



CYMBELL ADVOCATES

October 2020 Newsletter

FOREWORD

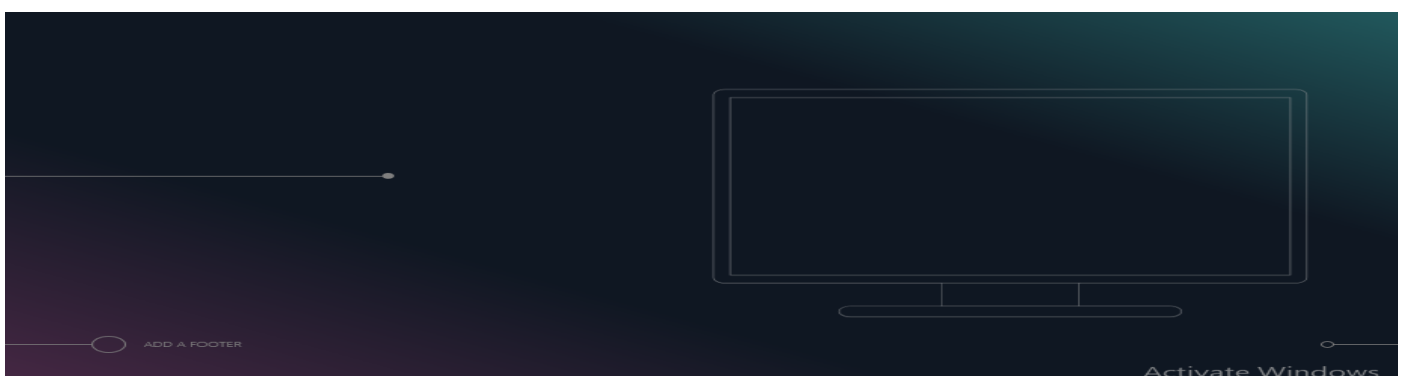
By Godwin. M. Matsiko, Managing Partner

There have been very interesting legal developments in the past few weeks. From fast paced murder charges in election processes to hacks in the digital finance ecosystem to questions on if syndicated financing arrangements will abort by legal process. We take the pleasure to dive into why commercial advisers can save your business, how you can protect your resources through setting up trusts and ways to safeguard your assets and keep your personal data safe.

We have separately [here](#) given our initial thoughts on how the HAM v DTB affects consumer protection and also offered some insights on cyber security [here](#).

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CONTINGENCY STRATEGIES TO MITIGATE THE RISKS OF AN INDUSTRIAL ACTION

By Alebar Kanyonza, Finance & Administration

Industrial action is not defined in Ugandan law but as a general guide, it amounts to concerted action taken to put pressure on an employer. It includes strikes and actions such as picketing, go-slow and a ban on call-out. Whether actual or threatened, industrial action can be disruptive and can have adverse consequences on the reputation, profitability and smooth running of a business. Often times, industrial strikes catch employers off guard with employers having to struggle to find efficient ways of resolving the strikes.

Employers however are not powerless. An employer that has a contingency strategy for an industrial action, threatened or actual, will be able to ensure their business remains operating smoothly. Below are some of the best practices to incorporate in an industrial action contingency strategy.

Be the better employer

It is often said that the seeds for industrial action are more often than not sown long before the actual strike happens. Employers sometimes do not address employees' concerns and these concerns, if left unattended to can quickly become a full-blown industrial action. Practices such as maintaining an unhealthy organisational culture, autocratic management style, inequitable employment practices, managing industrial relations by proxy and abdicating the right to communicate can make employees unhappy and frustrated at places of work. As the old adage goes, prevention is better than cure. If an employer can address these issues early, it goes a long way in preventing an industrial action.

Communication is key

As an employer, you can encourage employees to understand why a proposed strike may not be their best course of action and also that an industrial action is not the best way of resolving work disputes. An employer can emphasise the bigger picture by outlining how all employees benefit (through their future pay and employment prospects) from the success and good reputation of the business and explain that damage to the reputation of the business can put both the business and the livelihoods of the employees at risk.

Redeployment of internal staff

An employer can consider internal secondment of employees from non-business critical areas to back-fill striking employees. An employer can train employees from different departments on the basic skills needed to get operations running in a different department in case of an emergency. However, an employer should ensure that the re-deployed employee's contract allows this. For example, if employees are usually based in other geographical locations, ensure that there is a mobility clause in their contract. A mobility clause in an employment contract is a provision that requires the relevant employee to relocate if required to do so by their employer. An example can be drawn from companies such as London Midland that had trained managers to temporarily fulfil the duties of drivers and conductors during strikes.

Legal advice

When there is a threatened or actual industrial action, the employer should always seek legal advice on whether that action is lawful or has been instituted properly. Knowing whether an action is lawful or not will inform the employer on how best to resolve the dispute. Letting an employee know that their actions are not founded in law could go a long way in convincing them to abandon the industrial action. In case the action is lawful, an employer can know how to mitigate potential costly legal disputes that may arise from the industrial action.

Industrial actions if not managed well can paralyse your business. Employers often only consider them when they have happened. Without a proper industrial action contingency strategy, an employer exposes themselves to severe business disruption, loss of business and costly legal disputes.



HOW ASSET TRACING SERVICES CAN SAVE BUSINESS TRANSACTIONS

By Brenda Karuhanga, Research & Due Diligence Associate

In complex commercial fraud matters, money laundering is almost always interlinked with it. This is because if someone unlawfully obtains money or assets, they will look to ensure those funds or assets are out of reach of anyone who may be looking to retrieve them. This is where asset tracing plays a vital role.

Asset tracing is the process of locating assets of an individual or company that have been misappropriated. Asset tracing is closely related to fraud or theft. Assets include everything owned by a business or an individual, like real estate, stocks and shares, possessions, money in bank accounts, intellectual property rights, vehicles, livestock, and cash.

Victims who have lost their assets due to unfortunate events such as scam, embezzlement or theft, now use this tool called asset tracing to recover or trace the way about of their lost assets. This may be because many businesses and individuals don't have the resources, knowledge/expertise or time to follow up the fraudsters themselves. They need a specialist investigations agency to do the digging for them.

The focus of asset tracing is obtaining key information that can benefit clients who want to recover assets. These are some of the steps to consider for asset tracing or recovery: what are the assets involved; what is the value of the asset; what is the ownership structure; in what jurisdiction is it located; how liquid is the asset; and what are the chances of recovery?

For asset recovery to be undertaken, the process may involve freezing (by court order) of assets till, and restraining the culprit or those acting in their favour from access and sale. The success therefore, depends largely upon the investigator's ability to track the ownership trail of money and other assets. Again it takes constant effort, time and study, another reason for calling in the asset tracing experts.

Forensic accounting is also key to asset tracing and is even often required in divorce proceedings. When forensic investigators get involved, they look for any financial discrepancies and establish whether or not a person is hiding assets. Financial investigations are a large part of the work that private investigations firms perform especially when it comes to helping clients protect business and personal financial interests.

The framework for the return of stolen assets outside of jurisdiction requires State parties to take measures to restrain, seize, confiscate, and return the assets. To do so various mechanisms are applied such as: direct enforcement by freezing or confiscation orders; civil actions initiated by another party allowing that party to recover the proceeds as plaintiff; confiscation of property of a foreign origin by adjudication of an offense of money laundering or other offenses; Court orders of compensation or damages to another party and recognition by courts of another party's claim as a legitimate owner of assets acquired through corruption; spontaneous disclosure of information to another party without prior request; and international cooperation and asset return.

The tracing of money and property can be successful if the investigator is equipped to uncover and identify ownership interests often camouflaged by changes in the form and nature of the ownership, and know how to unravel accurately cleverly disguised control over, and interest in, property. With all the fraudulent activity there are numerous reasons why businesses, insurance companies, attorneys, and individuals hire private firms to conduct asset tracing, including determining whether a borrower has the means to pay back a loan, conducting due diligence when entering into a contract or merger/acquisition, in anticipation of litigation, and dealing with compensation issues arising from personal or property injuries.

In Conclusion, the process of asset tracing requires that additional local experts be employed, large volumes of documents may have to be obtained, interpreted and even translated, the costs of management and maintenance of frozen/seized assets or funds have to be considered, taking possession and returning the assets or funds may involve considerable costs but may be worthwhile.



WHY IT IS VITAL TO ENGAGE A COMMERCIAL LAWYER FOR YOUR BUSINESS

By Arinda Herbert Kainlawren, Associate, Dispute Resolution

Each year, thousands of litigation cases are filed in court and some litigants proceed without the help of a lawyer. Although this may possibly work for minor cases, it is inadvisable for a business to try to do without a lawyer because business/commercial litigation is complicated and potentially costly.

Commercial law is one of the most vital areas of your business; it deals with matters relating to business and trade amongst consumers, clients, and businesses. It creates a regulated system that is fair for both parties so that trade can be conducted in a reasonable manner. Thus without these sets of laws that govern how business is conducted, it would be very difficult to sustain business relations and enforce rights of parties in the event of breach.

What does a commercial lawyer do for you or your business?

Commercial lawyers specialize in business/corporate law and are concerned with handling all forms of commercial litigation. However, a good commercial lawyer will not only save you and your business from pointless or hopeless litigation, but also offer valued support in the running and handling of any legal matters and business decisions. Their responsibilities will include gathering information and documentation for litigation matters, seeking action through litigation on your behalf, representing you in the litigation process, regulation research, and assistance with business transactions and areas of compliance.

Why you should have a commercial lawyer.

1. Disputes are handled more efficiently and are thoroughly prepared for: Business or commercial law is a very intricate area of law that is dynamic and ever evolving. Therefore, there are always new regulations or amendments to the existing laws to better business or corporate relations. It is near impossible for a regular business owner to keep up-to-date with the commercial regulations and amendments that impact their business. Hence without full knowledge and expertise, it would require that the business owner delves into the arena he or she is not familiar with and runs the risk of facing a lawsuit without this knowledge base. For that reason, it is apparent that it is only a commercial lawyer that would best handle your legal disputes or needs ably, efficiently, and thoroughly.

2. Litigations could sink you or your business: The other important reason why your business needs a commercial lawyer is to guard against business catastrophe due to non-adherence to compliance issues or not paying attention to legal disputes appropriately. Running a business today needs one to pay attention to not only his or her competition, environment, profitability, but also eluding avoidable litigation. However, disputes are part of any healthy, and running business today; therefore, it is impossible to avoid litigation; but possible to manoeuvre with a good lawyer on hand.

3. A commercial lawyer will be able to advise on whether a case needs to go to court: Not all commercial disputes must go to court or be settled by a court of law. Some issues including those that may seem very complex can be successfully resolved outside the courts. When this is the case, you as a business owner will be able to substantially save on your time and the costs that come with litigation. Therefore, having a good commercial lawyer, will benefit you and your business because it will avail you their expertise to ascertain which is the most effective avenue for settling a dispute.

3. He or she can help you with more than just court cases: Most of the time business owners tend to turn to a commercial lawyer due to an impending or actual lawsuit. A commercial lawyer offers much more than that. He or she can also carry out other responsibilities on your behalf or for your businesses; for example, help you to keep your business legally sound in very many ways which include; incorporation, mergers, tax advice, contracts, compliance matters.

Conclusion

Almost all businesses are engaged in commerce with their customers, clients, other businesses within or outside the country, oftentimes without really paying attention to the legal side of their dealings. Therefore, having a virtuous commercial lawyer on hand will offer you and your business a reliable source of commercial law knowledge and understanding that will be crucial for you or/and your business.



HOW TO PROTECT ASSETS OR RESOURCES USING TRUSTS

By Owen Henry, Associate, Banking, Finance & Real Estate

Assets or resources face various risks ranging from theft to depreciation and even mismanagement or misuse. Individuals, associations or entities who wish to protect assets or resources for a particular purpose have the option of using a Trust. A Trust is an arrangement whereby property is entrusted to a person or entity known as the Trustee to hold and manage in accordance with the terms of the Trust Agreement or Deed for the benefit of another person known as the beneficiary. Such property can be land, buildings, shares in a company, and even money.

A Trust can be privately set up by individuals for particular private goals or beneficiaries, or it can be a public trust whereby public resources are placed under a trust arrangement for the benefit of the public. A good example of a public trust in Uganda is the aBi Trust (Agricultural Business Initiative Trust) set up jointly by the Government of Uganda and the Government of Denmark to support agribusiness development in Uganda.

A trust is ideal where for one or more reasons, the true legal owners may not appropriately manage the property or resources on their own. This may be on account of young age, absence from Uganda in the case of citizens living abroad, inability due to sickness, or any other reason. Under a trust arrangement, the legal title in the Trust property or resources will vest in the Trustee (s) and the beneficiaries enjoy only the equitable title. This means that the Trustees have all the legal right to deal with the property without recourse to or consultation of the beneficiaries, provided that it is in the best interest of the beneficiaries. Trustees remain liable for actions arising from management of trust property although they may be indemnified out of the Trust property.

There is more than one way to create a trust. The most common way is through executing a Trust Deed which would express the intention as well as the terms of the arrangement. This intention can be expressed such as when stated in a trust deed, or it can be inferred from the dealings or conduct of the parties involved. The property or resources subject to the Trust has to be specific in the sense that it can be identified or specifically labelled as subject to the Trust. For example, the proceeds of a particular bank account, land or developments, etc.

As far as Trustees are concerned, there are no formal or legal restrictions as to their qualifications. The Trustees are the particular individuals who comprise the Board of Trustees of the Trust and are charged with the responsibility of managing the Trust and the Trust property. The Trustees Incorporation Act, Cap 165 permits anybody (whether individual or corporation or an association) to appoint a Trustee or Trustees. It is however appropriate that the Trustees are suitable to act in light of the particular objectives of the Trust. The Trustees may also consider registration of the Trust as a body corporate. If registered as a body corporate, the Trust would have the right to act in its own name for example to enter into contracts in the corporate name of the Trust rather than in the individual names of the Trustees.

In conclusion, a Trust is usually the choice when the objectives involved are charitable or social in nature, and where the circumstances do not permit for the beneficiaries to hold or manage the property or resources. However a Trust can also be used in private cases such as when safeguarding family property for the benefit of future generations.



THE SAFETY OF OUR PERSONAL DATA

By Wanda Ronald Samuel, Associate Corporate Advisory

So often we share our data with several bodies including Government agencies like National Identification Regulatory Authority (NIRA), and Telecom Companies like MTN- Uganda without questioning its safety with such entities or the implications of sharing to our privacy. Privacy is a constitutional right guaranteed under Article 27 of the 1995 Constitution of the Republic of Uganda. Though it is not absolute, its limitation should be within the acceptable standards as per Article 43 of the 1995 constitution of the Republic of Uganda.

To enforce the provisions of Article 27 of the Constitution and in light of protecting personal data in Uganda, Uganda enacted the Data Protection and Privacy Act of 2019 which borrows a lot from the General Data Protection Regulation of the European Union 2016/679 (GDPR). Further several bodies in Africa have invested efforts in ensuring that data protection is prioritised by its member states. For Example the African Union adopted the convention on cyber security and data protection in 2014, the southern Africa development community (SADC) developed a model law on data protection which it adopted in 2013, and the East African Community developed a framework on cyber laws in 2008.

A few principles have been designed for protection of data in Uganda which among others include; being accountable to the data subject, collecting the data fairly and lawfully, only collect adequate and relevant not excessive or unnecessary data, only retain the said data for the period authorised by law, ensuring transparency and participation of the data subject in the process of collecting and using their data. Uganda has gone ahead by creating a data protection office which is headed by a national data protector.

For one's data to be collected clear and valid consent should be obtained from the data subject. This is emphasized by notifying the data subject the purpose of collecting the data and the need for additional consent in the event the data collected may be shared by a third party. The Act does not provide a particular manner within which the consent must be obtained but the GDPR has stipulated that the data collector is expected to keep the consent forms on which the data subject authorised the collection of the data. To obtain consent by implication means

that the data subject has the rights to object to the same and should this happen, then the data collector should stop forthwith. The Data protection principles of fairness, lawfulness and transparency require the data controller to inform the data subject about the sharing of personal data with third parties and the data subject shall have the right to stop the further processing and sharing of the data unless it is proved that sharing of the said data with third parties is necessary to provide a service as a data controller.

The data collected should be processed within the law, in a transparent manner and for the intended purpose. Therefore data collectors should not disguise the purpose of collection of the data and the data subject should consent to such kind of processing. Further in the event the data is to be processed outside the country the data collector should ensure that there are adequate measures of protecting that data. This can be ensured if that country has an equivalent of our Data protection and Privacy Act or the GDPR. It is also worth noting that the data controller should not allow the data processor to process personal data unless they comply with the security measures established under the Act.

Despite the available security measures, personal data may still be accessed by unauthorized persons. However, when this happens the data collector, data controller or the data processor is bound to immediately notify the Authority of the unauthorized access or acquisition and the remedial action taken. However, the Act goes short by leaving the authority with the discretion on whether the data subject should be notified of the breach or not. I believe this does not meet up the standards as the GDPR since under it the data breach should be reported to the supervisory Authority within 72 hours and to the concerned parties if the breach poses an implementation challenge and the controller is supposed to communicate to the data subject of the breach without undue delay.

Our Data protection and privacy Act also gives the data subject a right to object to the use of their data for direct marketing purposes. If this objection is made then the data controller is expected to notify the data subject on whether they have complied with the objection or give reasons why they will not comply. However, where the data controller does not comply they must also communicate such reasons to the Authority and the Authority shall make a decision on the same. Direct marketing has been defined to include communication by whatever means of any advertising or marketing material which is directed to an individual.

The Act further creates offences against individuals who mishandle personal data which come into their possession which include unlawful obtaining and disclosing of person data, unlawful destruction-deletion-concealment or alteration of personal data and sale of personal data.

Therefore it is prudent for all individuals involved in the process of data collection, data processing and data controlling to ably comply with the Data protection and privacy Act. Majority of companies have set down the above principles in line with the Act.



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