ZIMBABWEAN

LEGAL EAGLES

Profiling Zimbabwean Female Lawyers who have been in practice in and out of the country for 10+ years

WOMENINLAW CONNECT

Editor's Note

"Celebrating Legal Eagles"

The idea of a Magazine to celebrate Zimbabwean Female Lawyers practicing across the globe came about in March 2023 as we celebrated International Women's Day. Over the years, Women in Law Connect has celebrated female lawyers who have attained professional milestones, by recognizing them at an annual breakfast held in March each year. However, the onset of national lockdowns due to COVID-19 restricted gatherings, making it impossible to host the event, even in the following years. And so, the idea of a Magazine to celebrate Legal Eagles was birthed.

This inaugural edition of the Magazine profiles Zimbabwean Female Lawyers who have been registered for 10 or more years and work in different sectors: private practice, the Judiciary, Government, NGOs, international organizations, private sector corporates, banking institutions, Regulatory Authorities, State Owned Enterprises, and so on. The Magazine profiles Zimbabwean Female Lawyers so as to showcase the depth and breadth of expertise that the Zimbabwean legal profession carries. The Magazine also seeks to inspire young women who are thinking of pursuing a legal career or who are studying toward a Law Degree, to enable them to see the versatility that comes in the practice of Law.

Most importantly, the Magazine is a celebration of Zimbabwean Female Lawyers by Zimbabwean Female Lawyers: as the tides continue to shift, thereby creating spaces for women to work in any sector, let it be known to Zimbabwean Female Lawyers that, We see you, We salute you, We will emulate you.

We also take time to remember our sisters who have passed on over the years: while they are no longer with us, we certainly hold on to the memories they left us with in the Zimbabwean legal profession.

To the Reader, we hope you enjoy reading this inaugural issue of the Magazine as much as we enjoyed putting it together for you!

Nqobile Ndlovu
Editor
Partner, Titan Law

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FOREWORD

"Every woman's success should be an inspiration to another. We are strongest when we cheer each other on."

Serena Williams

"As women achieve power, the barriers will fall. As society sees what women can do, as women see what women can do, there will be more women out there doing things, and we'll all be better off for it."

Ruth Bader Ginburg

That the Legal profession is still very much a male dominated profession, and that women in the profession are rising to the challenge, making way to and gaining space at the table, and in some instances making their own tables and shattering glass ceiling, are all truths. And as more and more women achieve success in various aspects of their legal professional lives, they in turn inspire others, break barriers, and show the world what women can do.

As Women in Law, we are all about celebrating, cheering on and inspiring women in law to aim higher and break barriers.

This, our inauguration publication, aims to do just that. it is a celebration of women in the profession who have "lived to tell the tale" of the rigors of being Women in law. The women profiled in this inauguration publication are just but a few of the many "Legal eagles" who, every day, inspire and challenge us and make us proud to be women in law.

There are still barriers to be broken to even out the playing field. There is still lots of work to be done for women in the profession to achieve equality. Whilst we chase the bigger goal of equality, we must still celebrate our achievements, our small victories, as it is these that will set us up for greater success.

We should and do remain focused on the journey ahead, how much we still need to do, to be recognized as able but we should not lose sight of how much we have accomplished. It is these small victories that keep the flame of motivation flickering, and help boost our confidence and sets up the stage for bigger wins.

It is my hope that the profiles of these few "sisters in law" will serve as a celebration of women who have stayed the course in a profession that is still a man's world and further that we will all be inspired to achieve more and be better off for it.

Precious Chakasikwa
Chairperson
WOMEN IN LAW CONNECT

Understanding Corporate Rescue Proceedings in Zimbabwe

By Julian Mugova

Introduction

The Insolvency Act (Chapter 6:07), which was promulgated on 25 June 2018, has brought about the inaugural aspect of Corporate Rescue in Zimbabwe, which is a diversion from the commonly known process of judicial management, under which companies in distress were placed. This article seeks to provide an understanding the of concept of corporate rescue, the preparation and adoption of the corporate rescue plan, recourse to creditors against errant Corporate Rescue Practitioners, and the differences between corporate rescue and judicial management.

What is corporate rescue?

Section 121 of the Insolvency Act defines corporate rescue as proceedings the facilitation of the rehabilitation of a company that is financially distressed. The proceedings provide this through the temporary supervision of the company and of the management of its affairs, business and property by a qualified and registered Corporate Rescue Practitioner. A company under corporate rescue is entitled to a temporary moratorium on litigation on the rights of claimants against the company or in respect of property in its possession. This means that no litigation can be instituted or continued for any debts or liabilities of the company by any creditors. Finally, during the corporate rescue proceedings, there is the development and imple-

mentation, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis. This plan must be approved by the creditors. Were it is not possible for the company to continue in existence, the plan paves way for a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company.

It is clear from this section that corporate rescue proceedings are not permanent: they are simply a measure for the temporary supervision of a financially distressed company in order to revive it and restore it to viability. It is for this reason that section 125(3) provides that corporate rescue proceedings must be concluded within three months. If a longer period is required, the Corporate Rescue Practitioner must apply to the High Court for this.

When do Corporate Rescue proceedings begin and end?

According to section 125 of the Insolvency Act, corporate rescue proceedings may commence in one of 4 ways. Firstly, corporate rescue may be initiated by the company by filing a board resolution to place itself under supervision. Next, the company may apply to the High Court for consent to file a resolution placing the company under supervision. The section also empowers an affected person to apply to the High Court placing the company under supervision. The final route is that the High Court may make an order placing a company under supervision during the course of liquidation proceedings, or proceedings to enforce a security interest.

There is a school of thought which believes that corporate rescue proceedings end when the 90-day period within which the process must be completed has lapsed. This perspective is garnered from section 125(3) of the Act, which alludes to a period of three months within which corporate rescue proceedings ought to be concluded.

However, the second school of thought is to the effect that corporate rescue proceedings end under five distinctly defined circumstances derived from Section 125(2), namely, when the High Court sets aside the resolution or court order that began the proceedings; or when the High Court converts the rescue proceedings to liquidation; or when the Corporate Rescue Practitioner files a notice of termination of rescue

Section 125(3) *states that if corporate rescue proceedings have not ended in three months since their commencement, or such longer time as permitted by the High Court, the Corporate Rescue Practitioner has an obligation to prepare a progress report of the proceedings, which must be updated monthly until the end of the proceedings*

proceedings; or when a corporate rescue plan has been adopted and the Corporate Rescue Practitioner has filed a notice of substantial implementation of the plan; or when a corporate rescue plan has been proposed and rejected and there has been no extension of the proceedings.

Section 125(3) states that if corporate rescue proceedings have not ended in three months since their commencement, or such longer time as permitted by the High Court, the Corporate Rescue Practitioner has an obligation to prepare a progress report of the proceedings, which must be updated monthly until the end of the proceedings. The Corporate Rescue Practitioner must deliver this report and each monthly update to the affected persons, the High Court and the Master.

The corporate rescue plan

Section 142 stipulates that a Corporate Rescue Practitioner, must prepare a corporate rescue plan for consideration and possible adoption, having consulted relevant stakeholders of the embattled entity, including creditors, other affected persons, and the management.

Such a plan must contain all the information necessary for the stakeholders to decide whether or not to accept or reject the plan. It must include an inventory of the material assets of the company, identification of the assets held as security by creditors when the corporate rescue proceedings began; a comprehensive list of creditors and their qualification; an estimated dividend which will be received by creditors; a list of the of the company's shareholders; the Corporate Rescue Practitioner's remuneration; and a statement whether the corporate rescue plan includes a proposal made informally by a creditor of the company.

The plan must also include the nature and duration of any moratorium of litigation for which the corporate rescue plan makes provision; the extent to which the company is to be released from the payment of its debts, and the extent to which any debt is proposed to be converted to equity in that company, or another company; the treatment of any existing agreements; the property of the company that is available to pay creditors' claims; the order of preference in which creditors will be paid if the corporate rescue plan is adopted; a projected balance sheet for the company; and a statement of income and expenses for the ensuing three years prepared on the assumption that the proposed corporate plan is adopted.

This corporate rescue plan must be published within 45 business days after the date on which the Corporate Rescue Practitioner was appointed, or such longer time as may be allowed by the High Court, on

application by the company or the holders of a majority of the creditors' voting interests.

Section 143(1) of the Act states that the Corporate Rescue Practitioner must convene and preside over a meeting of creditors and any other holders of a voting interest, called for the purpose of considering the plan within 10 business days after publishing this plan in terms of section 142.

Failure to prepare a plan and convene a meeting as indicated above therefore cripples the corporate rescue proceedings altogether and constitutes incompetence and failure to conduct his duties by the Corporate Rescue Practitioner.

What available recourse is there when a Corporate Rescue Practitioner has not fulfilled his role?

When appointed, a Corporate Rescue Practitioner has full management control of the company in substitution of its board and management team, which are dissolved upon commencement of the corporate rescue process. The Practitioner has other powers and duties set out in the Act.

Where a Corporate Rescue Practitioner has not fulfilled his role, an interested party has the option to approach the High Court with an application for the removal of the Corporate Rescue Practitioner in terms of section 132(2) of the Insolvency Act read with section 132(1)(b). The High Court may also remove the Corporate Rescue Practitioners on its own motion.

Where the High Court removes a corporate rescue practitioner from office, it considers a number of factors as grounds for removal. The first is incompetence or failure to perform duties as a Corporate Rescue Practitioner. Next, is failure to exercise the proper degree of care in the performance of the Corporate Rescue Practitioner's functions, including failure to publish the corporate rescue plan within 45 business days after the date he was appointed. Another ground is failure to consult with creditors, other affected persons, and the management of the entity under corporate rescue and failure to prepare a corporate rescue plan for consideration and adoption. Finally, engaging in illegal acts or conduct; conflict of interest or lack of independence; incapacitation to the extent of being unable to perform the functions of that office also constitute grounds for removal from office.

The Court will grant the removal of a Corporate Rescue Practitioner upon being satisfied that one or more of these grounds exist, thus making it undesirable that he should continue in office.

End of the judicial management era

Corporate rescue brought to an end the era of judicial management, and rightly so. There are many differences and benefits between the two processes, the first being that corporate rescue must be concluded at least within 90 days, or a longer period approved by the High Court. Next, the preparation, approval and adoption of the corporate rescue plan is new, and comes with certainty of how the distressed company will be operated going forward. Finally, errant Corporate Rescue Practitioners can in fact be removed from office.

Conclusion

Whilst corporate rescue as a method of aiding distressed companies is a welcome development in our law, it is one which needs to be understood by all relevant stakeholders in the embattled organization, in order to realise its efficacy, success and fruits. In practice, this has not been the case, as a number of those appointed as Corporate Rescue Practitioners still need to learn and adapt to the concept, which can only be effectively done when they hang their judicial management boots.

Supreme Court

Hon. Justice Gwaunza
Deputy Chief Justice

Hon. Justice Makarau
Judgeof the Constitutional Court

Hon. Justice Gowora
Judge of the Constitutional Court

Hon. Justice Makoni
Judgeof the Appeal

Hon. Justice Guvava
Judgeof the Appeal

Hon. Justice Chatukuta
Judgeof the Appeal

Hon. Justice Mavangira
Judgeof the Appeal

Hon. Justice Mwayera
Judgeof the Appeal

High Court

Hon. Justice Tsanga
High Court Judge

Hon. Justice Matanda-Moyo
High Court Judge

Hon. Justice Chigumba
High Court Judge

Hon. Justice Dube
Judge President

Hon. Justice Kabasa
Bulawayo High Court Judge

Hon. Justice Muzofa
Chinhoyi High Court Judge

Hon. Justice Charewa
Mutare High Court Snr Judge

Hon. Justice Muremba
High Court Judge

Hon. Justice Munangati
High Court Judge

Labour Court

Hon. Justice Mhoya
Snr Judge of the Labour Court
Bulawayo

Mrs. Mushure
Chief Magistrate

Mrs. Guriro
Principal Administrator

Hon. Justice Makamure
Labour Court Judge

Hon. Justice Hove
Labour Court Judge

Hon. Justice Kudya
Labour Court Judge

Hon. Justice Chidziva
Labour Court Judge Gweru

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1988
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Company Freelance

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Company; Fund administration, Jersey, UK

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Company:- UNFPA (United Nations Population Fund).

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Designation: High Court Justice
Company :Judicial Service Commission

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Mrs Virginia Mabhiza
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Ministry of Justice Legal and Parliamentary Affairs

ZIMBABWE NATIONAL DEFENCE UNIVERSITY

ENERGY SECURITY SYMPOSIUM

"Re-Energising the Economy through Energy Security: A Panacea for Achieving an Upper Middle-Income Economy by 2030"

27th – 30th September 2023

HOLIDAY INN Mutare

SOME OF THE OBJECTIVES OF THE SYMPOSIUM

To assess the current status of energy infrastructure and its contribution to the energy security of Zimbabwe.
To analyse the energy security challenges currently obtaining in Zimbabwe.
To review alternative sources of energy and their feasibility in the energy security matrix.
To identify opportunities for non-traditional training in the Zimbabwe energy sector.
To proffer possible solutions for the short-term generation and distribution capacity, funding prospects and timescales for Zimbabwe's current and future energy requirements.

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Company: Securities and Exchange Commission of Zimbabwe

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Tina Kadhau
LLB (UZ),
Designation: Founder and CEO , Tkadhau Law Chambers, Non-executive Director of Victoria Tobacco Pvt Ltd, Board Member of Women Mining Zimbabwe

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Qualifications: LLB (UZ)
Designation: Deputy Director
Southern Africa Litigation Centre

A Guide to the Companies & Other Business Entities Act (Chapter 24:31) with Commentary, Checklist for General Counsel, and Annexes

A book by Nqobile Ndlovu and Theresa Muchinguri

Introduction

In November 2019, the Companies and Other Business Entities Act (Chapter 24:31) ("COBE Act" or "the new Companies Act") was promulgated in Zimbabwe, stating that it would repeal the Companies Act (Chapter 24:03), which had been passed in 1952 and the Private Business Corporations Act (Chapter 24:11), which was enacted in 1993. Section 1 of the new Companies Act states that it would commence on the 90th day after the date of the promulgation. In effect, the new Companies Act came into operation in February 2020, and all of its provisions began to apply thereafter, save for the re-registration of companies, that was to be done within 12 months from February 2020, and subsequently extended to February 2023. The COBE Act therefore applies to corporates of all sizes, and attempts to strike a balance between over- and under-regulation, in a bid to encourage formalisation of companies.

By repealing the old Companies Act, the new Companies Act ended seven decades of its predecessor's subsistence, which stood the test of time as evidenced in the minimal amendments. The new Companies Act was a result of extensive engagements between various sectors in the economy, facilitated by the World Bank as part of the Rap-

id Results Framework, which was spearheaded by the Office of the President and Cabinet in the "Ease of Doing Business" reforms for Zimbabwe. The approach taken in drafting the COBE Act was to begin by perusing the old Companies Act and the Private Business Corporations Act, identifying provisions that were no longer relevant or that were outdated, and either supplementing these provisions, or deleting them altogether, or inserting completely new provisions. Those provisions there were still applicable were retained, with the majority of changes thereto being the replacement of criminal liability for any contravention, with civil penalties.

The Book

In April 2021, two Zimbabwean lawyers, Nqobile Ndlovu and Theresa Muchinguri, wrote a book titled "A Guide to the Companies & Other Business Entities Act (Chapter 24:31) with Commentary, Checklist for General Counsel, and Annexes." The Guide seeks to provide the reader with a simpler understanding of all of the COBE Act's 304 Sections and 10 Schedules. It is broken down into seven Chapters, which align with the Chapters in the COBE Act.

A key feature of this Guide is that it provides Commentary on some provisions, so as to assist both legal and non-legal readers to gain insight and perspective of their meaning. In some instances, the Commentary is analytical in nature, as it provides the opinion of the authors on the Section under discussion. In other parts, the Commentary is technical in that it provides a legal analysis of the Section, either in the context of the application of the Section, or in the context of how the Section operates in relation to other Zimbabwean Acts or in the context of the country's legal framework for business operations.

Another key feature of this Guide is the Checklist for General Counsel in Annexure A. This Checklist provides a list of all the provisions in the COBE Act that comprise corporate governance obligations of registered entities and sets out the Sections in terms of which they must comply. As these provisions are derived from the new Companies Act, they are all compulsory and are applicable as relevant to companies and PBCs. The Checklist is not exhaustive and is intended to serve as a guideline to assist companies in ranking the most important corporate governance obligations for the purpose of developing a compliance programme. Other corporate governance obligations are found in the National Code on Corporate Governance, and in the Zimbabwe Stock Exchange Listing Rules, and can be referred to for additional guidance. Obligations under the National Code on Corporate Governance are largely voluntary. This is with exception of listed companies, where Section 220 of the new Companies Act requires that the board of every public company must establish corporate governance guidelines that are consistent with the National Code on Corporate Governance. On the other hand, listing rules are compulsory for the companies listed on the Zimbabwe Stock Exchange. Therefore, for the purposes of determining priority, the corporate governance obligations of the new Companies Act rank higher, as they are mandatory.

> The new Companies Act was a result of extensive engagements between various sectors in the economy, facilitated by the World Bank as part of the Rapid Results Framework, which was spearheaded by the Office of the President and Cabinet in the "Ease of Doing Business" reforms for Zimbabwe

The new Companies Act

The new Companies Act introduces many new legal principles into Zimbabwean law by borrow-

A key feature of this Guide is that it provides Commentary on some provisions, so as to assist both legal and non-legal readers to gain insight and perspective of their meaning.

ing and codifying Common Law, and also borrowing from other jurisdictions. Notably, the new Companies Act combines all matters relating to companies and other business entities namely, the constitution, incorporation, registration, management and internal administration thereof. Not only that, it also provides a list of entities that can register thereunder, and become subject to the Act, that is, businesses operated as partnerships, syndicates, joint ventures and certain associations that voluntarily register in terms of Section 278 of the COBE Act. This means these business entities or any unregistered association of persons can choose to bring themselves under the provisions of the new Companies Act.

Protection of minority shareholders

The COBE Act provides for protection of minority shareholders, by empowering them with the right to call for investigations into the affairs of the company. The methods of investigation are more detailed than in the old Companies Act, thereby giving minority shareholders the ability to exercise their rights in the affairs of the company.

Derivative Actions

The new Companies Act introduces the concept of derivative actions into Zimbabwean law. This is court action that is instituted by members of the company for the benefit of the company, and not for the benefit of the members instituting it. The new Companies Act provides that one or more members can bring an action in his own name, and in the name of the company against any directors, officers or managers to enforce or recover damages caused to the company by a violation of any listed duty, or any law including laws against fraud or misappropriation.

Corporate Governance

The new Companies Act addresses the concept of corporate governance, which had become a major cause for concern in the operations of companies under the old Companies Act, as the latter did not have corporate governance provisions. The new Companies Act stipulates the roles and responsibilities of the board, and states that these may not be transferred, discharged or determined to any other person within or outside of the company. The COBE Act instructs the directors to promote and abide by the corporate governance frameworks it has introduced. Public companies

have additional responsibilities to establish corporate governance guidelines that are consistent with the National Code on Corporate Governance, and they must report on the company's compliance with its guidelines at each Annual General Meeting.

Further, the new Companies Act demands increased accountability of company directors and officers, and their compliance with fiduciary duties. The COBE Act introduces the duty of care and business judgment, which includes the duty of good faith, and the duty of loyalty, which prohibits conflicts of interests in handling company matters or transactions. In terms of the new Companies Act it is mandatory that directors and officers perform their duties with due skill, care and attention.

Register of beneficial owners

The COBE Act also requires companies to maintain a register of beneficial owners and file the information with the Registrar of Companies. A beneficial owner is defined as an individual who directly or indirectly holds more than twenty percent of the company's shares or voting rights. The new Companies Act further provides that register must be filed with the Registrar by a person appointed to maintain such register, and must be updated within 7 days of any material changes. The information kept in the register by the Registrar, although public information, can only be available for inspection with the consent of the owner or in terms of a court order or to a financial institution or a designated non-financial business/ profession referred to in the Money Laundering and Proceeds of Crime Act.

Shareholders or Members meetings

In terms of the COBE Act, meetings can now be held through electronic or telephone or conference or other audio or visual means, provided that all participants can communicate with each other. Notably, the new Companies Act prohibits the appointment of a director or officer of the company to act as a proxy for a shareholder. It states that any vote cast by a person purporting to vote as a proxy in violation of this requirement is invalid. This is a complete departure from the current practice, as it is currently common for shareholders to appoint directors or officers of the company as their proxies particularly for AGMs.

Shares and Share Capital

The new Companies Act defines and describes the nature of shares thereby addressing the ambiguity that existed with the old Companies Act. A share issued by a company is movable property and transferable in any manner provided for by the Articles of the company or as recognised by the new Companies Act or any other law. The COBE Act states that shares no longer have nominal or par value. This is a complete departure from the old Companies Act, which recognised that companies could issue shares with nominal or par value, and record this value on its constitutive documents. The new Companies Act also adds that consideration for shares can be money, or tangible/ intangible property, or other rights with a monetary value, or a binding obligation to pay money or services previously performed.

The COBE Act provides for protection of minority shareholders, by empowering them with the right to call for investigations into the affairs of the company. The methods of investigation are more detailed than in the old Companies Act, thereby giving minority shareholders the ability to exercise their rights in the affairs of the company.

If the payment is non-monetary, its value must be verified by the opinion of an independent expert, be shared with all existing shareholders, and be approved by all existing shareholders.

Financial Reporting Structures

The new Companies Act provides for financial reporting structures that address gaps that existed in the old Companies Act. The new Companies Act requires more detail from the operating business entities thus significantly reducing possible fraudulent activities. Further, more advanced accounting and auditing structures are provided for, ensuring strict compliance to financial accounting by private companies.

Company Secretaries

The COBE Act sets out the requirements, duties and responsibilities of Company Secretaries. It provides a list of the Company Secretary's roles and responsibilities, including being the custodian of the company's records, giving notices to meetings on time, recording minutes of meetings, and advising the directors of their duties and powers under the Act. The new Companies Act mandates that a public company must appoint a Company Secretary who is registered as a Chartered Accountant, or a Chartered Secretary, or a Legal Practitioner, or a Public Auditor/ Accountant. The Company Secretary of a public company cannot hold any other position in the company, which is different from the old Companies Act, as the position Company Secretary could be held jointly with other positions, the most common being that of the Finance Director. The Act has additional provisions relating to disqualification from holding the office of Company Secretary.

Mergers and Takeovers

The COBE Act introduces a statutory merger, which is the amalgamation of one or more existing companies joining an existing company, or consolidation, which is when two or more companies consolidate into a new company. The statutory merger is subjected to extensive disclosure requirements, such as entering into a provisional merger contract, notifying the shareholders of this provisional merger contract, securing an independent financial opinion, as well as publication in the Government Gazette and in a local daily newspaper.

The new Companies Act provides a list of what must be included in a merger contract, as well as the effect of the merger. The COBE Act provides dissenting shareholders with the right to object to the merger. If however, the merger is passed, the COBE Act allows the dissenting shareholder to compel a company to buy back his/ her shares for fair value, and provides for this process in significant detail.

The COBE Act provides dissenting shareholders with the right to object to the merger. If however, the merger is passed, the COBE Act allows the dissenting shareholder to compel a company to buy back his/ her shares for fair value, and provides for this process in significant detail.

Electronic Registry

The COBE Act empowers the Registrar to establish an Electronic Registry and apply information technology in operating this registry. Under the old Companies Act the process of registering a company was entirely manual, thereby arduous and cumbersome as it involved a significant paper trail and manual filing. The documents could easily be misfiled or lost during the process by either the companies or the Registrar's Office itself.

This did not take into account the amount of physical storage space required to retain all the paper

. The new Companies Act also adds that consideration for shares can be money, or tangible or intangible property, or other rights with a monetary value, or a binding obligation to pay money or services previously performed.

records as companies submitted hundreds of documents over the years. The new Companies Act provides that any person intending to use the Electronic Registry must enter into a User Agreement with the Registrar of Companies, which is provided in the Seventh Schedule. The Agreement governs access to, and the use and disclosure of data in the electronic registry. The COBE Act does however retain the manual filing system to cater for those who do not enter into User Agreements with the Registrar's Office.

Private Business Corporations (PBCs)

The new Companies Act adopts the majority of the provisions of the Private Business Corporations Act. All matters relating to the constitution, incorporation, registration, management and internal administration of PBCs are covered in the COBE Act. The nature of PBCs is the same as before in that they are completely separate entities from their members. It is envisaged that many micro and small business will opt to register as this type of entity, as PBCs are less expensive to operate, and have a simpler compliance regime.

Conclusion

Overall, the COBE Act is a welcome development that codifies key elements of Common Law, while retaining sufficient simplicity to cater for corporate entities of all sizes. All the above concepts and other provisions in the new Companies Act are well-explained in a clear and straightforward manner in the Book written by Nqobile Ndlovu and Theresa Muchinguri, so to provide its readers, legal and non-legal alike, an appreciation of some of the new legal principles introduced by the Act.

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Understanding Real Estate Investment Trusts in Zimbabwe

By Priscilla Nyatsanga

Defining Real Estate Investment Trusts (REITS)

Real Estate Investment Trusts (REITs) are regulated investment vehicles that enable collective investment in real estate. Investors pool their funds and invest in a trust that is divided into units, with the intention of earning profits or income from real estate, as beneficiaries of the trust. In other words, a REIT is an investment vehicle that enables the issuer to pool investors' funds for the purpose of investing in real estate. In exchange the investors receive units in the trust commensurate with their contribution and as beneficiaries of the trust share profits from the real estate assets.

A REIT owns and typically operates income-producing real estate or related assets which may include among others, office buildings, shopping malls, apartments, hotels, resorts and warehouses.

Unlike traditional real estate eq-

uities, REITs are mandated to pay almost all income from rentals to investors. The level of distributions to REIT securities holders varies by jurisdiction and the legislation in Zimbabwe stipulates that at least 80% of gross taxable income must be distributed.

History of REITs

The REIT structure was first established in 1960 in the United States and arose in response to problems in the US property market. At the time, banks in the US were finding themselves in the possession of large portfolios of income-producing properties, whose mortgages had not been repaid. In the process of attempting to off-load these properties, the banks found that they were unable to sell them to traditional investors due to the inaccessible nature of large real estate assets. The REIT concept was thus developed as a strategy to "unitize" property and permit collective investment by the average investor, with the aim of providing this average investor a way to participate in the property market.

Other countries followed suit, with Australia listing the first property trust in 1971, Canada in 1993, while the UK established REITs in 2007. Since 1994, legislation and regulations governing REITs have been introduced in a number of African countries, including Ghana, Tanzania, Nigeria, South Africa, Kenya, Rwanda, and Morocco. In South Africa, the institutionalisation of the REITs structure has seen the registration of around 30 REITs since 2013, the emergence of REITs in other African countries has progressed at a slower pace.

The Legal Framework governing REITs in Zimbabwe

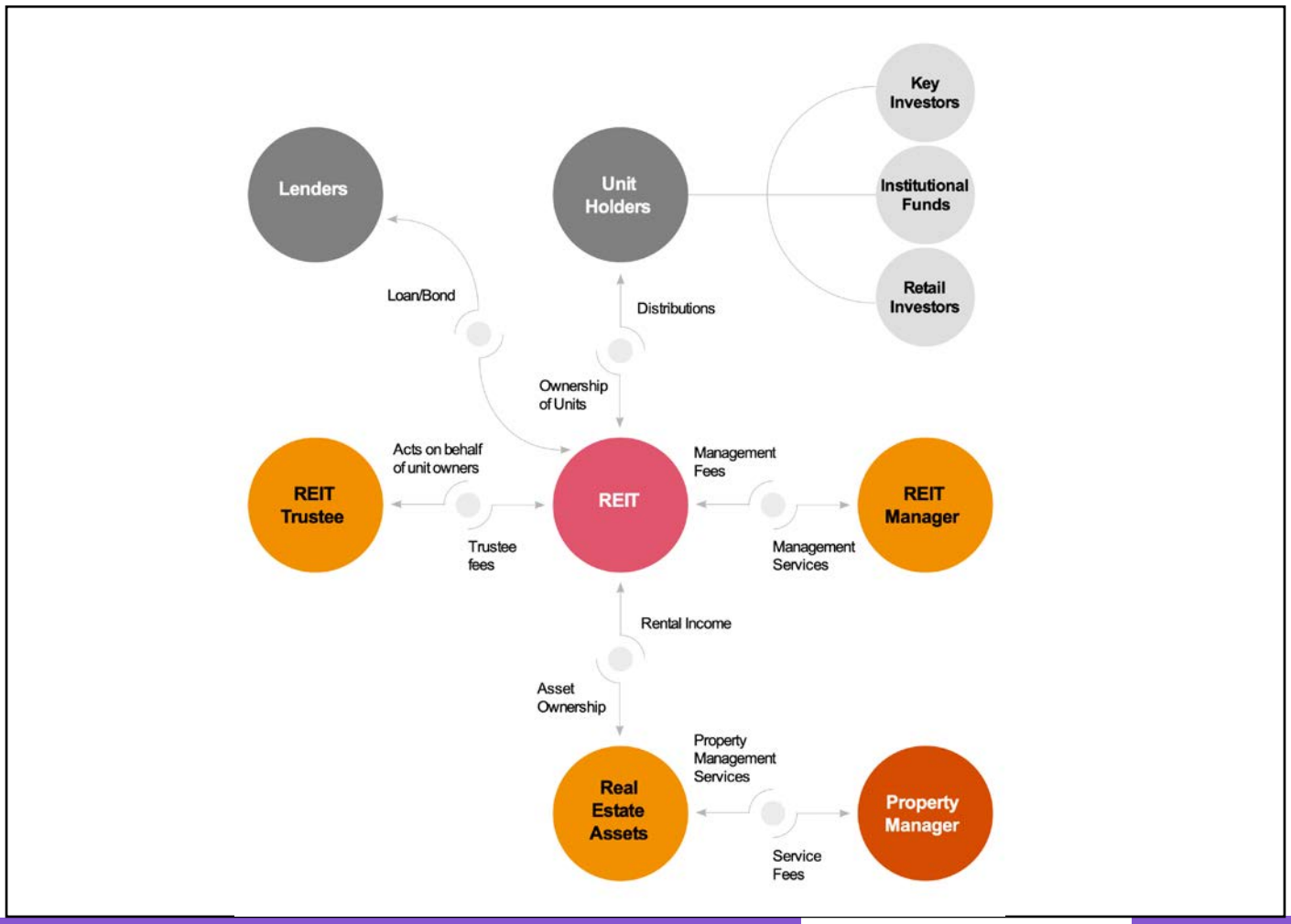
In Zimbabwe, REITs are regulated by the Securities and Exchange Commission of Zimbabwe (SECZ) under the Securities and Exchange Act (Chapter 24:25), Collective Investment Schemes Act (Chapter 24:19), Collective Investment Schemes (Internal Schemes) Regulations, 1998, Collective Investment Schemes (Internal Schemes) (Amendment) Regulations 2019 No. 5 and the Income Tax Act (Chapter 23:06).

HOW DO REITs OPERATE? KEY PLAYERS AND INSTRUMENTS

There are several parties involved in the structure of REITs. This is purposely done to improve transparency, accountability and ensure the interests of investors are fully protected. Below is a summary of the various parties.

The Trustee

The Trustee acquires the Property and holds it on behalf of



the beneficiaries or investors. The Trustee is responsible for appointing and supervising the Manager. It is also the Trustee's responsibility to ensure that the assets of the scheme are invested in accordance with the Trust Deed and the Offering Prospectus, and to ensure that distributions from the assets of the REIT are made in accordance with the Prospectus.

In short, the Trustee take legal ownership of the assets in Trust and ensures that the funds contributed are invested in line with the objectives and purpose laid out in the Trust Deed.

The Manager

The scheme is managed by a Professional Manager who is answerable to the Trustee. The Manager's duty is to oversee the investment of the assets of the scheme and maintain proper accounting records and other records of the scheme. The Manager also collects rental and other income on behalf of the Trustee. This income is distributed to the investors at the rate agreed upon in the Prospectus or at any other rate as may be agreed between the Trustee, the Manager and the Investors.

Trust Deed

This is a document that establishes or sets out the terms, objectives, and the Investment Policy of the REIT. All investments are done in line with the objectives in this document. It is similar to a constitution as it guides the management of the REIT. The trust deed has to be executed by the scheme's manager and trustee or proposed manager and proposed trustee and must comply with Section 11 of the Collective Investment Schemes Act. The trustee is responsible for implementing the scheme's investment policies and investment restrictions outlined in the provisions of the trust deed.

The Offering Prospectus

The Offering Prospectus is a document detailing the policies and investment strategies to achieve the REIT's stated objective, and the investment strategies, including the REIT's future plans as well as steps taken and the time frame to realise the plans. The prospectus also typically details the types and characteristics of real estate which the REIT will acquire, that is, considerations taken into account in selecting real estate such as location, types of real estate and income/rental prospects; permitted investments and investment limits and restrictions; the policy on borrowing or financing; and the REIT's level of gearing at the point of listing, including source, type, nature of borrowings or financing and the interest or profit rate payable; distribution policy and mode of distribution to investors; and the investors' profile most suitable for the REIT.

Securities Exchange Commission of Zimbabwe (SECZ)

This is the government institution that regulates capital markets in Zimbabwe. It licenses, supervises, and monitors activities in the REITs market to ensure that investments are safe.

BENEFITS TO INVESTORS

Investing in REITs offers several benefits to investors. Firstly, REITs present middle-income investors easier access and ownership in the growing real estate sector in a manner that is not as capital intensive as a direct purchase of property. It also offers issuers access to a larger and broader pool of investors and capital depending on how they solicit investment.

The unique structure has the advantage of investing in a variety of real estate such as shopping malls, residential projects and industrial projects. This is possible because a REITs structure affords to unit holders, an avenue to venture into real estate without the constraints and challenges faced in construction, sourcing for capital, managing tenants and buildings maintenance.

Because REITs are listed on the stock exchange, by implication, the structures tend to be liquid, as investors are able to buy or sell units easily in an organized marketplace. This is not particularly the case in the property market where residential or commercial property can stay on the market for years without attracting buyers due to exorbitant pricing.

REITs offer a tax-efficient structure that can enhance operational efficiency and profitability of property enterprises and ventures. Within the Zimbabwean legislative framework, effective 1 January 2021, REITs are exempted from corporate income tax, subject to certain conditions, including;

- in the case of investors other than pension funds, income must accrue from new real estate projects;
- at least 80% of gross income must be received from real estate;
- a minimum of 80% of taxable income must be distributed in the form of shareholder dividends each year;
- there must be a minimum of 100 shareholders after the REITs' first year of existence;

and

- the REIT must be listed on an exchange registered under the Securities and Exchange Act.

In Zimbabwe, REITs are exempt from income tax. REITs security holders pay 1% capital gains withholding tax on disposal of their securities and 10% withholding tax on dividends earned. Further, REITs have a favourable tax regime from both investors' perspective and also from the REITs' perspective.

This is attractive to real estate equities investors because listed businesses are generally liable to income tax of 25%, and equities investors are liable to a dividend tax of 10% as well as capital gains withholding tax of at least 1.5% when they dispose their securities.

Conclusion

At a macroeconomic level, the introduction of the highly transparent, well-regulated, tax-efficient REIT structure into the real estate sector of Zimbabwe has the potential to stimulate additional capital flows into the country's property markets, thus positively impacting the job market and business dynamism of the economy. At a microeconomic level,

REITs will provide an opportunity for private investors to play a significant role in the provision of the country's commercial offices, industrial premises, retail real estate, residential units, and healthcare facilities. In other words, the REITs structure has the potential to serve as an effective policy tool for channelling professionally managed capital into the delivery and operation of the property market.

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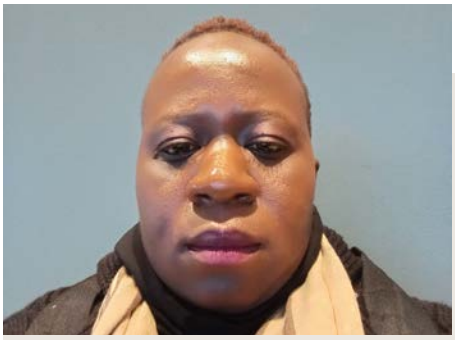

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Security Agreements in International Trade

By Heena Joshi

Introduction

International trade is dependent on security agreements or financial instruments provided by banking institutions or third parties to support the contracts of sale that are negotiated between transacting parties. These instruments include letters of credit, bank guarantees, and performance bonds. This is because international trade exposes transacting parties to various risks, particularly where if the buyer fails to the exporter pay on time, consequently negatively impacting the exporter's cash-flow.

This article examines the differences in credit arrangements or financial instruments that are available as well as the International Chamber of Commerce Uniform Customs and Practice for Documentary Credit (UCP 600), and Uniform Rules for Demand Guarantee (URDG 758).

Reducing risk of non-performance

Mitigating financial risks has become an area of enhanced documentation support to international trade. Financial institutions, through their trade-finance services, offer specialised documentary credit arrangements in the form of letters of credit (LCs), bonds, performance guarantees, demand guarantees and other such security agreemen
These are all designed to protect the parties entering into the transaction and to enable global trade, while reducing the risk of non-payment by a party, or failed performance of obligations.

There are various bodies in international trade finance whose primary objective is to facilitate international 'deal flow'. The International Chamber of Commerce (ICC) is one such organisation, which aims to promote international trade and investment as vehicles for inclusive growth and prosperity. It also resolves disputes when they arise in international commerce in a bid to support global efforts to streamline customs and border procedures. The ICC sets about correcting international trade dissonance and harmonising documentary credit practices across the globe.

Understanding Letters of Credit and Performance Guarantees

International security agreements or financial instruments are negotiated directly with banking institutions by the parties to the transaction. These can be in the form of letters of credit, bonds, performance guarantees, demand guarantees and other such security agreements that suit the transaction.

Letters of credit and performance guarantees or demand guarantees provide certainty of performance of payment, even where the exporter and buyer are transacting for the first time. These instruments alleviate the 'Distrust Divide' tension that arises due to the timing difference that can happen regarding payment and performance of the underlying contract. In other words, "the general course of international commerce involves the practice of raising money on the documents so as to abridge the period between the shipment and the time of obtaining payments against documents" as described by Lord Wright.

Article 4(a) of UCP 600 captures this succinctly by stating that "A credit by its nature is a separate transaction from the sale or other contract on which it may be based. Banks are in no way concerned with or bound by such contract, even if any reference whatsoever to it is included in the credit.

Article 2 of UCP 600 defines a credit as, "any arrangement, however named or described, that is irrevocable and constitutes a definite undertaking of the issuing bank to honour a complying presentation." This means the status of irrevocability is presumed, thereby creating a binding obligation on the financial institution or issuing bank to perform, and providing the beneficiary with financial reassurance.

It is for this reason that banking institutions that provide security agreements or financial instruments do not concern themselves with the underlying transaction: rather, they focus on the documents evidencing security, and payment obligations of the banking institution captured therein. Article 4(a) of UCP 600 captures this succinctly by stating that "A credit by its nature is a separate transaction from the sale or other contract on which it may be based. Banks are in no way concerned with or bound by such contract, even if any reference whatsoever to it is included in the credit. Consequently, the undertaking of a bank to honour, to negotiate or to fulfill any other obligation under the credit is not subject to claims or defenses by the applicant resulting from its relationships with the issuing bank or the beneficiary."

Letters of credit provide security for exporters in that in the event of a breach of payment by the buyer, the exporter has recourse against the bank issuing the letter of credit. The doctrine of strict

compliance compels the bank to pay irrespective of the status of the underlying debt. The bank's interest is ensuring the client's instructions are adhered to regarding payment to the beneficiary of the letter of credit. If the presentation of the documents is non-conforming, the issuing bank is not obliged to make payments without consent

On the other hand, performance guarantees or demand guarantees have different features. The first is that these are often provided by a third party, for a stated amount, normally a percentage of the contract value, which amount is payable in the event of a breach, or when the beneficiary suffers loss as a result of negotiated terms of the contract. Next, the guarantee may take two forms: it may kick-in in the event of default by the buyer or in the event of demand by the exporter. For a demand guarantee, the issuing bank agrees to make payment on the production of the demand or when there is a written notification of default. A performance guarantee has been described in case law as follows: "a performance bond is a new creature … it has many similarities to a letter of credit, …it has long been established that when a letter of credit is issued and confirmed by a bank, the bank must pay it if the documents are in order, and the terms of the credit are satisfied."

The difference between letters of credit and performance guarantees or demand guarantees can be summarised as this: a letter of credit is a facilitation tool that provides a mechanism of payment, which is subject to the transaction performing smoothly. A demand or performance guarantee comes into effect when the transaction has fallen through or when a default is expected to occur, and provides financial security.

Nonetheless, for either letters of credit or performance or demand guarantees, if they are structured correctly according to the commercial context, the obligation of banking institutions to make payments against these security documents is clearly expressed in Articles 14(a) and 15 of UCP 600. The exception of payment is when there is 'clear fraud of which the bank has notice'.

Uniform Rules for Demand Guarantee (URDG 758)

URDG 758 applies to guarantees that expressly indicate that they are subject to these rules. It provides for rules for the guarantee process, effectiveness of guarantees, content and instruction of guarantees, amendment of guarantees, extent of liability, rights of parties, and counter measures. Under demand guarantees, the obligation to make payment arises on the instance of a written demand. The payment is not conditioned on an actual failure to perform, but rather the demand by the exporter.

The Principal of Autonomy

The Courts recognise the autonomy of letters of credit and performance guarantees or demand guarantees as standalone security documents. These are independent of the actual transaction to which they provide security, and also of the direct relationship between the buyer and the issuing bank.

A reading of Article 5 of UCP 600 makes it evident that banks do not concern themselves with the goods or services in the underlying contract, but rather, that the security document has been called up as required, and must be fulfilled. Article 34 states that the banking institution's exclusive

A reading of Article 5 of UCP 600 makes it evident that banks do not concern themselves with the goods or services in the underlying contract, but rather, that the security document has been called up as required, and must be fulfilled. Article 34 states that the banking institution's exclusive obligation is to check whether the presented documents are in compliance.

obligation is to check whether the presented documents are in compliance. Therefore, the principle of compliance to payment on demand must be honoured by the issuing bank or third party, except for any known or implied fraud.

In the same vein, Article 5 of URDG 758 reads: "A guarantee is by its nature independent of the underlying relationship and the application, and the guarantor is in no way concerned with or bound by such relationship. A reference in the guarantee to the underlying relationship for the purpose of identifying it does not change the independent nature of the guarantee. The undertaking of a guarantor to pay under the guarantee is not subject to claims or defences arising from any relationship other than a relationship between the guarantor and the beneficiary."

Courts have held that "It is only in exceptional cases that the courts will interfere with the machinery of irrevocable obligations assumed by banks. They are the lifeblood of international commerce. Such obligations are regarded as collateral to the underlying rights and obligations between the merchants at either end of the banking chain."

Further, it has been held that "Under the terms of the guarantees an absolute obligation to pay arose simply from a demand for payment by the buyers. The bank had given its own guarantee, and in effect pledged its own credit, to... pay on demand. Its reputation depends on strict compliance with its obligations. This has always been an essential feature of banking practice."

Conclusion

It is clear that for international trade to run smoothly, there is need for security agreements or financial instruments that reduce the risk of non-payment by a buyer. These security documents issued by banking institutions or third parties, place obligations on the contracting parties to honour payment as specified therein. The security agreement or financial instruments are independent of the underlying contracts, as they are themselves standalone contracts, that exporters can call upon and litigate on if the banking institution or third party fails to comply with the payment obligations.

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Company: Makuku Law Firm

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Company: Kwande legal practitioners

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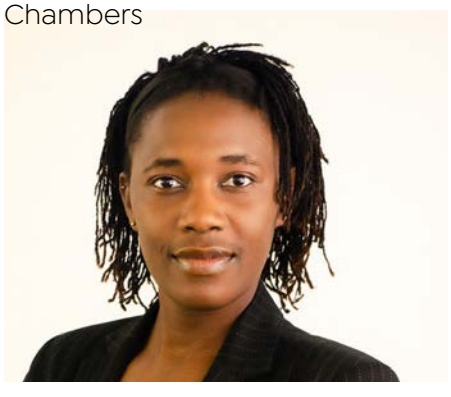

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Sexual Harassment And The LAW

By Rumbidzai Mukarakate (LLBS) (LLM) UZ

Sexual harassment is a type of harassment which include a range of actions from verbal and physical abuse to sexual abuse. It can occur in many different social settings such as the home, schools, colleges, churches and the workplace. This article will focus on sexual harassment at the work place, its effects and liability of the perpetrators. Though it affects both genders, the victims of sexual harassment are mostly women.

The legal definition of sexual harassment

The Labour Act [Chapter 28:01] does not expressly define sexual harassment. It provides for sexual harassment as an unfair labour practice by an employer or any other person. In terms of s 8(g) and (h) an employer commits an unfair labour practice if he; demands from an employee, sexual favours as a condition of improving the remuneration or other conditions of employment of the employee; engages in unwelcome sexually-determined behaviour towards any employee, whether verbal or otherwise, such as making physical contact or advances, sexually coloured remarks, or displaying pornographic materials at the workplace.

Section 2 of the Labour Amendment Act, 2023 does not define sexual harassment, it defines "gender-based violence and harassment" to mean violence and harassment directed at persons because of their sex or gender, or affecting persons of a particular sex or gender disproportionately, and includes sexual harassment. Sexual harassment was defined in the case of **Rustenburg Platinum Mine Ltd v UASA obo Steve Pietersen & Ors [2008] ZALAC JHB 72** as an unwanted conduct of a sexual nature. The unwanted nature of sexual harassment distinguishes it from be-

The Labour Act [Chapter 28:01] does not expressly define sexual harassment. It provides for sexual harassment as an unfair labour practice by an employer or any other person. In terms of s 8(g) and (h) an employer commits an unfair labour practice if he; demands from an employee, sexual favours as a condition of improving the remuneration or other conditions of employment of the employee; engages in unwelcome sexually-determined behaviour towards any employee, whether verbal or otherwise, such as making physical contact or advances, sexually coloured remarks, or displaying pornographic materials at the workplace.

haviour that is welcome and mutual. Sexual attention becomes sexual harassment if:

- the behaviour is persisted in, although a single incident of harassment can constitute sexual harassment; and/or
- the recipient has made it clear that the behaviour is considered offensive; and/or
- the perpetrator should have known that the behaviour is regarded as unacceptable.

Forms of sexual harassment

The case of Mbatha v Zizhou & Anor HH-675/21 provides an non-exhaustive list of forms of sexual harassment. The plaintiff pleaded sexual harassment against the first defendant who was the Chief Executive Officer of the company which she worked for. She was his personal assistant. The sexual harassment was over a period of nine months. It started when she was still on probation. The sexual harassment took the following forms:

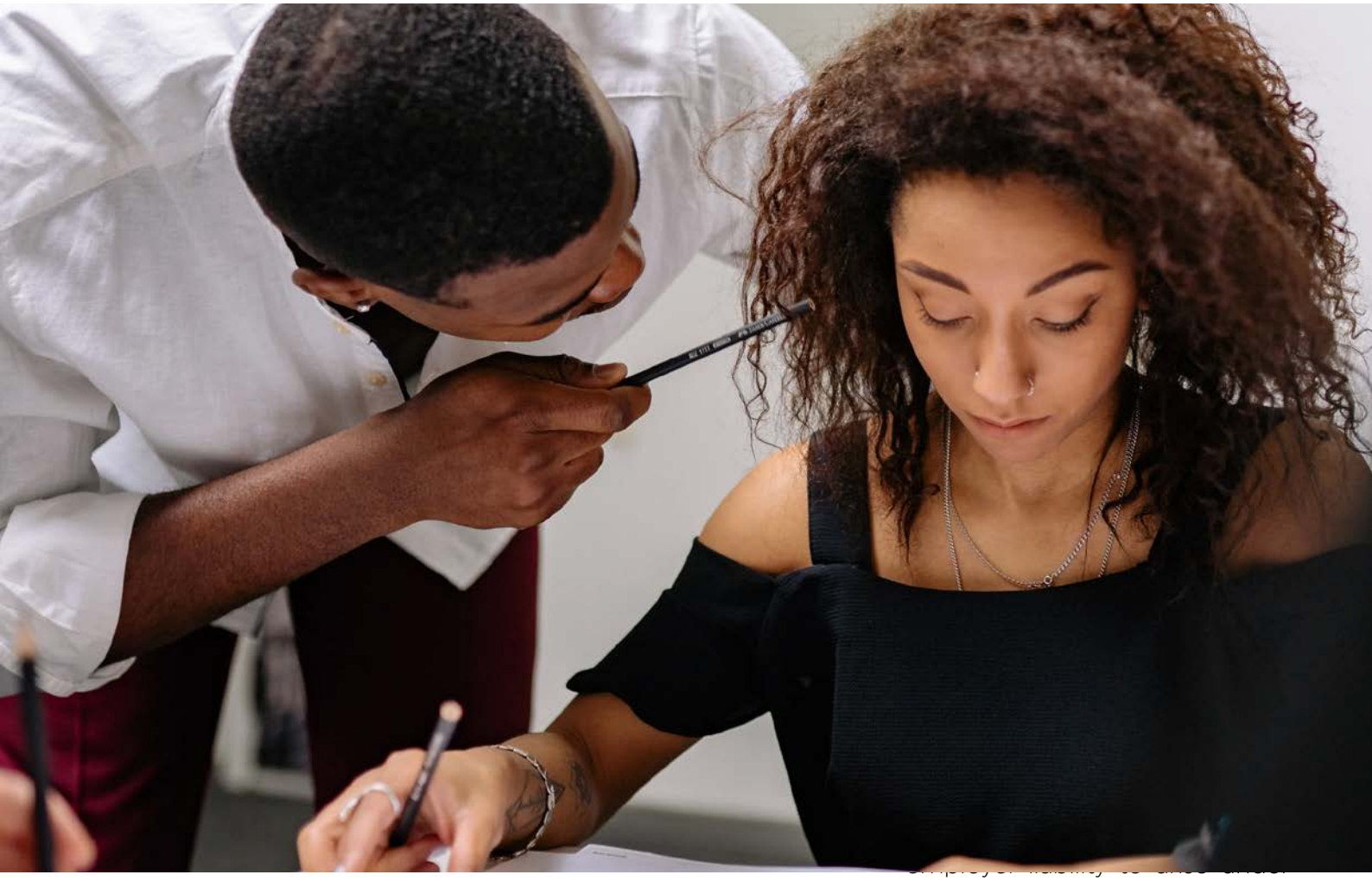
- inappropriate touching;
- unwelcome offensive jokes;
- invitation by innuendo to an inappropriate sexual relationship;
- receiving offensive telephone messages;
- receiving pornography on the computer; and
- an attempt to kiss by force, causing an injury on the thigh in the process of resisting.

Effects of sexual harassment

The case of **McGregor v Public Health & Social Development Sectorial Bargaining Council & Ors CCT 270** describes the effects of sexual harassment as follows;

"Sexual harassment is the most heinous misconduct that plagues a workplace. Although prohibited under the labour laws of this country, it persists. Its persistence and prevalence 'pose a barrier to the achievement of substantive equality in the workplace and is inimical to the constitutional dream of a society founded on the values of human dignity, the achievement of equality and the advancement of human rights and freedoms … and non-sexism'. Not only is it demeaning to the victim, but it undermines their dignity, integrity and self-worth, striking at the root of that person's being."

Section 51 of the Constitution of Zimbabwe guarantees the right to human dignity. It states that every person has inherent dignity in their private and public life, and the right to have that dignity respected. Sexual harassment, strips the victim of his or her dignity. It turns the victim into an object of sexual gratification. Th right to personal security as contemplated by s 52 and s 53 of the Constitution is also affected by sexual harassment. Section 52 provides that every person has the right to bodily and psychological integrity, which inter alia includes, the right to freedom from all forms of violence from public or private sources. Section 53 also guarantees freedom from,



inter alia, inhuman or degrading treatment. Sexual harassment therefore takes away the victim's rights which are provided for by the Constitution.

The case of **Mbatha v Zizhou & Anor (supra)** details how the plaintiff was affected by sexual harassment. It states that;

as a result of the sexual harassment, the plaintiff suffered severe posttraumatic stress disorder. This condition manifested almost immediately after the abuse. She experienced recurrent involuntary and intrusive memories of the traumatic event. Her pain was acute, with chances of recovery rated as being very poor. Treatment would be extensive and indefinite. During treatment, which included counselling, the plaintiff would often meander and get distracted. She suffered physical and emotional pain, with scarcely suppressed anger. During the counselling sessions, she would lose track of her answers midway through and would ask that questions be repeated. The psychiatric report notes that the psychological damage is widespread. Her personality has changed significantly. Before the incident, she was engaging, outgoing, and loved reading. She had a good sense of humour. All that is gone. She experiences recurrent nightmares. Her sleep is broken most nights. That leaves her drained physically and mentally. She was pursuing a law degree. She has had to drop. She has lost all confidence in herself. There was another kind of collateral damage. She says her marriage broke up, largely because of the change in her personality.

Employer liability for sexual harassment

where the complaint raised is one of sexual harassment at the work place. These are that:

- (i) The sexual harassment conduct complained of was committed by another employee.
- (ii) It was sexual harassment constituting unfair discrimination.
- (iii) The sexual harassment took place at the workplace.
- (iv) The alleged sexual harassment was immediately brought to the attention of the employer.
- (v) The employer was aware of the incident of sexual harassment.
- (vi) The employer failed to consult all relevant parties, or take the necessary steps to eliminate the conduct will otherwise comply with the provisions of the Employment Equity Act.
- (vii) The employer failed to

take all reasonable and practical measures to ensure that employees did not act in contravention of the Employment Equity Act.

Damages for sexual harassment

The plaintiff can claim damages for sexual harassment from the defendant. In the case of Mbatha v Zizhou & Anor (supra) it was stated that in order to succeed in a claim for damages under the lex Aquila in general, the plaintiff must establish the following factors:

- that the defendant committed a wrongful act;
- that the plaintiff suffered patrimonial loss, which is actual loss capable of pecuniary assessment;
- that the defendant's act caused the loss suffered by the plaintiff and that the harm occasioned was not too remote from the act complained of;
- that the responsibility for the plaintiff's loss is imputable to the fault of the defendant, either in the form of dolus (intention) or culpa (negligence).

The lex Aquila also covers non-patrimonial loss and compensation is designed to help the plaintiff overcome, as far as money can, the effects of his or her injuries. In the Mbatha case the court decided that the proper level of damages for the sexual harassment perpetrated by the first defendant upon the plaintiff was USD180 000-00 [one hundred and eighty thousand United States dollars].

Sexual harassment should not be tolerated at the workplace in whatever form or shape. The workplace should be a safe place where the principles of equality and non-discrimination are respected. Companies are encouraged to consistently review their sexual harassment policies to ensure that employees are protected from sexual harassment and are given the guidelines on how to report incidents of sexual harassment.

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Trade Marks: Registration & Protections

By Tariro Mafa

Introduction

Intellectual property has become one of the most renowned drivers of economic growth globally as most countries are moving from traditional resource-based economies to knowledge-based economies. There are four types of intellectual property, namely, patents, trademarks, copyrights, and trade secrets. Due to the surge of local manufacturers and producers in Zimbabwe over the last decade, there is need for producers to protect their intellectual property rights.

This article seeks to focus specifically on trade marks. The article begins by defining the concept of a trade mark, then provides the process for registering a trade mark in Zimbabwe for national, regional and international purposes. The article also touches on the benefits of registering a trade mark, as well as the remedies available to a trade mark owner if it is infringed.

What is a Trade mark?

A trade mark is a distinctive sign or name, which identifies certain goods or services of one producer, from those of another. In Zimbabwe, the most common type of registered trademarks are the logos and names for products, businesses and services, such as Mazoe, Cerevita, Pearlenta, Econet, Securico, CBZ, Nyaradzo, RTG, Innscor, Zi FM, OK Zimbabwe, and Edgars.

Registering a Trade mark

Trade mark protection is territorial, meaning that a trade mark is protected only in countries in which it is registered. This means that protection needs to be sought in each country where the trade mark may be used. Trade mark registration in Zimbabwe is possible via three routes namely the national route, the regional route and the international route.

Registration of a trade mark via the national route, also known as the Paris Convention route, is done in accordance with the Trade Marks Act (Chapter 26:04) and Trade Marks Regulations SI 170 of 2005. An application for registration of a trade mark is lodged with the Zimbabwe Intellectual Property Office (ZIPO), with the assistance of a law firm, and takes approximately 12 months from the application date.

The application for registration must contain ten clear reproductions of the mark filed for registration, including any colours, forms, devices of three-dimensional features. The application must also contain a list of goods or services to which the mark would apply. The trade mark must be distinguishable from other trade marks, and consumers must be able to identify it with a particular product. It is for this reason that upon receipt of an application for registration of a trade mark, ZIPO conducts a search and examination thereof, and also invites third parties to oppose the application for registration in the event that they have similar or identical rights. Trade marks must neither violate public order and morality, nor must they mislead or deceive customers.

When a trade mark registration is granted, the Registrar issues a registration certificate and enters the trade mark into the Register. The term of a trade mark is ten years, calculated from the application date, and can

be renewed for another ten years after the expiry of the first term.

A trade mark registered through ZIPO covers Zimbabwe only. Zimbabwe is a first to file jurisdiction meaning that a proprietor who files a trade mark application first, is deemed to be the owner of that trade mark.

Registration can also be done through the regional route using the African Region Intellectual Property Organization (ARIPO). ARIPO is an inter-governmental organization for cooperation among African states on Intellectual Property. The ARIPO system involves filing an application under the Banjul Protocol, to which Zimbabwe is a member. The Trade Marks Act recognises ARIPO trade mark applications and trade marks under this system enjoy similar status and protection as locally registered ones. Registration through ARIPO grants protection and recognition in Botswana, Lesotho, Liberia, Malawi, Sao Tome and Principe, Swaziland, Uganda, mainland Tanzania and Zimbabwe.

Trade marks can also be registered through the international route, which is done through the World Intellectual Property Office (WIPO). The registration is done in accordance with Madrid Protocol or the Madrid Agreement. Trade marks under this filing system also enjoy similar status and protection as those that are registered locally. Trade marks filed through ARIPO and the Madrid Protocol System routes provide for wider coverage.

What can or cannot be registered as a trade mark?
A name, invented words, combination of director initials, slogan, device, brand, heading, label, signature, word, letter or numeral presented in either two dimensional or three dimensional form, can be registered as a trade mark, provided that any of these is

capable of identifying and distinguishing the goods and services of one from those of another manufacturer.

Section 14 of the Trade Marks Act stipulates that trade marks which would likely deceive or cause confusion for example, Adidas versus Abibas; or the use of which would be contrary to law; or which comprise or contain scandalous matter; or which are prescribed to be a prohibited mark; or which, for any other reason, would not be entitled to protection in a court of law; shall not be registered as a trade mark.

Further, colour marks, which are a type of trade mark where at least one colour is used to perform the trade mark function of uniquely identifying the commercial origin of products or services, cannot be registered in Zimbabwe. Examples of colour marks include the Louboutin red sole shoes and the New York-based jeweller Tiffany & Co's trade marked blue box. Smell marks, generic marks, non-distinctive marks (marks which are not capable of distinguishing goods or services) and descriptive marks (marks which speak to the characteristics of the goods or services) also cannot be registered as trade marks as no framework exists for their registration in Zimbabwe.

Benefits of a Registering a Trade mark
One of the main functions of a trade mark is to enable consumers to identify a product of a particular business in order to set apart that business from other identical or similar products provided by competitors. There is a likelihood that consumers who are satisfied with a certain product are likely to use or purchase that product again in the future. For this, they need to be able to distinguish easily between identical or similar products. By equipping businesses with an avenue to set themselves and their products apart from competitors, trade marks play a pivotal role in the branding and marketing strategies of a business. A trade mark provides protection to the owner by ensuring the exclusive right to use it to identify goods or services. Essentially, trade mark registration confers legal rights to the owner of the trade mark.

A trade mark allows the owner to authorize another, to use it in return for payment (licensing) thus providing an additional source of revenue for owner's business through royalties, or it may be the basis for a franchising agreement. A registered trade mark with a good reputation among consumers may also be used to obtain funding from financial institutions.

Trade marks also enable businesses to differentiate their products and reduces the occurrence of tarnishment which ensues when a business' trade mark is used without its authorisation and the mark is linked to inferior goods. Trade mark registration hampers the efforts of unfair competitors, such as counterfeits, to use similar distinctive signs to market different products or services. Trade mark protection enables traders to produce and market goods and services in the fairest conditions, which in turn facilitates international trade and commerce. Companies with trade mark protection can also utilise trade marks as a marketing tool and the basis for building a brand image and reputation and it assists companies to invest in maintaining or improving product quality.

Trade mark protection also reduces disparagement which occurs when a deliberate effort is made to minimise the marketing value or worth of a business' trade mark or the dilution of a business' trade mark which usually occurs when another business uses another's established trade mark to sell other goods or services that the trademark owner's business is not known to trade in. This results in confusion regarding the origin and quality of the goods.

Remedies Available for Trade mark Infringement
A trade mark can be enforced in the High Court of Zimbabwe or the Intellectual Property Tribunal. When a trade mark has been infringed, the harmed party can seek various remedies, including an interdict which can either restrain the offender or compel the defendant to perform a positive act; damages which are aimed at compensating the proprietor for the actual or potential patrimonial loss they would have sustained through the infringement; delivery up or destruction of the infringing goods or an Anton Piller order, which is a special court order that is given to the Plaintiff to allow the Plaintiff or their lawyers to enter the premises of the defendants to obtain any necessary evidence.

Conclusion

It is imperative that manufacturers and producers register their trade marks. Such registration safe guards their intellectual property, and makes it easier for proprietors to enforce trade mark rights.

Unpacking Joint Venture Agreements in the Agriculture sector

By Lindsay Dzumbunu

Introduction

The land reform processes in Zimbabwe can be traced back to the Lancaster House Agreement. The underpinning reason for embarking on the land reform programme was a need to balance and distribute land equitably which had historically been skewed in favour of the white minority. Land was subsequently compulsorily acquired by the Government under the Land Acquisitions Act [Chapter 20:10].

Compulsory land acquisition resulted in indigenous black farmers being allocated A1 and A2 model farms through Offer Letters. Zimbabwe was at one point regarded as the "bread basket" of Africa but currently this is not the case. There was inevitably bound to be a decline in agricultural exports as there was no skills transfer and the majority of the beneficiaries of the land reform programme conducted largely informal farming operations.

Another factor that contributed to the decline in agricultural production is the lack of security to guarantee access to bank loans. Previously the white farmers owned vast tracts of land and these were used as collateral to raise much needed capital to mechanise their farms. Presently, farmers are unable to access capital from financial institutions due to the nature of their title which is largely in the form of Offer Letters. These can be withdrawn at the instance of the State hence making them unfavourable as a form of collateral. The country also experienced the devasting

effects of climate change which resulted in sporadic rainfall and intermittent drought as well as a hyper inflationary era which contributed and is still contributing to low productivity on farms.

The Government in line with the "Zimbabwe is Open for Business Mantra" took a policy shift and endorsed Joint Venture Partnerships on farms. The aim of these Joint Venture Partnership's is to ensure optimal production on farms, encourage skills transfer, land utilisation, security of tenure and bolster waning investor confidence. A Joint Venture Agreement can be defined as a contractual consortium of two or more parties. They usually seek to join each party's resources to achieve a specific objective. The parties benefit by receiving proportionately split profits and distributed ventures.

At the present moment Joint Venture Agreements are being undertaken in terms of Section 18 of the Land Commission Act [Chapter 20:29]. This Act amongst other functions provides for the acquisition of State land and the disposal of State land and the control of the subdivision and lease of land for farming or other purposes. Joint Venture Agreements are also governed by the Law of Contract with regards to their enforceability.

Provisions of the Land Commission Act

Section 18 of the Act regulates the relationship between the contracting parties and it makes it an offence to enter into a Joint Venture Agreement without the express approval of the Minister for Lands, Agriculture, Fisheries, Water and Rural Development. It states that no owner or occupier of land to which the Act applies shall permit the occupation on a share-cropping basis by another person of any portion of such land unless a written agreement has been entered into between such owner or occupier and such other person in respect of the occupation of such land on a share-cropping basis and such agreement has been approved by the Minister.

Section 19 provides for a penalty in the event that the provisions of Section 18 have not been complied with. It states that any owner or occupier of land who contravenes section 18(1) shall be guilty of an offence and liable to a fine not exceeding level ten or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment.

Why Government approval and registration of Joint Venture Agreements is necessary

It is apparent that the mischief that the Legislature sought to cure by the provisions of Section 18 pertains to unregulated and unapproved Joint Ventures which are entered into clandestinely. The Ministry should be able to account for and regulate land uses and this monitoring is effective where it is appraised of the developments on the various farms from the onset. Such regulation is also important as it impacts on financial projections for the country, food security and general policy planning.

Registration of Joint Ventures also ensures that unscrupulous elements do not take advantage of desperate and unsuspecting farmers. The mere fact that it is mandatory for the Joint Venture to be scrutinised and approved acts as a form of checks and balances. The Ministry of Lands, Agriculture, Fisheries, Water and Rural Development has gone so far as formulating a standard template for the different fields of farming with standard tenure and profit-sharing ratios. This in a way provides for standardisation of such joint ventures, although there can be deviation from the norm upon justification; the aim is to achieve some semblance of order in the regulation of the sector. This approval is also important in the event that there is a dispute between the Joint Venture partners that would require the intervention of the Ministry as they will be well appraised with the matter.

Furthermore, registration of Joint Ventures is important in that the line Ministry is aware and abreast with who holds what land. Most importantly the aim is to ensure security of tenure and enforce the principle of the sacrosanct nature of contracts. There are Government programmes such as the promulgation of Rural Land (Farm Sizes) SI 41 of 2020 that deals with the approved maximum hectarage of farm sizes. The implementation of this SI ideally is governed by the all-important principle that contacts are sacrosanct and cannot be altered or varied at will. Parties enter into a Joint Venture for certain hectarage and the profit as well as risk are calculated based on the available hectarage at that time. Any Investor will be weary to invest in a venture where there is no respect for the sacrosanct nature of contracts.

Given that farming by its nature is capital and infrastructure intensive, for one to "invest" in a Joint Venture some form of guarantee/security is required prior to making such investments. Also, the profits are not instantaneous; they are made over a protracted period of time after several

farming seasons. Registration of Joint Ventures protects the rights of both contracting parties as the contractual relationship is recognised at law. The most important attribute of registration pertains to security of tenure due to the fluid nature of Offer Letters for the A1 and A2 farms. Given that these are issued and maintained at the benevolence of the State and can be withdrawn at any time, this does not auger well for investment and investor confidence.

Challenges and benefits of the Joint Venture Agreements

This apparent "policy shift" has been met with resistance in some circles as it is misconstrued as reversing the land reform programme and bringing back an undesirable status quo via the back door and an acknowledgement that the land reform programme has failed. In some instances, it may be construed to be the case however the issue of Joint Ventures has to be understood in its proper context. Joint Ventures have not been created for the agricultural sector they are in use widely in the African region, world over and in various other sectors. They are a reflection of the importance of commercially viable collaborations and synergies to achieve any given goal and to mitigate the effects of climate change.

Joint Ventures are a strategic tool to lure, maintain and assuage weary Investors who have farming skills and capital to enable the country to unlock much needed value in the agricultural sector.

With the coming on board of Joint Ventures there has been an increase in land utilisation where previously land had been underutilised due to various factors. There has been a marked increase in the number of parties seeking to register their Joint Ventures, signalling increased uptake and land utilisation where previously land has lain derelict. Tobacco exports which had dropped significantly during the onset of the land reform programme are steadily climbing and once again the country is on its way to regain its status as one of the world's big five tobacco exporting nations.

Ultimately Joint Venture Agreements encourage productivity on the land as the contracting parties recoup financial rewards from the arrangement. Once again Investor confidence is restored as the underpinning Law of Contract is applicable in the event of a dispute arising between the parties. The Joint Venture Agreement clearly spells out the rights and obligations of each contracting party and there are no opaque terms governing the relationship. Increased land utilisation and productivity guarantees food security and economic development through exports to foreign markets to generate much needed foreign currency.

Conclusion

Joint Venture Agreements are a strategic and vital tool to facilitate the attainment of the Vision 2030 Agenda and they offer a platform for interaction between landowners and Investors. While some might label Joint Venture Agreements as a necessary evil that has resulted increased productivity and land utilisation, the Joint Venture framework in place is in fact watertight as it aims to protect Investors and at the same time maintain and consolidate the ethos and the principles underlying the land reform programme. Joint Ventures make it possible for one to farm where one does not own land thus making it an all-inclusive sector that does not discriminate on the basis of ownership.

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