

IN THE HIGH COURT OF ZIMBABWE

HC 3225/20

HELD AT HARARE

In the matter between

DUNCAN HUGH COCKSEGE

AND

CENTRAL AFRICAN BUILDING SOCIETY

RESERVE BANK OF ZIMBABWE

MINISTER OF FINANCE AND ECONOMIC DEVELOPMENT



APPLICANT

1ST RESPONDENT

2ND RESPONDENT

3RD RESPONDENT

3RD RESPONDENT'S OPPOSING AFFIDAVIT

I, the undersigned MTHULI NCUBE, do hereby make oath and swear to the following:

1. I am the Minister of Finance and Economic Development, appointed as such by the President of Zimbabwe, in terms of Section 104(1) of the Constitution of Zimbabwe.
2. The facts which I depose to herein are within my personal knowledge and are, to the best of my knowledge and belief, true and correct. Where I do not have personal knowledge of the facts I state, I aver that I have satisfied myself through diligent inquiry as to the veracity of such facts. Where I refer on points of law, I do so on the advice of my legal practitioners of record, which advice I accept and verily believe to be correct.
3. I have read and understood the Applicant's founding affidavit and wish to respond thereto in the paragraphs which follows hereunder. However,

before responding to the Applicant's averments *in seriatim* I wish to give a brief background to the currency reform policy in Zimbabwe for the benefit of this honourable court.

BACKGROUND

4. The multicurrency regime introduced in March 2009 had some shortcomings in serving the economy, addressing market distortions, liquidity and cash shortages, as well as maintaining public confidence. Government therefore had to come up with policy reforms to achieve the policy envisaged in the "Vision 2030" policy when it is expected that the country will have attained an upper middle-income level status. This vision is adumbrated in the Transitional Stabilisation Programme which was approved by the Bretton Woods institutions at Ball in October 2018, to enable Zimbabwe to be in a position to settle its external indebtedness. Zimbabwe is in the process of implementing the provisions of that Transitional Stabilisation Programme (TPS).
5. The major thrust of that programme is to enable Zimbabwe to be in a position that enables it to discharge its external indebtedness. For Zimbabwe to be able to do that, Zimbabwe has to address a variety of issues that have caused imbalances within the economy. One such issue is the issue of currency reform and monetary policy. This issue, is addressed in the TSP as will be seen for instance by ref to paragraphs 193 to 212 of the TSP document and more particularly in paragraph 207. The currency reforms which Government is and has been pursuing in order to stabilise the economy, include the adoption of a domestic currency amongst other key reforms. I attach hereto an extract of the Transitional Stabilisation Programme from Paragraph 193 - 212 marked as "Annexure "A".

6. It was in pursuance of this issue of currency reform that I recognised that the currency we were commonly using as at October 2018 was both in dollars of the United States of America and currency which had been created by the State through borrowing from the Central Bank and issuance of treasury bills to cover the indebtedness of State-owned entities to local institutions. It was therefore essential in terms of currency reform to separate the two different currencies which were both being transacted as dollars of the United States of America.
7. In order to achieve the separation, the Reserve Bank of Zimbabwe issued a monetary statement in October 2018 directed at banking institutions. The banking sector was directed to separate customer accounts holding actual dollars of the United States of America from accounts holding created money which was not currency of the United States of America. In order to avoid creating a burden on bank customers, the banks were directed to open what were described as "Nostro" accounts into which dollars of the United States of America would be deposited without charging the customers. The non-United States dollar currency would then remain in the customer's existing accounts. The Reserve Bank directive contemplated that bank customers would ensure that their deposits of actual United States dollars which were in their existing accounts (if any) would be transferred to the newly created nostro accounts.
8. This process of separating United States dollar currency from non-United States dollar currency was given time so that bank customers would not suffer any prejudice as a result of any situations of disagreement with their banks. It was only after a period of approximately four (4) months that I issued Statutory Instrument 33 of 2019 which then gave a name to the non-United States dollar currency. That name was RTGS dollar. That name was both befitting and apposite in that, non-United State dollar currency was

not a physical currency but was a currency which ~~could only be transferred through the Real Time Gross Settlement system of the Reserve Bank of Zimbabwe.~~

9. Having said this, I will now respond *seriatim* to averments made in Applicant's founding affidavit.

Ad paragraph 1 - 5

10. No issues save to state that my address of service is care of my legal practitioners of record, being the Civil Division of the Attorney General's Office, 3rd Floor, Block A, Mgandane Dlodlo Building, Cnr Samora Machel/Simon Muzenda Street, Harare.

Ad paragraph 6 - 20

11. Noted.

Ad paragraph 21

12. No issues save to state that I have not done any wrongdoing or actions which have threatened applicant's pension and retirement.

Ad paragraph 22

13. I have no knowledge of the averments made herein. 1st respondent is better placed to answer to the averments made by applicant.

Ad paragraph 23 - 24

14. No issues.

Ad paragraph 25

15. I have no knowledge of whether or not applicant lost millions of dollars as so alleged.

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Ad paragraph 26 - 27

16. There is no schedule which is attached to the founding affidavit as applicant alleges. Further, the averments made herein cannot be answered by myself as I do not hold any account for applicant. I believe 1st respondent whom applicant alleges that it holds an account on his behalf will be better placed to answer to the allegation on whether or not they held US\$179,239.69 for applicant in their bank.

Ad paragraph 28 - 30

17. The averments herein are directed to 2nd respondent whom I have no doubt that he will respond appropriately.

Ad paragraph 31 - 32

18. No issues.

Ad paragraph 33 - 34

19. In spite of the fact that 1st respondent is better placed to answer to the averments made in these paragraphs, there is no attachment by applicant demonstrating that he had actual United States Dollars in his account in the sum claimed.

Ad paragraph 35

20. Annexure "F" attached to the founding affidavit does not have any proof that his account held with 1st respondent had US\$322,000.00. It boggles the mind why applicant is claiming an inferior amount of US\$179,541.45 if his account had actual United States Dollars in the sum of US\$322,000.00.

Ad paragraph 36 - 43

21. I have no knowledge of the said letter in paragraph 36. I believe that 1st respondent is better placed to answer to the allegations contained in these paragraphs.
22. However, for the benefit of the court, I wish to state that there is no proof that applicant deposited actual or real United States Dollars into his account held by 1st Respondent. Following my appointment as Minister of Finance and Economic Development in 2018, in October 2018 I ordered that there be a separation in the actual United States Dollars and RTGS balances which existed in people's accounts. My directive was followed by the Reserve Bank of Zimbabwe Exchange Control Directive R120/2018 which was issued by 2nd respondent.
23. Applicant has not demonstrated that in light of my directive and the Reserve Bank of Zimbabwe Exchange Control Directive No. R120/2018 which ordered financial dealers to separate FCA Nostro accounts with RTGS FCA accounts, applicant's money which was held in his account was moved into an FCA Nostro account by 1st respondent. If the money was not moved into an FCA Nostro account following that directive, then it means that the amount was not real United States Dollars.
24. Applicant cannot claim the amount which was deemed not to be actual United States Dollars by 1st respondent and was not moved into an FCA Nostro account after the issuance of Exchange Control Directive on 4 October 2018. What it simply means is that applicant's balance as at 5 December 2016 was deemed to be RTGS FCA balance after the said directive. Hence, the reason why it was not moved into an FCA Nostro

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account notwithstanding that applicant had written to 1st respondent sometime in 2016 to preserve the said money.

25. Further, I wish to reiterate that whilst by 2016 people continued to transact in United States dollars, the reality was that there was the actual United States dollar which could be physically deposited and the other United States dollars which could only be transacted with electronically and could not be physically deposited. The two currencies became intermingled and were both called United States dollars. Applicants have not demonstrated to the court that the amounts held in 2nd applicant's bank account as at 22 February 2019 which is the effective date in terms of the Finance (No.2) Act, 2019 were indeed United States Dollar deposits which was deposited into their account or which had been moved into an FCA Nostro Account pursuant to the said directive. Without that demonstration, applicants cannot allege any deprivation of property in terms of section 71 of the Constitution or allege that the Finance (No.2) Act, 2019 is unconstitutional as the constitutional provision they are relying on would have fallen away.

26. May I, for the benefit of the court, hasten to state that this process of separating United States Dollar currency from non-United States dollar currency was given time so that bank customers would not suffer any prejudice as a result of any situations of disagreement with their banks. It was only after a period of approximately four (4) months that I issued Statutory Instrument 33 of 2019 which then gave a name to the non-United States Dollar currency. That name was RTGS dollars. That name was both befitting and apposite in that, non-United State Dollar currency was not a physical currency but was a currency which could only be transferred through the Real Time Gross Settlement system of the Reserve Bank of

Zimbabwe. Accordingly, while this currency may have been transacted as dollars of the United States between 28 October 2018 and 22 February 2019, it was apparent to everyone, including the Applicant herein, that this currency was not dollars of the United States of America. As such, the change of name did not mean that there was a change in the form of the currency.

Ad paragraph 44 - 47

27. No issues arise.

Ad paragraph 48

28. This is denied. SI 33 of 2019 did not convert United States Dollars into RTGS Dollars. United States Dollars had already been separated from RTGS balances in October 2018 through Exchange Control Directive R120/2018. Actual United States Dollars continued to be held in FCA Nostro accounts and to date there has been no conversion of the same into any other form of currency. What SI 33 of 2018 simply did was to convert RTGS FCA balances which were, as at 4 October 2018 fictitious United States Dollars into RTGS Dollars. Any individual who had their monies held in an FCA Nostro account continued to have and withdraw actual United States Dollars.

Ad paragraph 49 - 50

29. After the separation of accounts in October 2018 and the enactment of the Finance (No.2) Act, 2019 which incorporated SI 33 of 2019 and SI 142 of 2019, the Supreme Court of Zimbabwe in the Zambezi Gas Zimbabwe case interpreted that all balances and indebtedness which were denominated in United States Dollars be and are hereby balances in Zimbabwean dollar as at 22 February 2019.

Ad paragraph 51 - 52

30. SI 142 of 2019 meant that the Zimbabwe Dollar was from the effective date the sole legal tender in Zimbabwe. The said Statutory Instrument did not mean that all US\$ balances were now local currency as the US\$ had already been separated from RTGS dollar in October 2018 and in February 2018 when the Governor of the 2nd respondent announced his Monetary Policy Statement, he had even pegged the exchange rate of the US\$ to RTGS dollar to start at 1:2.5 which means that the US\$ and the local currency had a different exchange rate. Hence, it is not correct for applicant to allege that SI 142 of 2019 meant that all US\$ balances became local currency balances.

Ad paragraph 53 - 55

31. No issues arise from these paragraphs.

Ad paragraph 56

32. The Finance (No.3) Act, 2019 did not reproduce SI 33 of 2019 but what it incorporated the provisions of SI 33 of 2019 into law through the Parliamentary law making process as enshrined in the Constitution of Zimbabwe.

Ad paragraph 57 - 59

33. It is correct that in terms of section 44C of the Reserve Bank of Zimbabwe Act, FCA Nostro accounts continued to be designated in such foreign currency accounts. Applicant admits that in these paragraphs. Thus, it is very clear that there was no conversion of United States Dollars into RTGS dollar.

Ad paragraph 60 - 64

34. The contents in these paragraphs are denied. Exchange Control Directive R120/2018 is not irrational. The directive by 2nd respondent does not in any way take away applicant's rights.
35. One of the core functions of 2nd respondent is to regulate Zimbabwe's monetary system and to supervise banks among other things. There was nothing sinister in issuing directive R120/2018 by 2nd respondent in October 2018. That was a monetary regulation in order to ensure stability and preserve value of the actual United States Dollars in separating them from what became known as the RTGS dollar.
36. I have explained in detail the issue of this directive R120/2018 in my paragraphs 26 to 30 above. I also have no doubt that 2nd respondent in its opposing affidavit will explain further the rationality and lawfulness of the said directive.

Ad paragraph 65 - 71

37. The Finance (No.2) Act, 2019 is perfectly lawful and constitutional. It does not in any way violate the provisions of the Constitution of Zimbabwe namely section 71 and section 56.
38. Applicant's invitation to the court to set aside the Finance (No.2) Act, 2019 on the grounds of irrationality which means that he wants the court to substitute its own policy in place of that of the executive. I am advised that this would contravene the principle of separation of powers and is not permitted by law.

39. Applicant's case is based on a mistaken apprehension that the said enactments compulsorily acquired and appropriated people's United States Dollars savings in terms of section 71 of the Constitution.
40. Further, applicant is suffering from a fundamental misunderstanding that the Finance (No.2) Act, 2019 converted United States Dollars to a local currency. It was not the purpose of the said provisions to take away the United States Dollars in people's savings. If it were so, there would have been no need for government to order banks to open Nostro accounts for their customers without charge as I directed in October 2018 and the subsequent Reserve Bank of Zimbabwe Exchange Control Directive No. R120/2018. The reason for ordering banks to open nostro accounts for their customers was to enable the separation of actual (physical) United States Dollars and what became known as the RTGS dollar. It is on that basis that I respectfully submit that the provisions of the said enactments are not inconsistent with section 71 of the Constitution and are therefore valid in terms of section 2 of the Constitution.

Ad paragraph 72

41. The reason why RTGS balances were separated from United States Dollars is because it had become apparent that the two could never be equated. Hence, the issuance of directive R120/2018 by 2nd respondent.

Ad paragraph 73

42. I have no knowledge of the parallel rate which is an unofficial rate caused by economic saboteurs and the 2nd respondent is doing all it can in order to curb the parallel market.

Ad paragraph 74

43. If applicant's money was real United States Dollars as contemplated by directive R120/2018 then there is no way it could have depreciated value to an amount which applicant now alleges. The money would be contained in an FCA Nostro account. However, if the money was not actual United States Dollar deposits and remained contained in an RTGS account following 2nd respondent's directive to financial institutions to separate actual US\$ and RTGS balances, then it remains the sum of \$179,000.00. If applicant wants to convert that to United States Dollars, he can approach his bankers and get US\$ at the prevailing weighted rate depending on availability.

Ad paragraph 75 - 79

44. 2nd respondent is better placed to respond to averments made in these paragraphs and I have no doubt that he will appropriately do so.

Ad paragraph 80 - 82

45. I deny the allegation that I have caused loss of value. My press statement on 17 June 2020 is very clear that the salary review of Civil Servants and payment of US\$75 to Civil Servants is pursuant to Government's commitment to continuously review and improve the remuneration framework of Civil Servants due to the harsh economic conditions caused by the effects of the Covid-19 pandemic which has caused the escalation of prices.

Ad paragraph 83 - 85

46. I have already dealt with these averments in my background above.

Ad paragraph 86

47. As I have explained above, I have not appropriated people's values and the provisions of the Finance (No.2) Act, 2019 do not amount to appropriation of property contemplated in terms of section 71 of the Constitution.

Ad paragraph 87 - 88

48. No one has deprived applicant from being looked after by his savings. What the law simply says and specifically the Finance (No.2) Act, 2019 is that applicant cannot get what he had not had when 2nd respondent ordered the separation of accounts. I am legally advised that it would be an unjust enrichment on the part of applicant. If applicant's \$179,000.00 is real United States Dollars, 3rd respondent had not in any way stood in applicant's way to stop him from accessing his money. Applicant has his bankers and his bankers are well aware of the value and amount which applicant has in his accounts held by them.

Ad paragraph 89

49. No issues arise.

Ad paragraph 90

50. None of the respondents has appropriated applicant's savings. This has been explained in detail above and I would not belabour the court in repeating the same.

Ad paragraph 91

51. The Finance (No.2) Act, 2019 a creature of Parliament having followed due process. The Act cannot be said to have been made by me. If applicant wanted to challenge Parliament's approval of the Finance Act, he ought

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to have brought Parliament into the proceedings to answer for their cause. I am happy that the managing partner of applicant's lawyers is a member of parliament and would have been present when the Act sailed through in Parliament. Perhaps, he approved it without problems.

Ad paragraph 92 - 94

52. The allegations in these paragraphs are denied. I have been legally advised, which advice I accept that the provisions of the Finance (No.2) Act, 2019 are perfectly lawful and constitutional. They do not violate any provision of the constitution and specifically section 56(1) and 71. The reasons have been explained in detail above.

53. The respondents have not done anything unlawful which has infringed applicant's rights.

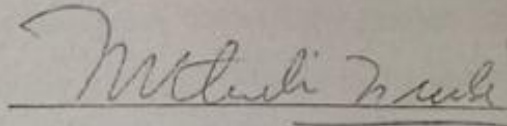
Ad paragraph 95 - 97

54. The contents herein are denied. Applicant has not taken the court into its confidence why the order he seek must be granted. Applicant is standing on a wrong misunderstanding of the provisions of the Finance (No.2) Act, 2019 and Exchange Control Directive R120/2018. That is demonstrated by applicant's failure to understand that there has been no appropriation of property in terms of section 71 of the Constitution by the respondents.

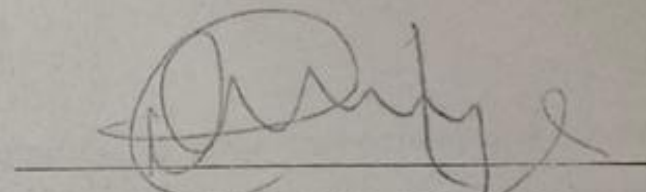
55. It is on the basis of the above that I submit that Applicants' case has no case against 3rd Respondent and that the Finance (No.2) Act, 2019 is constitutional.

WHEREFORE, Respondent prays that this matter be dismissed with costs.

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THUS, DONE AND SWORN TO AT HARARE THIS 9th DAY OF JULY 2020.


MTHULI NCUBE

BEFORE ME:


COMMISSIONER OF OATHS

FARAI CHINGWERE
LLB (Hons) MSU
LEGAL PRACTITIONER,
09 JUL 2020
CONVEYANCER, NOTARY PUBLIC
& COMMISSIONER OF OATHS