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“We welcome your feedback and comments”

‘Zimbabwe is open for business’: What an investor needs to know

The events which commenced 14 November 2018, triggered a ‘new dispensation’ for Zimbabwe, the old government was replaced by a new government and after thirty seven years a new President. The new government has been consistently saying ‘Zimbabwe is open for business’!

To any investor who might be keen to invest, Zimbabwe might be open for business but what does it take for one invest in Zimbabwe. This article summarises a general investor who is not in any partnership with the Government or who is keen to operate in a special economic zone.

The starting point is to identify a structure that helps the investor to operate a business. In Zimbabwe there are basically five structures that can operate a business and these are a company, a partnership, a trust, a private business corporation and a one man business. What is recommended as an ideal investment vehicle is a limited liability company incorporated in terms of the Companies Act [24:03].

Once the company is incorporated the next stage involves compliance with other key regulators.

The first regulator is the Zimbabwean Investment Authority (ZIA), which is responsible for foreign investments. Any person who wishes to obtain the approval of the ZIA to invest in Zimbabwe or anyone who wishes his or her business activity to be approved by ZIA as a foreign investment must obtain such an Investment Licence, failing which the shareholding by such person in the Zimbabwean company will be treated as domestic with attendant Exchange Control and tax consequences.

The other key regulators are the Zimbabwe Revenue Authority (tax), The Reserve Bank of Zimbabwe (Exchange Control), Environmental Management Agency (environmental issues), and the Parent Ministry where the investor needs to invest (for licenses and government policy papers). These can be dealt with in a separate article.

Finance matters, currently Zimbabwe is using the multi-currency system and external loans are controlled in terms of the External Loan Coordinating Committee (ELCC). It is generally advisable to seek the ELCC approval in respect of all foreign loans.

Dividends, the Government guarantees the repatriation of hundred percent (100%) of the original capital investment in the case of disinvestment. Up to hundred percent (100%) of dividends from net after tax profit may be remitted. Investors who become permanent residents may not remit their dividends without prior approval of the Exchange Control Authorities.

Hence the need to obtain an Investment Licence from ZIA.

Those investors bringing in funds through registered commercial banks may repatriate their income and sale proceeds, but the following withholding taxes will be levied on individuals: ten percent (10%) on dividends from companies listed on the Zimbabwe Stock Exchange; fifteen percent (15%) on dividends from non-listed companies, ten (10%) withholding tax on sale of listed marketable securities (Note that a different rate may apply where there is a Double Taxation Agreement (DTA) between Zimbabwe and the Investor’s country of origin).

Taxation and taxes, a company operating in Zimbabwe must be registered and obtain a Business Partner Number from the Zimbabwe Revenue Authority (ZIMRA). There are various taxes that are paid by a Zimbabwean company these include, corporate tax, pay as you earn, value added tax and royalties (for mining companies).

The new government has stated that it will not enforce this law but as things stand the law still stands until it is repealed by an Act of Parliament. Indigenization law provides that in Zimbabwe every existing (private or listed) non indigenous business must sell, donate or dispose a controlling interest of not less than 51% of the shares or interests therein to indigenous Zimbabweans. This is in terms of the Indigenisation and Economic Empowerment (General) Regulations Statutory Instrument 21 of 2010 (as amended) are regulations created from the Parent Act, the Indigenisation and Economic Empowerment Act [Chapter 14:33].

In employing personnel there is no restriction on employing locals, employment issues are provided for in terms of the Labour Act [Chapter 28:01]. Restrictions are however placed on foreigners and the Immigration Regulations, prohibit a foreigner from entering Zimbabwe and engaging in an occupation unless he or she is in possession of a valid employment permit. The Competition Act [Chapter 14:28] restricts a company from getting into a monopoly or from engaging in unfair trading practices.

Zimbabwe has environmental or health and safety regulations in place and these are found in the Environmental Management Act [Chapter 20:27] and the Regulations made in terms of that Act. These provisions of this Act take precedent over all other pieces of legislation.

The above is a summary of some of the key issues that an investor will encounter but before investing it is advisable for the investor to get a proper legal opinion which takes into account the Investor’s circumstances.

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Understanding divorce law: Grounds for Divorce (Part 1).

Whilst most people marry with the expectation of living happily ever after, somehow life has a way of coming out, and people eventually end up divorcing.

Oftentimes when one considers divorce, one is also faced with the question, of the grounds upon which divorce will be granted. One of the most frequent concerns is whether parties can be granted a decree of divorce within a year of being married or whether it is a legal requirement that a married couple should not live together as husband and wife for a period of at least one year prior to approaching the High Court for a decree of divorce. Regardless of whether one is married in terms of the Marriages Act [Chapter 5:11] or customarily in terms of the Customary Marriages Act [Chapter 5:07], a decree of divorce dissolving a marriage can be granted only on two grounds, to wit, irretrievable breakdown of a marriage and incurable mental illness or continuous unconsciousness of one of the spouses.

It follows therefore that a party seeking a decree of divorce must specifically allege and show any one of the above mentioned grounds. In the absence of any of the two grounds, there can be no cause of action for divorce and accordingly, the Court may not grant same.

The said two grounds are the broad grounds, and within them there are factors or characteristics which make them up.

In proving irretrievable breakdown of marriage, one needs show two characteristics namely, the marriage relationship is not normal anymore; and there is no reasonable prospect of the restoration of a normal marriage relationship.

In determining the irretrievable breakdown of the marriage, the Court is guided by certain factors as provided for by the law. These factors however do not prejudice or restrict any other circumstances which may indicate irretrievable breakdown of the marriage, hence the High Court will deal with each case depending on its own facts. Some of the factors that the High Court considers are as follows:

- (a) The parties have not lived together as husband and wife for a continuous period of at least twelve months immediately before the date of commencement of the divorce action
- (b) the defendant has committed adultery which the plaintiff regards as incompatible with the continuation of a normal marriage relationship
- (c) Criminal conviction and imprisonment
- (d) Abusiveness and habitual intoxication.
- (e) The loss of love and affection that is expected of husband and wife.
- (f) The existence of irreconcilable differences which render the continuance of a marriage impossible.

In proving incurable mental illness or continuous unconsciousness of one of the parties to the marriage. In terms

of the Matrimonial Causes Act [Chapter 5:13], a decree of divorce may be granted on the ground of mental illness or continuous unconsciousness of the other spouse. The Court before granting a decree of divorce on this ground it has to be satisfied that:-

- (a) the defendant is suffering from a mental disease or defect and has been under care and treatment for a continuous period of, or for interrupted periods which in the total amount to, at least five years, within the ten years immediately before the date of commencement of the divorce action; or
- (b) the defendant is by reason of a physical disorder in a state of continuous unconsciousness which has lasted for a period of at least six months immediately before the date of commencement of the divorce action.

In proving the existence of mental disease or physical disorder, the Court mandatorily requires the evidence of at least three medical practitioners, of whom two shall be psychiatrists appointed by the court. The party seeking a decree of divorce has to prove to the Court that there is no reasonable prospect that the Defendant will be cured or will regain consciousness. Hence, where there is a reasonable prospect of the party being cured or regaining consciousness the Court may decline the granting of a decree of divorce.

Conclusively, it being upon parties to a marriage to love one another and enjoy a successful marriage, a Court of law has no choice but to grant a decree of divorce if the presence of a ground for divorce has been objectively proved. Put differently a party cannot refuse to be divorced, if one party is no longer interested that it is the end.

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Labour court rules, 2017- what's new?

The recently introduced Statutory Instrument 150 of 2017 ushered in the new Labour Court Rules, 2017, which rules replaced the old Labour Court Rules, 2006. The new rules introduced a wide range of procedural and substantive changes to our labour litigation. This piece will, therefore, seek to highlight some of the most important of these changes, whose introduction will significantly impact our practice of labour law.

i. Persons who may effect service of document

The new rules introduced procedural changes as to who may effect the service of documents, more particularly notices of set down. Under Rule 8, the mandate to serve all notices of set down now exclusively vests in the Sheriff or his/her deputy, a position that did not exist in terms of the Old Rules.

ii. Informality of proceedings

The new rules altered the position relating to the informality proceedings. Under the new Rules, Rule 12(2) provides that: "The Court may, so far as appear to it appropriate, avoid formality in its proceedings...", a position dissimilar to the old Rules, which provided that the Court "shall" as opposed to "may". In effect, the new rules grant the Labour Court additional discretion in the avoidance of formality in its proceedings, as opposed to mandating it.

iii. Applications

The new rules introduced significant changes in respect to the type, manner and forms of Applications applicable in the Labour Court. Whereas, under the old rules, 'Applications' were narrowly defined, the new rules have broadened the scope of 'Applications' to include: Court Applications, Chamber Applications, Urgent Chamber Applications, Applications by the Minister in terms of section 120 of the Act, Applications for condonation of late noting of an appeal or review, and Applications for an order by a Labour Officer or Designated Agent in terms of section 93(5)(a), (5)(b) and (c) of the Act.

The new rules have, further, gone on to provide procedural guidelines as to the prescribed forms, dies, and security for costs necessary in such applications in the Labour Court.

iv. Record Preparation

The new rules introduced procedural changes as to the preparation of records. Under the new Rules, Rule 21 has been introduced stipulating the requirement that it shall be the duty of the parties or litigants to prepare the record of proceedings by indexing, paginating and binding; a duty that did not exist under the Old Rules.

v. Cross-Appeals

The new rules have made an important introduction through the specific provision for cross-appeals under Rule 19(4). Such cross-appeals were not explicitly provided for under the old Rules.

vi. Adoption of incorrect form of application

The new rules have introduced clarity in respect to the adoption of incorrect forms of applications. Under the new Rules, Rule 24 has been introduced which, simply put, provides that the adoption of an incorrect form of application shall not be a ground for dismissing an application, unless there is some prejudice that cannot be remedied.

vii. Representation

The new rules introduced guidelines in respect to the representation of parties before the Labour Court. Under Rule 25, a party may be represented by an official or employee of a registered trade union or employer's organization. Further, a party may also be represented by a company official.

Where one is represented by a trade union official, such representative must produce proof of their capacity to represent. Similarly, where a party is represented by a company official, such official must produce a company resolution or letter of appointment authorizing them to act.

viii. Hearing of Applications

The new rules have, under Rule 34, reversed the previous

position allowing a legal practitioner representing a party to make a submission or cite an authority that was not outlined or set out in the heads of argument.

ix. Referral in terms of Section 175(4) of the Constitution

The new rules have, under Rule 44, introduced provision for the referral of matters, by a Judge, to the Constitutional Court *mero motu* in terms of Section 175(4) of the Constitution, a provision that did not exist in terms of the Old Rules.

In light of the above, it is evident that the new Labour Court Rules, 2017 have indeed introduced a wide range of procedural and substantive changes to our labour litigation. Though the present piece only highlights but a few of the changes, several others exist whose introduction and application, along the one's expounded herein, will significantly impact our practice of labour law.

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Payability of tax on illegal receipts

With Zimbabwe's Revenue Authority ramping up efforts to collect taxes through a variety of measures, tax awareness has steadily increased. A question that has yet to be clearly answered in our jurisdiction, however, is the payability of tax on illegal receipts. This piece, therefore, will seek to tackle this question through an examination of decided cases in neighbouring jurisdictions, in order to establish whether income received from illegal receipts is subject to tax.

The taxability of income received from illegal activities has been explored in several cases. In this piece, three particular cases will be examined, namely: COMMISSIONER FOR INLAND REVENUE v DELAGOA BAY CIGARETTE CO, LTD (1918) 32 SATC 47, ITC 1545 (1992) 54 SATC 464 and MP FINANCE GROUP CC (IN LIQUIDATION) v COMMISSIONER FOR SOUTH AFRICAN REVENUE SERVICE 69 SATC 141; 2007 (5) SA 521 (SCA).

COMMISSIONER FOR INLAND REVENUE v DELAGOA BAY CIGARETTE CO, LTD (1918) 32 SATC 47

In this matter, the taxpayer company had advertised a scheme under which it sold packets of cigarettes at a discount. In the advertisement, the company undertook to set aside two-thirds of the amount received from such sales as a prize fund from which a monthly distribution would be made to such purchasers of the packets "as the directors of the company should in their discretion determine".

Two monthly distributions to winners were made. However, before the third distribution took place, the scheme was stopped, as it was considered to be a lottery and, therefore, illegal.

Following an interim assessment by the Commissioner for Inland Revenue, the Taxpayer argued that the payments of prizes were

outgoings incurred in the production of the income of the company and did not constitute a portion of its taxable income, and that the business of the company was illegal and the State was not entitled to collect tax on the profits of illegal transactions.

In coming to a decision, BRISTOWE, J, at page 49 of the judgment, stated as follows:

"I do not think it is material for the purpose of this case whether the business carried on by the company is legal is illegal. Excess profits duty, like income tax, is leviable on all incomes exceeding the specified minimum ... The source of the income is immaterial. This was so held in *Partridge v Mallandaine* [18 QBD 276] where the profits of a betting business was held to be taxable to income tax; Denman J saying that 'even the fact of a vocation being unlawful could not be set up against the demand for income tax'."

The principle was, therefore, introduced that in determining whether an amount is "income" or not, no account must be taken of the fact that the activity involved was illegal, immoral or ultra vires. Accordingly, the legality or otherwise of the business was deemed irrelevant, and the income earned taxable.

ITC 1545

In this matter, the appellant had been taxed on the proceeds from the sale of stolen diamonds and the receipts from the growing and sale of dried "milk cultures". The latter activity was described by the court as a money-making racket similar to a chain-letter scheme and was accepted as amounting to an illegal lottery.

The court held that the amounts were received by the taxpayer for the purposes of the definition of "gross income" notwithstanding that they were in pursuance of a void transaction.

Accordingly, the taxpayer's earnings were included in his gross income and deemed taxable.

MP FINANCE GROUP CC (IN LIQUIDATION) v COMMISSIONER FOR SOUTH AFRICAN REVENUE SERVICE 69 SATC 141; 2007 (5) SA 521 (SCA)

In this matter, during the 2000, 2001 and 2002 years of assessment, one Marietjie Prinsloo operated an illegal and fraudulent investment enterprise commonly called a pyramid scheme. Eventually, the scheme collapsed, owing many millions. The evidence revealed that most of the money received by the scheme was kept in cash and not banked and this cash float provided the source of payments to investors. However, substantial amounts of money were appropriated by Prinsloo and her accomplices.

The legal question arose as to whether the amounts paid by the various investors could be said to have been received by the appellant as gross income.

In coming to a decision, HOWIE P, at page 145 of the judgment, stated as follows:

"An illegal contract is not without all legal consequences; it can, indeed, have fiscal consequences. The sole question as between scheme and fiscus is whether the amounts paid to the scheme in the tax years in issue came within the literal meaning of the Act. Unquestionably they did. They were accepted by the operators of the scheme with the intention of retaining them for their own benefit. Notwithstanding that in law they were immediately repayable, they constituted receipts within the meaning of the Act."

Accordingly, the amounts in issue were deemed to constitute income received and duly taxable.

In light of the above, it is evident that a Taxpayer will be liable for tax in respect to illegal receipts and accruals which are income. The view taken by Courts in neighbouring jurisdictions is that a person who is involved in illegal or criminal activities should not further benefit from his or her own doing, and thus should be subject to tax. The illegality of a transaction or business will, therefore, largely be immaterial, and remain subject to tax.

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The Spoliation Order

"It is a fundamental principle that no man is allowed to take the law into his own hands; no one is permitted to dispossess another forcibly or wrongfully and against his consent of the possession of property, whether movable or immovable. If he does so, the Court will summarily restore the status quo ante, and will do that as a preliminary to any inquiry or investigation into the merits of the dispute."

These words of Innes CJ in the 1996 case of *Nino Bonino v de Lange* have stood the test of time to become the backbone of the remedy of spoliation in our jurisdiction.

It is a clear indication of how the law frowns upon anarchy even in the law of property. This means that even a squatter should be considered as being in peaceful possession of the area he is squatting on and due process must be followed to remove him, which may be a proper eviction order against him.

It is imperative to first visit the interesting dynamics between possession and ownership. One can be in possession of a property that they do not own yet one can also own something but not necessarily possess it. Possession is about the physical control and mental intention to control. A distinction can also be made between the right of possession and the right to possession. A potential squatter who intends to occupy a piece of land does not have the right to possession. However once a squatter is in possession of a piece of land, he or she has the

right of possession which is protected under the law.

The right of possession can only be interfered with through due process of the law, failing which one can apply for a spoliation order. In *Sillo v Naude* “unlawful” was defined to mean dispossession without the party in possession of the property’s consent or without due legal process. Once you are in possession of a thing and it is taken away from you without your consent, the spoliation remedy is available.

Spoliation by its nature as a remedy protects possession and it does not allow the court to delve into the merits of the matter. This means that when considering a spoliation action in its purest form, the lawfulness of the possession should not enter the arena for debate. The maxim of *spoliatus ante omnia restituendus est* dictates this remedy and it is interpreted to mean that the applicant’s control of the property must be restored at once without considering whether their possession was criminal, illegal or unlawful.

For one to succeed in a spoliation two requirements have to be satisfied and these are, the applicant in peaceful and undisturbed possession of the thing and was he forcibly or unlawfully dispossessed.

Some have argued that the spoliation doctrine protects criminals and illegal acts as it allows people with dirty hands to rush to the courts seeking its assistance in circumstances they are guilty of lack of probity or honesty. The argument is easily killed off because the spoliation remedy is there to ensure peace and to safeguard law and order in the community. This spoliation order is usually a temporary remedy done through a speedy action. The court first restores parties to their original position before spoliation and then the respondent can then claim his right to possession or ownership in another suit.

This subsequent suit is through the *rei vindicatio* and under it one can then prove that he/she is the owner of the thing, the thing exists and is identifiable and the defendant is still in control. It is then the duty of the courts to adjudicate on who is guilty and who is not or who has the absolute right to property and who does not.

In conclusion the message is clear, and it is that, in the law of property due process should be followed through the proper litigation channels. Citizens should not take the law into their own hands. Landlords should not lock their tenants doors upon a default in payment of rentals.

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JOKE OF THE MONTH

Family Law Judge to Father: Do you have anything to offer this court before I issue my judgment?

Father: No your honour, my lawyer took it all.

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