PENELOPE DOUGLAS STONE
and
RICHARD HAROLD STUART BEATTIE
t/a Stone/Beattie Studio Partnership
versus
CENTRAL AFRICA BUILDING SOCIETY
and
RESERVE BANK OF ZIMBABWE
and
MINISTER OF FINANCE & ECONOMIC DEVELOPMENT

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 27 June 2022

Date of judgment: 15 February 2023

Opposed application

Mr *T. Mafukidze*, for the applicants
Mr *T. Magwaliba*, for the first respondent
Mr *L. Uriri*, for the second respondent
Mr *D. Jaricha*, for the third respondent

MAFUSIRE J

[A] ABSTRACT

[1] The applicants are importunate. They want back their money – $142 000 – all in the currency of the United States dollars [USD]. If the first respondent, their banker, will not pay, then the second and third respondents, collectively the monetary authorities, should. The applicants allege these monetary authorities are partly the reason the first respondent will not pay. The applicants want a whole range of some financial legislation, and certain monetary policies or directives, set aside on the grounds of constitutional invalidity. They first came to this court in 2019. The subject matter was the same. This court ruled in their favour. It directed the first respondent to pay.[1] The first respondent did not pay. All the respondents

[1] *Stone & Anor v CABS & Ors* HH 287-20.

appealed separately. The appeals succeeded. The judgment of this court was vacated.[2] That was in March 2021. In August 2021 the applicants were back in this court. It is still the same subject matter. But the thrust is now different. They seek the following orders:

- *that* Exchange Control Directive No. R120/2018 issued by the Reserve Bank [is] unconstitutional and invalid as it violates s 71 of the Constitution,
- *that* the Exchange Control Directive No. RT120/2018 is grossly unreasonable and *ultra vires* s 35(1) of the Exchange Control Regulations, SI 109 of 1996, and is invalid,
- *that* s 44B(3) and (4) of the Reserve Bank Act are unconstitutional and invalid as they violate s 71 of the Constitution,
- *that* s 22(1)(b) and (d), s 22(4)(a) and s 23(1) and (2) of the Finance (No. 2) Act of 2019 are unconstitutional and invalid as they violate s 71 of the Constitution,
- *that* the conversion of the applicants' USD142 000 to RTGS142 000 is unconstitutional and invalid as it violates s 71 of the Constitution,
- *that* the first respondent should pay to the applicants the amount of USD142 000,
- *that* the first respondent is to pay interest on the aforestated amount at the rate of 5% per annum from 28 November 2016, to the date of payment, and
- *that* the respondents must pay costs of suit, jointly and severally, the one paying the other[s] to be absolved.

[B] BACKGROUND

[2] The first respondent is a building society. It is a bank or an authorised dealer for the purposes of exchange control regulations. At all relevant times the applicants were in business as architects. They banked with the first respondent. As at 28 November 2016 the balance in their account was $142 000-00. The designation of the account was USD. That designation was in line with the currency regime in force at the time. At the time, the national economy was on a multi-currency system. That had been the situation since 2009. In terms of that system, the currencies of other countries, specifically the British pound, the euro, the USD, the South African rand and the Botswana pula had been made legal tender in Zimbabwe, courtesy of an amendment to the Reserve Bank Act [*Chapter 22:15*][3]. The local

[2] *CABS & Ors v Stone & Ors* SC 15-21.
[3] By s 17 of the Finance (No. 2) Act No. 5 of 2009.

currency would float and find its own level in the basket of all these other currencies. Over the years, the local currency depreciated in value so much that it practically became non-existent. In 2015 the State President officially demonetized it through statutory instrument [SI] 70 of 2015.[4]

[3] After the demonetization as aforesaid, there followed some rapid developments in the monetary system. These were achieved through policy pronouncements and legislative changes by the State President in terms of the Presidential Powers (Temporary Measures) Act [*Chapter 10:20*], or via the second respondent, as the central bank, and the third respondent, as the Minister in charge of finance. Among other such changes, the third respondent, was empowered in 2016, through a statutory instrument, to reintroduce some form of local currency.[5] Such currency would comprise what would become known as "bond notes" and "bond coins". It would become legal tender. It would be exchangeable at par value with any specified currency. Each unit of a bond note would be exchangeable for one USD. The bond notes and coins eventually came into operation in March 2017. This was achieved through an amendment to the Reserve Bank Act.[6] The amendment practically reproduced SI 133 of 2016. But there were two significant additions:

- the amendment was deemed to have come into operation on 31 October 2016,[7] the date of SI 133 of 2016, and
- the bond note would be backed by a guarantee extended to the Reserve Bank by one or more international financial institutions.[8]

In a press statement on 4 May 2016, the second respondent had disclosed the extent of that financial guarantee. It was in the sum of USD$200 million. It had been issued by the African Export-Import Bank [Afreximbank].

[4] The next significant development was on 4 October 2018. On that date, the second respondent issued the Exchange Control Directive RT120/2018. The second respondent is empowered to issue such directives by s 35(1) of the Exchange Control Regulations, 1996.[9]

[4] Reserve Bank of Zimbabwe (Demonetisation of Notes and Coins) Notice, 2015, SI 70 of 2015.
[5] Presidential Powers (Temporary Measures) (Amendment of Reserve Bank of Zimbabwe Act and Issue of Bond Notes) Regulations, 2016, SI 133 of 2016.
[6] Reserve Bank Amendment Act No 1 of 2017.
[7] Section 1 thereof.
[8] Section 44B(1) of the Reserve Bank Act.
[9] SI 109 of 1996.

The background to the Exchange Control Directive RT120/2018 is this. At that time the economy was still operating in the multi-currency system. Bank accounts were all Nostro foreign accounts. "Nostro" is an accounting term used by banks and monetary authorities. A bank in Zimbabwe will operate a Nostro account with a foreign or correspondent bank in the world financial centres where a float of money designated in foreign currency is maintained. The Nostro account is for settling foreign obligations of the local bank. The local bank account transactions are replicated or "mirrored" in the Nostro account of the correspondent bank. Of the basket of currencies in use, the USD was the most predominate. Thus, most Nostro foreign currency accounts were predominantly in USD. The intrinsic provision of the Exchange Control Directive RT120/2018 directed banks to separate foreign currency accounts into two categories, namely Nostro foreign currency accounts [Nostro FCAs] and Real Time Gross Settlement [RTGS] foreign accounts [RTGS FCAs]. For the present narrative, RTGS would be the new form of the local currency. It would eventually be brought into circulation by central Government via SI 33 of 2019. Its effective date was 22 February 2019.[10]

[5] Exchange Control Directive RT120/2018 was directed at authorised dealers, principally banks. It addressed a number of issues. It said its purpose was to "*operationalise*" the measures which had been incepted earlier on to strengthen the multi-currency system to enhance business viability and price stabilization; to increase export generation capacity and to improve market confidence. It explained further that the measures were aimed at encouraging diaspora remittances, the banking of foreign currency into the Nostro FCAs and to eliminate the co-mingling effect or dilution of Nostro FCAs by RTGS balances. It was further stated that the relationship between the two categorise of the foreign currency accounts would continue to be at parity in order to preserve value for money for the banking public and the investors during the transition to a more market based foreign currency allocation system. The market based foreign currency allocation system would be implemented once the economic fundamentals had become appropriate.

[6] Before this court, the third respondent has provided some further insights into the thought process behind the implementation of the measures above, particularly the split of

[10] Presidential Powers (Temporary Measures) (Amendment of Reserve Bank of Zimbabwe Act and Issue of Real Time Gross Settlement Electronic Dollars (RTGS Dollars) Regulations, 2019, SI 33 of 2019.

people's bank balances into Nostro FCAs and RTGS FCAs. In summary, and as I have understood him, the multi-currency regime had come with its own problems. Market distortions, liquidity crunches, cash shortages, and so on, dogged the economy. Public confidence became difficult to maintain. Pressed by international financial institutions such as the Bretton Woods, it became imperative to initiate currency reforms. Key amongst such reforms would be the adoption of a domestic currency. As at 1 October 2018 the currencies in use in the economy were both the USD and another which had been created by the State through borrowing from the second respondent, and the issuance of treasury bills. The latter currency was at first nameless even though it continued to pass off as USD. It was not a physical currency. It was a currency that could only be transacted through the RTGS system. It was not a genuine USD currency.

[7] The third respondent further explains that the purpose of borrowing by Government from the central bank and the issuance of treasury bills had been to cover the domestic debt of State-owned entities. So, to achieve the intended reforms, particularly the currency reforms, it became necessary to separate the two types of currencies in use. In pursuance of that policy, and through the second respondent's monetary statement of 1 October 2018, financial institutions had been directed to separate their customers' bank accounts into two categories: those holding actual dollars of the United States, and those holding this other nameless currency still passing off as USD. Banks would open Nostro FCAs into which genuine dollars of the United States would be deposited. That other non-United States dollar currency would remain as the existing customers' accounts. Such process of separation would take about ten days. The modalities would be left to the financial institutions themselves. They would use their own data bases such as the Know Your Customer [KYC] principles to determine the source of the deposits in their individual customers' accounts. Henceforth, deposits or remittances from sources outside the country would be channelled into the Nostro FCAs which would automatically be created by the banks at no cost to their customers. All other deposits would continue to be channelled into the existing accounts.

[8] The separation of the FCAs in terms of the Exchange Control Directive RT120/2018 entailed that foreign currency realised from offshore or foreign currency cash deposits would be credited into individual or corporate Nostro FCAs. The sources specifically listed in these

regards included export proceeds, offshore loan proceeds, offshore funds from foreign investors, diaspora remittances, and so on. On the other hand, all RTGS or mobile transfers and deposits in bond notes or coins would be credited into individual or corporate RTGS FCAs. The third respondent eventually gave the nameless currency a name. This was through SI 33 of 2019 aforesaid. That currency would be called the RTGS dollar. SI 33 of 2019 empowered the second respondent to issue the RTGS dollar as an electronic currency. It would be legal tender in Zimbabwe. The RTGS balances, expressed in USD immediately before the effective date, would be, from that date, deemed to be opening balances in RTGS dollars at par with the USD at a rate of one-to-one. Thereafter any variance in parity would be determined by market forces on a willing-seller willing-buyer basis. Bond notes and coins in circulation at the time would continue to be legal tender exchangeable at parity with the RTGS dollar on the same ratio of one-to-one.

[9] All the aforesaid changes and reforms would formally be incorporated into the statute books, primarily through appropriate amendments to the Reserve Bank Act. The details are not important for the moment, save just to mention that this is the gamut of the legislation the applicants want knocked down. They aver that watching those changes from 2016, they feared the value of their deposit would devalue significantly. To them, the unfolding situation was not without precedence. They cite the bearer cheque dispensation of 2007 and 2008 when inflation had risen phenomenally. Money would be counted in quintillions of dollars. When the economy had dollarized, people's savings had been wiped out. Therefore, to avert another disaster, the applicants say they instructed the first respondent, on 28 November 2016, to "*freeze*" their account so that no deposits or withdrawals from it would be effected except upon the written instructions by the authorised signatories. It did not work. The first respondent cited the policy and legislative changes above and said it had to comply.

[10] The applicants aver that their bank account which previously reflected a balance of USD142 000 now reflected the same figure but in RTGS. Due to the movement of the exchange rate between the USD and the RTGS dollar and the depreciation of the RTGS dollar against all the other major currencies, the applicants allege that their deposit has become a minuscule fraction of its original value. They submit that this cannot be right. They

will not accept it. Apparently neither will so many other customers.[11] So, in 2019 the applicants sued the first respondent, their bank, on the basis of the banker-customer principles of the common law. In the alternative, they sued the monetary authorities, the second and third respondents, in the main impugning Exchange Control Directive RT120/2018. As mentioned at the beginning of this judgment, the applicants' cause found favour with this court. But they lost on appeal. They are now back again in this court, their cause of action having been re-formulated. But inevitably, and quite characteristically in matters such as this, the court has been called upon to first determine the numerous points *in limine* which have been raised by the respondents. These are dealt with below, not necessarily in the order that they have been raised in the affidavits, but rather on the basis of their individual likelihood or potential to dispose of the entire application without going into the merits.

[C] POINTS *IN LIMINE*

[i] Matter is res judicata or issue estoppel

[11] The second respondent alleges that by reason of the doctrine of *res judicata* or issue estoppel, the applicants are barred or estopped from bringing this claim in the form that they have, or at all. Singled out for impeachment under this objection are paras 1, 2, 3, 7, 8 and 9 in the applicants' draft order. Respectively, these are the paragraphs alleging that the Exchange Control Directive RT120/2018 is unconstitutional; that it is *ultra vires* the Exchange Control Regulations, 1996; that s 44B(3) and (4) of the Reserve Bank Act are unconstitutional; that the first respondent should refund them the contentious USD142 000 together with interest and costs of suit on the higher scale. Paras 4, 5 and 6 that the second respondent has not expressly singled out respectively contain the claim for the impeachment of s 44C of the Reserve Bank Act; the impeachment of certain provisions of the Finance (No. 2) Act of 2019[12] and the impeachment of the act of converting the applicants' bank balance from USD142 000 to RTGS142 000, all on the basis of unconstitutionality.

[12] The second respondent argues that the *substance* of the applicants' claim then and now was, and is the payment of USD142 000 irrespective of the *form* in which it was, and is

[11] As a matter of fact, there has been persistent litigation over the same subject matter since the changes in the monetary regime.
[12] Sections 22(1)(b), (d), s 22(4)(a) and (2) thereto.

being pleaded. It further argues that this substantive claim was determined to finality by both this court and the Supreme Court. In particular, this court declared the Exchange Control Directive RT120/2018 invalid. It then went on to order the first respondent to refund the applicants the USD142 000 in question. But the judgment of this court was vacated by the Supreme Court. There ended the case. There is no right of appeal beyond the Supreme Court. The second respondent cites widely case authorities from around the globe on *res judicata* and issue estoppel.

[13] Many jurists and scholars, here and abroad, have written extensively on *res judicata* and issue estoppel. Without in any way being presumptuous and pre-emptive, it is doubtful whether there remains anything that can usefully be added to the body of knowledge on this subject. So, I merely paraphrase the principles. Issue estoppel is a species of *res judicata*: *Munemo v Muswera* 1987 (1) ZLR 20 (SC), at p 23C. They are almost analogous concepts: *Galante v Galante (1)* 2002 (1) ZLR 144 (H), 151A. Issue estoppel has been described in *Mills v Cooper* [1967] 2 ER 100, *per* LORD DIPLOCK, as follows:[13]

> "A party to civil proceedings is not entitled to make, as against the other party, an assertion, whether of fact or of legal consequences of facts, the correctness of which is an essential element in his cause of action or defence, if the same assertion was an essential element in his previous cause of action or defence in previous proceedings between the same parties or their predecessors in title and was found by a court of competent jurisdiction in such previous civil proceedings to be incorrect, unless further material which is relevant to the correctness or incorrectness of the assertion and could not by reasonable diligence have been adduced by that party in the previous proceedings has since become available to him."[14]

In *Carl Zeiss Stiftung v Rayner & Keeler* [1976] 1 AC 853],[15] the three essential requirements of *res judicata* or issue estoppel were listed as follows:

- that the same question has been decided;
- that the judicial decision which is said to create the estoppel was final; and
- that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which estoppel is raised.

[14] I disagree with the second respondent that the applicants are estopped from bringing their claim in the manner that they have. Admittedly, the impeachment of the Exchange

[13] At p 468.
[14] Quoted by KHOSA JA in *Willowvale Mazda Motor Industries v Sunshine Rent-a-Car* 1996 (1) ZLR 415 (S), at p 423D – F.
[15] Quoted by KHOSA JA in *Willowvale Mazda Motor Industries*, *supra*, at p 421 – 422.

Control Directive RT120/2018 and s 44B(3) and (4) of the Reserve Bank Act had been issues before the courts in the applicants' previous claim, albeit as alternative claims. Admittedly, this court had gone on to determine the issue of the constitutional validity of the Exchange Control Directive. It had expressly declined to determine the constitutional validity of s 44B(3) and (4) of the Reserve Bank Act on the grounds that it had become unnecessary to do so. The Supreme Court, in judgment No SC 15-21[16], declared the whole approach by this court a *faux pas*. According to the appellate court, and in summary, the applicant's main claim being one *ad pecuniam solvendum*, [i.e. a claim for the payment of a sum of money]; that claim having been made expressly against the first respondent only; this court having found against the applicants on it; the claim for the constitutional invalidity of, *inter alia*, Exchange Control Directive RT120/2018 not having been made at all, this court had gone on a frolic of its own to assume that it could determine that aspect of the claim. What is worse, according to the appellate court, this court had gone on to pronounce judgment against the first respondent in circumstances in which neither the constitutional validity of the Exchange Control Directive RT120/2018 had been pleaded by the applicants as against the first respondent, nor the conditions dealt with by this court argued by any of the parties in those proceedings. On that basis the appellate court set aside the judgment of this court in its entirety.

[15] I disagree that in the present application issue estoppel or *res judicata* can be invoked successfully for the reason that the Supreme Court has determined that the consideration of the constitutionality of the Exchange Control Directive RT120/2018 had not been properly motivated before this court in those proceedings and had therefore been improperly decided. The decision of this court on that point has been vacated. Manifestly, it remains open. In other words, the question of the constitutional validity of the Exchange Control Directive RT120/2018 and of s 44B(3) and (4) of the Reserve Bank Act has not been determined. The respondents cannot approbate and reprobate. Their argument before the Supreme Court that the finding by this court against the applicants' prayer for an order *ad pecuniam solvendum* should have signalled the end of the case for the applicants was upheld. It was their further argument, which was also upheld, that it was this court, not the applicants, which had improperly formulated the cause of action on which it had eventually granted them relief. In

[16] *CABS & Ors v Stone & Ors*

this respect, and quite plainly, the applicants cannot be barred from formulating their cause of action for themselves. On the facts, what is manifestly issue estoppel, among other things, is the claim *ad pecuniam solvendum* in respect of the amount in question, on the basis of the banker-customer relationship and in the face of the Exchange Control Directive RT120/2018 and / or its legislative backbone. This court considers that *res judicata*, or issue estoppel, are even far removed in relation to the legislative provisions that the applicants have cited for impeachment. In the previous judgment, this court expressly declined to determine those provisions that the applicants had specifically cited, namely s 44B(3) and (4) of the Reserve Bank Act, on the basis that it had become unnecessary to do so. The rest of the other legislative provisions, now forming part of the gamut of laws the applicants want struck down, have not been raised before. So naturally, they have never been determined.

[16] The court is alive to the public policy rationale behind the doctrine of *res judicata* or issue estoppel. It is to bring finality to litigation and to give effect to judicial decisions even if they may be wrong: *Wolfenden v Jackson* 1985 (2) ZLR 313 (SC), 316B – C. In *Willowvale Motor Industries v Sunshine Rent-a-Car* 1996 (1) ZLR 415 (S), the Supreme Court said, *per* KHOSA JA:[17]

> "While the doctrine of issue estoppel may not be part of the Roman-Dutch law and may not as yet have found a berth in South African law, it seems to me that this court, in the wider application of existing law in the light of current modes of thought, has found the artificiality of limiting estoppel to the same subject to be unproductive of justice, and has embraced the doctrine of issue estoppel under the general rule of public policy that there should be finality in litigation."

[17] However, the public policy rationale would be overriding if all the elements of these doctrines are present in any given case. The substance of the argument by Mr *Uriri*, for the second respondent, and as I have understood it, is that all what the applicants seek is the return of their money, that this claim has since been determined to finality and that the issue of the Exchange Control Directive RT120/2018, being the backbone of their claim in whatever form, had also been determined in the previous proceedings. However, this argument fails on the same basis that the issue of the constitutionality of the Directive and of

[17] At p 423C.

those legislative provisions was not determined, either to finality, or at all. For these reasons, the second respondent's point *in limine* on *res judicata* or issue estoppel is hereby dismissed.

[ii] Applicants' reliance on s 85(1)(a) is incompetent

[18] Another point *in limine* raised by the second respondent is that the applicants' claim being for the nullification of Exchange Control Directive RT120/2018 on the basis that it is *ultra vires* s 35(1) of the Exchange Control Regulations, 1996, and the consequential claim for the return of the contentious USD142 000, together with the corollary claims for interest and costs thereon, the doctrine of subsidiarity in constitutional matters is such that this court is precluded from determining the claim as a constitutional matter under s 85(1)(a) of the Constitution of Zimbabwe. Section 85(1)(a) of the Constitution of Zimbabwe entitles any person acting in their own interests to approach a court for the vindication of a fundamental right or freedom, as enshrined, which may have been, or is being, or is likely to being infringed. Mr *Uriri* argues that it is incompetent for one to seek a relief that can be granted under some other law or legislation without invoking a constitutional provision because norms of greater specificity should be relied upon before resorting to norms of greater abstraction.

[19] The constitutional principle of subsidiarity says that a litigant who avers that his or her constitutional right has been infringed must rely on the legislation that was enacted to protect that right. He or she may not rely directly on the underlying constitutional provision in proceedings which have been brought to protect that right unless he or she wants to attack the constitutional validity or efficacy of the legislation itself: *Majome v Zimbabwe Broadcasting Corporation & Ors* 2016 (2) ZLR 27 (CC); *Moyo v Chacha & Ors* 2017 (2) ZLR 142 (CC). Once legislation to fulfil a constitutional right exists, the constitution's embodiment of that right is no longer the prime mechanism for enforcement. The legislation is primary. The right in the constitution plays only a subsidiary or supporting role: *Mazibuko & Ors v City of Johannesburg & Ors* [2009] ZACC 28. Mr *Uriri's* point is that in the present case, the validity of the Exchange Control Directive RT120/2018 can simply be tested against s 35 (1) of the Exchange Control Regulations, 1996, without invoking the constitutional provision.

[20] The situation now appears such a procedural bog and a legal minefield. It will be remembered that as one of the reasons for upsetting the judgment of this court in the previous proceedings, the Supreme Court held that this court's unprompted consideration of the constitutionality or otherwise of the Exchange Control Directive RT120/2018 violated the doctrine of subsidiarity in constitutional matters. The appellate court said that it had been incumbent for this court to consider and determine the constitutional validity of s 44B(3) and (4) of the Reserve Bank Act before addressing the validity of the Exchange Control Directive RT120/2018 itself, not only because the applicants had specifically sought such relief, but also on the basis of the principle of subsidiarity. Now it seems as if the applicants have simply wheeled back into the present proceedings the same problems and the same issues as before. However, that does not seem to be the case. The applicants do seek the setting aside of s 44B(3) and (4) of the Reserve Bank Act on the basis of constitutional invalidity. It is just that in their draft order the remedies sought are arranged in such a way that the order for the impeachment of the Exchange Control Directive RT120/2018 comes first ahead of the order for the impeachment of the statutory provisions. The applicants also seek the impeachment of the other statutory provisions. But none of all this should be a reason to non-suit them, or else the whole approach would sound pedantic and a miscarriage of justice.

[21] Whilst the Exchange Control Directive RT120/2018 purported to address the multiple problems dogging the economy at that time, and possibly now, its intrinsic component about which the applicants are severely aggrieved, was the conversion of their deposit from USD to RTGS. The prelude to this conversion was firstly, the aforesaid SI 133 of 2016[18], which became s 44B(3) and (4) of the Reserve Bank Act. Those intrinsic provisions of the Exchange Control Directive RT120/2018 were also cemented by s 21 of the Finance (No. 2) Act No. 7 of 2019 the provisions of which eventually became s 44C of the Reserve Bank Act. The one-to-one parity ratio of the RTGS to the USD became expressed in s 22 of the Finance (No. 2) Act aforesaid. It is all these statutory provisions that the applicants want struck down on the grounds of constitutional invalidity. There is therefore nothing precluding this court, in the present proceedings, from determining the constitutional validity of the intrinsic provisions of the Exchange Control Directive RT120/2018.

[18] Presidential Powers (Temporary Measures) Amendment of Reserve bank of Zimbabwe Act and Issue of Bond Notes) Regulations, 2019.

[22] Holistically, what the applicants want in these proceedings is the impeachment of the device by which the monetary authorities managed to convert their USD142 000 bank balance into an RTGS bank balance, and thereafter to be able to stop the applicants from accessing the amount in the original currency of the deposit. The applicants' suit is an omnibus approach, presumably because the device employed by the monetary authorities to achieve their goals was not a single statute or directive, but a series of new laws or amendments. But significantly, in paragraph 6 of the draft order, the applicants seek the setting aside of the conversion of their USD142 000 to RTGS142 000 on the basis of unconstitutionality, specifically s 71 of the Constitution. This is the crux of the dispute. It shall be the focus of the determination. For these reasons, the second respondent's objection No. 2 is hereby dismissed.

[23] There remains the aspect of the Exchange Control Directive RT120/2018 allegedly being *ultra vires* the enabling legislation, namely s 35(1) of the Exchange Control Regulations. Unhappily, counsel have not exhaustively and systematically synthesised this particular point, either in their heads of argument or in oral submissions. But evidently, the applicants can properly motivate the impeachment of the Exchange Control Directive RT120/2018 on the basis that it is *ultra vires* s 35(1) of the Exchange Control Regulations. In that regard, there would be no constitutional point before the court. This is a separate enquiry which is not constricted by what went on before.

[iii] Applicants' claim in foreign currency is incompetent by operation of the law

[24] The third objection by the second respondent, as I have appreciated it, is that the applicants' demand to be paid in USD cannot be met because following the enactment of SI 33 of 2019 aforesaid,[19] all debts previously denominated in USD became debts payable in RTGS from the effective date. For support, the second respondent refers to the case of *Zambezi Gas (Pvt) Ltd v N.R. Barber (Pvt) Ltd & Anor* SC 3-20 which determined that in line with SI 33 of 2019, the assets and liabilities expressed in USD immediately before the effective date, 22 February 2019, became assets and liabilities in RTGS, irrespective of their origins. The second respondent argues that the relationship between the applicants and the

[19] Presidential Powers (Temporary Measures) (Amendment of Reserve Bank of Zimbabwe Act and Issue of Real Time Gross Settlement Electronic Dollars (RTGS Dollars) Regulations, 2019.

second respondent being one of creditor and creditor in terms of banking law and that the applicants' claim being for payment of a debt in USD, this is not competent for as long as SI 33 of 2019 is still *extant* and when the judgment of the Supreme Court above is still the law. With all due deference, I need not be detained by this objection. The constitutionality of SI 33 of 2019 is part of the raft of legislation that is under challenge. It is SI 33 of 2019 that eventually became s 44C of the Reserve Bank Act. It also became s 22 of the Finance (No. 2) Act No. 7 of 2019. The applicants want all these set aside. Therefore, this point cannot be determined as a preliminary objection. It is part of the merits of the case. It was not before the appellate court in the *Zambezi Gas* case above. Therefore, as a preliminary objection it is hereby dismissed.

[iv] Applicants' draft order is defective

[25] The first respondent's sole point *in limine,* distilled, is that it is incompetent for the applicants to seek a declaration of invalidity of the range of legislation that they have singled out, and then, in the same claim, seek consequential relief in the form of an order directing the respondents to pay back the USD142 000 in contention. The first respondent's point is that in terms of s 175(1) of the Constitution, a declaration of constitutional invalidity made by any court has no force until confirmed by the Constitutional Court. The first respondent avers that the applicants are seeking to be paid the money before any order of constitutional invalidity which this court may make is confirmed by the Constitutional Court. The first respondent concludes that by reason of the fact that the applicants' draft order fails to reflect this position, it is fatally defective. The defect cannot be cured by an amendment. As such, the application ought to fail in its entirety.

[26] With all due respect, this objection lacks merit. By operation of the law, any declaration of unconstitutionality this court or any other may make, stands suspended until confirmed by the Constitutional Court. That should mean that any consequential relief that the court may see fit to grant also stands suspended until the declaration of unconstitutionality is confirmed. If the unconstitutionality is not confirmed, then the consequential relief that is based upon the constitutional point should automatically fall away. But such a position cannot preclude a litigant from claiming consequential relief where a declaration of constitutional invalidity is sought. He or she brings his or her claims in one motion to avoid a

multiplicity of proceedings. The first respondent's objection is hereby dismissed. That paves the way for the determination of the case on the merits.

[D] ISSUES FOR DETERMINATION ON THE MERITS

[27] In respect of the constitutional matter, the applicants seek the setting aside of the Exchange Control Directive RT120/2018 and a raft of some legislative provisions, being s 44B(3) and (4), and s 44C of the Reserve Bank Act; s 22 (1)(b) and (d), s 22 (4)(a) and s 23(1) and (2) of the Finance (No. 2) Act, No. 7 of 2019. In reality, and as stated already, the applicants' dominant and overall desire is the reversal of the act of the conversion by the first respondent of their bank deposit in the sum of $142 000 from USD to RTGS, which they allege was done on the authority of the monetary policy statements, the Exchange Control Directive RT120/2018, and the legislative architecture as set out above. The applicants allege the process was an infringement of their constitutional right to property. Therefore, it is necessary to determine the constitutionality or otherwise of the act of that conversion as prayed for in para 6 of the draft order. Manifestly, this is a claim for a *declaratur* under s 85(1) of the Constitution. As in all claims for declaratory orders, a court does not decide abstract or hypothetical questions: *Munn Publishing (Pvt) Ltd v Zimbabwe Broadcasting Corporation* 1994 (1) ZLR 337 (S); 1995 (4) SA 675 (S), [1995] 3 All SA 444 (Z) and *Johnsen v Agricultural Finance Corp* 1995 (1) ZLR 65 (S). Therefore, only such core provisions of the Exchange Control Directive RT120/2018 and the impugned statutes as had the authority claimed and used by the second and third respondents to the prejudice of the applicants, as alleged, fall for consideration, not the rest of the other provisions. However, in the present proceedings, it is necessary to first determine the question of the gross unreasonableness of the Exchange Control Directive RT120/2018 and the argument that it is *ultra vires* s 35(1) of the Exchange Control Regulations, 1996, as these are live and separate disputes.

[i] Exchange Control Directive RT120/2018 is grossly unreasonable and *ultra vires* *s 35(1) of Exchange Control Regulations, 1996, SI 109 of 1996*

[28] The applicants' argument that the Exchange Control Directive RT120/2018 is grossly unreasonable and *ultra vires* s 35(1) of the Exchange Control Regulations, 1996 was not

properly synthesised. It is not altogether clear whether 'gross unreasonableness' is a separate and stand-alone yardstick to be considered on its own merits in testing the validity of the Exchange Control Directive RT120/2018, or whether it is subsumed in the *ultra vires* doctrine argument. Mr *Mafukidze*, for the applicants, starts from the premise that s 86(2) of the Constitution permits the limitation of the rights and freedoms enshrined in the Chapter 4 Declaration of Rights, but only in terms of a law of general application, and to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom. Asserting that the Exchange Control Regulations, 1996, cannot themselves limit a Chapter 4 right given the proscription in s 134 of the Constitution[20], Mr *Mafukidze* goes on to make a detailed analysis of the s 86(2) limitation, *not* in relation to the Exchange Control Regulations, but in relation to the Exchange Control Directive. Thus, 'gross unreasonableness' is evidently a parameter to test the constitutionality of the Exchange Control Directive, rather than a parameter to test the constitutionality of the Exchange Control Regulations. But given the nature of the dispute before the court, the determination of the unconstitutionality or otherwise of the Exchange Control Directive RT120/2018 is to be held over until the determination of its validity on the basis of the *ultra vires* doctrine is made. The issue of the gross unreasonableness of the Exchange Control Regulations, 1996, is not before the court.

[29] On the *ultra vires* doctrine, the applicants' argument is that s 35(1) of the Exchange Control Regulations does not contain a limitation on their right to retain the value of their bank deposit in the USD currency and that, in any event, the Exchange Control Regulations, 1996, do not qualify to be a law of general application under s 86(2) of the Constitution that can limit rights. The argument why the Exchange Control Regulations, 1996, cannot qualify to be a law of general application as contemplated by s 86(2) of the Constitution has not been developed. But clearly these Regulations are a law of general application in respect of the subject matter of the dispute before the court. They apply to everyone alike. The scope of the limitation in s 86(2) is very wide. Apart from the enquiry whether or not a law that purports to limit a right set out in the Declaration of Rights under Chapter 4 of the Constitution is a law of general application, the further enquiry is whether such a limitation is fair, reasonable,

[20] Which *inter alia* grants authority to Parliament to delegate its power to make statutory instruments but with the circumscription that such statutory instruments must not infringe or limit any of the rights and freedoms enshrined in the Declaration of Rights.

necessary and justifiable in a democratic society. The enquiry has to go further to whether such a democratic society is one based on openness, justice, human dignity, equality and freedom. It still has to go even further to take account of the values set out in s 86(2)(a) to (f) relating to the nature of the right or freedom concerned; the purpose, nature and extent of the limitation in the public interest, and so on. In *Woods & Ors v Minister of Justice, Legal and Parliamentary Affairs & Ors* 1994 (2) ZLR 195 (S), the Supreme Court, conducting the same enquiry in relation to one of the guaranteed rights under the old Constitution, held:[21]

> "What is reasonably justifiable in a democratic society is an elusive concept. It is one that defies precise definition by the courts. There is no legal yardstick, save that the quality of reasonableness of the provision under attack is to be adjudged on whether it arbitrarily or excessively invades the enjoyment of the guaranteed right according to the standards of a society that has a proper respect for the rights and freedoms of the individual."

[30] In paraphrase, the relevant portion of s 35(1) of the Exchange Control Regulations, 1996, compels authorised dealers to comply with any such directions as may be given to them by an exchange control authority in relation to, *inter alia*, the terms on which they are to exchange foreign currency for the Zimbabwean currency. The origins of this power is s 317 of the Constitution. As a central bank, the second respondent herein, is empowered to regulate the monetary system; to protect the currency of Zimbabwe in the interests of balanced and sustainable economic growth, and to formulate and implement monetary policies. Then in terms of s 6 and 7 of the Reserve Bank Act itself, the second respondent is empowered to regulate Zimbabwe's monetary system; to maintain the stability of the Zimbabwean dollar; to foster the liquidity, solvency, stability and proper functioning of the Zimbabwean dollar, and to make and issue bank notes and coins. Finally, in terms of s 44C(4) of that Act,[22] the second respondent, in consultation with the third respondent, is empowered to issue any direction in the public interest.

[31] Effectively, the applicants concede that s 35(1) of the Exchange Control Regulations, 1996, is not *ultra vires* s 71 of the Constitution in the respects concerned. It is held that indeed it is not. It does not purport to take away a right enshrined in the Declaration of Rights under Chapter 4 of the Constitution. In this respect, it is not unconstitutional. The mandate

[21] At 199B – C.
[22] An amendment introduced in 2019.

that it grants the exchange control authorities in regards to the exchange of any foreign currency for the Zimbabwean currency is within the scope of the power vested in the second respondent by the Constitution itself and the enabling Act.

[32] However, the finding that s 35(1) of the Exchange Control Regulations, 1996, is not *ultra vires* s 71 of the Constitution in the respects challenged is not the end of the matter. The applicants' argument, which is the first relief claimed in the draft order, is that the Exchange Control Directive RT120/2018 went beyond what its enabling law, s 35(1) of the Exchange Control Regulations, 1996, could itself do. The Directive purported to take away or limit a Chapter 4 right. It is argued that it did so by depriving the applicants their right to property as enshrined in s 71 of the Constitution. The argument is that the Exchange Control Directive RT120/2018, together with the statutes that the applicants have impeached, arrogated to itself the power to limit a Chapter 4 right. This argument will now be considered.

[ii] Breach of s 71 of the Constitution by the Exchange Control Directive RT120/ 2018; s 44B(3) and (4), and s 44C of the Reserve Bank Act; s 22 (1)(b) and (d), s 22 (4)(a) and s 23(1) and (2) of the Finance (No. 2) Act

[33] The applicants' argument, distilled, is that the parity ratio of one-to-one of the RTGS vis-à-vis the USD was a fiction because the two were not at par, even on inception. To demonstrate this particular point, the applicants cite the second respondent's monetary statement of 1 October 2018 aforesaid[23] in relation to the purchase of fuel in Zimbabwe by foreign truckers and foreign traders buying goods in Zimbabwe. These payments had to be made in foreign currency only. The applicants assert that this was an admission that at the parallel market, the RTGS dollar was not at par with the USD.

[34] As a further illustration of the insincerity of the monetary authorities on the purported par values of the currencies, the applicants point out that when the auction system on the allocation of foreign currency to traders and other users was incepted on 26 February 2019, the RTGS dollar had already depreciated about 2 ½ times. It continued to depreciate. They say at the time that they decided to take legal action, the value of their deposit had dwindled more than 130 times. The aforesaid legislative architecture by the second and third respondents unlawfully deprived them of the true value of their original deposit. They allege

[23] Monetary Policy Statement (Strengthening the Multi-currency System for Value Preservation & Price Stability.

that this was unconstitutional. A credit balance in a bank account is a form of property. It is a right protected by s 71 of the Constitution.

[35] In counter, the respondents argue that by virtue of their constitutional powers, and also in terms of the common law, and for the public benefit, the second and third respondents, as monetary authorities, have the sovereign right, power and mandate *inter alia* to formulate and implement fiscal policy in order to control the supply or use of foreign currency. By that power or mandate, they determine what may constitute legal tender in Zimbabwe. They can issue bank notes and coins or they can designate something else as a medium of exchange. They can peg the rate of exchange between the local currency and any foreign currency. They can devalue the local currency. The respondents also argue that the power to do all these things is reposed solely and exclusively in the Executive and the Legislative arms of Government, not the courts. It should be recognized that by virtue of their bird's eye view of the economy, their experience in governance, and given the information and resources at their disposal, the Executive and the Legislature are better placed to determine the fiscal policy of the country, not the courts.

[36] The respondents further argue that the separation of the peoples' bank balances into Nostro FCAs and RTGS FACs was done to strengthen the multi-currency system, to conserve the scarce foreign currency, to ease the burden of cash shortages, and so on, all in the interests of export trade for the benefit of the entire economy. The applicants have not shown that the deposits that flowed into their bank accounts during the period of the multi-currency system were genuine USD currency from off-shore sources, and not mere RTGS electronic transfers. The applicants' deposits did not stay in the bank accounts for ever. The relationship between the applicants and the first respondent was not one of *depositum*. It was one of creditor and debtor in accordance with the well-known principles of banking law. After making those deposits, the first respondent was entitled to on-lend the amounts because money deposited into a bank account by a customer becomes the property of the bank, the customer merely retaining the right to the equivalent amount upon demand. The change in the fiscal regime was through laws of general application within the limitations of the rights and freedoms in terms of s 86(2) of the Constitution. Everyone was affected. Even the amounts lent by the first respondent denominated in USD currency also became RTGS dollars when

the change came. There has been no constitutional breach committed by the second and third respondents in announcing the various monetary policy statements, issuing the Exchange Control Directive RT120/2018 and enacting the various legislative provisions all of which the applicants impeach. They acted within the scope of their powers.

[E] DETERMINATION OF THE MATTER ON THE MERITS

[i] The issues and the law

[37] The applicants allege that the collective actions of the respondents, as aforesaid, amounted to a deprivation of their right to property as contemplated by s 71 of the Constitution. They argue that such of the exceptions to deprivation as set out in s 71(3)(a) to (c) have neither been claimed by the respondents nor are they applicable in any event. After analysing the dichotomy between ‘deprivation’ and ‘acquisition’ in terms of both the old Constitution and the current one, and relying extensively on case authority on the subject, both from this jurisdiction and abroad, the applicants argue that whilst deprivation may be different from acquisition, the jurisprudence that has developed is such that there can be no deprivation of a right to property by the State without providing for compensation. Both parties have extensively analysed the scope of the limitation of the rights and freedoms in terms of s 86(2) of the Constitution, the applicants concluding that none of the parameters set out therein apply, but the respondents concluding that they do.

[38] The right of the applicants to approach the court under s 85(1) of the Constitution has not been contested, except as a point *in limine* in regards the *ultra vires* doctrine which has already been disposed of. Furthermore, given that s 71(2) of the Constitution is dealing with a specific right and freedom in a whole range of rights and freedoms found in Chapter 4 of the Constitution, and given that s 71(2) has its own set of parameters for limiting this particular right and freedom, it is not necessary for this court, as the parties have urged, to embark on an analysis of the general limitation of rights and freedoms under s 86(2) of the Constitution.

[39] The power of Government to govern is unquestioned: *Grandwell Holdings (Pvt) Ltd v Minister of Mines and Mining Development* HH 193-16. Parliament has the right and power to pass laws for the benefit of the country. It has the right to delegate the power to make

subsidiary legislation. This power or right derives from the Constitution[24]. It also derives from the various statutes such as those under impeachment. With very few exceptions, the Legislature and the Executive have the right to monetary sovereignty. According to F. A. Mann, *The Legal Aspects of Money*, 4th edn. Clarendon Press, Oxford, 1993, p 267 and 464, this sovereignty reposes the power to decide what may be legal tender, what is money, what may be the currency in use, what nominal value to give to the currency, appreciating or depreciating the value of the currency, imposing exchange controls, and taking all other measures affecting monetary relations. Local legislation, chiefly the Reserve Bank Act, grants all such powers.

[40] Generally speaking, it is not permissible for a court to interdict the exercise of powers conferred by statute: *Gool* v *Minister of Justice & Anor* 1955 (2) SA 682 (CPD) at 688F-G. A court must observe the time-honoured doctrine of separation of powers. In *Doctors for Life International* v *Speaker of the National Assembly & Ors* 2006 (6) SA 416 (CC) it was stated:[25]

> "Courts must be conscious of the vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government. They too must observe the constitutional limits of their authority. This means that the judiciary should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution."

The same principle was also articulated in *International Trade Administration Commission* v *SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC):[26]

> "Where the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government, courts may not usurp that power or function by making a decision of their preference. That would frustrate the balance of power implied in the principle of separation of powers. The primary responsibility of a court is not to make decisions reserved for or within the domain of other branches of government, but rather to ensure that the concerned branches of government exercise their authority within the bounds of the Constitution. This would especially be so where the decision in issue is policy-laden as well as polycentric."

[41] However, to every rule there is invariably an exception. In constitutionalism there is always a corollary. The wide range of powers enjoyed by the Executive and the Legislature is not unchecked. It is not without limit. The power is not exercised arbitrarily. Government cannot, in the name of sovereignty, invade rights guaranteed by the Constitution unless the

[24] Section 117.
[25] At Para 37.
[26] At Para 95.

Constitution itself permits it: *Woods & Ors, supra*. The dominant exhortation by the Constitution in laying out the powers and functions of all the three arms of Government, the Executive, the Legislature and the Judiciary, is that their authority derives from the people of Zimbabwe and must be exercised in accordance with the Constitution.[27] Legitimate State authority exists only within the confines of the rule of law as embodied in, among others, s 3 of the Constitution. It is the provision that expresses the founding values and principles of Zimbabwe. In particular, the supremacy of the Constitution; the rule of law; fundamental rights and freedoms and good governance are singled out for special mention. In *S v Mabena* [2007] 2 All SA 137 (SCA), the Constitutional Court of South Africa, addressing the same subject matter, said:[28]

> "The Constitution proclaims the existence of a state that is founded on the rule of law. Under such a regime legitimate state authority exists only within the confines of the law, as it is embodied in the Constitution that created it, and the purported exercise of such authority other than in accordance with law is a nullity. That is the cardinal tenet of the rule of law. It admits of no exception in relation to the judicial authority of the state."

Section 165(c) of the Constitution of Zimbabwe unequivocally announces the role of the courts as being paramount in safeguarding human rights and freedoms and the rule of law. The courts are bound to enforce the provisions of the Constitution in regards to the substantive and procedural requirements to be fulfilled by other constitutional bodies: *Judicial Service Commission v Zibani & Ors* 2017 (2) ZLR 114(S).

[42] The applicants' complaint is not without merit. The series of measures adopted by Government in the name of reforms were undoubtedly harmful to the banking public. The Executive has expressly admitted as much, albeit, *post facto.* The applicants' allegation that their deposit of USD142 000, which was converted to RTGS, devalued more than 130 times by the time of litigation, has not been contested. No one is compensating them. The statement issued by the State President on 7 May 2022 dubbed "**Measures to Restore Confidence, Preserve Value and Restore Macroeconomic Stability**" does not seem to apply to the applicants, or to anyone else outside the threshold of the amounts stated therein. That statement has been admitted into evidence by consent. Under the heading "**Restoration of Lost Value on Bank deposits**", the statement reads:

[27] Section 88 of the Constitution for Executive authority; s 117 for Legislative authority and s 162 for Judiciary authority.
[28] In para 2.

"13 The currency changeover of 2019 adversely affected the value of bank deposits of the banking public mainly as a result of the depreciation of the exchange rate. To address this value erosion, Government has resolved to compensate the loss of value on bank deposits to individuals who had funds in their bank accounts of US$1 000 and below as of end of January 2019.

14 The compensation for amounts less than US$1 000 has begun and will continue.

15 Currently a framework is also being put in place to compensate individuals with bank accounts of up to US$100 000.

16 The amount required and Implementation modalities of this policy will be announced in due course guided by the Public Debt Management Act and Reserve Bank of Zimbabwe."

[43] The above statement is plainly an express admission that the legislative scheme by the second respondents to effect the currency change eroded the values of bank deposits. According to the third respondent, the rationale for such reforms was to address macro-economic problems manifesting in the form of market distortions, liquidity crunches or cash shortages. The measures were meant, among other things, to boost the export capacity of the manufacturing industry so as to increase the inflow of the foreign currency. While the rationale is understood, the rationality of the measures taken are not. In its judgment aforesaid[29], albeit overturned on appeal, but on technical grounds, this court, under the arbitrariness and reasonableness tests as values entrenched in the Constitution, declared such measures irrational and set aside the Exchange Control Directive. The reasoning of the court is encapsulated in its statements below:

"The first respondent cannot claim, as it seems to do, that the money it owed to the applicant was not in United States dollars. The debt is in United States dollars, because the account is denominated in that currency. If it was in some other currency, such as the South African Rand or Botswana Pula then that would have been the currency of the account. The debt which the first respondent owes the applicant is therefore in the sum of US$142 000.00 and not some other currency. Banking would be meaningless if a person deposited a certain sum of money or has money credited into their account only to be told when they demand withdrawal that they can only be paid in some other means of exchange whose value is determined by the authorities without recourse to the holder of the account.

… … … … … … … … It is offensive to any sense of justice that a person who holds money in a bank can wake up on any day to be told that his money means something else different from what has always been."

[44] From the papers in the current proceedings, what birthed the RTGS currency was domestic borrowing by Government, coupled with the issuance of treasure bills. To what

[29] *Stone & Anor v CABS & Ors* HH 287-20

extent, there is no information. At first this currency did not have a name. But somehow, it had the effect of diluting the USD currency. The USD currency had to be ring-fenced to avoid the co-mingling effect with this currency. But some things just do not add up. Quite how borrowing can create a currency has not been rationally explained. It cannot. Money or a currency do not just evolve on their own. According to the Reserve Bank Act, particularly Part VI thereof, and in accordance with common law tenets of sovereignty the world over, the designation of any chattel or thing as money is a positive declaration by the State. The designation of money as a medium of exchange is a positive declaration by the State. The declaration of any type of currency in use in an economy is made by the State. Money and currency cannot just incarnate in a formless shape in a formless state. Manifestly, and according to s 44B and s 44C of the Reserve Bank Act, it is the State that must create them by declaration.

[45] It will be remembered that at the time in contention, the local currency had been demonetized, not only officially through SI 70 of 2015,[30] but also it had practically become non-existent on the ground. People were now transacting almost exclusively in USD, at first in cash, but subsequently electronically. That followed an express declaration by the State. But apparently the local currency had never quite died away. It still existed in some nameless form and in some formless realm. The banking public was not told. Only later did the reality unfold. Thus, whilst the banking public was being told that the money in their accounts was USD, in reality it was not all USD. That reality only hit the public when the Government rapidly instituted the monetary changes aforesaid, by among other things, purporting to introduce a new currency and proceeding to give it a name. That conduct by Government could only have been a simulation because according to its explanation herein, the currency had continued to exist, albeit in its formless shape. That currency, even before being officially gazetted, had the power, among other things, to dilute the USD. But it is not explained what became of the $200 million guarantee from Afreximbank the purpose of which had been to hedge that currency against the USD so as to maintain the parity ratio of one-to-one. That there was such a guarantee was not just a mere policy statement, or announcement. It was actually enacted as a statutory provision.[31]

[30] Reserve Bank of Zimbabwe (Demonetisation of Notes and Coins) Notice, 2015.
[31] Section 2 of the Reserve Bank of Zimbabwe Amendment Act No 1 of 2017.

[46] The modalities of the whole process of creating Nostro FCAs and RTGS FCAs and the simultaneous separation of already existing bank balances into USD and RTGS, depending on the source of the deposits, is not properly explained. The second and third respondents allege that it was left to the individual banks to use the KYC principles and trace the source of the deposits that had flowed into the individual customers' accounts. But the first respondent has not explained how it actually did it. If the nameless currency was co-mingling with the genuine USD, then perhaps only the banks and the monetary authorities themselves knew. Outside them, nobody else did. The multi-currency dispensation was such that all transactions were predominantly, if not exclusively, in USD. The local dollar had ceased to exist. The banking public sometimes handled real cash in USD. It has not been shown that of the $142 000 standing to the credit of the applicants' account with the first respondents at the relevant time, none of it was from offshore sources. Given that the economy had practically dollarized in the 2000s and given that the multi-currency system had formally been incepted in 2009 by s 17 of the Finance (No. 2) Act of 2009, it was incumbent upon the respondents to demonstrate, in the present proceedings, how, before the phasing out of the multi-currency system and the prohibition on the use of foreign currency as legal tender in Zimbabwe in 2019, and before the re-introduction of the RTGS dollar in February 2019, it could be that the applicants' bank balance as at the time of separation was anything other than USD. As highlighted before, the only explanation given is that what passed on at the time as USD, was in fact, not all of it USD. This is not rational.

[47] What all this analysis boils down to is that the second and third respondents, in effecting the currency reforms aforesaid, breached one of the constitutional tenets of good governance as set out in s 3(1)(h) of the Constitution. A government must not make, let alone implement arbitrary decisions. It was held in *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa & Ors* 2000 (2) SA 674 (CC) that:[32]

> "… … the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement."

[48] Section 71 of the Constitution reads:

[32] At Para 85.

"(1) … … … … … … … …

(2) Subject to section 72, every person has the right, in any part of Zimbabwe, to acquire, hold, occupy, use, transfer, hypothecate, lease or dispose of all forms of property, either individually or in association with others.

(3) Subject to this section and to section 72, no person may be compulsorily deprived of their property except where the following conditions are satisfied—

(*a*) the deprivation is in terms of a law of general application;

(*b*) the deprivation is necessary for any of the following reasons—

(i) in the interests of defence, public safety, public order, public morality, public health or town and country planning; or

(ii) in order to develop or use that or any other property for a purpose beneficial to the community;

(*c*) the law requires the acquiring authority—

(i) to give reasonable notice of the intention to acquire the property to everyone whose interest or right in the property would be affected by the acquisition;

(ii) to pay fair and adequate compensation for the acquisition before acquiring the property or within a reasonable time after the acquisition; and

(iii) if the acquisition is contested, to apply to a competent court before acquiring the property, or not later than thirty days after the acquisition, for an order confirming the acquisition."

[49] It is not contested that the applicants, as customers, had a special property interest in the value of the money in their bank account with the first respondent: *Standard Bank of SA Ltd v Oneanate Investments (Pty) Ltd* 1995 (4) SA 510 (C). It is beyond contest that such a right was one protected under s 71(1) of the Constitution. Whilst the parties herein have extensively debated whether the effect of the impugned laws amounted to 'deprivation' or 'acquisition' or both within the meaning of s 71(3) of the Constitution, it is not disputed that the term 'deprive' or 'deprivation' is of wider import than 'acquire' or 'acquisition'. Any interference with the use, enjoyment or exploitation of private property involves some deprivation: *First National Bank of SA t/a Wesbank v Commissioner of South African Revenue Services & Anor; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC), para 57. In *Greatermans Stores (1979) (Pvt) Ltd & Anor v Minister of*

Labour & Anor 2018 (1) ZLR 335 (CC), the Constitutional Court of Zimbabwe, stressing the distinction between 'deprivation' and 'acquisition', held that deprivation does not necessarily amount to acquisition, or the taking away of property by the State. It may be confined to the imposition of restrictions on the use, enjoyment or exploitation of the private property.[33] There is no question that what the second and third respondents did when implementing the currency reforms as analysed above, deprived the applicants of the right to the value of their deposit with the first respondent. What is prohibited by s 71(3)(a) and (b) is deprivation, unless certain conditions are met. Where the deprivation amounts to an acquisition as well, as contemplated by s 71(3)(c), then, among other things, compensation has to be paid.

[50] It cannot be disputed that the special property interest right such as the applicants had in relation to their deposit of USD142 000 aforesaid was one which could legitimately be taken away if the conditions listed in s 71(3)(b) of the Constitution were met. The respondents argue that all of them were met. The applicants argue that not only were they not met, but also that none of them has specifically been relied upon by any of the respondents in the present proceedings. The court finds merit in the position advanced by the applicants. Whilst the deprivation might have been in terms of a law of general application in terms of s 71(3)(a), among other things, the reasons advanced by the respondents as the purpose for which they deprived the applicants of their right, do not fall within the constitutional framework of s 71(3)(b). Whilst the third respondent explains that the currency reforms became necessary, essentially to balance the Government books, to restore market confidence, to shore up exports, to deal with the liquidity crunch, and so on, critically, none of the specific interests listed in s 71(3)(b) have been invoked or claimed. In terms of these, deprivation should be in the interests of defence, public safety, public order, public morality, public health or town and country and planning.

[51] It is not necessary to decide the question of the right to compensation following an acquisition of property as provided for in s 71(3)(c) because, contrary to the applicants' argument, what happened was mere deprivation, not acquisition. As the Constitutional Court made clear in the *Greatermans'* case above, acquisition means and implies the acquiring of the entire title of the expropriated owner, whatever the nature or extent of that right might be.

[33] At 360C – D.

The whole bundle of rights which vests in the original owner passes to the acquirer.[34] That is not what happened in the present case. The applicants were merely deprived of their right to property in breach of s 71(2) of the Constitution. But such rights were not acquired by the State as contemplated by s 71(3)(c) of the Constitution.

[ii] The impugned laws

[52] The impugned laws are so intertwined and almost inexorably linked to one another. However, what is at the epicentre of the applicants' grievance as compacted under para 6 of their draft order, was the conversion of their USD 142 000 to RTGS 142 000. Therefore, the task for this court is to locate the particular legislative provision, or provisions, in the whole gamut that has been impugned which the respondents relied on as the basis for that conversion, in contravention of s 71(2) of the Constitution. Unquestionably, it was not the whole range of those laws as cited by the applicants. The rest of them are in reality abstract questions and not the pith of their dispute. Nonetheless, all the impugned laws are set out below, those that do not call for determination being listed in synoptic fashion for concision and context, and only those to be impeached *in extenso* and verbatim. The latter category is further underlined for ease of identification.

[a] The Exchange Control Directive RT120/2018

[53] The material portions of the Exchange Control Directive RT120/2018 read as follows, the underlined paras 2.5 and 2.6 being considered by the court as the harmful sting in the whole legislative matrix:

"Dear Sir/Madam

DIRECTIVE ISSUED IN TERMS OF SECTION 35(1) OF THE EXCHANGE CONTROL REGULATIONS STATUTORY INSTRUMENT 109 OF 1996

1. Introduction

1.1 Reference is made to the Monetary Policy Statement announced by the Reserve Bank Governor on 01 October 2018, which presented measures aimed at strengthening the multicurrency system, enhancing business viability, price stability, increasing export generation capacity and improving market confidence. In order to operationalise these measures, Authorised Dealers are advised as follows:-

2. Separation of Foreign Currency Accounts (FCAs based on source of funds

[34] At 360D.

21. Given the need to enhance market confidence, promote transparency, preserve value, incentivise generators of foreign exchange, promote effective and efficient utilisation of foreign currency and strengthen the multicurrency system, with immediate effect, FCAs are now separated according to the source of funds.

2.2 In this regard, foreign currency realised from offshore or foreign currency cash deposits shall be eligible for creating into individual or corporate Nostro FCA, while all Real Time Gross Settlement (RTGS) or mobile money transfers and bond notes and coins deposits, shall be credited into the individual or corporate RTGS FCA.

2.3 While these are the broad classifications for the FCAs, Authorised Dealers shall for purposes of ease of administration and for Exchange Control accounting, separate the Nostro FCAs in terms of the source of foreign currency as follows:-

Table 1: Separation of Nostro FCA Accounts

Account Designation	Source of Funds
1. Nostro FCA (Exports)	Export proceeds
2. Nostro FCA (Offshore Loans)	Offshore loan proceeds.
3. Nostro FCA (Investments)	Offshore funds provided by a foreign investor
4. Nostro FCA (Domestic)	Foreign currency cash deposits from local trade and foreign currency inflows Into Trust Accounts.
5. Non-Resident Nostro FCA	Funded from offshore sources by non-residents.
6. Individual Nostro FCA	Funded with diaspora remittances, donations and foreign currency cash deposits.
7. Non-Governmental Organisation, Embassies & International Organisations Nostro FCA	Funded with funds sourced from offshore.
8. Bank Nostro FCA	Funded with offshore funds intended for the benefit of a bank, interest receipts, bank charges etc,

2.4 Authorised Dealers are also advised to open Non-Resident RTGS FCAs to serve the same purpose of the existing Transitory Accounts

2.5 In line with the Monetary Policy Statement, all existing account balances should be separated into Nostro FCAs and RTGS FCAs by 15 October 2018 and these accounts should be opened at no cost using information already with banks. In separating the FCAs, Authorised Dealers are required to use the Customer Due Diligence (CDC) and Know Your Customer (KYC principles to ensure a smooth transition of this process.

2.6 Authorised Dealers shall provide Exchange Control with an outcome of this exercise through the completion and submission of the Exchange Control FCA Balances Return by 1000 hrs on 16 October 2018. Thereafter, the return shall be submitted to Exchange Control on daily basis by 1000 hrs as in the current case.

[b] The legislative provisions

- Section 44B(3) and (4) of the Reserve Bank Act[35] empowered the third respondent to prescribe, through a statutory instrument, bond notes and coins as legal tender at par

[35] Inserted by the Reserve Bank of Zimbabwe Amendment Act, No. 1 of 2017

value with the USD. There is nothing in this provision which is contrary to s 71(2) of the Constitution.

- Section 44C of the Reserve Bank Act empowered the second respondent to issue an electronic currency which would become legal tender in Zimbabwe. It also empowered the second respondent to issue, in the public interest, any direction to promote the objective and smooth implementation of the measures introduced by the provision. Again, there is nothing in this provision which is contrary to s 71(2) of the Constitution.

- Section 22(1)(b) of the Finance (No. 2) Act,[36] reads:

  "(1) Subject to section 5, for the purposes of section 44C of the principal Act, the Minister shall be deemed to have prescribed the following with effect from the first effective date—[37]

  (a) … … … … ; and

  (b) that Real Time Gross Settlement system balances expressed in the United States dollar (other than those referred to in section 44C(2) of the principal Act), immediately before the first effective date, shall from the first effective date be deemed to be opening balances in RTGS dollars at par with the United States dollar; and

  (c) … … … … …;and

  (d) that, for accounting and other purposes (including the discharge of financial or contractual obligations), all assets and liabilities that were, immediately before the first effective date, valued and expressed in United States dollars (other than assets and liabilities referred to in section 44C(2) of the principal Act) shall on the first effective date be deemed to be values in RTGS dollars at a rate of one-to-one to the United States dollar; and … … …"

- Section 22(4) of the Finance Act aforesaid reads:

  "(4) For the purposes of this section—

  (a) it is declared for the avoidance of doubt that financial or contractual obligations concluded or incurred before the first effective date, that were valued and expressed in United States dollars (other than assets and liabilities referred to in section 44C(2) of the principal Act) shall on the first effective date be deemed to be values in RTGS dollars at a rate of one-to-one to the United States dollar;"

- Section 23(1) and (2) of the Finance Act aforesaid prohibited the use of any foreign currency whatsoever as legal tender in any transaction in Zimbabwe with effect from 24 June 2019. Specifically singled out for mention, for the avoidance of doubt, were the British pound, the USD, the South African rand and the Botswana pula. The

[36] No. 7 of 2019.
[37] 22 February 2023.

Zimbabwe dollar was declared the sole legal tender. However, the prohibition on the use of foreign currency would not extend to the operation of Nostro FCAs from which foreign payments could still be made. The prohibition also would not affect the requirement to pay in foreign currency certain import taxes on luxury goods. The court finds nothing that is inherently contrary to s 71(2) of the Constitution.

[F] DISPOSITION

[54] The aforesaid paras 2.5 and 2.6 of the Exchange Control Directive RT120/2018 are impeachable because, among other things, they, together with the legislative provisions specifically singled out, were collectively the device by which the second and third respondents improperly interfered with the contractual rights and obligations as existing between the applicants and the first respondent, resulting in, among other things, the deprivation of the applicants' right to property in breach of s 71(2) of the Constitution. Additionally, paras 2.5 and 2.6 of the Exchange Control Directive RT120/2018 are *ultra vires* s 35(1) of the Exchange Control Regulations, 1996, in that they purported to arrogate to themselves the power which the Exchange Control Regulations did not have and, in the process purported to invade rights protected under s 71(2) of the Constitution. Accordingly, the following orders are hereby made:

i/ Paras 2.5 and 2.6 of the Exchange Control Directive RT120/2018 dated 4 October 2018 are *ultra vires* s 35(1) of the Exchange Control Regulations, 1996, SI 109 of 1996, and are hereby set aside;

ii/ Subject to s 175(1) of the Constitution of Zimbabwe—

1 The conversion of the amount of USD142 000-00 standing to the credit of the applicants' savings account No. 1005428905 with the first respondent as at 28 November 2016 violated s 71 of the Constitution.

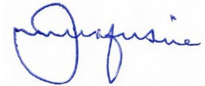
2 Paras 2.5 and 2.6 of the Exchange Control Directive RT120/2018 aforesaid violate s 71 of the Constitution.

3 Section 22(1)(b) and (d) and s 22(4)(a) of the Finance (No. 2) Act No. 7 of 2019 violate s 71 of the Constitution and are hereby set aside.

4 The first respondent shall pay the applicants the sum of USD142 000, together with interest thereon at the rate of 5% per annum from 28 November 2016 to the date of payment.

5 The respondents shall the pay costs of suit jointly and severally, the one paying the others to be absolved.

15 February 2023



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Mawere Sibanda, first respondent's legal practitioners
GN Mlotshwa & Company, second respondent's legal practitioners
Civil Division of the Attorney-General's Office, third respondent's legal practitioners