

# BILL WATCH 50/2019

[29th September 2019]

## Further Government Measures To Outlaw Use of US Dollars & Other Foreign Currencies in Domestic Transactions

### Background

Three months ago, when the Minister of Finance and Economic Development gazetted SI 142/2019 [\[link\]](#) declaring RTGS dollars to be the only legal tender in Zimbabwe, press headlines referred to the "outlawing" of the use of the US dollars and other foreign currencies in Zimbabwe. Ministers and officials said the same thing.

In Bill Watch 32/2019 [\[link\]](#) dated 24th June – the same day SI 142 was gazetted – Veritas, however, cautioned that the SI did not in law forbid the use of foreign currencies in Zimbabwe and was, therefore, not as far-reaching as its makers had perhaps intended.

### Latest Measures to Outlaw Use of Foreign Currency

The Government has now taken further steps to outlaw the use of all foreign currencies in domestic Zimbabwean transactions. In a Government Gazette Extraordinary released after close of business on Friday 27th June two closely-linked statutory instruments made by the President were published, effective immediately:

SI 213/2019 – Presidential Powers (Temporary Measures) (Amendment of Exchange Control Act) Regulations, 2019 [\[link\]](#)

This is a ten-page set of regulations made by the President in which he amends the Exchange Control Act to expand his own regulation-making powers under the Act to authorise him to make regulations for "*the enforcement of the exclusive use of Zimbabwe dollar for domestic transactions*". The term "domestic transaction" is not defined.

Other amendments to the Act by the SI introduce a detailed "civil penalty" system under which the Reserve Bank is empowered to impose civil penalties for contraventions of regulations made under the new power. The Schedule containing the provisions for civil penalties take up 8 pages of small print [\[some of them are probably not legal\]](#)

*The enabling statutory authority cited for the regulations is the Presidential Powers (Temporary Measures) Act. In Veritas' view this Act is unconstitutional. See comment later in this bulletin.*

SI 212/2019 – Exchange Control (Exclusive Use of Zimbabwe Dollar for Domestic Transactions) Regulations, 2019 [\[link\]](#)

This is a much shorter set of regulations in which the President uses the new power he has given himself by SI 213 to enact the following general prohibition in section 3(1):

*"3.(1) Subject to section 4, no person who is a party to a domestic transaction shall pay or receive as the price or the value of any consideration payable or receivable in respect of such transaction any currency other than the Zimbabwean dollar."*

Section 3(2) is a continuation of the general prohibition, commencing "In particular" and giving specific examples of forbidden activities. Section 3(3) makes any person contravening the prohibition liable to civil penalties to be imposed by the Reserve Bank in terms of the Exchange Control Act as amended by SI 213. *[Again the form of the civil penalties is probably not legal.]* There is a definition of "domestic transaction" which only becomes comprehensible when read with the details in section 3(3).

Section 4 lists transactions excluded from the scope of the prohibition, including transactions conducted through authorised dealers [e.g., banks] for which payments in foreign currency are permitted by Exchange Control directives. Section 5 allows sales of petrol, diesel and other petroleum products to Guests of State [diplomats and staff of gazetted regional or international organisations] at fuel outlets specially licensed for the purpose by the Zimbabwe Energy Regulatory Authority.

### **Legal Issues**

Are the two statutory instruments legally assailable? If, as we think, the Presidential Powers (Temporary Measures) Act is unconstitutional and void, and if a court were to so decide, the legal bases of both SI 213/2019 and SI 212/2019 would disappear and they, too, would be void and of no effect in law.

#### **Is the Presidential Powers (Temporary Measures) Act constitutional?**

Veritas' position on the Presidential Powers (Temporary Measures) Act has been repeatedly stated in our bulletins: we believe the Act became unconstitutional and void when the present Constitution came into force in August 2013. And it should not be used to make regulations amending Acts of Parliament.

#### **A recent and highly relevant High Court decision**

Only nine days before SI 213 was gazetted, a judgment handed down in the High Court decided, that section 3 of the Finance Act is unconstitutional to the extent that it enables the Minister of Finance and Economic Development to amend a rate of tax stated in another provision of the same Act. Parliament, ruled Justice Zhou, cannot delegate to a Minister its own primary power to amend an Act of Parliament.

In addition, as a matter of principle it is highly undesirable that measure of such impact should be enacted through regulations rather than an Act of Parliament. They should be subjected to full analysis, questioning and debate by both Houses of Parliament before enactment.

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