PENELOPE DOUGLAS STONE
and
RICHARD HAROLD STUART BEATTIE
Trading as THE STONE/BEATTIE STUDIO
versus
CENTRAL AFRICAN BUILDING SOCIETY
and
RESERVE BANK OF ZIMBABWE
and
MINISTER OF FINANCE AND ECONOMIC DEVELOPMENT

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 7 May 2019 & 14 May 2020

Opposed Application

T. Biti for the applicant
G. M. Nyangwa for the first respondent
L. Uriri for the second respondent
Ms *P. Macheka* for the third respondent

ZHOU J: This is an application for an order that the first respondent pays a sum of US$142 000.00 together with interest thereon at the rate of five percent per annum from 28 November 2016 to the date of payment within seven days from the date of this order. In the alternative, the applicant asks that the first and second respondents be ordered to pay the said sum of money jointly and severally the one paying the other to be absolved. The further alternative relief is for the Exchange Control Directive No. R120/2018 to be declared a nullity or, in the further alternative, that s 44B(3) and (4) of the Reserve Bank of Zimbabwe Act [*Chapter 22:15*] be declared unconstitutional. Costs of suit are in the main sought against the first respondent and, in the alternative, against all the respondents jointly and severally the one paying the others to be absolved. The application is opposed by all the respondents.

The factual background to this matter is as follows. The applicants are partners in a firm of architects trading under the name The Stone/Beattie Studio. The partnership has a savings account, number 1005428905, with the first respondent which was opened in 2011. This account was opened after the introduction of the multicurrency system which became operational in February 2009. The account was a United States Dollar account.

On 4 May 2016 the Governor of the second respondent issued a press statement under the title: "**Measures to deal with cash shortages whilst simultaneously stabilising and stimulating the economy.**" In that statement the Governor of the second respondent acknowledged the prevailing shortage of cash, the factors contributing to such shortage and the impact that these factors had had on the economy, among other issues. He announced some monetary policy measures instituted to address the challenges which he highlighted as afflicting the multi-currency system. In paragraph 13 of the written statement the Governor announced that the Reserve Bank had established a USD200 million foreign exchange and export incentive facility which was supported by the African Export-Import Bank (Afreximbank) to provide cushion on the high demand for foreign exchange and to provide an incentive facility of 5 percent on all foreign exchange receipts, including tobacco and gold sale proceeds. He proclaimed that in order to guard against possible abuse of the facility through capital flight the facility was to be granted to qualifying foreign exchange earners in bond coins and notes which would continue to operate alongside the currencies within the multi-currency system and at a par with the United States Dollar. The statement also promised the introduction of the Zimbabwe Bond Notes of denominations of $2, $5, $10 and $10 in due course to facilitate portability given the magnitude of the USD200 million backed facility. The facility would, further, be used to discount trade related paper in order to provide liquidity for business trading operations. The BOND currency was made part of the family of currencies in the multi-currency basket. In the same statement the Governor announced that the process to configure the RTGS system into the multi-currency was already underway. It did come, in that on 31 October 2016 the Presidential Powers (Temporary Measures) Regulations, 2016 which were contained in Statutory Instrument 133 of 2016 were enacted in terms of s 2 of the Presidential Powers (Temporary Measures) Act [*Chapter 10:20*].

As at the end of October 2016 the applicants' account number 1005428905 had a credit balance of US$142 000. In response to the enactment of the regulations referred to above the

applicants wrote a letter dated 28 November 2016 to the first respondent. The material portions of the letter are as follows:

> "RE: THE STONE/BEATTIE STUDIO SAVINGS ACCOUNT No. 1005428905
>
> The attached printed statement of the above account dated today's date records that CABS is the custodian of US$142 000.00 (one hundred and forty two thousand United States Dollars) deposited and held on behalf of The stone/Beattie Studio.
>
> You are advised there will be no further deposits into or withdrawals from this account after today's date until written instruction is given to you by the partners named below being the authorized signatories, or their successors.
>
> Yours faithfully"

The letter is signed by the two applicants. A statement showing a credit balance which was attached to the letter is part of the documents attached to the founding affidavit. The applicants have also adduced proof of delivery of that letter. On 4 October 2018 the second respondent issued the Exchange Control Directive RT120/2018 which separated what was therein referred to as the RTGS Foreign Currency Account from a Nostro Foreign Currency Account based on the source of funds. The effect of this was to categorise the applicants' account as an RTGS Foreign Currency Account. Money from the applicants' account could only be paid in the Bond note (and bond coin), but not in the United States dollar which was the currency in which it is denominated. By letter dated 17 October 2018 written on their behalf by their legal practitioners to the first respondent, the applicants asked to withdraw the sum of US$142 000.00 from their account or, alternatively to have it transferred into a Nostro Foreign Currency Account. The concept of the Nostro Foreign Currency Account came into existence following the second respondent's Monetary Policy Statement of 1 October 2018. According to the applicants the letter of demand was written after they were advised by the first respondent that they could only be paid their money in the Bond note currency.

The applicants' case

The applicants' case is that they are entitled to payment of the sum of US$142 000.00 on the basis of the banker/customer relationship that exists between them and the first respondent. In the alternative, should this court find that the first respondent is excused from paying the money

in the currency of the United States in which it was reflected in their account by reason of the Exchange Directive No. R120/2018 issued by the second respondent, that that Directive be found to be unconstitutional for being unlawful and grossly irrational and *ultra vires* the provisions of the enabling Act. In the further alternative, the applicants contend that s 44B(3) and (4) of the Reserve Bank Act contravene the provisions of s 71 and s 56 of the Constitution of Zimbabwe Amendment (No. 20) Act 2013 which, respectively, protect property rights and equality before the law and the right to equal protection and benefit of the law.

The first respondent's case

The first respondent contends that the applicants' cause is founded upon a falsehood in that they allege that they instructed the first respondent to preserve their balance in the currency of the United States yet the letter relied upon does not state so. A second argument raised *in limine* in the opposing affidavit but does not appear to have been pursued in argument is that the application was not one for an order *ad pecuniam solvendam* but for a declaratur and, further, that the requirements for declaratory relief were not met. The first respondent states that its obligation as the banker is "to pay on demand the equivalent of the money deposited by the applicants". The first respondent advances the further contention that it could not be enjoined to pay the applicant in the currency of the United States because such payment would be contrary to the Exchange Control Directive RT120/18 issued by the second respondent on 4 October 2018 by which all credit balances were to become RTGS balances unless they were converted into Nostro Foreign Currency Accounts. In this respect the respondent's case is that at law it is under obligation to comply with the terms and conditions of its registration as a banking institution. For these reasons the first respondent's case is that the amount in the applicants' account is payable in the RTGS or Bond currencies.

Second respondent's case

The second respondent's case is that it exercised its powers in terms of the law by issuing the Directive referred to above. It also states that the Bond note (and coin) is not a currency and, further, that Bond notes are legal tender in Zimbabwe. Second respondent states that there is "no such thing as an RTGS balance in our law, in much the same way as there is no currency in Zimbabwe known as the bond note (or coin). The second respondent's averments that the Bond

note (or coin) is not a currency are contradictory because the impugned Directive talks of making the Bond note part of the family of currencies in the multi-currency basket.

Third respondent's case

The third respondent's case is that the dispute in this case is a contractual one between the applicant and first respondent and that he was improperly joined in this matter. He therefore objected to his joinder. According to the third respondent the dispute revolves upon an interpretation of the contractual terms arising out of the agreement between applicant and first respondent.

Issues for determination

The following issues are material to the determination of this matter:

1. Whether the third respondent was improperly joined in this application and, if so, the effect of such joinder on the proceedings.
2. The nature of the relationship between the applicant and first respondent and the implications thereof on the relief which is being sought.
3. Whether the Exchange Control Directive RT120/2018 is unconstitutional and, if so, the implications thereof.
4. Whether s 44B(3) and (4) of the Reserve Bank of Zimbabwe Act [*Chapter 22:15*] are unconstitutional and, if so, the implications thereof.

There are other matters which were raised which can be easily disposed of as they do not quite affect the substance of the dispute between the parties. The debate on whether or not the applicants' letter instructed the first respondent to preserve the applicants' account is not material. The letter is very clear that the applicants did not intend any other money to be deposited into or withdrawn from that account without their written authority. No amounts were deposited into or withdrawn from the account after that letter. Determination of the obligations of the first respondent in respect of that account do not depend on whether the account was ring-fenced or not but on the relationship of the parties. The precise import of the applicants' letter of 28 November 2016 is a question of interpretation of that letter. No incorrect factual statement arising out of its interpretation by the applicants who allege that their intention was to have their account preserved has been established to justify the allegation that there is a false statement in the affidavit. The submission that the application is for declaratory relief arises from the heading of the application which refers to it as one for an order *ad pecuniam solvendam*. The first respondent may be excused

for taking this point because, clearly, the alternative relief sought as set out in the draft order is not just an order to pay a sum of money but, in the alternative, includes a declaration that the Exchange Control Directive and the cited provisions of the Reserve Bank Act are unconstitutional. However, nothing turns on this point as clearly the question as to whether the declarations sought are supportable is one that pertains to the merits of the application. In relation to the banker-customer relationship of the first respondent and the applicant there is no declaratory relief being sought. Only consequential relief is being sought based on the alleged facts of the matter.

The joinder of the third respondent

The third respondent states that he was improperly joined in this matter because he was not a party to the contractual relationship between the applicant and first respondent. A party may be joined in proceedings before a court if that party has a direct and substantial interest in the subject matter and outcome of the application. The authorities show that what is required is a legal interest as opposed to a financial or commercial interest which is only an indirect interest in such litigation, see *Zimbabwe Teachers Association & Ors* v *Minister of Education* 1990 (2) ZLR 48(HC) at 52F-53E and the cases cited therein. The third respondent's objection to his joinder is based on the relief which is sought in the main by the applicant. But the alternative relief seeks the annulment of a Directive issued by the second respondent as well as a declaration that cited sections of the Reserve Bank of Zimbabwe Act are invalid for contravening the Constitution. The Administration of that Act has been assigned to the third respondent who has a lot of powers in relation to the appointment of the Governor, Deputy Governors and Directors of the second respondent, see, for example, s 14(1); s 15(2); s 17(1)(a); s 17(2); s 17(3); s 18(1); s 1892); s 19(1); s 22(1); s 24(1)(a) and s 64. He, in fact, is the authority responsible for supervising the second respondent. He therefore has a direct and substantial interest in the subject matter and outcome of the instant application. The fiscal powers and policies of the third respondent inform the monetary powers of the second respondent which are impugned herein. Accordingly, he has been properly joined in this matter. The objection to the joinder is therefore dismissed.

The relationship of the applicant and first respondent and its implications

Both the applicant and the first respondent accept that theirs is a banker customer relationship. The relationship has its foundation in contract, hence the general principles of the

law of contract apply to it. It, however, has its unique features which would distinguish it from other special contractual relationships. The relationship is explained in a leading text on Banking Law, *Paget's Law of Banking 13th Ed.*, by M. Hapgood QC (Editor) at 145, as follows:

> "The relationship of a banker to customer is one of contract. It consists of a general contract, which is basic to all transactions, together with special contracts which arise only as they are brought into being in relation to specific transactions or banking services. The essential distinction is between obligations which come into existence upon the creation of the banker-customer relationship and obligations which are subsequently assumed by specific agreement; or, from the standpoint of the customer, between services which a bank is obliged to provide if asked, and services which many bankers habitually do, but are not bound to, provide."

In the case of *Standard Bank of South Africa* v *Oneanate Investments (Pty) Ltd* 1995 (4) SA 510(C) at 530 the Court examined how this relationship of banker-customer developed to its current status:

> "The law treats the relationship between banker and customer as a contractual one. The reciprocal rights and duties included in the contract are to a great extent based upon custom and usage. Although historically the original objective of a depositor was to ensure the safekeeping of his money, over time jurists have considered characterizing and explaining the basic relationship as one of *depositum*, *mutuum or* agency. All of these approaches have on analysis proved to be inadequate. It is now accepted that the basic, albeit not sole, relationship between banker and customer in respect of a current account is one of debtor and creditor. In the landmark 1848 case of *Foley v Hill (1843-60)* All ER Rep 16 (1848) 2 HL Cas 28 it was strenuously argued that the banker should be treated as an agent with authority to use his customers' money at his own discretion. The argument was rejected in favour of the finding that the nature of the ordinary relationship was one of debtor and creditor. The bank makes use of the money which the customer has deposited:
>
> > 'It is then the money of the banker . . . he makes what profit he can, which profit he retains for himself . . . he has contracted, having received that money to repay to the principal when demanded a sum equivalent to that paid into his hands.'"

In situations where the bank collects on behalf of a customer the proceeds of a cheque the relationship remains the same, as articulated by ATKIN LJ in *Joachimson* v *Swiss Bank Corporation* 1921 (3) KB 110 at 127:

> "The bank undertakes to receive money and collect bills for its customer's account. The proceeds so received are not to be held in trust for the customer, but the bank borrows the proceeds and undertakes to repay them. The promise to repay is to repay at the branch of the bank where the account is kept, and during banking hours. It includes a promise to repay any part of the amount due against the written order of the customer addressed to the bank at the branch, and as such written orders may be outstanding in the ordinary course of business for two or three days, it is a

> term of the contract that the bank will not cease to do business with the customer except upon reasonable notice. The customer on his part undertakes to exercise reasonable care in executing his written orders so as not to mislead the bank or to facilitate forgery. I think it is necessarily a term of such a contract that the bank is not liable to pay the customer the full amount of his balance until he demands payment from the bank at the branch at which the current account is kept."

Where a current account is in credit money deposited into the account ceases to belong to the account holder. The banker becomes the owner of the money and is free to use it as it pleases, as long as it pays the equivalent thereof on demand, see *Zimbabwe Revenue Authority & Anor* v *Murowa Diamonds (Pvt) Ltd* 2009 (2) ZLR 213(S); *Standard Chartered Bank of Zimbabwe Ltd* v *China Shougang International Ltd* 2013 (2) ZLR 385(S) at 388; *ABC Bank* v *Mackie Diamonds* SC 23-13.

But the kind of debtor-creditor relationship that exists between a banker and its customer is a complex one and has different facets. MOSENEKE AJ (as he then was) described the relationship as a "conspicuously complex collection of juristic relationships", see *Standard Bank of South Africa Limited* v *ABSA Bank Limited* 1995 (2) SA 740(T) at 746G-H. That is so because within that relationship there may be other contractual dimensions such as in situations where the bank offers custodial services to its customers in which case the relationship becomes one of *depositum* and in a case where the account becomes overdrawn in which case the bank becomes the creditor and the customer becomes the debtor. It is in this context that the debtor-creditor relationship of a banker and its customer has been characterized as a contract *sui generis*, see *G S George Consultants and Investments (Pty) Ltd* v *Datasys (Pty) Ltd* 1988 (3) SA 726(W) at 734-736; Pen & Shea, *The Law Relating to Domestic Banking 2nd Ed.* p. 107; *Malan on Bills of Exchange, Cheques and Promisory Notes* p. 296. It is a debtor-creditor relationship in a class of its own, with its own unique facets which demand careful approach when considering the obligations of the parties to it. More than many other such relationships, the banker-customer relationship is the subject of regulation by different statutory bodies and constitutional entities such as the first respondent.

This court is clear that in this case the obligation of the first respondent is to repay the equivalent sum of money and not the exact notes or coins deposited into the bank. Further, some of the money may not have been deposited as notes or coins but could have been transferred from other financial institutions as suggested by the respondent. Whichever way the money was credited into the account of the applicants is irrelevant for the purposes of determining the

obligations of the first respondent to the applicant because the value of the money is reflected in the credit balance. It is US$142 000.00. The first respondent accepts, by reference to the case of *Equitable Trust and Insurance Company of South Africa Limited* v *Registrar of Banks* 1957 (2) SA 167, cited in para 30 of its heads of argument, that "a deposit of money on the understanding that the same amount, but not the same coins and notes, will be returned is not a *depositum* but rather a loan." 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 the Botswana Pula then that would have been the currency of the account. The debt which the first respondent owes to 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 authorities without recourse to the holder of the account. In such a case the debtor will not be repaying the debt. A debtor cannot unilaterally change the value of its indebtedness.

But the situation of the first respondent is complicated by the authority which the second respondent exercises over it as the monetary authority of this country. The first respondent is correct in its submission that it could not defy the directive of the second respondent. The second respondent is established in terms of s 317 of the Constitution of Zimbabwe and its objects are set out in the same section, which states:

"(1) There is a central bank, to be known as the reserve Bank of Zimbabwe, whose objects are –

(a) to regulate the monetary system;

(b) to protect the currency of Zimbabwe in the interest of balanced and sustainable economic growth; and

(c) to formulate and implement monetary policy.

(2) An Act of Parliament may provide for the structure and organization of the Reserve Bank of Zimbabwe and confer or impose additional functions on it."

In issuing the impugned Exchange Control Directive No. RT120/2018 the second respondent was exercising its powers as conferred by the Constitution and the Reserve Bank of Zimbabwe Act [*Chapter 22:15*]. This court accepts that as long as the Exchange Control Directive

has not been set aside the first respondent could not comply with the applicant's demand without incurring the penalties and other consequences threatened by the second respondent. On this basis, the court cannot order the first respondent to make the payment in the face of the Exchange Control Directive which is to the contrary, hence the need for an inquiry into the constitutionality of that directive and/or the section in terms of which it was issued.

The constitutionality of Exchange Control Directive RT120/18

On 4 October 2018 the second respondent issued **Exchange control Directive RT120/18** which was addressed to all Authorised Dealers. The Directive was issued in terms of s 35(1) of the Exchange Control Regulations, 1996 which are contained in Statutory Instrument 109 of 1996. The material portions of the Directive read as follows:

> "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 operationalize these measures, Authorised Dealers are advised as follows:
>
> 2. **Separation of Foreign Currency Accounts (FCAs) based on source of funds**
>
> 2.1 Given the need to enhance market confidence, promote transparency, preserve value, incentivize generators of foreign exchange, promote effective and efficient utilization 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 realized from offshore or foreign currency cash deposits shall be eligible for crediting into the individual or corporate **Nostro FCA**, while all Real Time Gross Settlement or mobile money transfers and bond notes and coins deposits, shall be credited into the individual or corporate RTGS FCA.
>
> 2.3 . . .
>
> 2.4 . . .
>
> 2.5 In line with the Monetary Policy Statement, all existing account balances should be separated into Nostro FCAs and RTGS FCAs by 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 (CDD) and Know Your Customer (KYC) principles to ensure a smooth transition of this process."

The applicant challenges the constitutional validity of the Directive on various grounds which include illegality, irrationality, and gross unreasonableness. The review sought is clearly not under the common law but under the constitutional law of Zimbabwe and these grounds must be understood in that context. Constitutional review differs from common law review, as was held in the case of *Commissioner of Customs and Excise* v *Container Logistics (Pty) Ltd; Commissioner of Customs and Excise* v *Rennies Group Ltd t/a Renfreight* 1999 (3) SA 771(SCA), 1999 (8) BCLR 833(SCA), para 20:

> "Judicial review under the Constitution and under the common law are different concepts . . . Constitutional review is concerned with the constitutional legality of administrative action, the question in each case being whether it is or is not consistent with the Constitution, and the only criterion being the Constitution itself. Judicial review under the common law is essentially also concerned with the legality of administrative action but the question in each case is whether the action under consideration is in accordance with the behests of the empowering statute and the requirements of natural justice. The enquiry in this regard is not governed by a single criterion. The grounds of review which the courts have developed over the years can never be regarded as a *numerus clausus* for the simple reason that administrative law is not static. As new notions develop and take root, so must new measures be devised to control the exercise of (official) functions . . . "

However, the distinction is now only of academic interest given the pronouncement by the Constitutional Court of South Africa in the case of *Ex Parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa* 2000 (2) SA 674(CC), 2000 (3) BCLR 241(CC). In that case the Constitutional Court of South Africa held that given the entrenchment of the supremacy of the Constitution there is only one system of law and that law is shaped by the Constitution. All law, including the common law, derives its authority from the Constitution and is subject to constitutional control. There are therefore no separate common law grounds of review which are distinct from the constitutional grounds of review. There is remarkable merit in this interpretation of the relationship between the constitution and the common law scope of judicial review which commends itself. I respectfully endorse the approach embraced by the Constitutional Court of South Africa for the reason that the constitutional supremacy clause in this jurisdiction is worded in similar terms to that in the Constitution of the Republic of South Africa. Thus in considering the legality, rationality and reasonableness of the

impugned Exchange Control Directive the court must measure it against the constitutional provisions.

The constitutional provisions

The Constitution of Zimbabwe enshrines the principle of constitutional supremacy firstly as a rule in s 2 and, secondly, as one of the founding values and principles upon which the Republic is founded in s 3. The other "founding values and principles enshrined" include the rule of law, fundamental human rights and freedom and good governance". Section 2 of the Constitution provides as follows:

> "2 **Supremacy of Constitution**
>
> (1) This Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency.
> (2) The obligations imposed by this Constitution are binding on every person, natural or juristic, including the State and all executive, legislative and judicial institutions and agencies of government at every level, and must be fulfilled by them."

Section 3 (1) provides that: "Zimbabwe is founded on respect for the following values and principles":

> "(a) supremacy of the Constitution;
> (b) the rule of law;
> (c) fundamental human rights and freedoms;
> (d) . . .
> (e) . . .
> (f) . . .
> (g) . . .
> (h) good governance . . ."

The entrenchment of constitutional supremacy as a rule and as one of the foundational values and principles of our Constitution has empowered the courts in this jurisdiction in the exercise of their judicial review powers to interrogate, analyse and examine the basis upon which every decision made or action taken by the executive, legislative, judicial arms of government and by other state agencies to ensure compatibility with the Constitution and the values which underpin

it. The idea is to ensure that every decision or conduct does not impinge upon fundamental rights or other provisions and values and principles of the Constitution. These values and principles must therefore shape the interpretation of the Constitution, including assessment of the constitutional validity of any law, practice, custom or conduct. The supremacy of the Constitution means that every law, practice, custom or conduct is subservient to all the provisions of the Constitution, including the founding values and principles articulated in s 3. The Exchange Control Directive of the first respondent which is an agency of the State is therefore also subject to the supremacy of the Constitution and its validity can be tested using the standard of the Constitution.

The rule of law (which includes in it the principle of legality) is a principle that is meant to circumscribe the power of those in authority by placing it under control in order to prevent abuse or arbitrary use of power. The principle has its foundation in the common law but obviously assumes a different status because of its constitutionalisation by the current Constitution. It has both procedural and substantive components. The procedural aspect of the rule of law means that all law and conduct must be rationally connected to a legitimate government purpose, otherwise it would be arbitrary. As was held by the Constitutional Court of South Africa, in *Prinsloo* v *Van der Linde & Another* 1997 (3) SA 1012(CC), 1997 (6) BCLR 759(CC) at para 25: "(T)he constitutional state . . . should not regulate in an arbitrary manner . . . that serve(s) no legitimate governmental purpose, for that would be inconsistent with the rule of law . . . ." In the case of *Pharmaceutical Manufacturers Association of SA: In re: ex parte President of the Republic of South Africa* 2000 (2) SA 674(CC), para 85, the Constitutional Court of South Africa expressed this principle as follows:

> "(I)t is a requirement of the rule of law that 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. It follows that in order to pass constitutional scrutiny the exercise of public power by the executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action."

A court faced with a challenge to action or a decision founded on rationality must examine the means selected and employed to determine whether they are rationally related to the objective sought to be achieved, *Albutt* v *Centre for Violence and Reconciliation and Others* [2010] ZACC 4, 2010 (3) SA 293(CC), 2010 (5) BCLR 391(CC) para 51; *Democratic Alliance v President of the Repunlic of South Africa and Others* [2012] ZACC 24 at p. 23.

The substantive component of the rule of law directs that government, its functionaries or any other authority for that matter, must respect the individual's basic rights, see Iain Currie and J. de Waal, *The Bill of Rights Handbook 5th Ed.* pp. 12-13. This aspect of the rule of law has also been entrenched as a rule in s 44 of the Constitution of Zimbabwe as follows: "The state and every person, including juristic persons, and every institution and agency of the government at every level must respect, protect, promote and fulfil the rights and freedoms set out in this Chapter."

In light of the constitutional provisions, every decision taken by the respondents should not exceed the bounds of rationality, but must comply with the doctrine of legality which is encapsulated in the value and principle of the rule of law. If it is found to be irrational or arbitrary then it would fail the legality test and is liable to be judicially reviewed and set aside for being unconstitutional, see *Movement for Democratic Change and Another* v *Chinamasa and Another NNO* 2001 (1) ZLR 69(S); also the South African cases of *Albutt v Centre for the Study of Violence and Reconciliation and Others* 2010 (3) SA 293(CC) at para 49; *Minister of Military Veterans* v *Motau* 2014 (5) SA 69(CC) at para 69; *Democratic Alliance* v *Ethekwini Municipality* 2012 (2) SA 151(SCA) at para 21; *Democratic Alliance* v *President of the Republic of South Africa and Others* Case No. 24396/2017 (High Court of South Africa Gauteng Provincial Division, Pretoria) (Per VALLY J)at p. 11.

Reasonableness in the context of constitutional review is concerned with the merits of the impugned decision, in this case the Exchange Control Directive No. RT120/18. A decision would fail to pass the test of reasonableness if it is not "one that a reasonable decision-maker could reach", see *Bato Star Fishing (Pty) Ltd Minister of Environmental Affairs and Tourism and Others* [2004] ZACC 15, 2004 (4) SA 490(CC), 2004 (7) BCLR 687(CC); *Democratic Alliance v President of the Republic of South Africa and Others* [2012] ZACC 24 at p. 23. In other words, a decision would transcend the bounds of reasonableness if a reasonable person applying their mind thereto would not have taken such a decision.

Application of the constitutional provisions and principles to the facts

The impugned Exchange Control Directive has retrospective application, in that it arbitrarily converts an existing United States Dollar account balance into something else by arbitrarily imposing an RTGS value on the United States dollar value of the credit balance in the applicants' account. Equality of value is not something that can be arbitrarily or capriciously

imposed in the manner that the Governor of the first respondent sought to do in relation to the balance in the applicants' account. The value of money is its acceptability and can only be fairly determined by the market. If the first respondent intended to introduce an RTGS account with a value equal to or different from the United States dollar account held by the applicant then that decision ought to have affected future transactions rather than existing balances. 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 it has always been. The applicants would have been entitled to withdraw United States dollars from their account prior to this Directive being issued. The Directive effectively disables any withdrawal of United States dollars from that account. They can only withdraw bond notes. That reality cannot be altered by renaming the account as an RTGS FCA. This drastic deprivation of existing rights is not what is contemplated by s 317 of the Constitution of Zimbabwe as constituting regulation of the monetary system, protecting the currency of Zimbabwe and formulating and implementing monetary policy.

For it to pass the test of rationality conduct must not only be legally but also morally justified; it must be shown to be just, reasonable or correct or defensible", not just by reference to the procedure invoked but also by reference to its merit and outcome, see *Carephone (Pty) Ltd* v *Marcus NO and Others* 1999 (3) SA 304 (LAC), para 31-32. The democratic founding values of accountability, responsiveness, justice and transparency would be violated by a decision which, without recourse to any affected individual, businessperson or investor, changes the currency of money in a bank. If the decision of the first respondent was to be allowed to stand the effect of it is that the applicants money is now Z$142 000 which is probably less than 4% of its value at the prevailing official rates which this court cannot ignore. A decision which reduces US$142 000 to a small fraction of its value cannot be defended in a democratic society founded upon the values enshrined in the Constitution of Zimbabwe. It in substance, manifestly violates the right to property.

Further, the effect of the first respondent's directive is to make the second respondent breach the contractual terms of its banker-customer relationship as explained above. This is achieved by turning the applicant's United States Dollar account into an "RTGS FCA", a contradiction in itself because RTGS is not a foreign currency and one wonders how it could be hosted in a foreign currency account. The sovereignty of any Government to determine its

currency cannot extend to arbitrarily changing the currency of money in a bank to another currency as that would not only be unlawful deprivation of property in contravention the right protected in s 71(2) of the Constitution of Zimbabwe but compels a party, the first respondent, to breach its contractual obligations. It would be contrary to all notions of justice and fairness, and to the rule of law and good governance if the State or the first respondent was to be allowed to simply rename money in an account and decide that it has become something else different from what is in the account. This makes the Exchange Control Directive not only arbitrary and irrational, but fail the test of reasonableness. The decision is an incursion of vested rights. No reasonable person who had applied his or her mind to the matters in question would have taken the decision which has the effect of eroding a person's investment or savings in this manner. When regard is had to the loss which would be involved if the applicants were to be paid a sum of Z$142 000 or even the 'equivalent' thereof at the official exchange rate the Exchange Control Directive reflects insensitivity and unresponsiveness which offends against the values espoused by the Constitution.

The Constitution in s 1 proclaims that Zimbabwe is, *inter alia*, a democratic Republic. In the preambular section "the need to entrench democracy" is recognized. Good governance which is enshrined in s 3(1)(h) is an essential feature of democracy. Good governance which, according to s 3(2), binds the State and all institutions, includes "transparency, justice, accountability and responsiveness'. The value of good governance is a new feature of our constitutional dispensation having been introduced by the 2013 Constitution. It demands that a new approach to decision-making be embraced by all arms of the government and other public institutions. Power must be exercised with sensitivity to fairness and justice, and in a manner that does not unnecessarily deprive persons of their rights. The Exchange Control Directive is, in my view, illegal, irrational and unreasonable for offending against the rule of law and the constitutional values of good governance. It is therefore unconstitutional.

The constitutionality of s 44B (3) and (4) of the Reserve Bank Act

In view of the conclusion reached in respect of the constitutionality of Exchange Control Directive RT120/2018, it is unnecessary for the court to determine the constitutionality of s 44B (3) and (4) of the Reserve Bank Act. This is so because the matter stands to be disposed of on the basis of this court's conclusion that the impugned directive is unconstitutional and consequently invalid.

Costs

The applicants have succeeded in obtaining the relief which they sought before this court. There are no special reason warranting departure from the usual conclusion that costs should follow the result. The applicants are therefore entitled to recover their costs of suit.

Disposition

In the result, IT IS ORDERED THAT:

1. Exchange Control Directive No. R120/2018 issued by the first respondent through its Governor on 4 October 2018 be and is hereby declared to be invalid, and is accordingly set aside.
2. The first respondent shall pay to the applicant the sum of US$142 000.00 in the currency of the United States of America or transfer that amount into a Nostro Foreign Currency Account as may be directed by the applicants within seven days from the date of this order together with interest thereon at the prescribed rate of 5 percent per annum from the 17th October 2018, being the date of the letter of demand, to the date of full payment or transfer into the Nostro Foreign Currency Account as directed herein.
3. The respondents shall pay the costs jointly and severally the one paying the others to be absolved.

Tendai Biti Law, applicants' legal practitioners
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