) If the judgment is to recover a debt and the defendant has no goods or means but has a house, instead of issuing a writ of eligit, the plaintiff can apply for a charging order that creates an interest in the defendant's property and once created means that the defendant cannot dispose of his property without first taking care of the interest of the plaintiff.

(b) A charging order can also be used in relation to shares held by a defendant in a company.

7. Garnishee Order

(a) Three parties, the plaintiff, defendant and a third party who owes or holds money for the defendant.

(b) The plaintiff will first apply for a garnishee order nisi which requires the third party to show cause why a garnishee order absolute should not be issued.

(c) A garnishee order nisi is applied for by way of summons to show cause why a garnishee order absolute should not be issued. [E.g. the bank may say that the defendant's account is in the red or has been closed.] If the bank confirms that the defendant holds an account that has sufficient funds, the court will make the garnishee order absolute. The bank will than pay to the plaintiff the amount of the order.

(d) The defendant has no role to play in these proceedings. He is not allowed to swear any affidavit that he has no funds in the bank - no collusion between the bank and the defendant is allowed.

(e) However, the plaintiff cannot go "fishing" and he must disclose the account number in which the defendant's money is kept. How he gets this number is up to him. The plaintiff must establish that the defendant is a creditor of the third party (usually a bank).

8. Committal Proceedings

(a) These are common in matters where Government is involved, as a plaintiff cannot issue a writ of Fifa against government property. Even if the Government consents but then does nothing, a Fifa or charging order cannot be obtained.

(b) However, you can recover the money by citing the Secretary to the Treasury for contempt. He may be thrown into prison until the debt is paid as the Government budget under the line item "Compensation and Awards" is supposed to budget for these judgments made against Government.

<u>Office of the Sheriff</u>

See Cap 37 of the Laws of Zambia

The Sheriff of Zambia is a civil servant who is appointed by the Judicial Service Commission. Below the Sheriff is the Deputy Sheriff - also a civil servant and both are based in Lusaka. At district level there are under-sheriffs, below who are the court bailiffs. The main duties of the Sheriff of Zambia and his officers are:

(a) to assist courts enforce their judgments; and

(b) To serve court documents e.g. writs of summons (but not documents served for interlocutory applications e.g. an interpleader or summons to set aside).

In summary, the following are noteworthy about enforcement of judgements.

(i) Concerned with enjoyment of fruits of judgement oe execution of a judgement

(ii) Enforcement method will depend on the nature of judgement e.g. 'money judgement' will be enforced differently from say one for delivery of goods.

(iii) Applies where judgment debtor does not comply with judgment

(ii) Nature of enforcement dependent largely on type of judgement e.g. money judgement or money for delivery of item

(iii) Modes of enforcement include writ of fieri farcias (fifa), writ of elegit, attachment of debts (garnishee proceedings), attachment of earnings and judgment summons.

Students can also read an article by Justice Mumba Malila in an article entitled 'Mocking the Successful Litigant: Legally Sanctioned of Denial of the Fruits Judgement in Zambia' publishes in Volume 37 of the 2005 Zambia Law Journal

COSTS

Refer to Order 40 HCR and Order 39 SCR. Costs are expenses incurred in prosecuting a matter. The award of costs lies in the discretion of the court. Usually, the court will award costs and left to be agreed by the parties, taxed in default of agreement. Taxation entails working out the costs payable to the party awarded costs. It is undertaken by a court official (usually the Deputy Registrar in the High Court).

Where the court decides that costs follow the event, it means that costs will be borne by the person who is unsuccessful in the action. Where a party considers that he risks not being paid costs in the event that they are awarded, such as where the plaintiff resides outside jurisdiction, one may apply for security of costs. **Read on the factors taken into account when granting security for costs in *Isaac Lungu v Mbewe Kalikeka Appeal No. 114/2013***

In summary, the following should be noted in relation to costs: -

(i) What are costs – expenses incurred in prosecuting case

(ii) Can be awarded at any stage of the proceedings

(iii) Award of costs Discretionary and not as a matter of right through as a general rule, are awarded to successful party

(iv) Costs in the cause

(v) Plaintiff's/defendant's costs in the cause

(vi) Plaintiff's/defendant's costs in any event

(vii) Dismissal with costs

(viii) No order as to costs

(ix) Security for costs

(x) Taxation of costs

APPEALS

An aggrieved party may appeal against Judgement or Ruling by filing a Memorandum of Appeal. The Memorandum should state the grounds of appeal. An appeal may be on a point of law or fact or mixed law and fact. It is essential to note that further to Rule 58 of the Supreme Court Rules, a party cannot introduce grounds of appeal not included in the Memorandum of Appeal. For instance, in ***Clifford Kananja v CNMC Luanshya Copper Mines Appeal No. 96/2015 SCZ/8/202/2014***, the Supreme Court declined to consider grounds that were later introduced. The Court further noted, in this case, that it had the power to dismiss an appeal on grounds of non-compliance with the Rules.

As a general rule, an appellate court will not reverse findings of fact. In ***Ndongo v Mulyango and Another (2011) ZR Volume 1 187*** the Supreme Court opined: -

"An appellate court will not reverse findings of fact made by a trial judge unless it is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapplication of facts, or that they were findings which on proper view of the evidence, no trial court acting correctly can reasonably make".

Similarly, in ***Nkhata and Others v Attorney General (1966) ZR 124***, the Supreme Court had held:

"The findings of a trial judge sitting alone without a jury can only be reversed on fact, when it has been positively demonstrated to the appellate court that:

(a) By reason of some non-direction of misdirection of otherwise, the judge erred in accepting the evidence which he did accept;

(b) in assessing and evaluating the evidence, the judge has taken into account some matter which he ought not to have taken into account or has failed to take into account some matter which he ought to have taken into account;

(c) it unmistakably appears from the evidence itself or from the unsatisfactory reasons given by the judge for accepting it, that he could have not taken proper advantage of his having seen and heard the witness; or

(d) in so far as the judge has relied on manner and demeanour, there are other circumstances which indicate that the evidence of the witness which he accepted is not credible as for instance, where those witnesses have on some collateral matter deliberately given an untrue answer'.

Guided by the above cases, the Supreme Court in ***Charles Mutemwa v Nkosi Hlazo Appeal No. 212/2015*** declined to overturn a judgement of the high court._Further, an appellant is not allowed to raise new issues on appeal. In ***Victor Kampamba Mulenga v Zambia China Mulungushi Textiles Joint Venture Limited and Another Appeal No. 219/2016,*** the Supreme Court observed:

"In the case of Antonio Ventriaglia, Manuela Ventriaglia v Eastern and Southern Trade and Development Bank (2010) ZR 486 (SC) we did hold that, a party cannot raise on appeal for the first time, matters that were not placed before the trial court. This rationale holds true to the situation now at hand, in the present appeal, where the appellant sought to raise before the District Registrar, the issue of a house that was neither part pf the grounds of appeal from the trial court, the subject of our judgements on the merits dated 12th September 2013".

PART II
CRIMINAL PROCEDURE

1. JURISDICTION OF THE COURTS

A. The courts (Criminal Jurisdiction) their functions, Jurisdiction and Power

B. The term jurisdiction refers to the authority of a court to:

- Accept one to present a case before it
- To decide on maters presented before it

- and in Zambia it is set out in the legislation establishing the court; **MIYANDA V THE HIGH COURT 1984 ZR 62**

- **Section 5 Penal Code cap 87-** court's jurisdiction extends to every place in Zambia
- **Section 6 Penal Code -** also have extraterritorial jurisdiction where:
    - Subsection (1) A Zambian does something which is a crime in Zambia - **NGATI AND OTHERS V THE PEOPLE 2003 ZR 100**
    - Subsection (2) nationals who partly commit the offence in Zambia - **THE PEOPLE V ROXBURGH 1972 ZR 31**
    - **LIPIMILE AND ANOTHER v MPULUNGU HABOUR MANAGEMENT 2008 ZR 252**
    - Subsection (3) cannot be tried if convicted or acquitted

- **Section 14 PC–** criminal responsibility;
    - Below 8 years old (absolute),
    - Between 8 and 12 years responsible if shown that he knew that he ought not to do the act or make the omission
    - Person under the age of 12 years presumed to be incapable of having carnal knowledge

- **Section 20 PC-**person not to be prosecuted twice except where death occurs

C. Three main courts

- Established by provisions of constitution and acts of parliament
- The Subordinate Court- chapter 28

- The High Court-chapter 27
- The Supreme Court-chapter 25
- Some criminal cases
    - in local courts and
    - courts martial -chapter 106: defence act

D. SUBORDINATE COURTS

- Set out by Article 91(1)(d) of Constitution
- Established by the Subordinate Courts Act Chapter 28
- Established by **section 3**-
- There shall be and are hereby constituted courts subordinate to the High Court in each **District** as follows:
    - Subordinate Court of the **first class** to be presided over by a principal resident magistrate, a senior resident magistrate, resident magistrate or a magistrate of the first class;
    - Subordinate Court of the **second class** to be presided over by a magistrate of the second class;
    - Subordinate Court of the third class to be presided over by a magistrate of the **third class**.

- **Section 7** Subordinate Courts Act-magistrates equal power, authority and jurisdiction,

- **Section 7 of the CPC** providing for sentence as follows;

Subject to the other provisions of this Code, a subordinate court of the first, second or third class may try any offence under the Penal Code or any other written law, and may pass any sentence or make any other order authorised by the Penal Code or any other written law:

- a senior resident magistrate shall not impose any sentence of imprisonment exceeding a term of **nine years;**
- resident magistrate shall not impose any sentence of imprisonment exceeding a term of **seven years**;

- magistrate of the first class shall not impose any sentence of imprisonment exceeding a term of **five years**;
- Magistrate of the second and third class, shall not impose any sentence of imprisonment exceeding a term of **three years**.

- **Section 9 CPC –**sentences requiring confirmation by High Court
  - first class (other than a Senior Resident Magistrate or a Resident Magistrate) exceeding two years' imprisonment with or without hard labour shall be carried into effect in respect of the excess and a fine exceeding three thousand penalty units, or imprisonment in default thereof (can levy without confirmation by the High Court; but such court shall immediately transmit)

  - No sentence imposed by a subordinate court of the second class, exceeding one year's imprisonment with or without hard labour and a fine exceeding one thousand and five hundred penalty units, or imprisonment in default thereof,
  - No sentence imposed by a subordinate court of the third class, exceeding six months' imprisonment with or without hard labour, shall be carried into effect in respect of the excess, and no fine exceeding seven hundred and fifty penalty units

  - **Section 15(2) CHOMBA V THE PEOPLE (1975) ZR 245**
    Where the aggregate of consecutive sentences imposed is above the limit a case must be sent for confirmation of sentence as it is treated as one sentence
  - In practice the state waits until appeal period expires before submitting case for confirmation.

- **Section 217 CPC –** committal for sentencing

- **Section 19** subject to CPC or other legislation in exercise of criminal jurisdiction

- **Section 4** jurisdiction and powers as set by act and within limits of district
- **Section 6** two or more presided over by different magistrates
- **Section 69** general rule where offence committed
    - section 66- where apprehended in another district
    - section 70 where act done or where consequences felt
    - section 71 where connected with another offence in another jurisdiction
    - section 72 where district is uncertain
    - section 73- where near boundary
    - section 75- where doubt

- Section 11 CPC- chief Justice by statutory order specify cases tried by HC or SRM

- **Section 12-** practice and procedure in CPC or as set out in other Act

- **Can transfer to other subordinate court**

- Section 13-Can transfer to local court

- **Part VII** of CPC Holds preliminary inquiries for cases triable in High Court

E. COURTS MARTIAL

- **Section 86 of Defence Act Cap 106** court martial power to try person subject to military law under act
    - **Section 121** limitation of time for trial
        - Trial must begin within three years of the commission of the offence except mutiny and failure to suppress mutiny
        - No more than three months after leaving service
    - **Section 73** can be charged with civil offence in addition to offences under the Act
        - But cannot be tried for offences like treason, murder, manslaughter, treason-felony, rape and section 8 of the Suicide Act when committed in Zambia

F. HIGH COURTS

- Established by section 3 of the High Court Act chapter 27
- Established by Article 94 of the Constitution-
    - There shall be a High Court for the Republic which shall have, except as to the proceedings in which the Industrial Relations Court has exclusive jurisdiction under the Industrial and Labour Relations Act, unlimited and original jurisdiction to hear and determine any civil or criminal proceedings under any law and such jurisdiction and powers as may be conferred on it by this Constitution or any other law.

    - **ZAMBIA NATIONAL HOLDINGS LIMITED AND UNIP V ATTORNEY GENERAL 1994 ZR 22-** unlike Industrial Relations Court and Subordinate and local Courts with limits in penalties and geographical limit, unlimited but not limitless
        - **Section 11 CPC-sets out** cases triable by High Court
    - The High Court shall be divided into such divisions as may be determined by an Act of Parliament.

- The High Court shall be **a superior court of record** and, except as otherwise provided by Parliament, shall have the powers of such a court.

- **Under section 336-337 of the CPC, the High** Court has supervisory powers.
  - **Part XI CPC-**appeals, revision and case stated
  - **Section 136 of Defence Act cap 106-** appeal to court of appeal which is supreme court
  - **Section 80 of CPC** High Court has power to **change venue** of hearing before Subordinate Court where:

    - Fair and impartial trial cannot be had in any subordinate court
    - Question of law of unusual difficulty likely to arise
    - Need to view scene of crime for satisfactory trial
    - Where will be convenient to parties and witnesses
    - Expedient to the ends of justice
    - May order;
      - Other court to try or
      - One of higher jurisdiction
      - Accused person be committed for trial before itself
    - Every application by motion and affidavit, except by DPP
    - Must give DPP notice

- **The Chief Justice may make rules** with respect to the practice and procedure of the High Court in relation to the jurisdiction and power

- **Section 4** –High Court Act judges have equal power, authority and jurisdiction. **RAHIM OBAID V THE PEOPLE AND HADEHIM QUASMI V THE PEOPLE 1977 ZR 119**
    - **MUNDIA SIKATANA V THE ATTORNEY GENERAL 1982 ZR 109-**a High Court Judge cannot adjudicate on a matter in civil case that has been dealt with in a criminal case.
- **Section 6 CPC** may pass any sentence authorized by law
- **Section 9** of the HC Act, HC is a superior court of record
- **Section 10** High Court Act, practice and procedure as set out in CPC in default that by High Court of Justice in England-**RAHIM CASE**

- **Section 19** High Court Act sits in sessions by the Chief Justice's statutory order-currently Lusaka, Ndola, Livingstone, Kitwe, Kabwe, Mongu, Chipata, Mansa, Kasama and Solwezi.
- **Section 22** can transfer cases
- Section 23 and 24- transfer to other judge, Subordinate and Local Courts
- Appeals from the Subordinate Courts

2. PUBLIC PROSECUTIONS: POWERS AND DUTIES OF THE DIRECTOR OF PUBLIC PROSECUTION:

- **Established under Article 180 of the Amended Constitution**
- appointed by the President subject to ratification by the National Assembly
- Qualified to be appointed to the appointment of a Judge of the High Court with experience biased towards criminal law.

- DPP has power in any case which the DPP considers it desirable -

- to institute and undertake criminal proceedings against any person before any court (other than court-martial) in respect of any offence
    - **MUMBA V THE PEOPLE (2006) ZR 93**
    - **Section143 of the Defence Act Cap 106-** Attorney General handles cases where one convicted by courts Martial appeals
- to take over and continue criminal proceedings that may have been instituted or undertaken by any person or authority; and
- to discontinue, at any stage before judgment is delivered, any criminal proceedings instituted or undertaken by himself or any other person or authority.

    - **Section 81 CPC-***nolle prosequi*; either filling in court or stating (subsection 1) or under subsection 2 filling before the registrar or clerk

      Case: DIRECTOR OF PUBLIC PROSECUTIONS v MBAYO MUTWALA AUGUSTINO (1977) Z.R. 287 (S.C.)

    - **Section 88 CPC-**withdrawal before the subordinate court consent of the court or on the instruction of the DPP- if after defence will result in acquittal

- powers may be exercised by him in person or by such public officer or class of public officers in accordance with general or special instructions:
    - **section 82 delegation to Solicitor General and State Advocates-** power to enter nolle –section 81 and committal proceedings (summary committal ss 253-259 and proceedings after committal 241-247)

- **Section 86 CPC** appoint public prosecutors who exercise delegated powers see section
  - **Section 87 CPC-**powers of the public prosecutor; to appear and plead without any written authority in a public prosecution or were private person instructs a lawyer, public prosecutor may conduct and lawyer operates under him
  -

- not subject to the direction or control of any other person or authority except Attorney General for general consideration of **public policy,**
- also by a legal practitioner.
- powers to take over and discontinue exclusive
- DPP has discretion to prosecute not bound by coroner or police findings-**KAMBARANGE MPUNDU KAUNDA v THE PEOPLE (1990 - 1992) Z.R. 215 (S.C.)**
- in some cases law requires that consent of DPP
  - Penal Code Cap 87
    - wrongfully inducing a boycott- section 92
    - seditious practices section 57- section 58 requires consent
    - expressing hatred, ridicule or contempt for persons due to race, tribe and place of origin-section 70
    - proposing violence or breaches of law to assemblies-section 91
    - defaming a dead person section 192
    - incest- under sections 159 and 161 required by section 164
    - abuse of authority of office –section 99(2)
    - possession of offensive weapon or material-section 85(3)
    - obscene material-section 177(5)

- National Assembly (Powers and Privileges) Act cap 12-section 27
- Contempt of Court (Miscellaneous Provisions) Act cap 38-section 4(3)
- Suicide act cap 89 section 8(3) complicity in another's suicide
- Offences committed by Zambians outside jurisdiction section 59(2) of the Extradition Act cap 94
- Prohibition of uniforms and flags in connection with political objects- section 3(2) of the Public Order Act cap113
- The Societies Act cap 119- section 32
- Section 31 of the Citizens Act cap124
- ACC Act- section 46
- State Security Act Cap 111-section 14
- Preservation of Public Security Act cap 112-secion 12
- Trading with the Enemy Act cap 114-section 3(6)
- The Rent Act cap 206 section 6(2)
- The Agricultural credits Act cap 224- restrictions on publication of agricultural charges-section 9(3)
- Attempting to influence decision of local government appeals board-section 104-by section 106 Local Government Act chapter 281
- Prosecution for offences committed on an aircraft (other than offences under the Act)-section 23 of Safety of Civil Aviation Act cap 445
- Cooperative Society Act cap 397 -false returns section 143 and 171 misdealing with property
- The Standards Act cap 33
- Section 11-unauthorised activities cap 469 The Telecommunications Act
- Chiefs Act cap 287- section 13

- **Section 32 of Societies Act** consent by DPP or delegate of Dpp; Solicitor General or state advocate

- **CLARKE v THE PEOPLE (1973) Z.R. 179 (C.A.)** –effect of absence of consent
- **Section 85 CPC-**where law requires DPPs consent a person can be arrested and remanded in custody or granted bail but no further action will be taken until consent is obtained
- **Section 321A CPC -** power to appeal
- **OTHER POWERS OF THE DPP**
    - **Section 47 ACC Act-** can serve notice to the Commissioner of taxes to provide information for affairs

Pursuant to the National Prosecutions Authority Act No. 34, the DPPs Chambers falls under the National Persecutions Authority. The Act;

(a) Creates National Prosecution Authority and outlines its functions;

(b) Creates a Board chaired by the DPP;

(c) Has broadened the functions of the DPP, mainly of an administrative nature;

(d) Reiterates the 3 broad powers of the DPP as provided under Article 180 of the Constitution; and

(e) Establishes Witness Management Fund.

Refer to an Article by Justice Mumba Malila entitled *'The Shifting Paradigms in the Fight Against Corruption in Zambia'* published in Volume 43 of the 2012 Zambia Law Journal in which he discusses the potential adverse effects of the Act on the independence of the DPP.

3. ARREST

- **Section 18 CPC** must touch and confine
- Elements of an arrest-**SILUNGWE v THE PEOPLE (1974) ZR 130-**
    - Physical restraint (actual or conduct suggesting force will be used to prevent departure) and
    - Inform suspect that is arrested
- Does not necessarily mean will be followed with the arrest charging of a person
- However, must be exercised for the right reasons
- Not right when there is no intention to charge
- Justified by the breach of the law

- There must be reasonable cause-
    - That has committed offence
    - Is committing an offence or
    - Is about to commit an offence-
    - **IN RE SIULUTA 1979 ZR 14-** a person must not be arrested for the purpose of facilitating investigations
- Reasonable cause is dependant on facts known by the officer at the time
- Reasonable existence of facts
    - **LAURENT v WILLIAMS (1963-1964) Z AND NRLR 4-** arrest not illegal where no warrant as long as has reasonable cause to believe that offence committed
- Test- reasonable man acting without passion or prejudice would fairly have suspected one to be committing an offence
- Standard lower than evidence to establish a prima facie case
    - **DANIEL CHIZOKA MBANDANGOMA v THE ATTORNEY GENERAL (1979) ZR 45-** sufficient to show that arresting officer has reasonable suspicion that person has committed offence
- Can rely on hearsay evidence

- Must communicate reasons either;
    - At time of arrest or when reasonably practicable-
    - **ATTORNEY GENERAL v SAM AMOS MUMBA 1984 ZR 14-** must inform of reasons unless impeded by suspect and failure to inform amounts to false imprisonment
    - No precise language
- Can use force where;
    - There is resistance to arrest
    - To prevent escape from arrest
    - To prevent violent breach of peace
- Person can resist unlawful arrest but cannot use excessive force to resist
- Police have right to search on arrest to;
    - To ensure does not have implements to facilitate escape
    - Prevent injury to oneself
- Can also enter premises where suspect was immediately before arrest without warrant
- Person must be taken to police as soon as possible after arrest
- **Section 22 CPC** –power to search on arrest and take away property except necessary apparel
- **Section 24 CPC** search of a woman

ARREST WITHOUT WARRANT

- **Section 26 CPC – P**olice officers may arrest without warrant for listed offences and cognizable offences
- **Section 31 CPC-** arrest by private persons
- **Section 2 CPC-** defines cognizable offences as those set out in **First Schedule of CPC** or as defined in particular law
- Mainly preventative
- Offences under **section 27 CPC** included
- Arrested person to be presented to court- **section 30 and 32**

- **Section 33 CPC**-detention of persons arrested without warrant
    - **M.MUTEMWA V ATTORNEY GENERAL (1979) ZR 251**-person arrested without warrant must be taken to court within 24 hrs or released on bail if offence not punishable with death
-
- **.Section 35 and 36 CPC** – arrest by magistrate
    - **Section 35** only in cases where offence committed in presence of magistrate
    - **Section 36** will only direct where offence is committed in presence of magistrate

ARREST ON WARRANT

- **Section 90 CPC-** allows one to institute proceedings by lodging a complaint
- **THE PEOPLE v MWEEMBA (1972) ZR 292**
    - Criminal proceedings can only be instituted by making a complaint or bringing to court person arrested without warrant
    - Warrant only issued after charge drawn up
- **Section 91(1)** – proviso warrant will only be issued where complaint is on oath
- **PAUL JEREMIAH LUNGU v THE PEOPLE (1978) ZR 298-** only advocate can prosecute on behalf of complainant
- **THE PEOPLE v MUTACHILA (1976) ZR 96-**A person can be arrested for additional offences

SEARCH WARRANTS

- **Section 119 CPC-** proved on oath that suspects that evidence proving commission of offence can be collected
- **LISWANISO v THE PEOPLE (1976) ZR 277-** also that evidence will become available

4. REMAND, BAIL, POWER IN PARTICULAR CASES.

- The release from custody of an accused or convicted person, who undertakes to subsequently surrender to custody
- Bail is taking sureties by an authorities person for the appearance of the accused on a certain day at a certain lace
- Surieties must be sufficient in that they must be able to answer for the same in which they are bonded
- Amount of bail lies within he discretion f examining justice
- Court when granting bail may include conditions it considers likely for the appearance of the accused

- Bail can therefore be granted in the following;
    - **Police bond**
    - **Bail pending trial**
    - **Bail pending appeal and**
    - **Constitutional bail.**
- **Section 33(1) CPC–** allows the detention of persons arrested without a warrant for a reasonable time
    - Officer in charge must release if cannot present to court within 24hrs
    - Only offences not punishable by death
    - And offences of a serious nature
    - Release on bond with or without sureties
    - **IN RE SIULUTA AND THREE OTHERS (1979) ZR 14** Section 33 must be complied with when evidence has been collected
- **Section 123 CPC**
        - Treason, Murder offences carrying mandatory capital penalty
        - Misprision of treason or treason felony
        - Aggravated robbery
        - Theft of motor vehicle and
        - Espionage- where DPP places certificate

POLICE BOND

- Granted by the officer-in-charge (section 33)
- To appear in court on specific date
- Must execute bond-section 126
- With conditions like sureties or on own recognisance
- Not be granted where arrested on warrant unless there is provision **section 103 CPC**
- **THE PEOPLE v BENJAMIN SIKWITI CHITUNGU AND OTHERS 1990-1992 ZR 190**
    - Police can cancel it before court date
    - Court can increase conditions-**Section 127 CPC**
    - Does not cease where one appears in court
- **Section 124** officer before whom bond is executed or the court d may demand additional conditions that are reasonable in a particular case

BAIL PENDING TRIAL

- **Section 123(1)-**apply before trial court
- Application ether by summons supported by affidavit or viva voce
- Main test is the likelihood to attend court
- **OLIVER JOHN IRWIN v THE PEOPLE 1993-1994 ZR 54-** factors
    - Nature of accusation and severity of punishment
    - Nature of evidence
    - Independence of sureties
    - Prejudice to accused person
    - prejudice to state
- Factors in general
    - Likelihood to attend trial
    - Likelihood to interfere with witnesses

- Risk of committing other offences
- nature of charge
- evidence in support of a charge
- punishment for offence
- likelihood of repeating the offence
- likelihood of interfering with witnesses
- in dependence and reliability of the surities
- Whether accused will surrender for trail

-

- Standard is that substantial grounds exist and that court must be satisfied that will-factors
  - Nature and seriousness of offence
  - Character and antecedents of offender
  - Previous conduct in relationship to bail and
  - Nature of evidence against one
- Application is before the trial court
  - Can renew application to the High Court (supervisory power) where denied by the Subordinate Court
  - **THE PEOPLE v BENJAMIN SIKWITI CHITUNGU AND OTHERS 1990-1992 ZR 190**

    Where denied bail by police can under section 123(3) apply before High Court it is not an appeal- in practice only allowed when denied in the subordinate court.

- Cannot appeal to the Supreme Court where denied by High Court-**BUKASA PELU SEKELE v THE PEOPLE 1990-1992 ZR 5**

  Supreme Court will only entertain application if there is appeal pending before it
- **Section 124-** court may demand additional conditions

- **Section 126-**High Court may reduce or vary conditions imposed by Subordinate Court or police officer
- **Section 137-** court may demand additional if first insufficient because of mistake or fraud
- **Section 128-** surety may apply to be discharged

BAIL PENDING CONFIRMATION OF SENTENCE

- **Section 13(1) CPC** allows for bail pending the confirmation of sentence-under section 9

BAIL PENDING APPEAL

- **Section 332 CPC** after lodging appeal Subordinate Court may grant bail
- **Section 336-CPC**where one appeals or applies for leave to appeal High Court may grant bail
- **Section 22** Supreme Court Act where High Court refuses to Supreme Court may grant bail
- **Section 123(5)-MAYONDE v THE PEOPLE 1976 ZR 129-** must lodge appeal
- **KAMBARANGE MPUNDU KAUNDA v THE PEOPLE 1990-1992 ZR 215-**bail cannot be granted on appeal for cases to which **section 123 CPC** applies

- **STODDART v THE QUEEN (1)1954 NRLR 288**
    - Can only be released if there are exceptional circumstances-
        - Likelihood that will have served sentence by the time appeal heard
        - The likely hood of success

CONSTITUTIONAL BAIL

- Only made in High Court because **Article 28(2) of Constitution ;** High Court has jurisdiction where there has been, there is, there is likely to be a breach of Articles 11 to 26 alleged
- **Article 13(3) Constitution-**person arrested or detained on court order or on suspicion of committing offence when not released shall be brought before court without delay if not released and if not tried within reasonable time be released on bail
- Overrides provisions in **CPC** restricting bail
- **CHENTANKUMAR SHANTAL PAREKH v THE PEOPLE ZR 1995-**where unreasonable delay through no fault or stratagem of accused will be released

5. CHARGES AND INFORMATIONS

- Person arrested and charged with a criminal offence when presented to court must take plea. Document setting out offence:
  - Called charge in the Subordinate Courts
  - Called information in the High Court
  - Also referred to generally as an indictment

FRAMING OF CHARGES AND INFORMATIONS

- **Sections 134 to 137 CPC** set out how both charge and information should be drawn

- **Section 134 CPC-** both documents will have a-e
  - The commencement
  - Statement of offence
  - Particulars of offence

THE COMMENCEMENT

- Contains information of-
    - Which court trying
    - Where trial being held

STATEMENT OF OFFENCE

- **Section 137(a)(i)** nature of the offence, example murder

- **Section 137(a)(ii)** section or sections creating the offence

- **JOSEPH NKOLE v THE PEOPLE 1977 ZR 351**
    - Reference to wrong section when particulars are correct makes charge defective but not bad
    - Does the accused person suffer any prejudice

PARTICULARS OF OFFENCE

- **Section 137(a)(iv)-**Examples of format in **Second Schedule CPC**
- Immediately after the statement of offence
- Contents;
- **Names of accused person(s)**
    - **Error in name** does not affect the validity of the charge
    - Where name not known can be described as "a person unknown"-section 137(d)
    - Also "alias…."
- **Date of offence;**
        - State in so far as it is known
        - Practice- day, month and year
    - Where date not known
        - "On or about the ….."

        - "On a date unknown but between the…. And the….."
    - Can be crucial in certain cases
        - Legislation may have not come into force
        - defilement cases-victim may have turned 16

    - Must be on single date but for continuing offences can be on several dates
        - In noncompliance cases- " on and since the….." and
        - Conspiracy cases- "on divers dates between the….."

- **Time not necessary but essential in some cases like burglary**
    - Section 301- burglary is house breaking during the day time
    - Section 42 of the Liquor Licensing Act Cap 167 prohibits sale of alcohol during permitted hours; section7(2) bar can only sale between 10 in morning and half past 10

- **Place where offence committed**
        - Practice town, district, province and country
        - **CDDD- road essential**-section161 of Road Traffic Act offence must be committed on public road
        - **Section 42 of Liquor Licensing Act** prohibits holder of restricted licence from having sprits on premises without reasonable excuse; section 16 holder cannot have spirits

- **Role of parties** not indicated as accomplices or principles or aiding or abetting
    - **Section 21**-counsel, procure, aid, abate or omits to do for the purpose of enabling

- **Intent section137(g)** not necessary to state intent to defraud, deceive or injure unless s ingredient of offence
- **Age of victim** unless is an ingredient of offence
    - defilement

RULE AGAINST DUPLICITY

- **SHAMWANA AND SEVEN OTHERS v THE PEOPLE 1985 ZR 41**
    - Duplicity matter of form and not evidence
    - Section 52 of the penal Code allows offences under chapter 12 to be proved by overt acts
- **THE PEOPLE v MAKHOKHA 1967 ZR 173**
    - Two sections creating separate offences in statement of offence
    - **Burglary and theft exception**
    - **Conspiracy and attempt different**

- **NSAMA AND OTHERS v THE PEOPLE 1976 ZR 171**
    - Should not charge with conspiracy where one charged with actual offence
- each count must contain only one offence

- if it alleges more than one then it is bad for duplicity

- bad for duplicity where
    - more than one offence
    - more than one date
    - more than one item stolen
    - more than one victim
- where the is duplicity one can apply to quash but courts will not where it can be amended

JOINDER OF COUNTS

- **section 135 CPC**
    - in some cases lawful to join two more counts against one accused person in a single information or charge sheet
    - this the case where
        - charges founded on the same facts
        - they form a series of offences
        - are offences of a similar character

- **Section 135(2)-**a statement is set out in a count where more than one offence is charged
    - **FLUCKSON MWANDILA v THE PEOPLE (1979) ZR 174**
    - Where more than one count they shall be marked consecutively

- Section 135(3)- can apply to be tried separately if accused person will be embarrassed
    - **R V CHAKOPA MAULU AND NELSON CHEMBELA 5 NRLR 208-ALFRED KALUMBA-** wanted to call co accused as witness but could not compel to do so. similar to current section 157 CPC

JOINDER OF ACCUSED PERSONS

- **section 136 CPC**
    - this may either be by
        - naming two accused persons in one count or
        - accused persons individually in separate counts
    - words "jointly and whist acting together"
    - these are
        - persons who commit the same offence in same circumstances

- persons who commit the offence and those who abate
- different offence in course of same transaction
- theft related offences chapter XXVI to XXX of penal Code
- counterfeiting offences chapter XXXVII of Penal Code

OBJECTIONS TO A CHARGE OR INFORMATION (INDICTMENT)

- indictment preferred in breach in breach of **sections 134, 135, 136 and 137 CPC**
- where there are time limits for preferring charges
    - **Section 219 CPC-**offences with maximum punishment of six months and or fine not exceeding one thousand five hundred penalty units in the subordinate court must be charged within 12 months.
- charge not known by the law
- court has no jurisdiction
    - **section 11 CPC-** cases triable in High Court
    - **section 85(1) CPC-**where consent not obtained
    - **section 138 CPC**- where already convicted or acquitted
        - **section140** not where consequences are unknown
            - Penal Code- allows for murder charge even after prosecution for assault
        - **section 141 CPC** where acquitting is not competent court

          THE PEOPLE VS PETROL ZAMBWELA 2002 ZR 45-subordinate court has no power to acquit when conducting PI
    - charges a person immune from prosecution

        - **Articles 43(2) and (3) Constitution** person holding or a person who held office of President
        - **Section 14 Penal code** –immature age
        - **Diplomatic Immunities and Privileges Act cap20**

          Section 3 make article 31 of the Vienna Convention on Diplomatic Relations applicable to Zambia. – Immunity from criminal jurisdiction of receiving state
    - Where objections court can
        - Quash or
        - amend

QUASHING A CHARGE OR INFORMATION (INDICTMENT)

- **section 274 CPC** only where charge or information does not disclose offence punishable by the law and cannot be amended to state offence
- convicted or acquitted
- immune

AMENDMENT OF A CHARGE OR INFORMATION (INDICTMENT)

- **section 273 CPC** Information
- **section 213 CPC Subordinate Court** at any stage before accused is required to make defence
- court can upgrade, substitute or include new count
- **KAMBARANGE MPUNDU KAUNDA v THE PEOPLE 1990-1992 ZR 215**
    - Court, prosecution or defence can apply to amend
    - Nature of amendment and when

- **SHAMWANA AND OTHERS v THE PEOPLE 1985 ZR 41**

- Amend in line with evidence
- No injustice if given opportunity to recall witnesses

- purpose-
  - to correct a formal defect or
  - as a result of evidence
  - dependant on-
    - timing of amendment and
    - risk of injustice
- **procedure on amendment**
  - **JOHN BANDA v THE PEOPLE 1970 ZR 14**
    - Where there is amendment plea should be retaken and right to recall witnesses explained
- The effect of the omission of material particulars (where no objection or amendment during trial)

  - **ALAKAZAMU v THE PEOPLE 1973 ZR 31**

    Charged with theft with another but the words "jointly and whilst acting together with other persons unknown"- lack of reference did not make particulars defective as is not ingredient of offence

  - **HARRISON ZIMBA v THE PEOPLE 1970 ZR 101**

    Charged with attempted house breaking, omitted the words "with intent to commit a felony"- found to be material defect as particulars did not disclose offence

  - **MUTALE v THE PEOPLE 1973 ZR 15**

    Espionage charge omitted the words "for purposes prejudicial to the safety or interests of the Republic"- indictment did not disclose an unknown offence but it described a known offence with incomplete particulars

OVERLOADING OF A CHARGE OR INFORMATION (INDICTMENT)

- **MULWANDA V THE PEOPLE 1976 ZR 133**
    - Not fair for accused or court to charge with 37 counts, call 87 witnesses and 89 exhibits

7. THE TRIAL PROCESS GENERALLY

A criminal trial is generally as follows: -

(a) Opening speech by prosecutor (optional)
(b) Calling of evidence by the prosecution;
(c) Close of prosecution case;
(d) Consideration of case to answer;
(e) Opening speech by the defence (optional);
(f) Calling of evidence by defence;
(g) Close of the defence case;
(h) Closing speeches;
(i) Judgement.

The first part from (a) to (c), is left to the prosecution to make out its case and is thus referred to the prosecution's case. Only if the accused is found with a case to answer is the accused required to make his or her defence.

- **TRIAL**
    - **Calling the case**
        - Open to public excerpt
            - Section 76 CPC interlocutory, prejudice to public safety or trial of a juvenile
            - Section 121 Juveniles Act –juvenile witness offences against morality
            - Section 120 Juveniles children not allowed(other than infant in arms), except witness
            - Section 15 of the State Security Act

- Case called-**section 191 CPC; must proceed in presence of accused**
- Prosecutor and defence counsel put themselves on record
- Accused asked language he intends to use if not English interpreter provided-**section 195 evidence given in language not understood must be interpreted**
- Accused asked to confirm name and address
- Charge read out: both statement and particulars of offence
- **Section 356 CPC** In the case of a cooperation appears by a representative

- **TAKING PLEA**
  - Accused invited to respond after each and every count is read
  - **section 160 CPC** where accused does not respond court must enquire whether accused is capable of making a defence
  - **section 161 CPC** court to enter plea of not guilty
    - **Section 17 CPC** accused medically examined-

  - **MALITA BANDA v THE PEOPLE 1978 ZR 223-** incapacity to make a defence under section 161(1) cannot result in special finding under section 167
  - where accused incapable of taking plea enter plea of not guilty
    - **MUSITINI v THE PEOPLE 1975 ZR 53-**plea of not guilty where mute of malice or visitation of God
  - **MBAYE v THE PEOPLE 1975 ZR 74-** compliance mandatory whenever it arises under section 160 and court cannot send accused for treatment must proceed

- **THE PEOPLE v NJOVU 1974 ZR 60-**deaf mute must be represented.
- **THE PEOPLE v BANDA 1972 ZR 307 and THE PEOPLE v MWABA 1973 ZR 271-**the question of insanity can arise even in cases where one is capable of making a defence
- **STEWART v THE PEOPLE 1973**

  If case requires consent of DPP certificate presented to court or case adjourned for presentation of certificate
- Where more than one each and every one must respond to each count
- Accused must personally plead not sufficient for counsel to indicate that his client intends to plead guilty
- Court records plea of guilty or not guilty
- Where represented lawyer indicates whether it is according to instructions
- **Accused can plead guilty to some counts and not guilty to others**

- **PLEA OF GUILTY**
  - Can plead on own volition or as a result of a plea agreement –
  - section 7 of the **Plea Negotiations and Agreements Act no 20 of 2010 Section 4 –**plea negotiations can be initiated by a public prosecutor or the accused person at any time before judgment
    - The accused person undertakes to plead guilty to an agreed offence and fulfil other obligations
      - **Section 19** grant of legal aid to a person wishing to negotiate a plea

- **Section 5-** sets out the prosecutors' obligations are to
    - withdraw or discontinue the original charge
    - To accept the accused persons plea to lesser charge
- **Section 6** the prosecutor is also obliged to inform the accused person of the right to legal representation and will only negotiate through the lawyer.
- **section 9** whenever an agreement has been entered into the court must be informed in open court or in chambers were good cause exists

- Accused invited to confirm particulars of offence
    - **SHAMPETA AND ANOTHER v THE PEOPLE (1979) ZR 168**

      for a person to plead guilty they must appreciate the nature of the offence and admit sufficient facts.
- Where there is statutory defence and accused is unrepresented rule of practice is that court must explain **MWABA v THE PEOPLE (1974) ZR 264**
- Prosecutor invited to present statements of fact
    - includes medical reports
    - public analysts report
    - ballistics report
    - post-mortem report
- **Section 7 Pre-Negotiation Agreements Act** the plea agreement Will be in writing and will contain the following information
        - The original charge
        - The new charge
        - The statements of facts
        - A statement that the accused had been informed of his rights

- The rights and obligations of the state and the accused persons under the agreement
- It will also be signed by public prosecutor, the accused and his lawyer

- **statement of facts only on those where pleaded guilty**
- accused asked if facts true and correct
  - **THE PEOPLE v JOHN KAPALU KANGUYA 1979 288**

    a plea must not be equivocal. Each and every fact must be admitted. Admission of the facts will not validate equivocal or imperfect plea especially where not represented
- confirms and /or indicates which ones not correct
- court considers whether disputed facts go to the root of the admission
  - if they do not court still records a plea of guilty
  - may actually amend the facts to take care of the disputed facts
  - if goes to the root of the admission records a plea of guilty
  - **THE PEOPLE v MASISSANI 1977 ZR 324**
    - Where facts vital to a conviction disputed plea of not guilty should be entered. But does not matter if not vital
- court considers whether statement of facts discloses an offence, where does not enters plea of not guilty
  - **THE PEOPLE v PATEL 1968 ZR 167**

    facts must support the charge, where they do not prosecutor must clarify or amend or court enter plea of not guilty
- **section 10 Pre-Negotiations Agreements Act** the court is not bound to accept a plea agreement except where

non-acceptance would be contrary to the interests of justice

- **Sections 11 and 12 Pre-Negotiations Agreements Act** sets out the factors the court should consider before accepting the agreement and the grounds on which an agreement can be can refused
    - The accused person has not been induced
    - The accused person understands subsistence, nature and consequences of the plea agreement
    - There is factual basis on which the agreement has been made
    - Acceptance of plea would not be contrary to the interests of justice and public interests.
    - An agreement that is contrary to interests of justice will not be accepted
    - An agreement whose facts do not disclose an offence will not be accepted
    - Where the accused person does not confirm the agreement, it will not be accepted
    - Rejection of an agreement does not prevent the parties from negotiating another one
    - Where the agreement is not accepted trial proceeds on the original charge
- on recording a plea of guilty court also convicts
- prosecutor invited to indicate if there are previous conviction
- accused lawyer invited to mitigate
- court passes sentence usually indicating why has arrived at particular sentence
    - **THE PEOPLE V CHOTOO LALA 1974 ZR 201**

      Plea can be withdrawn at any stage before sentence after which becomes functus official

- **TITO MANYIKA TEPULA v THE PEOPLE 1981 ZR 304**
- Within discretion of court to allow but for good and sufficient grounds

- **Section 15 and 16 Plea Negotiations and Agreements Act -** a party to a plea agreement can withdraw from it where,
  - The accused person was improperly induced, has breached the terms of the agreement or has made a misrepresentation
  - The Prosecutor was misled on material fact by accused person or his lawyer or where accused was induced
- Pre-Negotiations Agreements Act
  - **section 8 requires** the state to inform the victim of the reason why the agreement was entered into and its substance as soon as practicable
    - The victim is also entitled to be present in court when the agreement is considered
  - **Section 16** Evidence made available in a plea negotiation agreement cannot be used in any criminal or civil proceedings
  - **Section 17** an application can be made to seal records of a plea negotiations or agreement

- **PLEA OF NOT GUILTY**
  - prosecutor calls first witness
  - there may be object to competence of witnesses-section 151 CPC and section 128 of Juveniles Act cap 53- spouse being called as witness
  - other witnesses remain outside
    - **MWABA v THE PEOPLE 1969 ZR 61-**

A witness will not be disqualified from testifying merely because they were in court during the testimony of other witnesses

- witness sworn or affirmed-**PHIRI V THE PEOPLE (1975) ZR 30**- where witness is non-believer can affirm
    - if child of tender years voire dire
    - Procedure in section 122 of the Juveniles Act
- Summoning witnesses section 143 CPC
    - Section 144 CPC can issue warrant were ignores or 145 CPC where has information that is unlikely to attend
- witness led in evidence
    - evidence in chief
    - cross examined accused or defence counsel (counsel cross examine in the order of the accused persons they represent in the absence of agreement)
        - **SIKOTA v THE PEOPLE 1968 ZR 42**
          Accused persons in the order that they appear cross examine
    - re-examined on issues raised in cross examination
    - court may ask to clarify during or after
- no order in which witnesses must be called but danger of hearsay
- all expert witnesses must be called except medical
    - Section 191A document by medical officer can be produced without the maker
    - Section 192 affidavit of public analyst
- Court can issue a commission for the examination of a witness- section 152
    - Magistrate can apply for the commission section 154
- Can also produce affidavit using mutual legal assistance

- witness not limited to oral testimony may also refer to things and documents-identifies exhibit during testimony
    - by describing features
    - if author or person whose has had custody can produce exhibit

TRIAL WITHIN A TRIAL

- To determine admissibility of confession statement
- Accused cannot elect to remain silent

- **SUBMISSION OF NO CASE TO ANSWER**
    - defence makes the first speech

      NGOMA v THE PEOPLE (1972) ZR 42- court should not allow state to close its case and address the court before defence has submitted on case to answer
    - followed by prosecution
    - defence reply
    -

CASE TO ANSWER

A case to answer is also what is referred to as a prima *facie case*. The test applied in determining whether an accused has a case to answer is whether a reasonable tribunal could convict on the evidence before the court. An accused not found with a case to answer is acquitted.

Section 206 of the CPC provides: -

> ***"If, at the close of the evidence in support of the charge, it appears to the court that a case is not made out against the accused person sufficiently to require him to make a defence, the court shall dismiss the case, and shall forthwith acquit him."***

Section 207;

> ***".....at the close of the evidence in support of the charge, if it appears to the court that a case is made***

out against the accused person sufficiently to require him to make a defence, the court shall then hear the accused and his witnesses and other evidence, if any……" 4

In **THE PEOPLE V. JAPAU (1967) Z.R. 95** Justice Evans, J. stated: -

"…….I now have to rule upon the defence submission that the accused has no case to answer. The test to apply is well-known and was succinctly stated by Parker, L.C.J., in the Practice Note published in (1962) 1 All ER 448 …….in short the test is:

(a) there is a case to answer if the prosecution evidence is such that a reasonable tribunal might convict upon it if no explanation were offered by the defence.

(b) A submission of no case to answer may properly be upheld if an essential element of the alleged offence has not been proved, or when the prosecution evidence has been so discredited by cross-examination, or is so manifestly unreliable, that no reasonable tribunal could safely convict on it. 5

In the case of **THE PEOPLE v WINTER MAKOWELA AND ROBBY TAYABUNGA (1979) Z.R. 290 (H.C.), the court held: -**

> ***"……a submission of no case to answer may be properly made and upheld where there has been no evidence to prove an essential element in the alleged offence and when the evidence of the prosecution has been so discredited as a result of cross examination or so manifestly unreliable that no reasonable tribunal could safely convict on it…."***

Justice Chali, in **THE PEOPLE V JAMES KAWANDA 2011[UNREPORTED]** also observed: -

> ***"On the Supreme Court authority in the case of Mwewa Murono.v. The People (2004) Z.R. 207, the court can make a finding of no case to answer if there is no evidence to prove the essential elements of the offence alleged and therefore the accused's guilt, or when the evidence adduced by the prosecution has been so discredited that no reasonable tribunal can safely convict on it."*** 6

The Supreme Court of Zambia, on the other hand, in the case of **MWEWA MURONO v THE PEOPLE (2004) Z.R. 207 (S.C.)** which was cited in the James Kawanda case held inter alia:

> ***"In criminal cases, the rule is that the legal burden of proving every element of the offence charged, and consequently the guilt of the accused lies from beginning to end on the prosecution. The standard of proof must be beyond all reasonable doubt. A submission of no case to answer may properly be and upheld:-***
>
> ***(a) When there has been no evidence to prove the essential element of the alleged offence; and***
>
> ***(b) When evidence adduced by the prosecution has been so discredited that no reasonable tribunal could safely convict on it.***
>
> ***If an accused person is convicted as a result of an error of the trial Court in thinking that there is a prima facie case, the conviction cannot stand. It must be quashed.***

In a 2013 case of **THE PEOPLE v MALIZANI TEMBO** Judge Chashi adopted the legal rule in the Japau case and further cited a recent Supreme Court Judgment on the subject matter in the case of **THE PEOPLE V THE PRINCIPAL RESIDENT MAGISTRATE, EX PARTE FAUSTIN KABWE AND AARON CHUNGU** where it was held inter alia as follows:

"***There is no requirement under Section 206 of the Criminal Procedure Code that the Court must give reasons for acquitting an Accused person: That it must merely appear to the Court. The converse therefore must also be true that where the Court finds an Accused with a case to answer it must merely appear to the Court that a case has been made out.***

A finding of a no case to answer is based on the Courts feelings or impressions and appearance of evidence".

The Supreme Court also opined in **PENIAS TEMBO V THE PEOPLE:**

"It is mandatory for a court to acquit an accused at the close of the prosecution case if the facts do not support the case against him, and no evidence led, thereafter, can remedy the deficiency in the prosecution evidence" .

- **RULING ON CASE TO ANSWER**
  - can find with case to answer
    - same offence
    - lesser offence
    - different offence- invite or recall witness
  - court can acquit
    - no case to answer
    - **THE PEOPLE V WINTER MAKOWELA AND ANOTHER (1979) ZR 290**
    - **THE PEOPLE v JAPAU 1967 ZR 95**

      submission of no case to answer properly made and upheld where
      - essential elements of offence not proved
      - prosecution evidence discredited in cross examination
      - a reasonable tribunal cannot convict

- **CASE FOR THE DEFENCE**

- accused advised on rights
    - sworn statement
    - unsworn statement
    - can remain silent
    - call witnesses

- where accused person is unrepresented court has duty to explain statutory defence- **CHANDA v THE PEOPLE (1968) ZR 58**

- **SICHOTE v THE PEOPLE (1975) ZR 32-**but cannot do so on the ground that counsel is inexperienced.
- accused first to give evidence
    - **SHAW v THE QUEEN 1963-64 ZR 167**
    - **BARROW AND YOUNG v THE PEOPLE 1966 ZR 43-** The accused person must give testimony before his witnesses
    - **SIKOTA v THE PEOPLE 1968 ZR 42**
      First accused person gives evidence first and cross examined by fellow accused in order of appearance then by prosecutor
    - if more than one first to cross examine if in person or represented by different lawyers
- first accused person calls all witnesses before next gives evidence and calls witness
- **HASWELL MVULA v THE PEOPLE (1963-64) Z AND NRLR 171-** the defence must support allegations they make in cross examination with evidence

- **case in reply**
- **judgment**
- **previous conviction**
- **reports and mitigation**
    - social welfare reports

        - advocate mitigates
    - **sentence**

SUBORDINATE COURT TRIAL (CPC)

- **PART 6 OF THE CPC** deals with trials before the subordinate courts
    - **Sections 197-221**
        - **Section 200-**trial in the presence of the accused person unless dispensed with under section 99
            - **Section 99-**attendance can be dispensed with for offences only attracting a fine or 3 Months imprisonment
            - Must be in writing or by counsel
            - Where fine not paid can summon
            - Where previous convictions not admitted can summon
        - **Section 202** – adjournments no more than 30 days and if in custody 15 days
        - **Section 203-**for non-felony can proceed in absence of accused but conviction can be set aside
        - **Section204-**
            - plea
            - plea of not guilty
            - refusal to plead
        - **Section 205** plea of not guilty-the trial can cross examine witnesses by self if not represented
        - **Section 206** acquittal- when the court can do it
        - **Section 207-208** defence
            - Explain the charge again and
            - The rights of the accused person
            - Accused must be the first to give evidence before his witnesses

- **Section 209 submissions**-prosecutor submits first followed by the defence counsel where (calls no witnesses)
    - Only accused gives evidence in defence
    - Accused gives unsworn evidence
    - Remains silent (**s. 212**)

- **Section 212** where does not give evidence immediately prosecution sums up and is followed by defence
- **Section 210 evidence in reply**

- **Section 214-** court can
    - Convict or
    - Acquit or
    - Make an order

COMMITAL FOR SENTENCE TO HIGH COURT

- **Section 217 committal for sentence to High Court**
    - Where accused is not less than 17 years
    - Antecedents and character are such that greater punishment be inflicted or minimum sentence is higher than
- **Section 218**
    - Record sent to high court
    - Court proceeds as if had convicted him, thus appeal lies in the Supreme Court

- **THE PEOPLE v OSTAIN NKAUSU AND ANOTHER 1979 293**
    - Sets out principle but was before amendment of section 217
- **CHOMBA V THE PEOPLE (1975) ZR 245**
    - Section 217(2) where one receives consecutive sentences the total of which is more than the maximum sentence, the case will not be committed to the High Court for sentencing.

TRIAL BEFORE THE HIGH COURT

Trial before the High Court is after a preliminary inquiry or summary committal

- **PRELIMINARY INQUIRY**

  A preliminary inquiry is also referred to as committal proceedings. The objective of a preliminary inquiry is to ascertain as to whether a matter merits being committed d to the high court for trial.

  - **Section 222** by any subordinate court
  - **Section 223** whenever case not triable by the Subordinate court or is triable by the High Court in section 10 or 11
    - **Sub-section (3)-**will not hold one if information signed by DPP is presented
  - **Section 224** procedure**;**
    - Charge read procedure explained but no plea
    - Prosecution witnesses called examined, cross-examined and re-examined
    - Witnesses statements read and asked to confirm and then signed by witness and court plus reporter
    - Prosecutor closes case defence submit followed by prosecutors reply
  - **Section 225** –medical evidence can be presented without witness being called if author is medical office or Government analyst.
  - **Section 226-**cannot object to a charge on ground that for defect in substance or form or for variation between evidence and charge
    - Where court of view that misled can adjourn for purpose of recalling witnesses
  - **Section 228-**where evidence discloses offence

        - Accused invited to make statement, does not plead or put up a defence
        - And call witnesses
        - Can reserve the right to make a statement and call witnesses to trial
    - **Section 229-** right to address court
    - **Section 230-**discharge
        - **THE PEOPLE v PETROL ZAMBWELA 2002 ZR 145-** there is no provision in the CPC for an acquittal during a Preliminary Inquiry
    - **Section 231- test sufficient evidence to put accused on his trial** committal for trial
    - **Section 232-** summary adjudication where evidence discloses lesser offence
        - Since plea not taken may need to take plea again before recall of witnesses
    - **Section 233-**accused and witnesses bound over
        - Conditionally
        - Unconditionally

SUMMARY COMMITTAL PROCEDURE

- **Section 254-**DPP can issue certificate
- **Section 255-**where certificate is issued a Preliminary Inquiry should not take place or should be abandoned
    - **ATTORNEY GENERAL v EDWARD JACK SHAMWANA AND OTHERS 1981 ZR 12-**section 255 prohibits the continuation of a Preliminary Inquiry when DPP issues certificate

THE TRIAL

- **Section 272-**Arraignment by information

        - **Section 223** allows for joining of a person who was not committed if was not discovered
    - **Section 276-** plea
    - **Section 277-**plea in bar
    - **Section 278-** refusal to plead
    - **Section 280 -**plea of guilt
    - **Section 286-**additional witnesses
        - **233-**witnesses bound over but can call one who wasn't a witness during a preliminary Inquiry
        - **234-**refusal to be bound over can result in imprisonment
    - **Section 288-**reading of depositions
    - **Section 152- issuance of a commission**
        - **153 parties may examine**
        - **Section 154 magistrate may apply to the high court**
    - **Section 290 –**statement of accused person
    - **Section 291-**close of prosecution case
    - **Section 292-**the defence
    - **Section 294** evidence in reply
    - **Section 296-**accused not giving evidence

8.JUDGMENT

- **Section 168 CPC-**should be pronounced in open court
    - whole judgment read
    - accused be brought to court
    - absence of party will not invalidate judgment
        - **section 353 CPC-**provision that irregularity in procedure will not invalidate finding or order of court unless results in substantial miscarriage of justice
- **section 169 CPC-** contents of judgment
    - prepared by presiding justice
    - points for determination
    - decision and reason for decision
    - offence convicted of and sentence

- Where acquittal offence acquitted and words directing that accused is being set at liberty
- Must be dated and signed
  - **DASHONI V THE PEOPLE (1966) ZR 58**
    Failure to sign a judgment is an irregularity but is curable as there is no miscarriage of justice

- **Section 169A CPC-** where judge or magistrate is ill, dies or relinquishes or cesses to be another can deliver
- **Section 302 CPC** court may receive such evidence to help it pass sentence
- **NYIRONGO V THE PEOPLE (1972) ZR 290**-where judgment is lost appeal must be allowed

9. MOTION IN ARREST OF JUDGMENT

- An accused person or his advocate may move the court to arrest judgment in a case tried on an information

- **Section 298- CPC** provides that;

  - The accused person may, at any time before sentence, whether on his plea of guilty or otherwise, move in arrest of judgment, on the ground that the information does not, after any amendment which the court is willing and has power to make, state any offence which the court has power to try.

  - The court may, in its discretion, either hear and determine the matter during the same sitting or adjourn the hearing thereof to a future time to be fixed for that purpose.

- The application can be made at any time before the passing of the sentence but after judgment;

- In cases where the accused has pleaded not guilty or

- Where accused has pleaded guilty

- The grounds on which the application can be made are that

    - Lack of certainty in the information or does not disclose an offence. There is a defect in the information which defect is not formal and the court has not amended it either at case to answer or in the judgment
    - Aggravated robbery not disclosing that one was armed and working with another.
    - The charge is founded on an act that was repealed before the plea

- Judgment cannot be arrested on the ground that:

    - The evidence does not support the charge

    - There was a procedural irregularity during the trial

- If the court decides in favour of the accused, he shall be discharged from that information.

THE TRIAL IN DETAIL

MENTAL DISABILITY

- accused person must plead when charge is read
- where unable to respond must find out why

- **section 160 CPC** court must inquire into where issue of failure to plead by reason of unsoundness of mind or disability arises
    - **THE PEOPLE v MUSITINI 1975 ZR 53** the court should immediately enquire when the issue of whether accused is capable of making a defence

- **section 161 CPC**
    - this may include medical examination
    - enters plea of not guilty where finds that not able to make defence
    - **THE PEOPLE v MWABA 1973 ZR 271** whether a person can make a defence should be dealt with as soon as it arises from any person including a medical expert
    - **THE PEOPLE v BANDA 1972 ZR 307** in the inquiry the court needs to find out whether is capable of making a defence or whether he was insane at the commission of the crime

- trial proceeds
- at end of trial
    - acquits if no evidence-**161(2)(a) CPC**
    - called upon to give defence **MWABA CASE**
- **if sufficient evidence to justify conviction**
    - order detention during the president's pleasure-**section 161(2)(b) CPC**
    - **THE PEOPLE v MWEWA 1971 ZR 171** procedure under section 163(1) (**was 154(1)**) is only applicable to a person who suffers from mental illness. Mute person for the purposes of sentencing treated like a normal person.

    - special finding (defence of insanity-**section 167)**

- even where acquitted can order detention-**section 161(3)**
    - **Mental Disorders Act Cap 305**

- **section 165 CPC**- one detained because cannot make a defence must be brought back when ok

    - **MBAYE v THE PEOPLE 1975 ZR 74** where a person is taken for medical examination even if they have been found not to be able to make a defence they must be tried. They cannot wait until treated.
      A court cannot make a special finding if it finds one innocent by reason of insanity

    - **CHABALA v THE PEOPLE 1975 ZR 128** the difference between mental capacity at the time of a trial (fairness of the trial) and at the time of the commission of the offence (criminal responsibility)

- no appeal against special finding
    - **MALITA BANDA V THE PEOPLE 1978 ZR 223** no appeal lies to an order under 161(2)(b) on its merit but where made without jurisdiction.
- Onus of establishing unsoundness of mind rests on accused person
    - **KHUPE KAFUNDA V THE PEOPLE 2005 ZR 31**

TRIAL WITHIN A TRIAL

- in the course of investigation, the accused may give incriminating evidence
- verbal or written
- the written one is usually called a warn and caution statement

- admissibility of a confession is being voluntary and not truthfulness
- where it is contested that statement was not free and fair
    - **KASUBA V THE PEOPLE 1975 ZR 41**when a witness is about to be referred to the incriminating evidence the accused should be asked if they object
    - **HAMFUTI v THE PEOPLE (1972) ZR 420** whether or not the accused is represented he must be asked whether he objects to the contents of a statement
- A trial within a trial Will not be held because accused did not understand the language or was scared
    - **VILONGO v THE PEOPLE 1977 ZR 423** not sufficient that was scared but that fear was put into a person to induce the confession
- an allegation that no statement was made despite beatings does not raise the issue of voluntariness but raises a question of credibility as one of the general issues-but being forced to sign does
    - **MATE, MBUMWAE AND MWALA 1995-1997 ZR 135**
- Prosecution will call police officers and/or persons who were present during recording of statement
    - Witnesses cross examined and re examined
- At close of prosecution case accused person gives testimony and calls witnesses
    - Cross examination limited to admissibility of statement during trial within a trial-
    - **TAPISHA v THE PEOPLE ZR 1973 222 –**has argument why
- held even where subsequentl**y**
    - **LUMANGWE WAKILABA v THE PEOPLE 1979 ZR 74** can be held where accused suggests that was induced even after the prosecution has closed its case

VOIRE DIRE

- At common law a person incapable of understanding an oath by reason of infancy was incompetent to testify
- **Section 122 (1) of The Juveniles Act** provides for admission of child's evidence

- ***122. (1) Where, in any proceedings against any person for any offence or in any civil proceedings, any child of tender years called as a witness does not, in the opinion of the court, understand the nature of an oath, his evidence may be received though not on oath, if, in the opinion of the court, he is possessed of sufficient intelligence to justify the reception of his evidence and understands the duty of speaking the truth; and his evidence though not given on oath but otherwise taken and reduced into writing so as to comply with the requirements of any law in force for the time being, shall be deemed to be a deposition within the meaning of any law so in force:***

- ***Provided that where evidence admitted by virtue of this section is given on behalf of the prosecution, the accused shall not be liable to be convicted of the offence unless that evidence is corroborated by some other material evidence in support thereof implicating him.***

ZULU v THE PEOPLE 1973 ZR 326 sets out procedure under section 122

- The court must first decide that the proposing witness is a child of tender years; **if he is not, the section does not apply** and the only manner in which the witness's **evidence can be received is on oath.**
- If the court decides that the witness **is a child of tender years**, it must then inquire whether the child **understands the nature of an oath**; if he does, he is sworn in the ordinary way and his

evidence is received on the same basis as that of an adult witness.

- If, having decided that the proposing witness is a child of tender years, **the court is not satisfied that the child understands the nature of an oath**, it must then satisfy itself that he is **possessed of sufficient intelligence to justify the reception of his evidence and that he understands the duty of speaking the truth**; if the court is satisfied on both these matters then the child's evidence may be received although not on oath, and in that event, in addition to any other cautionary rules relating to corroboration (for instance because the offence charged is a sexual one) there arises the statutory requirement of corroboration contained in the proviso to section 122 (1).
- But if the **court is not satisfied** on either of the foregoing (sufficient intelligence and duty to speak the truth) matters the child's **evidence may not be received at all**.

- **CHIBWE V THE PEOPLE 1972 ZR 239** the court must record actual questions and answers on which the conclusion has been reached.
- No fixed age below which child is incompetent to give evidence on oath or unsworn evidence
- Where a voire dire has been inadequate the fault lies with the court; there is no question of the prosecution being given the opportunity to look for further evidence to strengthen its case.

- **SEMANI V THE PEOPLE 1973 ZR 203-**ordering a retrial is in the discretion of the court.

TYPES OF PUNISHMENT

Provided for under Chapter 6 of the penal code. A court may impose the following forms of punishment:

(a) death;

(b) imprisonment or an order for community service;

(d) fine;

(e) forfeiture;

(f) payment of compensation;

(g) corporal punishment;

(h) deportation;

(i) any other punishment provided by this Code or by any other law.

Death Penalty Section 25 PC

(a) By hanging, by the neck until dead.

(b) A death sentence shall not be imposed on a person who committed the offence under the **age of 18**. He will instead be detained at the president's pleasure. A **pregnant woman** cannot be sentenced to death. She will instead be sentenced to life imprisonment.

Imprisonment – Section 26

(a) A judge has discretion to order imprisonment with or without hard labour, unless hard labour is prescribed by law.

(b) A person liable to imprisonment for life or any other period may be sentenced for any shorter term.

(c) A sentence can be backdated to when the accused was remanded. The judge has to say " …with effect from…" –Section 37

(d) A fine can be imposed instead of or in addition to imprisonment.

(e) A sentence can be concurrent or consecutive. The guiding principle is that "where the facts of the case disclose a series of offences forming a course of conduct, the proper procedure is for the sentence imposed to run concurrently**." Muke v The People (1983) ZR 94**

(f) Where an accused has committed many offences, the court should assess the proper sentence which is appropriate for the whole course of conduct " Isaac Simutowe & Others Vs The people (2004) ZR 91

(g) For offences to be considered as one course of conduct, they must all be committed within a short period of time. **Chomba v the people (1975) ZR 245.** Appellant had been found guilty of 5 counts of burglary and theft- all committed within 12 days. The trial court ordered that these should run consecutively. On appeal, the supreme court held that the sentences should run concurrently. The court made this statement" this was a series of offences committed over a short period and should have been treated as one course of conduct for the purses of sentence".

(h) In the case of the People v Soko 2011, the court stretched the principle of proximity to include similarity in the offences committed. Although the offences were spaced, (by one year in some counts), the conduct of the appellant revealed a fraudulent disposition of mind that led to the commission of a series of offences involving either the sale or renting out of a house to a different people over a period of one year". The court allowed the appeal on the ground that it fell within the principles laid down in the above cases and so the magistrate was wrong to order the sentence to run consecutively. The appellate court made the order to run concurrently.

(b) **suspended sentences** are commonly imposed in order to alleviate the strain on overcrowded prisons or to first time offenders who have committed minor crimes. A suspended imprisonment is served outside jail - does not take effect until the happening of some event. Usually, a sentence is suspended on condition that the offence is not repeated during suspension of sentence (operation period). For example, an individual may be sentenced to a six-month jail term, wholly suspended for six months. If they commit any other offence during that year, the original jail term is immediately applied in addition to any other sentence.

FIFTH SCHEDULE

OFFENCES FOR WHICH COURTS MAY NOT SUSPEND SENTENCE

Any offence punishable by death.
Any offence against section 226 of the Penal Code.
Arson.
Robbery.
Any offence in respect of which any written law imposes a minimum punishment.
Any conspiracy, incitement or attempt to commit any of the above-mentioned offences.

The period for which the sentence is suspended cannot exceed the term of the original sentence

Sentencing

The fundamental purpose of sentencing is to contribute to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives, namely to:

(a) **denounce** unlawful conduct; (criticise)
(b) deter the offender and other persons from committing offences; (**deterrence**)
(c) separate offenders from society, where necessary; (for the protection of the society, oftentimes).
(d) assist in **rehabilitating** or **reforming** offenders;
(e) provide reparations (compensation) and or retribution (revenge) for harm done to victims or to the community; and
(f) promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

Principles of Sentencing

(a) A sentence must be **proportionate** to the gravity of the offence and the degree of responsibility of the offender.

(b) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender. This is why it is important that **previous convictions**, if any, are read out.

(c) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances; (that is why case law is crucial)

(d) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;

(e) The maximum penalty should be reserved for worst case scenarios; and

(f) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances. E.g. if the prescribed penalty is a term of imprisonment or a fine, the court should rather go for the fine. In **Musonda v The People (1976) ZR 263**, the Supreme Court held that where there is an option of a fine or imprisonment, a first offender should be sentenced to pay a fine with imprisonment only in default unless there are aggravating circumstances.

Mitigating Factors

There is no exhaustive list, but from case law, these are some of the things the court takes into account when passing sentence.

(a) Youth and age

(b) Antecedents of accused e.g. previous conviction

(c) Extent of corporation in the investigation

(d) Mental state – including a degree of diminished responsibility

(e) Lack of premeditation - lack of long premeditation may help reduce sentence. Spur of the moment kind of thing, or heat of passion.

(f) Character - good character; standing in community and having reputation for kindness and being an exemplary family man; .

(g) Remorse - lack of remorse is an aggravating feature.

(h) Capacity for reform and continuing dangerousness

(i) Due to youth or commitment to undergo rehab for drug or alcohol addition.

(j) Delay up until time of sentence

(k) How long the accused has been in custody.

(l) Guilty plea

Community service – Section 26A

Where an offender has been sentenced to community service, the offender shall perform community work for the period specified in the order for community service shall be performed in an area where the offender resides.

Fines Section 28

(a) Where fine is not specified, the amount of fine imposed is unlimited, but may not be excessive.

(b) The court may order that in default of paying the fine, a term of imprisonment shall be served, (the conversion table is provided for in this section) e.g. failure to pay a fine exceeding 1500 penalty units will attract a term of 6 months imprisonment. Court may order a warrant for the levy of the amount on the convict's movable or immovable property.

Forfeiture Section 29

Compensation –Section 30

Deportation Section 34, 35