CYMBELL ADVOCATES

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Cymbell Advocates Newsletter

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Ronald S. Wanda (Associate)

Regulatory Compliance for Corporations Post Covid-19

The Convid-19 virus has had a great impact on the world order and has introduced a new normal, most activities have come to a standstill and has affected several business operations due to the restriction measures issued by several countries. Some of the measures to date include a ban on large gatherings, restriction on movements in and out of the country, among others. However, despite the pandemic business operations have to continue and organisations have to continue complying with the statutory mandates which include; holding of Annual General Meetings, statutory filings at Uganda Registration Services Bureau, payment of taxes and collecting the same on behalf of Uganda Revenue Authority as tax agents.

It is that time of the year where most national and multinational organisations hold their Annual General Meetings (AGM) and have ordinarily been holding their AGM physically. However, these meetings are no longer possible due to the restrictions on mass gatherings yet most of these companies did not anticipate the possibility of not being able to meet as shareholders to make the important decisions for their companies, and thus did not address this eventuality in their Articles of Association or provide other means of holding such important meetings.

However, several organisations have resorted to virtual meetings during the lock down era and have continued to do so despite the partial lifting of the lock down since it has proved to be effective and less costly. However since the Articles of Association which are the governing laws of a company did not provide for virtual meetings, several companies have resorted to Court for authorisation to hold the AGM. One of Stanbic Bank Holdings Limited whose shareholder Oscar Kambona petitioned court under Section 142 of the Companies Act No.1 of 2012 seeking for orders among others to have a virtual AGM. Justice Musa Ssekaana agreed with the Applicant and issued the order subject to the Bank obtaining a no objection from the Uganda Securities Exchange and complying with all the applicable notices under the Uganda Securities Exchange Listings rules 2003 and the Law. The AGM was successfully held and several resolutions were passed but the most important one was a special resolution to amend their Articles of Associations to cater for virtual & hybrid AGM's in the future. This means that as an organisation they have embraced the new normal and are ready to conduct business and also give an opportunity to the shareholders who are not ordinarily domiciled in Uganda to always have an opportunity to attend the AGM in the future without necessarily appointing proxies for the same.

By this lead several others have followed including British American Tobacco which held their virtual AGM on 23rd July 2020, the Lawyers' umbrella body the Uganda Law Society which held their first virtual AGM on the 07th August 2020 and DFCU Holdings Limited which is expected to hold its Virtual meeting soon. Therefore companies that are currently stuck on the way forward with regards to their AGM should resort to applying to Court under Article 142 of the Companies Act in order to obtain such orders and thereafter amend their Articles of Association to include the new normal way of conducting business across the globe.

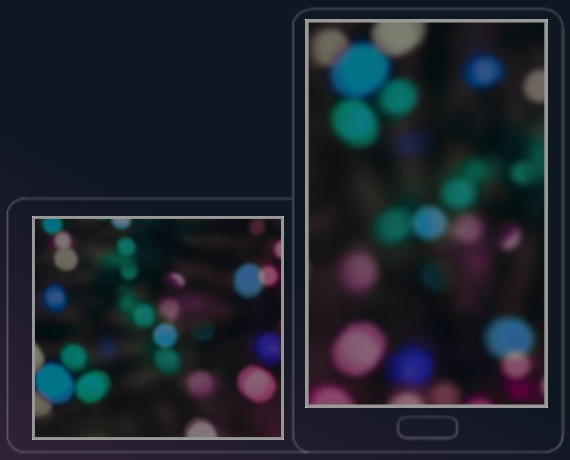
Multinational for profit and not for profit organisations have also had to comply with the immigration laws of the country. This is majorly in line with immigration facilities of their expatriates which had expired during the lockdown. In a bid to ensure that these expatriates stay in the country legally, Ministry of Internal Affairs issued several notices which lasted till the 09th June 2020 when it resumed operations. Therefore all organisations are expected to expedite the renewal of these facilities in order not to accrue penalties for illegal stay. The Ministry of Internal Affairs equally set up several measures like the standard operating procedures issued by the Ministry of Health like social distancing, among others.

Prior to the Covi-19 pandemic, organisations were expected to hand deliver their documents for registration at Uganda Registration Services Bureau (URSB) but the same has been minimised due to the restrictions on gatherings. Therefore URSB has since moved to online filings of most of their documents with no need for clients gathering at their offices to submit or pick up documents. For Example, filing of Annual Returns has now fully shifted from submitting the bulky documents to inputting the information in the system, other company documents are being sent through an online platform and the registration is being done there.

We all agree that with the pandemic and very limited activities for most organisations, their incomes have been affected yet they still have to meet their statutory obligations like filing and making payments for PAYE, VAT, Excise duty, among others, filing and making payments for NSSF contributions, among others. Uganda Revenue Authority (URA) and the National Social Security Fund (NSSF) created measures to ensure that Organizations continue complying with the filings and payments but with little hardships. For example the Uganda Revenue Authority granted tax payers deferrals on making the payments but this did not amount to a waiver. Therefore the organisations have to continue filing the returns and making payments as and when they are due at the time of the deferrals. Further NSSF invited organisations to apply for amnesty in order to have more time in which to remit the contributions. This too did not mean that organisations have been cleared to not make payments but rather gave them more time within which they could make such payments and this has relieved most organisations who made use of use amnesty of. However, with this amnesty we advise the corporations to continue filing their NSSF deductions on time and make the declared payments promptly in order to continue complying with their statutory obligations under the National Social Security Fund Act.

Further Uganda Revenue Authority has introduced the E-invoicing and E-Receipting to enable it track the invoicing and receipt system to maximise revenue collection and mitigate tax administration shortfalls while promoting efficiencies. Online invoicing and receipting will also help to curb false refund claims, fictitious purchases with no physical movement of goods and unverifiable claims by taxpayers due to loss of records. We implore organisations to make use of this platform which will enable them to properly track their payments to the Authority. This measure has equally helped in decongesting their head office as one of the conditions set by Ministry of Health Standard operating procedures.

It is our advice that all organisations comply with the necessary statutory regulations. We at Cymbell Advocates are happy to help you in ensuring that you duly comply with the regulations and measures in the "new normal".



Owen Henry (Associate)

Financial Regulation in Uganda: The Role of the Central Bank.

Since 1966 the Bank of Uganda (the "Bank") has functioned as the Central Bank of the Republic of Uganda. The statutory objectives of the Bank include the maintenance of a stable financial system, fostering economic stability and the formulation and implementation of monetary policy. In many ways, the Bank is the custodian of the financial system and in fact the economy of our country as a whole.

Financial services go beyond intermediation to advisory, brokerage, investment, etc. The financial system covers the way in which financial decisions and relationships are made and implemented, i.e. laws, government policies, regulations, etc.

There is no singular law that governs the financial system in its entirety, but only aspects of it. In that regard, the Financial Institutions Act 2004 is the primary legislation relating to financial sector and even so, only to specific institutions therein. There are other relevant laws however as far as the Bank is concerned, the key legislation through which it exercises its mandate is the Financial Institutions Act 2004.

Under the law, a "Financial Institution" is defined as a company licenced to carry on or conduct financial institution business in Uganda. The Act defines "financial institution business" to include acceptance of deposits, issuance of deposit substitutes, lending or extending credit, engaging in foreign exchange business, issuing and administering means of payment such as credit cards, providing money transmission services, among others.

As times change, the Bank's role has and will continue to evolve and its success will be judged on its ability not only to maintain a stable financial system but also to foster economic growth and protect the public. In a post crisis environment such as in the wake of the global financial crisis of 2007 or the 2020 Covid-19 pandemic, the role of the Bank is even more critical and is cast in the limelight as the economy looks to it for leadership and interventions that should forestall the worst effects of a crisis or hasten recovery.

Arguably, one of the impediments or limitations of this effort is the legislative or regulatory climate within which the Bank operates. Not enough liberties are embedded within Uganda's current financial regulatory regime, to enable the Bank creatively respond to a crisis, more so in a wholesome manner. For example, fiscal interventions such as reduction of interest rates were implemented by commercial banks in a lack-lustre manner, and only after threat of action by the Bank.

Even worse, the sectoral model of financial regulation in Uganda is not coherent, or efficient and is likely to be dogged by the pitfalls of lack of coordination and absence of uniformity of standards across the entire financial sector. It is worth noting that the financial sector is not made up of only those institutions supervised by the Bank. Such a model or structure of regulation where every sector in the system has its own regulator does not help the Bank reach the real economy, and yet expectations are that its policies and interventions in such times should trickle down to the grassroots. This is because each regulator has its own objectives, standards and policy responses, and there is no statutory mandate to coordinate or accountability of one to the other.

With the proliferation of financial technology, the financial sector in Uganda has been disrupted and opened up for non-traditional players. Today, like never before, the sector is quite fluid and difficult to define or delimit. Regulating the sector therefore requires a more nuanced approach.

With this in mind, legislation ought to evolve in such a manner that the mandate and policies of the Central Bank extends to and are directly applicable across the entire financial sector, rather than assume that such policies will naturally percolate down. The Bank already recognises services such as insurance, micro-loans, savings, and payment facilities as financial services. The presence of such other financial institutions at the grassroots is an opportunity for Uganda to increase access to financial services, and to use policy or law as a tool to drive economic growth and stability.

Financial regulation be it through the Bank or other regulators needs to organically grow and evolve in response to modern day challenges. Such challenges include far reaching globalisation and integration, advanced industry consolidation, persistent competition, and incessant technological advances in financial services. Other aspects of regulation that need to evolve relate to matters such as objectives or tasks, relationship with government and other stakeholders, interaction with financial markets at both macro and micro levels, and internal management and decision making processes.

In conclusion, the challenges of regulating the modern financial sector are likely to be felt by the stakeholders as well, such the companies engaged in this sector. This is because, as the Bank adjust to modern trends, and with the technological disruption, inefficiencies and bureaucracy is likely to abound thus making legal compliance and the cost of doing business generally high.

We advise our clients in this sector to conduct a legal audit of their business to ascertain how prepared they are to continue their operations in an ever changing environment.

Herbert K. Arinda (Snr. Associate)

Challenges of Enforcing Pre-Trial Remedies in an Election Sea-

The pre-trial stage is the period after one is charged with a crime but before their trial ensues. During this time, the accused has the option to enter a plea in response to the charges brought against them. If they plead not guilty to the offense, a judge will decide what issues to address before trial; while a remedy is a means with which a court of law enforces rights and redresses wrongs or threats of harm or injury. Thus, a pre-trial remedy is a judicial or non-judicial relief granted by the justice institutions such as police, and courts of law in the exercise of jurisdiction to enforce or safeguard a right.

In instances of civil remedies; the primary goal is to make victims whole, or put them back in the position they would have been in had the wrong not been occasioned on them. Therefore, civil remedies customarily take the form of financial or non-financial compensation but can also include, for example, restitution, apologies, and injunctions to prevent injury. On the other hand, a criminal remedy or sanction is dogged by the state, with or without the involvement of the wronged party. Simply put, civil law is intended to compensate whereas criminal law is intended to punish the offender so as to deter others from violating community's morals or standards.

Notwithstanding, most new and developing democracies in Africa and world over are known to face numerous challenges affiliated to the prevalence of a very intensely competitive political environment. As a result, there are increased numbers of electoral disputes, political persecution, arbitrary arrests, and abuse of court process by the States among others. Election seasons hence come with a lot of testing moments and at times leads to electoral disputes, arbitrary arrests and detention.

What are the available Pre-Trial Remedies?

Despite the universal importance of legal structures in the administration of justice, the implementation or adherence to the purpose of legal framework varies from country to country. However, in general pre-trial remedies are uniform and universally applied in all jurisdictions. Most if not all the pre-trial remedies are founded on human rights,

and form part of the requisite tenets for a democratic state in which there is rule of law and respect for human rights. The State, all organs and agencies of the State and all persons are enjoined to respect, uphold and promote these rights and freedoms (Art.20(2) Constitution of Uganda).

The succeeding Articles of Uganda's Constitution, say Art.23 – protection of personal liberty, Art.24 – respect for human dignity and protection from inhuman treatment, and Art.28 – right to a fair hearing are the most relevant to the pre-trial and trial process in Uganda. They basically set the basis and standard for the administration of justice in Uganda that must be respected, upheld, and protected. In the event that those basic standards are breached, the victim may apply for redress by bringing an action against the desecration under Art. 50 (1) & (2), and he or she will be entitled to compensation (Art. 23). Nonetheless, in the event that one is arrested and presented before court for trial, or wants to have court determine a legal dispute prior to the hearing of their case, there are a number of pre-trial remedies one can seek, namely; police bond, court bail, a writ of habeas corpus, declaratory judgement, and injunction depending on the circumstances at the time which I will discuss concomitantly with the challenges in enforcing or seeking them.

Police Bond

The Constitution (Art.23) authorizes the deprivation of one's liberty for the purpose of bringing that person before court in execution of a court order or upon reasonable suspicion that the person has committed or is about to commit an offence. The Constitution (Art.23) further requires that all persons arrested are presented before a court of law before the lapse of 48 hours (also refer to Art.9(3) ICCPR). As noted by the Human Rights Committee in Communication No. 521/1992, V. Kulomin vs. Hungary, the first sentence of Art.9(3) ICCPR is intended to bring the detention of a person charged with a criminal offence under judicial control. This is a rational safeguard considering that one has the right to be presumed innocent until proved guilty and deprivation of liberty must be a last resort.

The police are therefore granted the mandate to release on bond under section 17 of the Criminal Procedure Code Act (CPCA) pending completion of investigations. The release is based on the assurance that the suspect will report back whenever required. Note that police bond is not paid for (section 38 CPCA), it is free of charge. This police mandate is mostly exercised for suspects involved non capital offences such as murder, aggravated robbery, treason or rape. In the exercise of this mandate, the police are able to release petty offenders on bond before the 48 hour in case the suspects' files are not yet sanctioned for court. However, on the contrary suspects in reality spend more than 48 hours in the custody of police or military cells either deliberately or out of total disregard of the law. For example, see what happens to opposition supporters who are arrested with their candidates for breaching the Public Order Management Act; securing a police bond for them is a nightmare even when one has instructed a lawyer to follow through. In such instances, police bond ceases to be free and one has to part with money to secure a police bond. Here lies the greatest challenge coupled with the lack of political will to hold those responsible accountable.

Court bail

Bail on the other hand is the release of an accused person by court pending completion of their case on the understanding that the accused person will turn up for trial or on a date and time as fixed in the bond

to start his trial. The accused may or may not be required to provide sureties and a reasonable amount as the circumstances of the case permit in form of cash or some other property. The right to apply for bail is guaranteed under the Constitution (Art. 23); however, the right does not regard a right to be granted bail but to apply to court for bail (see Uganda vs. Col (Rtd) Dr. Kiiza Besigye). The choice to grant or not to grant bail is one that is purely dependent on judicial discretion as may deem fit in each case.

Similarly, just like the case is for police bond, there are a number of challenges affiliated with court bail considering that it is subject to fulfilment of the requirements asked by the court and judicial discretion. Hence, the suspects granted bail upon satisfying court that they have committed to pay cash or non-cash as security for their attendance of court on the date named on the bail bond. However, at times the bail money requested by court is excessive, unrealistic for the suspects or accused persons to afford, or in other instances, one can not get the security or sureties for their bail. This being the case, you find that it is only those that have a social standing or that can raise the requisite bail money that benefit from this remedy. For this reason, it becomes challenging to successfully secure bail for those arrested during the election season for they are always ordinary persons or those with little social standing.

A writ of Habeas Corpus

The right to a writ Habeas corpus is a right guaranteed under the Constitution (Art.23(9). The writ is considered to provide an assurance that personal freedom will always be protected (Sheik Abdul Karim Sentamu & Anor Constitutional Reference 7/1998). This right is inviolable and non-derogable under the Constitution (Art.44). Therefore, anyone who is deprived of their liberty either by arrest or detention is entitled to take proceedings before a court of law, for the court to determine the legality of their detention and make such orders as to his or her release if the detention is found unlawful (Art.9(4) ICCPR). It is noteworthy that these legal guarantees are applicable to all deprivations of liberty, whether in criminal or in administrative cases.

For Uganda's case, the writ is obtained by petition to the High Court in whose jurisdiction the prisoner is incarcerated (brought under Art. 23(4) & (9) of the Constitution, section 34 of the Judicature Act and Rules 3 & 4 of the Judicature (Habeas Corpus) Rules S.I 13 – 6). This remedy is applicable in instances where an accused person or detainee is held without charges, or when due process is clearly denied, or bail is excessive among others. Although the writ is guaranteed in instances discussed herein, this remedy is not readily granted considering that persons that find themselves in need of this remedy are usually held on charges such as terrorism, engaging in rebel activities, high level murders or even for being against government inter alia. For that reason, the State ensures that they are kept in custody or detention until that time when the State deems that they are no longer a threat to public order or national security, and cannot interfere with sensitive investigations.

Nonetheless, it is a very fundamental remedy that guarantees one's right to liberty. Consequently Hon. Lady Justice H. Wolayo in the Matter of Evert Arinaitwe (Misc. Cause No. 229/2016) [2016], held that the deliberate disregard of the writ of habeas corpus by concerned authorities was a violation of the Applicant's fundamental human rights which the court had a duty to stop. Hence ordering for the Applicant's immediate release from detention. Accordingly, even where one is denied the right to a writ, the Committee on

remedy to challenge their arrest and detention (see, E. D. Santullo Valcada vs. Uruguay, in UN doc. GAOR, A/35/40). Despite all the above decisions, the right continues to be violated by most especially the law enforcement institutions of government which remains a very big challenge.

Declaratory judgment

A declaratory judgement is a lawful decision granted by court to a party or parties involved in an actual or possible legal dispute that conclusively determines and resolves legal uncertainty for the litigants. Therefore, it is a remedy that is legally binding on the party or parties. It is generally considered a statutory remedy and not an equitable remedy that courts can also make by consent, or in the interim. The remedy may be used to challenge the status quo; for example, to challenge the government's position on OTT taxes, to protect citizens' right to freely move during the pandemic. However, much of the remedy is available, the discretion is exercised cautiously when it comes to decisions that may affect government programs or policies which is a challenge in itself.

An injunction

An injunction is a remedy (legal or equitable) in the form of a separate court order that coerces a party or parties to do or refrain from doing specific acts. It is often applied for to render an interim remedy to a party or parties so as to maintain the status quo pending the hearing of the suit. Nonetheless, when deciding whether to grant an injunction, the court takes into account the probability of success, balance of convenience (Fairness), and whether compensation in damages would be adequate. Much as this remedy is intended to offer interim relief, in practice, it is becoming administratively difficult to be granted the relief since it is heavily dependent on the judge's discretion upon being satisfied that you can not be compensated in damages, the balance of convenience is in your favour, and there is a likelihood of success in the main suit. Therefore, this places a huge burden on the one seeking the relief to satisfy the court why he or she should be granted the relief even in cases where you may see it is as obvious that an injunction is deserving to stop an injustice. Now imagine the burden on those who can not afford a lawyer to represent them in a matter where their ancestral home is being demolished.

Conclusion

Generally, Courts in Uganda process thousands of criminal cases annually. Each requires a judicial officer to determine whether or not an accused or suspect should be released pending trial. Therefore, providing for public safety becomes one of the court's primary goals. Although public safety is at times not considered a good reason to impose conditions, today it is recognized as an underlying goal of effective justice systems. This is the case because pre-trial remedies are a valuable resource for making vital improvements in the criminal justice system because they are used in the early stages of the case to guarantee individual freedoms and rights. Even though the legal framework for pre-trial decision-making is in favour of guaranteeing access to pre-trial remedies, it also allows the government or the State a lot of latitude to impose circumstances that abuse court processes to deny access to pre-trial remedies in the name of 'assuring public safety and order', and securing 'court attendance'.

Godwin M. Matsiko (Managing Partner)

The Impact of Transfer Pricing on Socio Impact Investment

Transfer pricing refers to the way in which prices for goods and services are set between associated or related parties, with one of the parties being a non-resident for tax purposes. Associated enterprises (for example in a group of companies) are capable of setting their own prices for services or goods exchanged within the group, which may have the effect of shifting taxable profits from one jurisdiction to another. Transfer pricing is therefore a tax avoidance strategy. Uganda like any other country, has in place rules to check on tax avoidance by way of transfer pricing. The Income Tax (Transfer Pricing) Regulations of 2011 mandates that prices set for goods and services should follow the arm's length principle, meaning that price which would have been applicable to a person outside of a group transacting at an arm's length basis.

Where there is a deviation from the arm's length price which may create a tax advantage for one of the parties, or erosion of the taxable income, Uganda Revenue Authority is mandated to readjust the price following the arm's length basis. Associated companies view transfer pricing as an opportunity to competitively and efficiently allocate resources, source goods and services and basically manage their supply chains for goods and services within the group in a manner to maximize competition.

Unfortunately, anti-avoidance legislation such as The Income Tax (Transfer Pricing) Regulations of 2011 are based on the blanket assumption that all transfer pricing efforts are intended to escape tax liability. The effect may be so, but there are circumstances when transfer pricing is actually beneficial not only to the companies in the group but to the country as well. **For example, in the case multinational NGOs or socially oriented companies and impact investors would benefit from a transfer price to optimally allocate prices and therefore increase their level of investment in the recipient community or country.** The assumption here is that managing the intragroup pricing would enable such entities to have vast capital reserves which can be ploughed back into investment.

The legislation however does not take into account transfer pricing that may be undertaken by associated entities that are not entirely profit oriented such as non-profit entities or NGOs or impact investors. The Regulations are applicable to all transactions between "associates" as defined under the Income Tax Act. All transactions by associates are therefore subject to the regulations, regardless of specific circumstances of each.

An empirical study published in 2018 by the IMF (At a cost: The Real Effects of Transfer Pricing Regulations) concluded that transfer pricing legislation had the effect of reducing investments by multinationals by more than 11 percent, and even larger if the transfer pricing legislation is enforced strictly. According to the study, this could be due to a higher cost of capital for the multinational resulting from the transfer pricing regime, or reallocation of investment to other affiliates in other jurisdictions. One of the implications of the study is that countries like Uganda have to choose between one of two evils; base erosion of taxable profits, or reduction of investment by multinationals.

Effects on Impact Investment

Impact investment refers to the allocation of capital resources to socially oriented entities with clear and measurable social and environmental impact, alongside financial returns. It basically means the financing of projects or ventures that also carry the promise of social returns such as reduction of inequality, environmental protection, gender mainstreaming among others. Impact investment is based on the idea of “doing well by doing good”.

From an accountability perspective, there are no universally agreed metrics for measuring the social or environmental returns from Impact Investment, with the same ease that the financial returns may be measured. As such Impact Investment may to some, not be the best candidate for exemption from the wide and wholesome application of transfer pricing regulation.

However if transfer pricing is viewed from the perspective of the multinational involved, it presents an opportunity to make capital savings by reducing the tax liability, with the objective of reinvesting the capital into socially impactful projects.

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- Mediation
- Pre-trial consultation
- Election petitions

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- Family estate management

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