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FROM THE MANAGING PARTNER'S DESK

Dear Reader

The response to our first issue was overwhelming. Your words of encouragement and the numerous requests to join the mailing list have given us wings! We hope you will find this and the other issues as informative as the first one.

In our quest to ensure that we remain abreast with international developments our partners with be attending various conferences this year. Two of our partners involved in the financial markets practice will be in Cape Town on the 25th and 26th March 2015 attending the Bonds and Loans Africa conference. This a platform, the only one of its kind in Africa, which allows local and international financial institutions, corporates, investors, government officials and lawyers who advise these entities to learn about the latest developments in the debt markets. It gives the participants an opportunity to understand the full range of products available to both the issuers and borrowers. We are convinced that our clients will benefit from the knowledge that our team will acquire from this conference.

The International Bar Association's Legal Practice Division Women Business Lawyers Initiative will host a conference in Livingstone, Zambia on 21-22 April 2015. This is the first IBA Women Business Lawyers' event to be held in Africa and we are glad that our female partners will be there to share ideas with their colleagues from around the world. In terms of promoting gender equality I am proud to say that M & S has not been found wanting.

In May 2015 alone, our partners will be attending three different international conferences. The first one is the European, Middle East & Africa regional meeting of Mackrell International (MI), which is to be held in Sweden. MI is an international network of over 4000 lawyers dotted around the world and we are the MI member firm for Zimbabwe. The second conference is the International Trademarks Association (INTA) Annual Conference in California, USA, and our attending partner is a committee member of the INTA Young Trademark Lawyers Association. The third May 2015 conference we will be attending is the International Bar Association (IBA) ICT Lawyers Conference in England and our attending partner for this conference is a committee member of the IBA Telecommunications Committee.

And of course in October 2015 three of our partners will be in Vienna to attend the IBA Annual Conference which is the global voice of lawyers. This is a gathering of over 5000 leading lawyers from around the globe to discuss the latest developments in law and legal practice in general.

The skills development that we derive from these conferences is very important to us as we constantly endeavor to improve our service delivery to our clients and our standing in the profession. This explains why we have an attendee for each of the conferences every year.

Lastly, please allow me to welcome Norman Chimuka and Nokuzola Charlene Ndlovu who have joined the M & S Team as Professional Assistant and Legal Intern respectively with effect from the 1st February 2015. We are certain that they will find their stay with us educative and rewarding and that they will also contribute to the improved quality of the service that we will provide to our clients.

Regards—VB

ARE YOU GETTING QUALITY LEGAL SERVICES?

One of the greatest complaints against lawyers is poor communication skills and general client care. I am sure most of you read the alarming Herald headline which stated that the Law Society of Zimbabwe was investigating over 400 lawyers for complaints filed against lawyers. The correct position was that the LSZ had received over 400 complaints in that year. Complaints filed by individuals do not translate to an investigation of a lawyer. Some of them involve debtors who say that a lawyer has caused his house to be sold when in fact it was auctioned pursuant to a Court order.

Your right to proper legal service—cont from pg 1...

The vast majority of those cases involved a simple failure by lawyers to advise their clients about the management of their cases even in instances where they would have done the work. When did you last get an update from your lawyer about your case? Do you send countless emails that are not responded to? Do you know why a certain course has been adopted in the management of your matter? If your answer to any of the above questions does not satisfy you then you are dealing with a lawyer of old. Such a lawyer has no place in the modern world. The fundamental purpose of a lawyer's service is to enable the client to make decisions on how their case is to proceed based on information provided by the lawyer. The lawyer must provide options available to the client and explain procedures involved, give a clear indication of the basis for billing and must of necessity give a detailed account for services rendered.

On fee information it is imperative to sort out the question of billing so that it is agreed from the outset. It is a sensitive issue which will not resolve itself. This information is so important as it enables a client to decide whether to proceed with the matter or not. How often do you hear a client saying "If I had known that it would cost so much, I would not have bothered with this case".

In this day and age you should not allow a lawyer to say to you "I do not know how much this case will cost you". That is nonsense. At the very least he should give you an indicative figure which may change if certain situations arise or give you a capped fee. It must however be understood that estimating legal costs especially in litigation matters may be very difficult because of so many contingencies.

In managing matters most lawyers fail to give information regarding the procedures involved, the causes of delays and the firm's policies generally in dealing with clients. It is imperative from the beginning for the client and the lawyer to have an understanding of the objectives of the mandate, the processes that follow and the probable time lines to carry out the mandate.

However in this modern era the non-competitive lawyer is likely to be a thing of the past. Clients have a right to and indeed should demand value for their money. They have a fair amount of lawyers to choose from and can move their business to law firms that value them.

The annual survey results of the Sharp Legal Brands published by Acritus has shown that clients demand value, commercial awareness, business understanding and international expertise from their lawyers. In the context of Zimbabwe it is important that our lawyers keep in touch with modern trends. Your lawyer must be comfortable in an international legal practice. Surely your lawyer must attend international conferences, seminars and similar events that will keep him abreast of international best practices. Joining a network of international law firms is one way of ensuring that he can service clients around the world and has access to international expertise for the benefit of his clients.

Besides his knowledge of the law, your lawyer must:

Manage your legal matters in a way which is focused on you as the client;

Enable you to participate in the legal processes by providing you with information that will tool you to make informed decisions;

Be transparent in his billing. The billing arrangement must be agreed to at the beginning of the matter;

Be ethical and honest;

Provide you with a clear complaints procedure in case there is need to follow that path.

As a client therefore you are entitled to take a more active role in the management of your matter but always subject to the understanding that you have gone to the lawyer for his expertise. You are not a lawyer yourself!

By V B Sibanda — Partner

SYNDICATED LOANS: PART 2 – THE PARTIES

In the first part of this series, we introduced the basics of syndicated loans and the benefits thereof to banks and corporations. By way of recap, we explained that a syndicated loan is offered by a group of lenders (the syndicate) who jointly provide funding to a borrower (usually a corporate in need of substantial funding). Each of the lending banks provides a portion of the loan in return for a proportionate percentage of repay-

ments and interest for the duration of the loan.

The main advantage of this structure to the borrowing company is that it manages to source large-scale funding from various banks in one transaction with uniform terms and uniform interest rates instead of the time and resource consuming process of negotiating loan agreements with various banks on varying terms. The main advantage to the Banks is the ability to participate in large scale financing while enjoying institutionalized sharing of risk with the other lenders thereby minimizing exposure in the event of default.

In this second part, we briefly introduce the parties to a typical syndicated loan agreement and their roles. The information is set out in table form for ease of reference.

Party	Role/Function
Borrower	Seeks the funding and is responsible for drawdown requests, repayment of principal and interest.
Guarantor (*optional*)	Binds itself as surety and co-principal debtor with the Borrower for the due and punctual repayment of principal plus interest.
Arranger/Lead Bank	Responsible for sourcing the funding on Borrower's behalf, invites other banks to participate in lending to the Borrower and structures the loan. For fulfilling these functions, the Arranger/Lead Bank is entitled to an agreed fee.
Lenders/ Participating Banks	The banks who form the syndicate that lends to the Borrower. Each participating Bank provides a defined percentage of the loan and receives the same percentage in capital repayments and interest payments.
Underwriting Bank (optional)	Guarantees that the entire loan amount will be availed to the Borrower. It is common to have the Lead Bank take on the role of Underwriting Bank as well.
Facility Administrator/Agent	This role is undertaken by one of the Banks, normally but not necessarily, the Lead Bank. The role of the Facility Administrator is to attend to draw down requests, monitor and pursue loan disbursements by the Lenders, monitor and pursue repayments from the Borrower, and allocate repayments to the Lenders. A fee is usually paid for this role.
Security Agent/ Trustee	Holds the security on behalf of the Lenders which security is shared on a *parri-passu* basis and, if realized, proceeds therefrom are paid to the Lenders on a *pro rata* basis. The Security Agent need not be one of the Lenders although it can be. Under our law, if the security involves mortgage bonds, the Security Agent must be a company that is registered as bond-holding company in terms of our Deeds Registries Act which can then facilitate the registration of participating bonds on behalf of the Lenders. A fee is also usually paid for this role.

In a nutshell, the above table concisely outlines all the standard and optional parties to a syndicated loan agreement, particularly in our jurisdiction. In the next and final article in this series, we shall briefly discuss the special problems of syndicated loans and how these can be minimized or overcome so that all parties derive optimal benefit from this financing structure.

To the interested reader, more extensive information of syndicated loans can be found on the Loan Market Association website, www.lma.eu.com. Mawere & Sibanda Legal Practitioners is a member of the Loan Market Association which is a body made up of large and small financial institutions, law firms, accounting firms and other professionals with an interest in the syndicated loan market association whose key objective is improving liquidity, efficiency, transparency and promotion of the syndicated loan market.

***Sharon Bwanya is a Partner in our Banking & Corporate Law Department**

By - S Bwanya

Of demonetisation, currency nominalism, and Zimbabwean Dollar labour damages

By Tatenda Nhemachena

Following the collapse of the Zimbabwean Dollar owing to hyperinflation, under Statutory Instrument 5 of 2009, the government established the multicurrency system that still prevails today. The result of Statutory Instrument 5 of 2009 was that with effect from February 2009 it became legal to use foreign currency as legal tender in Zimbabwe notwithstanding that the Zimbabwean Dollar was never demonetized and officially scrapped as legal tender.

Interestingly, efforts to formally do away with the defunct currency have only come to the fore recently through the Reserve Bank of Zimbabwe's January 2015 Monetary Policy Statement.

From its policy statement, the Reserve Bank of Zimbabwe has communicated an intention to demonetize the Zimbabwean Dollar completely by 30th June 2015. As such, all bank accounts, other than loan accounts, as at 31st December 2008 will be paid an equal amount of five (5) United States Dollars by the Reserve Bank and the then prevailing United Nations exchange rate will be used to convert Zimbabwean Dollar balances that were as a result of arbi-

trage opportunities (then commonly referred to as "burning").

The above apart, the continued legal existence of the Zimbabwean Dollar has led to many challenges in labour circles, particularly in the quantification of damages accrued in the Zimbabwean Dollar era, pre the adoption of the multicurrency system. Employees with Zimbabwean Dollar damages claims have on numerous occasions approached the courts seeking to have the same converted to United States Dollars – this is of course very understandable given the de facto abandoned and valueless Zimbabwean Dollar.

In attempting to have Zimbabwean Dollar damages claims converted to United States Dollars, employees have met resistance from employers, with employers citing the entrenched common-law principle of currency nominalism on the one hand and employees grasping at public policy and the principle of social justice in the workplace on the other.

From an employer perspective, ***the principle of currency nominalism is to the effect that all debts are to be paid in the currency in which they are denominated.*** Accordingly, under currency nominalism, a debt sounding in money has to be paid in terms of its nominal value irrespective of any fluctuation in the purchasing power of the currency – a position strongly contested by employees for obvious reasons.

"the principle of currency nominalism is to the effect that all debts are to be paid in the currency in which they are denominated "

As regards the treatment of Zimbabwean Dollar labour debts, not much clarity has been given by the legislature or the courts, with the Supreme Court on many a occasion deferring to the Labour Court on matters of quantification and conversion of the no value Zimbabwean Dollars to foreign currency. What is however clear from the recent Supreme Court judgment Madhatter Mining Co v Tapfuma S-51-14 is that the courts are not forthcoming to explicitly deal with the applicability or otherwise of the principle of currency nominalism in labour matters. Neither the Supreme Court nor the Labour Court has pronounced on the issue of currency nominalism despite having ample opportunity to do so, yet both courts have confirmed that the Labour Court has the power to issue judgments sounding in foreign currency values where damages are concerned and such damages accrued initially in Zimbabwean Dollars.

In Samanayau & 38 Ors v Fleximail (Private) Limited LC/H/776/14, the Labour Court attempted to quantify damages accrued in Zimbabwean Dollars as United States Dollars but neglected to deal with the question of the applicability of the currency nominalism principle in labour matters despite such question having been specifically referred to it for determination by the Supreme Court. In its endeavours, the Labour Court preferred to compute Zimbabwean Dollar damages to United States Dollars by taking into account the foreign currency wage of an employee on the specific date on which the employer first started paying that same employee in foreign currency. This formula was not backed by any mathematical or actuarial basis contra to the pronouncement of the Supreme Court in the Madhatter case above that in dealing with the complexity of the computation of Zimbabwean Dollar damages to foreign currency, the Labour Court should consider engaging the services of a qualified financial expert in order to work out a formula for calculating damages – which formula must of necessity give a fair value in foreign currency to damages denominated in Zimbabwean Dollars. Here a lot may be said about the desirability of the Labour Court's approach to computation as the same cannot be adopted where a former employee's position never became subject to remuneration payable in foreign currency.

Evidently, as the common-law rule of currency nominalism has not been done away with expressly or otherwise in labour matters, one can only assume that the principle still applies in our law, the result thereof being that damages accrued in Zimbabwean Dollars remain payable in the obsolete Zimbabwean Dollar.

The Reserve Bank of Zimbabwe's statement on demonetization also does not help the situation much either as by law Zimbabwean Dollar bank accounts are to be credited with United States Dollars. In such an instance, an employer faced with a claim for computation of a Zimbabwean Dollar claim to United States Dollars from a former employee may very well raise the principle of currency nominalism as a defence, coupled with impossibility – here it is only reasonable that if by law a debt is payable in Zimbabwean Dollars and by law if the government has abolished the Zimbabwean Dollar, the obligation to pay the debt becomes impossible to perform in the absence of Zimbabwean Dollars.

In the end guidance on how to resolve Zimbabwean Dollar claims will only come from the legislature and in its absence from the courts (where they have mustered enough courage for the controversy). Until then the Zimbabwean Dollar will continue to haunt Zimbabwean labour matters.

By—Tatenda Nhemachena

UNDERSTANDING COPYRIGHT—by A T Muza

What is Copyright?

Copyright is a legal term used to describe the rights that creators have over their literary and artistic works (Source—WIPO Website). In Zimbabwe copyright law is governed by the Copyright & Neighbouring Rights Act [Chapter 26:05]. The Act defines copyright as real right which subsists in a work and which entitles its owner exclusively to do in Zimbabwe and to authorise others to do in Zimbabwe the things which the Act designates in relation to that work.

Copyright legislation was enacted in order to offer protection to authors (writers, artists, music composers, etc.) on their creations, remedies in the event of infringement and means to facilitate commercial transactions emanating from the works of the copyright owner.

"...ownership of a copyright vests in the author of the work concerned or in the case of a work of joint ownership, in the co – authors of the work."

What is covered by Copyright?

From the above statutory definition, the next question that comes to mind is what work is eligible for copyright protection. Section 10 of the Act provides that literary works; musical works; artistic works; audio-visual works; sound recordings; broadcasts; programme-carrying signals and published editions are eligible for copyright for as long as they are original.

Work, other than a broadcast or programme-carrying signal, shall not be eligible for copyright unless it has been reduced to writing, recorded or reduced to material form.

It must be noted that copyright does not extend to ideas, but only to the expression of thoughts. There is no copyright in ideas because something as ethereal as an idea cannot receive legal protection, but as the idea is recorded in material form (in writing, on a canvas, as a photograph) copyright automatically arises.

Even if the following are recorded in material form, they are not eligible for copyright:(See section 10 (5) of the Act.)

procedures;

systems;

methods of operation;

concepts;

principles;

discoveries;

facts or figures, even if they are explained, illustrated or embodied in a work;

news of the day that are mere items of press information;

speeches of a political nature and

speeches delivered in the course of legal proceedings are not eligible for copyright

Who owns a Copyright?

In terms of section 14 of the Act, **ownership of a copyright vests in the author of the work concerned or in the case of a work of joint ownership, in the co – authors of the work.**

It bears noting that the author or creator of the work is the owner of the copyright, unless the person is in employment, and the work is created in the course and scope of the employment, in which case the employer holds the copyright.

It is, however, possible for the creator of the work to share copyright as in joint authorship, or to contractually assign in writing, the copyright or part thereof, to a publisher or other third party, either on an outright basis or for a limited purpose or period.

Duration of a Copyright

In terms of section 15 of the Act, duration of a copyright depends on the type of work that has been created. Generally, the term of copyright is 50 years, subject to the following:

Literary, Musical or Artistic Works - copyright exists for the life of the author plus fifty 50 years following death, calculated from the end of the year the author died in or 50 years from the date of first publication, performance in public, offering for sale of records thereof or the broadcasting thereof , whichever is later.

Films and Photographs - 50 years from the end of the year in which the work is made publicly available, or the end of the year in which the work is first published, whichever is longer, or fifty years from the end of the year in which the work is made

Sound Recordings - 50 years from the end of the year in which the recording is first published

Broadcasts - 50 years from the end of the year in which the broadcast first takes place

Programme-carrying Signals - 50 years from the end of the year in which the signals are emitted to a satellite

Published Editions - 50 years from the end of the year in which the edition is published.

By A T Muza—Partner

CIVIL IMPRISONMENT UNDER THE NEW CONSTITUTION

By Sharon Bwanya

Introduction

Defaults on loan repayments and failure to pay for goods and services received have been increasing in recent years mainly due to the prevailing economic challenges. Creditors are doing all they can to pursue payments due to them and some debtors are doing all they can to evade the proverbial 'long' arm of the law. As a final desperate enforcement mechanism, when the Sheriff's execution process has failed to yield sufficient pro-

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ceeds to clear the amounts owed, as is often the unfortunate case, (a discussion for another day), creditors then turn to civil imprisonment in the hope that a ninety (90) day stay in prison would surely compel a defaulter to pay. And in this way, creditors usually finally win the long arduous battle that is debt recovery.

However, since the promulgation of our new Constitution, judgment debtors believe that they may have discovered a card to trump the hand of civil imprisonment in the form of section 49(2) of the new Constitution. In this article, we explore whether civil imprisonment may still be resorted to as an enforcement mechanism in light of the provisions of section 49(2) of the Constitution and the rules of court.

Court Rules v The Contentious Section 49(2) of the Constitution

Order 41 Rule 370A (1) of the High Court Rules provides that if the court is satisfied, after due inquiry, that:

....the debtor has the means to pay or the ability to pay the amount due, and that his failure or refusal to pay the amount due is wilful, the court may issue an order for the personal attachment and imprisonment of the judgment debtor;

If the court is not satisfied as provided for in paragraph (a), the court shall refuse to make an order referred to in that paragraph.

Section 49 of the Constitution provides that:

(1) Every person has the right to personal liberty, which includes the right –

(a) not to be detained without trial; and

(b) not to be deprived of their liberty arbitrarily or without just cause.

(2) No person may be imprisoned merely on the ground of inability to fulfil a contractual obligation.

A reading of the above provisions of Order 41 Rule 370A (1) alongside section 49(2) of the Constitution makes it apparent that there is nothing unconstitutional about civil imprisonment since the court will only issue an order for civil imprisonment if it is satisfied that a debtor is able but unwilling to pay while section 49(2) of the Constitution only protects those persons who are unable to pay.

In principle and in practice, before making a determination as to whether a debtor is able but unwilling to pay, the court is obliged by Order 40 Rule 370A(2) of the High Court Rules to take into account factors such as the nature and extent of the debtor's income and the amounts needed by the debtor for his necessary expenses and those of his dependants and similar provisions also apply to the Magistrates Courts.

Futuristic Interpretation of Section 49(2) of the New Constitution by the Supreme Court: Chinamora v Angwa Furnishers (Pvt) Ltd & Ors 1996 (2) ZLR (S)

Nearly two decades ago, as though anticipating the need for clarity on the matter in the future, our Supreme Court already discussed and pronounced on the constitutionality of civil imprisonment viz the provisions of what is now section 49(2) of our new Constitution in the case of Chinamora v Angwa Furnishers (Private) Ltd & Ors 1996 (2) ZLR 664 (S).

In the Chinamora case, the creditor company had obtained a default judgment against the debtor and a writ of execution was issued. The debtor had already divested himself of all his property and accordingly the creditor issued summons requiring the debtor to show cause why a decree of civil imprisonment should not be made against him. The debtor, though not indigent, failed to answer the summons and an order of civil imprisonment was made by the magistrate's court. The debtor then applied to the Supreme Court challenging the constitutionality of the order for civil imprisonment.

In dismissing the application, the Supreme Court explained that the onus lay on the creditor to establish the debtor's ability to pay and the court would only order imprisonment if satisfied that the debtor could but would not pay. The Supreme Court further stated that the procedure for inquiring into the debtor's financial circumstances contained sufficient safeguards to prevent a poverty-stricken debtor being consigned to jail and, being manifestly fair in all circumstances, did not violate the constitutional right to personal liberty.

What is important to note is that, in the Chinamora case, the Supreme Court interrogated international human rights instruments to which Zimbabwe is a party such as Article 11 of the International Covenant on Civil and Political Rights (ICCPR) 1966 which states that "no one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation" and the court found that Rule 370A(1) of the High Court Rules did not violate the said Article 11 of ICCPR.

The said Article 11 of ICCPR is what has since been adopted into our Constitution as section 49(2). The wording is almost identical.

It can therefore be soundly said that our Supreme Court has already ruled on the constitutionality of civil imprisonment since the new section 49(2) of our recently amended Constitution is the same as the said Article 11 of ICCPR that was interrogated in the Chinamora case.

Conclusion

In conclusion, it must be understood that, even before the recent constitutional amendments, the rules of court did not and still do not allow the civil imprisonment of debtors who are genuinely unable to pay. An order for civil imprisonment has always and is still only issued where the judgment creditor has satisfied the court that a debtor is able but unwilling to pay. For that reason and notwithstanding the new Constitution, our courts have been and are still issuing orders for civil imprisonment wherever appropriate.

By—S Bwanya