

# ZIMBABWEAN LEGAL Eagles



*Invest in Women: Accelerate  
Progress Inspire Inclusion*

**The Last Will And  
Testament : Its  
Relevance As A  
Wealth  
Distribution  
Tool**

Overview  
of Surrogacy  
in Zimbabwe

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



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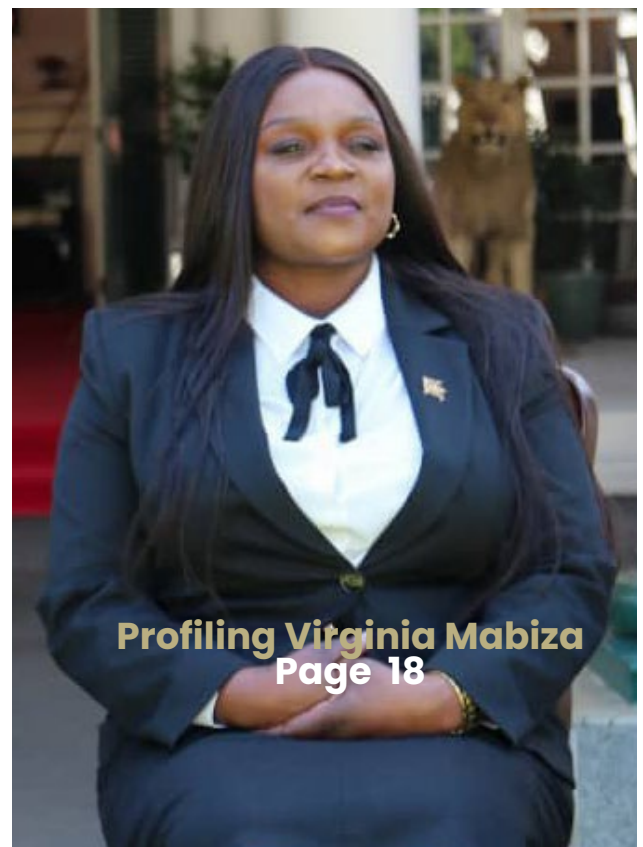
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# Editor's Note

## "Celebrating Young Legal Eagles"



*Greetings Readers.*

In September 2023, we published the First Edition of the Legal Eagles Magazine, in which we profiled Zimbabwean Female Lawyers who have been registered for 10 or more years and work in different sectors: private practice, the Judiciary, Government, NGOs, international organisations, private sector corporates, banking institutions, Regulatory Authorities, State Owned Enterprises, and so on. Through these profiles, we were able to showcase the depth and breadth of expertise that the Zimbabwean legal profession carries.

In this Second Edition of the Legal Eagles Magazine, we profile "Young Legal Eagles", that is, Zimbabwean Female Lawyers who have been registered for less than 10 years, and work in various sectors of the Zimbabwean economy, and abroad. Presently, Zimbabwe has four law schools that graduate many young women into the Legal Profession each year. Add to that the graduates who pursue their studies in the SADC region, other African universities and abroad. It is important to recognise and celebrate their individual professional journeys, as it is during these formative years that important life decisions around marriage, chil-

dren and furthering studies are made.

As you will see, the profiles showcased in this Magazine are a cause for celebration: young Zimbabwean Female Lawyers are making significant professional strides, setting up their own law firms, working as General Counsel for large corporates, and pursuing successful careers in the public sector, as well as the non-profit space. They are certainly following in the steps of their big Sisters-in-Law.

This Second Edition is published in March 2024, in commemoration of International Women's Day. This publication is befitting of this year's theme "Inspire Inclusion": every female lawyer, regardless of age, race or other demographic, is essential in contributing to the growth of the Zimbabwean legal profession. To the Young Legal Eagles, let it be known that, We see you, We salute you, We will be proud of you.

We hope you enjoy reading this Second Edition of the Magazine as much as we enjoyed putting it together for you!

**Nqobile Ndlovu**  
 Editor  
 Partner, Titan Law

**Magazine Editor**  
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# Foreword



## Celebrating Women's Day

One of the reasons Women in Law Connect was founded was to provide a platform not just for Zimbabwean female lawyers to network, and mentor each other, but to celebrate our successes and cheer each other on.

This Edition does just that focusing more on the young women in law who are breaking barriers and taking space in the profession. It is heartening to see the number of females joining the profession and more so, setting up their own practices as principals.

Often times recognition is given to those who have walked the long and odious professional journey, who are lauded for having stayed the course, yet, every milestone is deserving of recognition and celebration for a journey of a thousand miles begins with a single step. It is more specifically so in this cut-throat, male-dominated field.

The publication of this Edition could not have been at a better time. This March, we celebrate International Women's Month 2024 with the theme "Invest in Women: Accelerate Progress" and the campaign theme "Inspire Inclusion." The profiles of these young

Women in Law are not only inspirational, but are a testament that where there is investment in women, progress is achieved.

As we commemorate International Women's Day 2024, it is important to acknowledge not just the contribution of these young professionals to the Legal profession but also their achievements, strength and resilience in a world and a profession that does not always do so.

**Precious Chakasikwa**  
**Chairman, Women in Law Connect**  
**Partner, Kantor & Immerman**



### Message from the **President of the Law Society of Zimbabwe**

March is Women’s History Month, and as female lawyers it is important for us to stop and reflect on our history, our struggles, our future, but most importantly, to celebrate our achievements. As the third female to lead the Law Society of Zimbabwe, after Beatrice Mtetwa (2011 to 2012) and Vimbai Nyemba (2015 to 2016), I find myself pondering over what progress we have made. Historically, the legal profession was male dominated and the few women who ventured into the profession kept a low profile preferring to occupy themselves with what were deemed fewer demanding roles. But I am proud to say we now have more females studying law in the law schools and have recently seen the upsurge of female-led law firms. On a national level, we have more female lawyers leading critical areas in the justice sector than ever before. Indeed, we must celebrate.

This year’s theme is “Invest in women, accelerate progress”. What a fitting summary of what this publication seeks to do. By recognizing young women who have made significant strides in their careers in recent times, we are not only encouraging each other and the world to invest in the women we recognize, but we are also accelerating their progress by putting them on the map. Given the patriarchal state of our society and in fact our profession, the only way that women can succeed is if women support women and women applaud other women. Those in privileged positions of influence must not only inspire those who are upcoming but lend a hand to them in the form of mentorship, training, and general exposure to the opportunities available.

Remember ladies, you are your sister’s keeper.

*Happy Women’s Month!*

**Rumbidzai Matambo**  
**President of the Law Society of Zimbabwe**  
**Partner, Dube, Manikai & Hwacha**

# Overview of Surrogacy in Zimbabwe



By **Priscilla Nyatsanga**

## Introduction

With the increase in infertility rates all over the world, more and more couples are looking into the use of Assisted Reproductive Technology (ART) methods, such as surrogacy, to enable them become parents. For couples who are unable to conceive naturally due to infertility issues in either partner caused by chronic or terminal illnesses, and health complications, the option of surrogacy, though somewhat costly, offers some relieve. Zimbabwean couples facing infertility are not left out of the mix in all of this, as in recent years, many have embraced the option of surrogacy.

As surrogacy becomes more widespread, many countries have enacted legislation for the purposes of regulation. Zimbabwe is not one of these countries.

Although the country does not prohibit surrogacy, it has not laid down any legal framework to govern the surrogacy process. This leaves both the couple and the intending surrogate mother in a legal vacuum, wherein the parties are exposed to legal risks.

This article briefly considers the Zimbabwean legal stance regarding surrogacy and proposes a creation of a clear legal framework for surrogacy in Zimbabwe, while advising as to legal safeguards to be taken by couples

intending to conceive via surrogacy in the interim.

## What is Surrogacy?

In short, surrogacy is the process of carrying and delivering a child for another. Surrogacy may also be defined as a form of third-party reproduction in which a woman consents to carry a pregnancy for intended parent(s) (“commissioning parents”) who cannot conceive for medical reasons.

The arrangement is usually based on the agreement that the child will be given to the commissioning parents after delivery and may be classified

into two types: traditional surrogacy and gestational surrogacy.

### Traditional Surrogacy

A traditional surrogate is defined as an individual who has a genetic tie to the child she is carrying. The surrogate acts as both egg donor and carrier. Individuals choosing to use this route, therefore, do not need to identify an egg donor because the surrogate uses her own egg. Typically through intra-uterine insemination, the surrogate's egg is fertilized by sperm of the intended parent or a donor.

### Gestational Surrogacy

Unlike a traditional surrogate, a gestational surrogate is defined as an individual who does not have a genetic tie to the intended child but agrees to carry the child on behalf of another individual or couple. Through in vitro fertilization, an embryo is created using either the intended parents own genetic material or that of a donor. This embryo is transferred to the gestational carrier to grow to term.

Additionally, surrogacy may be commercial or altruistic, depending upon whether the surrogate receives financial reward for her pregnancy. In case of altruistic surrogacy, a surrogate does not receive any monetary compensation and the majority of these agreements often involve close relatives of the intended parents.

Many countries frown upon commercial surrogacy, and only permit altruistic surrogacy arrangements. In jurisdictions like Belgium, Netherlands, and the United Kingdom, commercial surrogacy is prohibited. Conversely, in France, Italy and Germany, surrogacy, be it altruistic or

commercial, is prohibited.

### Absence of a Legal Framework for Surrogacy Agreements in Zimbabwe and its Conversant Risks

While surrogacy is not expressly prohibited in Zimbabwe, it also is not legally acknowledged, as there is currently no legal framework regulating surrogacy in the country. Unlike many other countries, Zimbabwe lags behind in surrogacy agreements entered into on a daily basis in the country.

Despite this, surrogacy has not been criminalized in Zimbabwe, since it is not defined in any written law as an offence and no punishment is prescribed for it.

As such, if a person engages in surrogate motherhood or enters into a surrogate contract in Zimbabwe, such a person cannot be said to have committed a crime. The underlying problem, however, is in terms of legally defining the legal parentage of the child as well as the contractual rights and duties of parties to the surrogate agreement.

### Landmark Surrogacy Cases: a look at USA

In jurisdictions such as the USA and the UK, surrogacy has raised issues mostly pertaining to

- maternity status;
- potential undue financial or other pressures for the surrogate, and
- women's constitutional rights



over their reproductive choices and bodily autonomy, especially with respect to decisions regarding pregnancy management, termination, and selective reduction.

One such case is the *In Re Baby M (1988) M, 537 A.2d 1227 (N.J. 1988)* when the surrogate mother decided she would like to keep the baby.

The watershed *Baby M* case, which took place in 1987 in New Jersey, USA, was the first major legal skirmish concerning surrogate parent arrangements. Mary Beth Whitehead had contracted with William and Elizabeth Stern to act as a surrogate mother for them.

She was impregnated with an embryo (made by her egg was fertilized with Stern's sperm), and after carrying the child to term, she had a change of heart about handing the baby over to the couple. When Whitehead changed her mind, she offered to return the \$10,000 payment, and attempted to keep the baby after the child's birth. Whitehead then proceeded to sue for custody of the child raising the then-novel legal questions of enforceability of contract, maternity rights, and a custody determination.

The New Jersey Supreme Court ruled that the surrogacy contract was illegal and a violation of public policy. The Court rejected the proposition that a surrogate could contractually agree in advance or be forced by contract to terminate her parental rights. Instead it applied a "best interest" standard to decide who should have legal and physical custody of the child. Class dif-

Firstly, parties should ensure they have a written contract in respect of the surrogacy, delineating all rights and obligations of each party.

Surrogacy agreements are like regular contracts and can be enforced accordingly since there is no law prohibiting the contract.

ferences were noted throughout the litigation, with a Guardian ad litem appointed to evaluate the parenting capabilities of each of the parties.

Ultimately, the New Jersey court ruled that the Sterns would be the better parents and should have physical custody of the child, with Mary Beth Whitehead remaining as the legal mother with visitation rights. Elizabeth Stern was allowed to adopt the child, a necessary step to secure her maternal rights.

Another case heard by a state Supreme Court took place in California in 1993. *Johnson v Calvert (1993) 5 Cal. 4th 84 S023721* resulted in a contrasting ruling to the *Baby M* case. Mark and Crispina Calvert hired Anna Johnson to carry to term their genetic child. Anna Johnson ultimately sued for custody of the child. In a 6-1 decision, the California Supreme Court ruled that Anna Johnson had no parental rights to the child.

This was the first time a state court

enforced a surrogacy contract. "It is not the role of the judiciary to inhibit the use of reproductive technology when the legislature has not seen fit to do so," wrote Justice Edward Pannelli for the majority. The court's only woman, Justice Joyce Kennard, wrote in a sharply worded dissent: "A pregnant woman is more than a mere container or breeding animal; she is the conscious agent of creation no less than the genetic mother, and her humanity implicated on a deep level. Her role should not be devalued." The court has reaffirmed this finding several times since 1993.

The above cases are examples of what happens when agreements happen in vacuo, without any underpinning law, statute or regulation.

From the experience of other jurisdictions, surrogacy case law has addressed four principal issues to date:

- balancing constitutional privacy and reproductive rights with public policy interests;
- the enforceability of surrogacy contracts;
- safeguards and professional duties of care owed in surrogacy arrangements; and
- the establishment and disputed parentage issues of children born through surrogacy.

### Legal Safeguards for Entering and Enforcing a Surrogacy Agreement

While efforts to enact a legal framework continue in Zimbabwe, parties interested in entering surrogacy agreements are advised to take certain safeguards in the interim.

Firstly, parties should ensure they have a written contract in respect of the surrogacy, delineating all rights and obligations of each party. Surrogacy agreements are like regular contracts and can be enforced accordingly since there is no law prohibiting the contract. A contract between the intended parent/s and gestational surrogate (and any spouse or partner) is an essential part of any surrogacy arrangement, and should be drafted and negotiated by separate, independent legal counsel experienced in reproductive law.

Having separate, independent legal counsel protects each of the respective parties or couples, helps avoid conflicts of interest, and is not only a generally applicable ethical rule for legal representation but uniformly recommended or required for surrogacy arrangements.

Amidst other requirements, most contracts require two key elements to make them valid and enforceable: All parties must be in agreement (based on an offer and acceptance), and something of value, for example monetary payment, must be exchanged to serve as a consideration. Like most jurisdictions, in Zimbabwe, once a contract satisfies the required elements, it becomes enforceable. Thus, although there is no law or statute regulating the act of surrogacy in Zimbabwe, surrogacy contracts and agreements remain enforceable.

Additionally, after the birth of the baby, the commissioning couple should consider obtaining a custody order in Zimbabwe to be certain their parental rights are recognized.

### Concerns around Surrogacy in Zimbabwe: Public Policy

One concern that will remain is whether the courts will enforce surrogacy contracts, on the grounds of pub-

lic morality and policy grounds. While it has been argued that the standpoint of morality and public policy may present a contrary view on the enforcement of surrogacy contracts; it does not change the fact that surrogacy contracts fall under legally enforceable agreements. There is therefore recourse in the courts for parties and a good possibility that surrogacy agreements may be enforced in our national courts when put to judicial test.

At a glance, surrogacy seems like an attractive alternative as a poor surrogate mother gets very much needed income and a woman or couple unable to conceive get their biologically related baby. In the absence of proper regulation of the process, there remains a danger in the exploitation of surrogate mothers and intended parents by middlemen and agencies.

Looking at the experience of surrogate mothers, particularly those of a poor, rural and illiterate background, they are often persuaded to enter into these arrangement by their spouses or middlemen for earning easy money. These women have no say on the decision regarding their own body and life.

Further, in the absence of legislation, there is no provision for much needed psychological screening and counselling, both prior and after the end of the surrogacy arrangement.

The worst outcome for unregulated surrogacy arrangement lies with the surrogate in the event of an unfavourable outcome of pregnancy. In these instances, they are unlikely to be paid, and there is often no provision for in-

surance or post-pregnancy medical and psychiatric support for them.

All this evidences an urgent need for the framing and implementation of laws for the parents and the surrogate mothers in Zimbabwe.

### Conclusion

It is the opinion of the author, that the growth of both traditional and gestational surrogacy signifies expanded family-building options for potential intended parents and should be recognized as legitimate forms of assisted reproduction in Zimbabwe.

This will require, as a first step, the modelling of an Assisted Reproductive Technology (ART) Bill to enact a legal framework for surrogacy which is compatible with international best practices and to thereafter, ensure the Bill's passage.

In sum, this article advocates for the introduction of legislation to guide the rapidly growing surrogacy market in the country. There is a pressing need for Zimbabwe to enact legislation regulating surrogacy and other forms of Assisted Reproductive Technology (ART) methods to curb possible abuse or exploitation of these arrangements. This more so as the surrogacy market continues to grow. There will always be a desire for children, causing a virtually unlimited market with no regulations.

Supreme Court



**Hon. Justice Gwaunza**  
Deputy Chief Justice

**Hon. Justice Makarau**  
Judge of the Constitutional Court



**Hon. Justice Gowora**  
Judge of the Constitutional Court



**Hon. Justice Makoni**  
Judge of the Appeal



**Hon. Justice Guvava**  
Judge of the Appeal



**Hon. Justice Chatukuta**  
Judge of the Appeal



**Hon. Justice Mavangira**  
Judge of the Appeal



**Hon. Justice Mwayera**  
Judge of 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 Chvizhe**  
Labour Court Judge



**Hon. Justice Mhoya**  
Snr Judge of the Labour Court  
Bulawayo



**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



**Mrs F. Mushure**  
Chief Magistrate



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# LAST WILL AND TESTAMENT



## The Last Will And Testament : Its Relevance As A Wealth Distribution Tool

By **Mercia Monica Tshuma**

### Introduction

The relevance of a Last Will and Testament (Will) as an estate distribution tool has often been questioned due to its contestability and conflicting court judgements that have been given in the past.

At the core of conflicting rulings is the aspect of disinheritance of spouses through the Will with one school of thought arguing that a Will/clause in a Will disinheriting a spouse is void and the other saying the Testator has freedom of testation and can disinherit whoever they wish to, including a spouse. The position was clarified and settled in the 'infamous'

Chigwada v Chigwada landmark ruling. The ruling has significant implications for estate planning as it confirmed the position that spouses can indeed disinherit each other in their Wills.

The main issue in the case concerned the validity of the Will left by the late Aaron Chigwada, which gave Gerald Chigwada, rather than his wife Penelope, half of the marital residence. Penelope Chigwada's claim to the property was granted by the High Court's ruling that the Will was invalid, citing the deceased's inability to disinherit his spouse through a Will.

This decision was overturned by the Supreme Court which ruled in favour of Gerald Chigwada based on the doctrine of freedom of

testation. The focus of this article is the Chigwada v Chigwada Supreme Court decision and its contribution to the discourse of Estate Planning. This paper looks at the following: - Definition of Estate Planning and Will, Overview of the Chigwada v Chigwada case, Conflicting High Court Rulings, Clarity brought by the Chigwada case and Implications on Estate Planning.

### Definition of Estate Planning & Last Will and Testament

Estate Planning is a process of planning and arranging one's assets in anticipation of incapacitation/death, to ensure that one's heirs are legally and financially catered for. It involves the acquisition, preservation, and the dis-

tribution of wealth, in a way that minimize the costs associated with administering an estate.

The Chigwada case focused on a Will as an estate distribution tool, which is a legal document that records how an individual (Testator) chooses to distribute property, care for minors and other beneficiaries, and make special after death wishes, such as a preferred place of burial. It should specify an Executor, entrusted with making sure the estate is distributed in accordance with the Will. It is encouraged that the Will is registered with the Master of High Court (3 original copies are submitted) and another copy can be kept in safe custody (for example, a bank) with instructions to a trusted person (for example, an Executor) on how to access it in the event of the death of the Testator.

## **Overview of the Chigwada v Chigwada Supreme Court Decision**

The judgment was delivered by MALABA CJ, through an appeal against the whole judgment of the High Court, interrogating the determination of whether the law that governs the property rights of married persons binds a testator to bequeath their estate to their spouse. Penelope Chigwada was married to the late Aaron Chigwada in 1971 and solemnized their marriage under the then Marriage Act, in 1975. The Late Aaron was once married (then divorced) to Gerald Chigwada's mother with whom he had six children, Gerald being the youngest.

During the subsistence of their marriage, Penelope and the late Aaron acquired a matrimonial home in Harare and registered it

in both their names. In 2007, the late Aaron made a Will bequeathing his half share to his son Gerald. Penelope, as the surviving spouse challenged the right of Gerald to inherit her late husband's half share.

The issue before the High Court was whether the Will that disinherited Penelope was valid under the Wills Act. In the High Court, NDEWERE J had ruled that the bequeathing of 50% of the house to Gerald prejudiced Penelope of her rights to a fair share in the deceased estate. NDEWERE J held that section 3A of the Deceased Estates Succession Act, compelled a married person to dispose their estate by a Will to the surviving spouse.

Commenting on the provisions of the Deceased Estates Succession Act, he opined that section 3A of the Act included situations where part of the estate was covered by a Will as evidenced using the phrase "dies wholly or partly intestate". This was also held to be in conformity with section 56 of the Constitution, which prohibits discrimination based on marital status and promotes equality before the law. Accordingly, the bequest of 50 % of the matrimonial home to the son was considered an obstacle and prejudiced the plaintiff from the enjoyment of her matrimonial home and could not stand.

Aggrieved by the High Court decision, Gerald appealed to the Supreme Court where MALABA CJ, disregarded the reasoning in Chiminya v Estate Late Chiminya and Ors, which the High Court relied on, as illogical, as there had been an admission that section 3A of the Deceased Estates Succession Act was irrelevant to the matter under discussion.

The attempt to draw similarities between the purpose of section 5(3)(a) of the Wills Act and that of section 3A of the Deceased Estates Succession Act was considered unnecessary. The Supreme Court confirmed that the law governing the property rights of married persons in Zimbabwe was the Married Persons Property Act which provides that, since 1929, marriages in Zimbabwe are out of community of property. Parties to a marriage out of community of property are legally entitled to own and dispose of property in their individual capacities. More so, the law of testamentary disposition in Zimbabwe recognizes the doctrine of freedom of testation and does not oblige a testator to bequeath his or her property to the surviving spouse and was not discriminatory (as it simply recognized vested rights).

## **Two schools of thought that existed before the Chigwada Supreme Court Ruling**

There are two schools of thought that existed before the Chigwada Supreme Court ruling and these resulted in confusion as regards the actual position of law on spouses' rights to inherit through the Will and protection of freedom of testation.

In Estate Late Wakapila v Matongo & Ors KUDYA J indicated that it was absurd to allow a spouse to dispose of their property however they wished, during his or her lifetime but take away that power from testament disposal. Allowing that, was considered a serious departure from the Common Law doctrine of freedom of testation.

In Roche v Middleton CHITA-

KUNYE J confirmed the Estate Late Wakapila v Matongo's decision and indicated that it was based on the correct interpretation and application of section 5(3)(a) of the Wills Act. The court further held that if the Legislature intended such a radical departure from the common law (the stripping away of the right to freedom of testation) it would have enacted express provisions to that effect.

In Chimbari NO v Madzima and Ors, the reasoning championed by Estate Late Wakapila v Matongo was rejected and the new position was that a Will which does not bequeath the matrimonial house to the surviving spouse was void (invalid), for the same reasoning as advanced in the Chigwada High Court ruling. The same reasoning was followed in Chiminya v Estate Late Chiminya and Ors, where the court went on to rely on section 3A of the Deceased Estates Succession Act, notwithstanding the fact that the Act applied to intestate succession, whilst section 5(3)(a) of the Wills Act addresses requirements for the validity of disposition of estates of married persons by Will.

The approach adopted in Chiminya v Estate Late Chiminya and Ors was further followed in Majuru v Majuru and Nyamnshanya and Ors v Nyamnshanya and Ors.

All decisions that stripped the Testator's right to freedom of testation were overturned through the Supreme Court ruling in Chigwada v Chigwada

### **The Certainty brought by the Chigwada v Chigwada Supreme Court decision**

The Supreme Court answered and settled the questions on the

interpretation of section 5(3)(a) of the Wills Act considering the concept of freedom of testation and the disinheritance of a surviving spouse through a Will and the application of the provisions of the Deceased Estates Succession Act to testamentary dispositions. People wishing to dispose of their estates through the Will are sure that their freedom of testation is protected by the law and that their wishes will be upheld. The following are specific confirmations and clarity brought by the ruling.

### **Status of Marriages in Zimbabwe**

The case confirmed that the law governing the property rights of married persons in Zimbabwe is the Married Persons Property Act, which provides that, since 1929, marriages in Zimbabwe are out of community of property. Parties to a marriage out of community of property are legally entitled to own and dispose of property in their individual capacities. There was general misconception that marriage, especially a Civil Marriage (Chapter 37, and later Chapter 11- as they were then) entitled spouses to an automatic 50% share of the property owned by the other.

### **Discrimination in terms of Section 56 of the Constitution**

It was held that protection of freedom of testation had no relationship to Section 56 of the Constitution, which prohibits discrimination based on marital status and promotes equality before the law.

### **Application of the Deceased Estates Succession Act where there is a Will**

It was confirmed that the Deceased Estate Succession Act did not apply to testamentary dispositions of estates.

### **Freedom of Testation**

The law of testamentary disposition in Zimbabwe recognizes the doctrine of freedom of testation and does not oblige a testator to bequeath their property to the surviving spouse. The law of testamentary disposition, which is based on the universal principle of equality of men and women, gives a right to a person married out of community of property to dispose of their estate, by Will, to whomsoever they choose.

There are however limitations to the doctrine, for example, restrictions based on social justice, public policy, and economic considerations and those found in Statutory and Common Law principles. More so, a provision in a Will is not executed if it is unlawful, immoral, or impossible. Property rights of parties also precludes freedom of testation, where for example, someone distributes 100% of a property jointly owned with a spouse, in his estate (as they should only distribute their share).

### **The implications of the Decision on Estate Planning**

A Will is a reliable and valid estate distribution tool and is protected by the doctrine of freedom of testation, as such people are encouraged to have one as a basic estate planning tool.

There is need to seek the assistance of professionals when drafting a Will to ensure that it is watertight and not contestable. As an example, there are people who when included as benefi-

ciaries, give ground for contestation of a Will, such as someone who writes it/part of it (even under the direction of the testator), and someone who signs the Will/amendment as a witness.

As all marriages in Zimbabwe are out of community of property, when acquiring properties couples need to be aware of the implications of having/not having their names on assets they may have contributed to purchasing. Due to the doctrine of freedom of testation spouses can write their Wills independent of each other and make bequests of their wealth to anyone of their choice. It is however advisable that couples plan their estates together for the ultimate benefit of their vulnerable children and other dependents as agreed. Planning an estate is essential as the law is not always interpreted in black and white and may not be on our side. When planning to amass assets such as a home, it is

always advisable to seek the assistance of financial and tax advisors for proper guidance.

Estate Planning is key and essential. Families need to adopt a more inclusive estate planning approach, which ensure that a family asset does not only benefit a single person to the disadvantage of everyone else. The Chigwada house only benefited Gerald, when it could have benefited all the children in varying shares and leave a legacy for future generations.

The disadvantage of only benefitting one child was also espoused in the aftermath of Magaya v Magaya case where the son sold the family home immediately after inheriting it to the disadvantage of everyone else, especially the sister, who not only stayed there but contributed to its improvement.

## Conclusion

The relevance of a Will as an Estate Planning mechanism has never been an issue throughout the conflicting court decisions, it has been cemented by the Chigwada v Chigwada Supreme Court ruling.

It is contestable for purposes of giving effect to exceptions to freedom of testation (as indicated above) and to prevent acceptance of fraudulent Wills. All this is meant to protect the wishes of the Testator as highlighted in this paper. It is not automatic that every contestation sails through as the courts thoroughly interpret the law for protection of the Testator's wishes.

It is however essential to seek the assistance of professionals such as Lawyers, Estate Administrators and Tax Advisors to ensure that the Will is not only legal but watertight and reasonable.

In a world that often feels like it's upside down, thank you for putting that extra effort to excel.

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Tapiwa Chizana is a Qualified Chartered Accountant and served as a partner for 16 years, at Deloitte. Tapiwa is a former President of the Institute of Chartered Accountants of Zimbabwe (ICAZ).

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# Virginia Mabiza

Attorney-General of Zimbabwe

Virginia Mabiza is a Zimbabwean lawyer, who has made history as the first female Attorney-General of Zimbabwe. She was appointed to this position by H.E. President ED Mnangagwa in November 2023, after serving as the Permanent Secretary in the Ministry of Justice, Legal and Parliamentary Affairs for two terms since 2013.

Mrs Mabiza has a distinguished career in the legal field, having obtained an LLB Honours degree from the University of Zimbabwe and a MBL Master's degree in Leadership and Change Management from the Leeds Metropolitan University. She was also the Secretary for Constitutional Affairs who oversaw the country's constitution making process up to 2013.

Mrs Mabiza has been involved in various initiatives to promote justice, human rights, and public health in Zimbabwe. She was instrumental in delivering the President's promise to the victims of the Gukurahundi massacres, by consulting with the relatives of the deceased and facilitating the exhumations and reburials of the remains. She also announced that Zimbabwe would host an International Intellectual Property Conference in 2019, to foster innovation and creativity in the country. Moreover, she played a key role in the country's response to the COVID-19 pandemic, by ensuring the compliance of the lockdown measures and the vaccination programme.

Mrs Mabiza is a role model for many young women who aspire to pursue a career in law and politics. She is a board member of the Alpha Asset Management Zimbabwe, a company that provides financial services and investment solutions.

Mrs Mabiza is married and has three children. She enjoys reading, gardening, and travelling in her spare time.

*Mrs Mabiza has a distinguished career in the legal field, having obtained an LLB Honours degree from the University of Zimbabwe and a MBL Master's degree in Leadership and Change Management from the Leeds Metropolitan University. She was also the Secretary for Constitutional Affairs who oversaw the country's constitution making process up to 2013.*



# Vimbai Nyemba

Permanent Secretary in the Ministry of Justice,  
Legal and Parliamentary Affairs

Vimbai Nyemba is a Zimbabwean lawyer, author, and leader who has made remarkable contributions to the legal profession and society at large. She is the managing partner of V Nyemba & Associates, a law firm that she established in 1997, which offers various legal services in commercial, corporate, civil, criminal, environmental, energy, and mining law matters. She is also the author of

the best-selling book “Women Entrepreneurship through Procurement”, which aims to inspire and empower women to pursue business opportunities in public procurement. In October 2023, Mrs Nyemba was appointed by H.E. President ED Mnangagwa as the Permanent Secretary in the Ministry of Justice, Legal and Parliamentary Affairs.

Mrs Nyemba has held several prestigious positions in the legal sector, both nationally and internationally. She is the former Vice President (2013 to 2014) and President (2015 to 2016) of the Law Society of Zimbabwe, the current President of the SADC Lawyers Association, the Vice President of Southern Africa for the African Bar Association, and a non-executive director of the Commonwealth Lawyers Association. She serves as the Board Chairman of the Procurement Regulatory Authority of Zimbabwe, and she is a non-executive director of the Deposit Protection Corporation, the Zimbabwe Asset Management Corporation (Private) Limited (ZAMCO), and FBC Holdings Limited. She was also the Chancellor of the Harare Diocese of the Anglican Church (CPCA) until 2023.

Mrs Nyemba has been recognized for her achievements and excellence in law and leadership. She has received several awards, such as the Women in Law Award from the Law Society of Zimbabwe in 2019, the Women in Leadership Award from the Zimbabwe Institute of Management in 2020, and the Business Woman of the Year 2021 Northern Region from Megafest Business Awards. She has also been featured in various media outlets, such as Lawyer Monthly, Legal Women, and The Herald.

Mrs Nyemba is a role model and mentor for many aspiring and practicing lawyers, especially women. She is passionate about promoting gender equality, human rights, and social justice in the legal profession and beyond. She is also an advocate for innovation, entrepreneurship, and sustainable development in the legal sector and the economy. She is a visionary leader who strives to make a positive impact in the world through her work and service.



# Hon. Justice Loice Matanda-Moyo

## Prosecutor- General of Zimbabwe

Hon. Justice Loice Matanda-Moyo is a Zimbabwean lawyer and a former judge of the High Court of Zimbabwe. In October 2023, Hon. Justice Matanda-Moyo was appointed by H.E. President ED Mnangagwa as the Prosecutor-General of Zimbabwe. She took over from Mr Kumbirai Hodzi, who held the position from 2019 until he stepped down in 2022, citing medical reasons.

Hon. Justice Matanda-Moyo has vast experience in the justice delivery system, having served as a Magistrate, State Advisor in the Zimbabwe Defence Forces, State Counsel in the Criminal Division of the Attorney-General prosecuting in the High and Supreme Courts. She rose through the ranks to the post of Director Civil Division and Director Public Prosecution before being appointed Judge of the Labour Court in 2009. She later became the president of the La-

bour Court. She has also served as Chairperson of the Land Acquisition Task Force and represented Zimbabwe in international cases on human rights. In 2013, Hon. Justice Matanda-Moyo was appointed a Judge of the High Court.

In March 2019, Hon. Justice Matanda-Moyo was appointed as the chairperson of the Zimbabwe Anti-Corruption Commission (ZACC), a position she held until her recent appointment. During her time as Chairperson of ZACC, the law-enforcement Commission investigated and referred hundreds of cases of corruption involving billions of United States Dollars to the National Prosecuting Authority for prosecution, some of which involved public officials. ZACC worked hand in hand with other law-enforcement bodies, including the Zimbabwe Republic Police, the National Prosecuting Authority, the Zimbabwe Revenue Authority, the Auditor General's Office, and the Attorney General's Office. ZACC also engaged civil society organisations that fight or expose corruption in the public and private sectors.

Hon. Justice Matanda-Moyo is the wife of the late Hon. Sibusiso Moyo, the former Minister of Foreign Affairs.

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**By Patience Chigumba**

## 1. Introduction

Historically the majority of responsibilities or duties of directors have been set out in case law. The Companies Act [Chapter 24:31] has partially codified these responsibilities in legislation following the example of other jurisdictions like the United Kingdom and South Africa. The rationality of such action in our jurisdiction is based on the founding values of our Constitution which states that Zimbabwe is founded on good governance.

These values of good governance have prompted the drafters of our company laws to align company laws with the Constitution by advocating for transparency, openness and competitive procurement systems. Zimbabwe has also adopted a National Code on Corporate Governance which advocates for good corporate governance. The common

# An Appraisal of Directors Duties and Responsibilities under the Companies and Other Business Entities Act [Chapter 24: 31]

law duties developed over the years include the duty to act in good faith, in the best interests of the company, duty to exercise skill and care, duty to avoid conflicting interests and duty not to make a secret profit. Section 195 of the Companies and Other Business Entities Act [Chapter 24:31] has simply codified these common law duties of Directors

largely unchanged in legislation.

Section 195 (4) of the Companies and Other Business Entities Act [Chapter 24:31] endows every director of the company with responsibilities of exercising independent judgment, acting within power conferred, acting in good faith and promoting the success

of the company and such actions must benefit shareholders of the company as a whole. This provision will not allow directors to delegate their core duties and accountabilities, directors are allowed to delegate none core management functions, clerical duties and administrative duties. The Responsibilities imposed on directors by section 195 (4) are to be interpreted together with the statutory duties of Directors provisioned in the Act, being the duty of care and business judgment, duty of loyalty and duty to disclose conflict of interest.

### 1.1 Duty of Good Faith

The Act in detailing the duty of good faith more specifically has actually changed the scope of the same duty, through introduction of an overriding duty of good faith. Section 195 (4) states that: Each or every director (as the case may be) shall exercise independent judgment and shall act within the powers of the company in a way that he or she considers, in good faith, to promote the success of the company for the benefit of its shareholders as a whole.

The responsibility to act in good faith is similar to the common law duty to act in the best interest of the company but however the Companies Act has refurbished this responsibility by introducing a non-exhaustive list of what may be deemed to be acting in the best interest of the company in subsection 5 of the same provision. The duty of good faith is an overarching fiduciary duty upon which all other duties flow. The duty of good faith depends on honesty and a breach of this duty looks at subjective awareness. The duty of good faith also entails

the duty to exercise independent judgment.

The test for whether one acted in good faith is whether or not the director believed that he/she acted in the interests of the company. This test examines the Director's state of mind. There are evidentiary difficulties in assessing the director's state of mind at the time of the decision, which leads the courts to look at what the director actually believed, based on the relevant evidence but also whether he or she could plausibly believe that.

### 1.2 Independent Judgment

The duty to exercise independent judgment basically means the director should act without control of others and he or she cannot act as a proxy of someone. The director is supposed to exercise autonomous and unfettered discretion in an unbiased and objective manner. This duty is linked to the duty of good faith that's why it has not been stated as a stand-alone duty under section 195 (4) of the Act. This duty is a trap for the unwary nominee director who cannot serve two masters meaning serving the nominator at the expense of the company's best interests.

The unfettered direction referred to in this section does not only refer to third party influence but executive/senior directors and shadow directors who exercise de facto power over other directors. However the director can escape liability under this section if there exist a contract between him and the company which allows him not to exercise his discretion or in the constitution of the company the director is authorized not to exercise unfettered discretion.

### 1.3 Proper Purpose

This duty refers to exercising power for the main reason upon which it has been conferred and granted, and not for ulterior purpose or collateral purpose. This is a duty which works hand in hand with the duty of good faith in section 195 (4) of the Companies and Other Business Entities Act. The director might have subjectively acted in good faith (honestly) but might not escape the objective test of proper purpose. The proper purpose phrase is a catch net for all directors so as not to completely exonerate them under good faith, because the courts are given opportunity to scrutinize corporate management decisions.

### 1.4 Duty to Act within Power Given

It is no secret that no principal can be held liable for the actions of an agent who has exceeded the powers given to him or her by the principal. The director is an agent of the company since the company has no hands to perform. The director cannot enter into an ultra vires contract on behalf of the company because such actions exceed the legal capacity of the company. This common law duty is based on the ultra vires doctrine.

This duty is also an aspect of the duty to exercise power in good faith for proper purpose. This duty also imposes a positive duty on the directors of the company to act in terms of the company constitution and use their powers properly. The essence of this duty is embedded in examining, whether or not the director honestly believed his actions were in the best interest of the company.



### 1.5 The Duty to Promote Success of the Company

This duty serves to promote the members needs and benefits. The director must consider the collective interests of the members as a body or association not individual interests. Under this duty the directors are enjoined to consider the consequences of their decisions in the long term. This responsibility is centered on six factors which are:

- i) The consideration of employee interests in promoting the best interests of the company.
- ii) The consideration of the relationship between the company and all participants in the economic chain for example, suppliers, customers and service providers,
- iii) The impact of the company operations on the community and the environment.
- iv) The desirability of the company maintaining a high standard of business conduct.
- v) The need to act fairly between members of the company and

- vi) Use of power for purpose intended not collateral purpose.

### 1.6 Duty of Care and Skill

Section 195 (8) provides that the corporate responsibilities of directors shall be exercised in consonant with their statutory duties of care and skill, business judgment and the duty of loyalty. The duty of care and skill incorporates the issue of negligence whereby a director is enjoined to exercise the care and skill expected of a reasonably diligent person in the same circumstances. A reasonably diligent director in these circumstances is a director with the requisite general knowledge, training and expertise expected of a director. There is also a second leg to the test which looks at the general knowledge, skill and experience of that particular director.

A director with specialized knowledge or skill will be scrutinized on the standard of a 'reasonable director' possessing specialized

knowledge and skill. The less a director has knowledge the less he or she is likely to be found liable under this provision. Care can be objectively assessed but skill is a subjective test because it varies depending on the aptitude, special training, competence and expertise of a director. This duty is difficult to prove because it is difficult for the courts to decide on the qualities of a reasonable director, due to the different roles of directors and the company size. Under this provision directors will not escape liability for negligence by avoiding undertaking any of their directorship roles or activities. The provision for exercising care and skill under this section also exonerates the failures of the Directors to act in the same manner by providing for the business judgment principle. The business judgment principle alleviates directors from the duty to act with reasonable care and skill. This rule restrains the courts from reviewing business decisions or interfering with honest and reasonable business decisions of directors.

### 1.7 Duty of Loyalty and no Conflict of Interest

The Companies and Other Business Entities Act has a wide duty of loyalty which also includes the duty of no conflict of interest whereby the Director is now required to disclose both direct and indirect interests. The duty applies to director's exploitation of property, information or opportunity belonging to the business entity. However the board of directors of an entity may approve or authorize the director to engage in the conflict of interest but the same directors are precluded from voting at a board meeting deliberating on the issue or forming part of the quorum.

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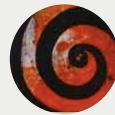
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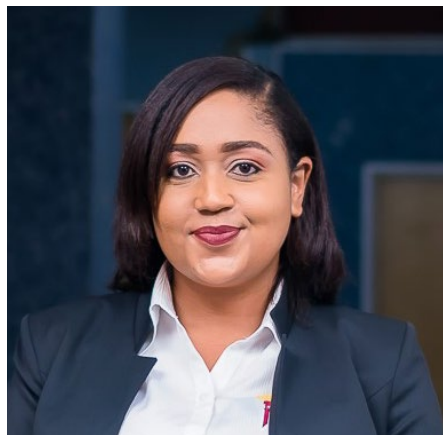
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# The end of an Era for NGCBs



By Priscilla Nyatsanga & Nqobile Ndlovu

## Introduction

Access to credit facilities by financially excluded population groups such as women, youth, rural communities, small holder farmers and micro, small and medium enterprises (MSMEs) in developing countries remains a mirage without a functional, accessible, inclusive and efficient system of credit and security. As these population groups contribute significantly to the GDP of any economy, the inability to access credit has constituted serious growth constraint necessitating government intervention through regulatory and enabling environment support.

With a goal of improving financial inclusion and access to affordable debt finance, Zimbabwe's Movable Property Security Interests Act (Chapter 14:35) was enacted in 2017 to regulate the creation, perfection and realisation of security interests in movable assets. The Act also makes significant changes to the laws of securitising movable property in Zimbabwe such as the Deeds Registries Act; the Bills of Exchange Act; the Grain Marketing Act; the Hire Purchase Act and the Insolvency Act.

This article examines how the Movable Property Security Interests Act ends the existing regime of registering security interests in movable assets, and how the Act deepens financial inclusion in the country.

## Notarial General Covering Bonds

Prior to the enactment of the Act, lenders who sought security were limited to real security through various types of mortgage bonds over immovable property. Notarial General Covering Bonds (NGCBs) which permitted for the use of movables including book debts, as security for a debt were the main available form of security, even though they afforded insufficient security over the movable assets.

An NGCB is registered over all the movable property of a debtor, but does not entitle the creditor a real right of security in that property. Nothing prevents the debtor from dealing and disposing of the property subject to the NGCB. In other words, the creditor cannot prevent an alienation, sale or pledge of the property subject to the NGCB, he cannot follow the property in the hands of the acquirer and cannot prevent a judicial attachment. The rights of the creditor are of importance mainly upon insolvency. However, even in that instance, a creditor is not secured and is only entitled to a preference over the concurrent creditors with respect to the proceeds of sale of the movable property subject to the NGCB.

### What constitutes a Security Interest under the Movable Property Security Interests Act?

operation, will change the securitisation laws in Zimbabwe which will necessitate amendments to statutes such as the Insolvency Act. Furthermore, The Act will create a “security interest” which is defined in section 2 of the Act as a property right in a movable asset created by an agreement to se-

cure payment. A security interest is created when a borrower and lender enter into an agreement in terms of which the lender provides a loan to the debtor. The loan is thereafter secured by a movable asset provided by the debtor. In terms of the Act, the security agreement must be in writing and signed by both the debtor and creditor.

It must identify both parties and it must describe the secured obligation and the collateral. This is beneficial in that the Act permits such security interests to be registered in the Collateral Registry and thereafter enforceable against all other third parties

The Act creates a “security interest” which is defined as a property right in a movable asset created by an agreement to secure payment. After a borrower and lender enter into a written loan agreement, the loan is secured by a movable asset provided by the borrower. The Act requires that the security agreement be in writing, it must identify both parties, it must describe the secured obligation and the collateral and it must be signed by both parties. Once completed, the Act permits such security interests to be registered in the Collateral Registry and become enforceable against all other third parties.

### The function of the Collateral Registry

The Act formalises the registration of security interests in a central, public registry known as the Collateral Registry within the Reserve Bank of Zimbabwe. The Collateral Registry is publicly available and constitutes a database of interests in, or ownership of movable assets in the country. From the onset, it is clear that the process of

registering security interests in movable assets shifts from the NGCB regime under the Deeds Office, to the Collateral Registry at the Reserve Bank.

A lender who registers a security interest in movable assets is issued with a Registration Notice, which affords the lender preferential creditor status in those assets. A lender can easily ascertain whether a security interest in movable assets is already registered in favour of another creditor prior to accepting that security. The lender is also able to verify whether a security interest has been discharged following payment of a debt or performance of the secured obligation.

## Financial Inclusion

According to the Reserve Bank, financial inclusion means that individuals and businesses have access to useful and affordable financial products and services for transactions, payments, savings, credit and insurance that meet their needs and are delivered in a responsible and sustainable way. The first Zimbabwe National Financial Inclusion Strategy (2016-2020) identified various financially excluded population groups such as women, youth, rural communities, small holder farmers and MSMEs. Significant efforts were made to narrow the financial exclusion gap which saw financial institutions offering low-cost accounts, increasing their footprint through bank agents, widespread acceptance of digital payment platforms such as mobile applications and USSD, and integration/ interoperability of banking and mobile payment systems. However, there still remained the aspect of ac-

*It certainly is the end of an era for NGCBs, as the Collateral Registry ushers in an affordable, accessible framework for the registration of security interests in movable assets. What remains are regulations that provide for the modalities of transferring the responsibility of this registration from the Deeds Office to the Reserve Bank Collateral Registry, the format of notices to be registered in the Collateral Registry, and the registration fees.*

cess to credit as a hinderance, which in turn had a negative impact on the growth of businesses led by the financially excluded population groups.

For financially excluded groups, the Collateral Registry translates to decreasing the cost of credit, as any movable asset can now be considered as security for loans offered by lenders or financial institutions, at a relatively lower cost than present. Prior to the enactment of the Movable Property Security Interests Act, the legal framework for the creation of security in movable assets lay in the Deeds Registries Act through registration of NGCBs, accessible primarily by big enterprises seeking financing for capital projects. The cost of registering such NGCBs amounted to between 5% and 10% of the value of the loan to be secured. With the ushering in of the Collateral Registry, it is envisaged that the cost of registering a security interest over movable assets will be more administrative and therefore affordable, even if it is on a slid-

ing scale.

Next, the Collateral Registry broadens the type of movable assets that can be considered as security beyond the scope of factory equipment, office furniture, trading stock, company vehicles/ trucks, and company debtors; to include personal motor vehicles, personal household furniture, ICT equipment, livestock, rights to sale proceeds, and intellectual property. These latter types of movable assets are indeed accessible to women, youth, rural communities, small holder farmers and MSMEs.

Finally, process of calling up the security under the Collateral Registry has been curtailed. Previously, in enforcing an NGCB, a creditor would go through lengthy court battles, that do not yield results in the end as the security under the NGCB would have been alienated or disposed of. The Act provides that a notice of registration of a security interest issued under it is a liquid document that is enforceable by provisional sentence proceedings. This means that the security document is prima facie evidence of the loan owed by the borrower to the creditor, and there is no need for trial to establish this. The Act goes further to state that the creditor may seize and take custody of the movable asset that is under the security agreement pending the grant of provisional sentence. This seeks to protect the lender's rights in the specific movable asset used as security, by allowing the lender to take immediate custody of the movable security. It prevents the dissipation of the movable assets prior to conclusion of court proceedings or public auction, as was the order of the day under NGCBs. These provisions give confidence to lenders that their security interests in movable assets can be called up with ease, and affordably, without

the need to go through lengthy, costly trials.

## Conclusion

It certainly is the end of an era for NGCBs, as the Collateral Registry ushers in an affordable, accessible framework for the registration of security interests in movable assets. What remains are regulations that provide for the modalities of transferring the responsibility of this registration from the Deeds Office to the Reserve Bank Collateral Registry, the format of notices to be registered in the Collateral Registry, and the registration fees.

operation, will change the securitisation laws in Zimbabwe which will necessitate amendments to statutes such as the Insolvency Act. Furthermore, The Act will create a "security interest" which is defined in section 2 of the Act as a property right in a movable asset created by an agreement to secure payment. A security interest is created when a borrower and lender enter into an agreement in terms of which the lender provides a loan to the debtor. The loan is thereafter secured by a movable asset provided by the debtor. In terms of the Act, the security agreement must be in writing and signed by both the debtor and creditor. It must identify both parties and it must describe the secured obligation and the collateral. This is beneficial in that the Act permits such security interests to be registered in the Collateral Registry and thereafter enforceable against all other third partiesThe

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National University of Science  
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# Striking a Balance Reporting Suspicious Money Laundering Cases and Confidentiality for Lawyers in Zimbabwe



By Sandra Kabaya

## Introduction

In Zimbabwe, lawyers play a crucial role in upholding the rule of law and ensuring justice is served. However, they also face the challenge of balancing their duty to report suspicious money laundering cases with maintaining client confidentiality. Money laundering is a serious crime that involves disguising the origins of illegally obtained funds. Lawyers in Zimbabwe, like in many other jurisdictions, have a legal and ethical duty to report suspicious activities related to money laundering. However, they also have a duty to maintain client confidentiality. Balancing these two obligations can be challenging but is essential to uphold the rule of law and prevent financial crimes.

## Legal Obligations Regarding Money Laundering Reporting

Lawyers in Zimbabwe are subject to the Money Laundering and Proceeds of Crime Act (Chapter

9:24), which requires them to report any suspicious transactions to the Financial Intelligence Unit (FIU). The FIU is responsible for receiving, analyzing, and disseminating financial information to combat money laundering and terrorist financing. Failure to report suspicious transactions can result in serious consequences for lawyers, including fines or imprisonment.

## Importance of Reporting Suspicious Activities

Reporting suspicious money laundering activities is crucial for combating financial crimes and protecting the integrity of the financial system. Lawyers play a key role in detecting and preventing money laundering by being vigilant about unusual transactions or activities that may indicate illicit funds.

## Confidentiality Obligations for Lawyers

Client confidentiality is a fundamental principle of the legal profession that ensures trust between lawyers and their clients. Lawyers are obligated to keep all information obtained from clients confidential, except in specific circumstances where disclosure is required by law.

## Striking a Balance

To strike a balance between reporting suspicious money laundering cases and maintaining confidentiality, lawyers in Zimbabwe can take several steps:

**Know Your Client:** Conduct thorough due diligence on clients to understand their background and the nature of their transactions. This can help identify any red flags that may indicate po-

tential money laundering activities.

- **Seek Legal Advice:** If unsure about whether certain activities should be reported, lawyers can seek legal advice from experts in anti-money laundering regulations to ensure compliance with the law.
- **Document Everything:** Keep detailed records of all transactions and communications with clients. This documentation can serve as evidence of due diligence in case of any investigations or inquiries.
- **Educate Staff:** Ensure that all staff members are trained on how to recognize suspicious activities and the procedures for reporting them internally and to the relevant authorities.
- **Use Secure Communication Channels:** When discussing sensitive information related to potential money laundering cases, use secure communication channels to protect client confidentiality.

## Conclusion

Balancing reporting suspicious money laundering cases and maintaining client confidentiality is a delicate task for lawyers in Zimbabwe. By understanding their legal obligations, conducting thorough due diligence on clients, seeking legal advice when needed, documenting transactions, educating staff, and using secure communication channels, lawyers can fulfill their duty to prevent financial crimes while upholding client confidentiality.

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# Expanding beyond borders: Legal and compliance considerations for SMEs in Zimbabwean international trade



By Namatirai Ruzvidzo

## Introduction

As globalization continues to pave the way for expanded markets and business opportunities, [Small to medium enterprises] SMEs in Zimbabwe are increasingly looking to venture into international trade. However, engaging in cross-border commerce requires careful consideration of various legal aspects to ensure a smooth and compliant expansion. This article aims to highlight the key legal considerations that Zimbabwean SMEs should take into account when expanding their business beyond borders.

## Key takeaways

Compliance with various international laws and regulations is crucial for SMEs before they engage in international trade for several reasons: Compliance with international laws and regula-

tions provides SMEs the necessary licenses, certifications, and permits to access global markets. By complying with international laws and regulations, SMEs reduce the risk of legal challenges and protect themselves from costly litigation that could hamper their growth prospects.

Compliance with international laws and regulations reflects positively on an SME's reputation and demonstrates ethical business practices, corporate responsibility, and commitment to global norms.

Compliance with international laws and regulations fosters trust with these stakeholders, improving the chances of successful business partnerships.

### The following are the key considerations

#### Understanding international trade regulations

Before conducting international trade, SMEs need to familiarize themselves with the trade regulations of target markets. This includes understanding import and export laws, customs duties and trade agreements applicable to specific countries or regions. Thorough research and consultation with experts in international trade law can help SMEs navigate these legal complexities. In an increasingly economically interdependent world, the importance of developing and maintaining a robust cross-border legal framework for the facilitation of international trade and investment is widely acknowledged. The United Nations Commission on International Trade Law (UNCITRAL) plays a key role in developing that framework in pursuit of its mandate to further the progressive harmonization and modernization of the law of international trade. UNCITRAL does this by

preparing and promoting the use and adoption of legislative and non-legislative instruments in a number of key areas of commercial law.

#### 2. Compliance with Export Control Laws:

When exporting goods or technology, SMEs must comply with export control laws to ensure they are not violating any bans, embargoes, or restrictions imposed by international organizations or individual countries. Conducting due diligence on restricted goods and obtaining the necessary licenses and permits is essential to avoiding legal consequences. Zimbabwean Small and Medium Enterprises (SMEs) involved in exporting goods must comply with various laws and regulations to ensure they are not violating any bans and embargoes imposed by international organizations. Here are some key export laws that Zimbabwean SMEs should be aware of:

##### a. Zimbabwean Export Control Act

The Export Control Act regulates the export of goods from Zimbabwe. It aims to control the export of strategic goods, including military equipment, dual-use items, and goods related to national security. SMEs must comply with licensing requirements and obtain necessary permits for exporting controlled goods.

##### b. Export controls imposed by regional organizations

Zimbabwe is a member of several regional organizations such as the Southern African Development Community (SADC) and the African Union (AU). SMEs should familiarize themselves with export control regulations adopted

by these regional bodies to ensure compliance.

#### c. Industry-specific regulations

Certain industries, such as pharmaceuticals, chemicals, nuclear technology, and firearms, may have specific export control regulations. SMEs operating in these sectors must comply with any relevant laws and regulations, including export licensing requirements.

#### 3. Intellectual Property Protection

Expanding internationally exposes SMEs to the risk of intellectual property infringement. Therefore, it is crucial to protect trademarks, copyrights, patents, and trade secrets by registering them with relevant authorities in target markets. SMEs should also be cautious when sharing proprietary information or engaging in licensing agreements. SMEs should comply with various international intellectual property protection laws to safeguard their intellectual property rights. Here are some significant laws they should consider:

##### a. World Intellectual Property Organization (WIPO) treaties

SMEs should comply with WIPO-administered treaties, such as the Paris Convention for the Protection of Industrial Property and the Berne Convention for the Protection of Literary and Artistic Works. These treaties provide mechanisms for the protection of patents, trademarks, copyright, and other intellectual property rights.

##### b. Trade-related aspects of Intellectual Property Rights (TRIPS) agreement

Zimbabwean SMEs should adhere to the TRIPS Agreement es-

established by the World Trade Organization (WTO). TRIPS provide minimum standards for intellectual property protection, including patents, trademarks, copyrights and trade secrets.

### **c. Madrid Protocol and Hague agreement**

SMEs that intend to register and protect their trademarks internationally should consider the Madrid Protocol and the Hague Agreement. The Madrid Protocol provides a centralized system for trademark registration, while the Hague Agreement streamlines international registration of industrial designs.

### **d. Regional Intellectual Property Protection agreements**

Depending on where the SMEs plan to do business, they should be familiar with regional agreements like the African Regional Intellectual Property Organization (ARIPO) or the Economic Community of West African States (ECOWAS) Intellectual Property Protocol. These agreements harmonize and enhance intellectual property protection within specific regions.

### **e. Copyright laws**

SMEs should comply with the copyright laws in the countries they operate or plan to export their products to. Understanding the copyright laws can help SMEs protect their creative works, such as literary, artistic, musical, and audiovisual creations.

### **f. Patent laws**

SMEs should be aware of the patent laws in different jurisdictions they operate in or plan to export to. Complying with patent laws ensures protection for their inventions, allowing them to exclude others from using, making, or selling their patented products

or processes.

## **3. Dispute Resolution Mechanisms**

In the event of a legal dispute arising from international trade, SMEs should be prepared for potential challenges in pursuing litigation across borders. Understanding alternative dispute resolution mechanisms, such as mediation or arbitration, can provide a quicker and more cost-effective way to resolve disputes in an international context.

There are several international dispute resolution mechanisms available to protect SMEs from Zimbabwe. These mechanisms provide avenues for resolving conflicts that may arise during international trade. Here are some commonly used options:

### **a. International Chamber of Commerce (ICC) Arbitration**

ICC arbitration is a widely recognized and utilized method of dispute resolution. SMEs can choose to include an arbitration clause in their contracts, stating that any disputes will be settled through ICC arbitration. The ICC provides a neutral forum and experienced arbitrators to resolve disputes efficiently and fairly.

### **b. World Trade Organization (WTO) Dispute Settlement**

If a dispute arises concerning a violation of WTO agreements, SMEs can file a complaint with the WTO. The WTO dispute settlement system offers a structured process that includes consultations, panel hearings, and appellate review. If a violation is found, the WTO can authorize retaliatory measures or impose sanctions.

### **c. International Centre for Settlement of Investment Disputes (ICSID)**

SMEs engaging in foreign investment can protect their interests through ICSID arbitration. ICSID provides a forum for resolving investment disputes between states and foreign investors. If an SME believes that its investment rights have been violated by a host state, it can initiate arbitration proceedings through ICSID.

### **d. Regional Economic Integration Organization Dispute Resolution Mechanisms**

Depending on the region, SMEs can utilize regional economic integration organization dispute resolution mechanisms. For example, in Africa, the African Union (AU) has various dispute settlement mechanisms, including the African Court of Justice and the African Court of Human and Peoples' Rights.

### **e. Bilateral Investment Treaties (BITs)**

SMEs can seek protection under BITs signed between Zimbabwe and other countries. BITs often include provisions for investor-state dispute settlement, allowing SMEs to initiate arbitration against a host state for treaty violations.

## **Conclusion**

Expanding beyond borders presents exciting opportunities for Zimbabwean SMEs, but it also requires due diligence in understanding and complying with various legal considerations. By thoroughly researching and seeking legal advice, SMEs can navigate the complexities of international trade, minimize legal risks, and unlock the full potential of global markets.

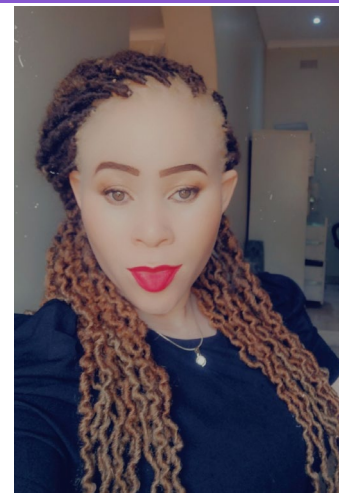
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# The Efficacy of Corporate Rescue Proceedings in Enhancing Creditor Returns in Insolvency Cases



By **Tafadzwa Shava**

## Introduction

The business operating environment in Zimbabwe for both large and small companies has been marred with challenges over the past 20 years. Sanctions, inflation, currency changes, and exchange rate distortions have all contributed to making it difficult for businesses to survive, let alone thrive.

Such a landscape characterized by insolvency often presents a challenging scenario, with several companies grappling to address mounting liabilities and the risk of financial collapse. In such circumstances, corporate rescue proceedings emerge as a potential solution, offering a structured framework for the rehabilitation and recovery of financially distressed entities. This article em-

phasizes the need to evaluate the efficacy in securing a better return for creditors, particularly in cases where a company's solvency is uncertain.

Historical background: Judicial management

Corporate rescue was introduced to Zimbabwe through the Insolvency Act (Chapter 6:07). Prior to the enactment of this Act, the rescue of companies was conducted through judicial management proceedings under the repealed Companies Act (Chapter 24:03). The purpose of judicial management was to prevent a company from being placed in liquidation if there was a reasonable probability of the company being able to recover and resume operations. However, the courts found judicial management to be a "spectacular failure". One of the reasons for its failure was the high burden of proving "reasonable probability". Additionally, unlike corporate rescue which should be concluded within 3 months, judicial management continued for an indefinite period resulting in negative financial impact on creditors. Judicial

management also had several unsatisfactory aspects that undermined its intended purpose.

## Corporate rescue

Corporate rescue entails the restoration of a company to a healthy state, allowing it to preserve its value and continue operations. The primary objective of corporate rescue is to maintain the solvency of the company for the benefit of its stakeholders, including security holders, creditors, workers and other parties who rely on the company's existence.

This is achieved through handing over all management and control of the company to a Corporate Rescue Practitioner for at least 90 days, a moratorium on claims, including litigation, from creditors of the company or its assets, and drawing up a rescue plan aimed at restructuring the company's affairs. The corporate rescue plan serves as the focal point of the process, guiding the development and implementation of the company's rescue efforts.

## The corporate rescue process

Corporate rescue proceedings commence when either the company initiates the process by submitting a resolution to subject itself to supervision, or the company seeks court approval to file a resolution. The process can also be initiated by an affected party that files a court application for an order to place the company under supervision. Alternatively, a court may order the company to be placed under supervision during liquidation proceedings.

Upon the commencement

of corporate rescue proceedings, a Corporate Rescue Practitioner is appointed to assume full management and control of the company. The Corporate Rescue Practitioner's primary responsibility is to develop a corporate rescue plan, which will be evaluated by the company's creditors.

**Notification of corporate rescue**  
The notification of affected persons by standard notice in corporate rescue proceedings is a crucial aspect of ensuring creditor protection and inclusion. Affected parties include company creditors, employees, the Office of the Registrar of Companies, and Regulatory Authorities. The legal obligation to notify each affected party through standard notice serves to provide all creditors and affected parties with the opportunity to assert their claims and actively participate in the proceedings. Failure to notify each affected person by standard notice renders the application for corporate rescue fatally defective.

### **Rights of creditors**

The exercise of rights by secured creditors and other contracting parties following the initiation of corporate rescue plays a crucial role in determining the success or failure of the rescue efforts.

All of the company's creditors are required to actively participate in the corporate rescue process and cooperate with the Corporate Rescue Practitioner by ensuring that their claims and interests are submitted and approved during the preparation, consideration and implementation of the corporate rescue plan. Each of the company's creditors has the right to receive notification of all court proceedings, decisions, and meetings, as well as the right

to participate in both court and corporate rescue proceedings. Creditors are also entitled to submit proposals for the corporate rescue plan, to amend, approve, or reject a proposed rescue plan and to propose the development of an alternative plan. Additionally, the creditors have the right to establish a Creditors Committee, which is consulted by the corporate rescue practitioner during the formulation of the rescue plan.

Regarding voting interests, a secured or unsecured creditor's voting interest is equivalent to the value of the amount owed to them by the company. An unsecured creditor who would be subordinated in a liquidation, as per a subordination agreement, has a voting interest based on the amount they would reasonably expect to receive in such a liquidation of the company.

### **Moratorium on litigation**

To optimize the likelihood of delivering tangible benefits to all stakeholders, including the secured creditors themselves, section 126 of the Insolvency Act imposes a general moratorium on legal proceedings. This means that no enforcement actions against the company or related to its property may be initiated unless specifically ordered by a court under section 126 of the Act. This temporarily suspends the rights of secured creditors to sell or dispose of company property over which they hold security interests throughout the rescue period. Furthermore, the enforcement of guarantees or sureties given by the company to other parties requires prior approval from the court. Consequently, all creditors, including secured and preferential creditors, are prohib-

ited from pursuing individual enforcement measures during the rescue period.

This provision serves as a robust tool for ensuring the stability and continuity of operations during corporate rescue, while also guaranteeing fair and equitable treatment of all creditors. By temporarily restraining the exercise of rights by secured creditors and other parties, the moratorium fosters an environment conducive to the successful implementation of the rescue plan, ultimately benefiting all stakeholders of the company.

### **Challenges of corporate rescue**

It is important to acknowledge that corporate rescue proceedings are not without their challenges. Unsatisfactory aspects of previous rescue mechanisms, such as judicial management, have highlighted the need for a more effective and efficient approach. The introduction of corporate rescue proceedings, as provided for in the Insolvency Act, represents a significant step forward in addressing these challenges and enhancing creditor returns.

### **Conclusion**

Corporate rescue proceedings have the potential to be a valuable tool in insolvency cases, offering a fair and equitable resolution for distressed companies and their creditors. By striking a balance between the interests of all stakeholders and providing a structured framework for rehabilitation, corporate rescue proceedings can contribute to the enhancement of creditor returns.

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**By Loveness Shambamuto**

**Introduction**

A contract of employment is a legally binding agreement between an employer and an employee, which governs the employment relationship. Contracts of employment are the backbone of employment laws. In Zimbabwe the Labour Act (Chapter 28:01) provides a legal framework in which employers and employees can bargain collectively and promote fair labour standards.

The Labour Act applies to all employees except those, whose conditions of employment are governed by the Constitution of Zimbabwe, such as, persons employed through the Public Service Commission and members

of the uniformed forces.

In terms of section 12(1) of the Labour Act, a contract of employment can be written or unwritten. Section 12(2) of the Labour Act requires that once an employment contract is agreed upon, the employer is mandated to inform the employee in writing of the following:

- the name and address of the employer;
- the period of time, if limited, for which the employee is engaged;
- the terms of probation, if any;
- the terms of any employment code;
- particulars of the employee's remuneration, its manner of calculation and the intervals

- at which it will be paid;
- particulars of the benefits receivable in the event of sickness or pregnancy;
- hours of work;
- particulars of any bonus or incentive production scheme;
- particulars of vacation leave and vacation pay;
- particulars of any other benefits provided under the contract of employment

The above information forms the essentials of a contract of employment. While the Labour Act recognises unwritten contracts of employment, it is wiser to have written contracts, as this minimises future disputes regarding the conditions of employment.

## Meaning of employer and employee

For there to be a valid contract of employment, there has to be an employer and employee. The Labour Act defines these two terms, thereby removing any misconceptions about their meaning. According to Professor Madhuku, in his book *Labour Law in Zimbabwe* (2015) “this definition sheds little light on what is it that separates the contract of employment from that of an independent contractor”. The distinction between an employee and an independent contractor can be difficult, but this has been explained in case law: *Masango and Others v Peter Kenneth & Another* SC 41/2015.

A legally binding contract of employment must be between a person who has reached the legal age of majority of 18 and above. The law does not recognise the employment of young persons. Section 11 of the Labour Act which deals with the employment of young persons states that a person who has not reached the age of 18 years requires the consent of his legal guardian to enter into a contract of employment for apprenticeship. Contravention of this provision results in criminal liability with imprisonment of not more than 2 years or a level 11 fine or both the fine and imprisonment.

### Types of employment contracts

Employment contracts can be classified into two categories namely contracts without limit of time or permanent contracts and fixed term contracts. Other types of fixed term contracts are contracts for casual work. The Labour Act does not define a casual employment. The focus is

on the frequency and volume of work done by an employee. If the work is irregular and occasional then it qualifies as casual work. The Supreme Court reinforced that there is distinction between casual workers and fixed term contract workers in the case of *Simbi (Steelmakers) (Private) Limited v Shamu & Others* SC71/15.

Another type of fixed term contract is a contract of seasonal work. The Labour Act defines seasonal work as work that is performed only at certain times of the year owing to the nature of the industry. Such work is available at certain times of the year for example in farming of various crops. These contracts naturally lapse at the end of the season. Such contracts of employment clearly states the duration of the contract. They have a commencement date and an ending date.

More often than not there are employers who renew fixed term contracts on numerous occasions such that the employees will end up believing that they are permanent employees. When drafting fixed term contracts one has to be clear and concise regarding the duration and whether or not it will be renewed at its expiry.

In the case of *UZ CSF Collaborative Research Programme In Women’s Health v David Shamuyarira* SC 10/10. The employer had renewed a fixed term contract for Mr. Shamuyarira from 2001 to about 2008. The last contract between the parties stated

that the contract may or not be renewed depending on various circumstances.

The employer was clear to the employee that the renewal did not create any legitimate expectation. The employee signed the contract and when the contract was not renewed at its expiry, he filed court action alleging that he was unlawfully terminated and that he had a legitimate expectation to be re-employed. He further sought that the court declare the termination of his contract unlawful. The Labour Court agreed with the employee, but on appeal, the Supreme Court reversed the Labour Court ruling.

What is clear from this judgment is that it is not enough for an employee to just allege that they had a legitimate expectation to be re-employed. The employee further bears the onus to prove that another person was employed in their place and they are performing the same duties as they were doing. Ideally employers are to act in good faith in non-renewal of fixed term contracts.

### Variation of terms and conditions of employment contracts

Employment contracts are not cast in stone and they can be altered. There are various factors that lead to variations and alterations. What is important to note is that when the contract does not empower the employer to vary the terms unilaterally then the employer cannot do without consulting the employee.

It is imperative for the employer to discuss the terms and conditions to be varied with the employee concerned first so that there will be a mutual understanding as to why the changes to the contract are being made. Such discussion should take place whether the contract of employment provides for variations or not.

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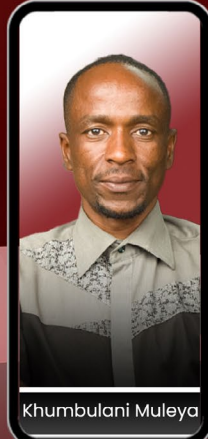
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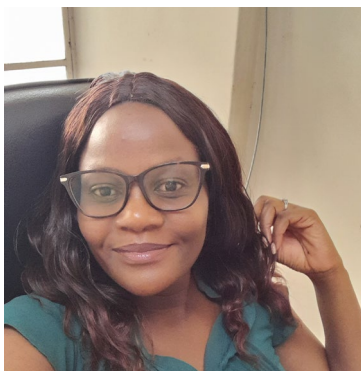
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