

MFUNDO MLILO
versus
MINISTER OF TRANSPORT AND INFRASTRUCTURE DEVELOPMENT
and
MINISTER OF FINANCE AND ECONOMIC PLANNING

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE, 12 April 2021 and 18 January 2023

Opposed application

Mr T Biti, for the applicant
Mr D Jaricha, for the respondents

CHINAMORA J:

On 14 April 2021, after reading documents filed of record and hearing Counsel for the applicant and for the respondents, I pronounced the following order:

“IT IS ORDERED THAT:

1. The first respondent’s actions, on 21 September 2020, in impounding the applicant’s Subaru motor vehicle, without warrant of court order, were unlawful, null and void
2. Part 1, relating to items 1 to 4 being fees that are expressed in United States Dollars, of the Vehicle Registration and Licensing (Amendment Regulations 2020) (No 21), published as Statutory Instrument 166 of 2020 be and is hereby declared to be *ultra vires* the provisions of the Finance Act [*Chapter 23:04*] and that they be set aside.
3. The respondent pays the cost of suit.”

I did indicate then that my reasons for the order will be furnished. Here they are.

Background facts

Sometime in 2019, the applicant imported a Subaru second hand motor vehicle from Japan. Upon delivery of the vehicle in the country in January of 2020, the applicant paid duty for it and had all the clearances for the vehicle done on 19 January 2020. Upon payment of duty and the release of the vehicle from a bonded warehouse, the applicant approached the Vehicle Registration Department (VID), where he applied and was issued with a registration book and upon paying in

local currency was issued with a registration number and the number plate of the vehicle. However, during that time, owing to the perennial shortage of number plates, the applicant was issued with a temporary number plate endorsed “indefinite” due to the aforesaid shortages of number plates.

On 21 September 2021, as the applicant was driving along Robert Mugabe Road, he was stopped by two VID details employed by the first respondent who impounded his motor vehicle and took it to the first respondent’s Vehicle Inspection Department in Eastlea. Despite his protest that he had already paid for the vehicle’s number plate and its registration in local currency, the VID officers could have none of that. To be able to secure the release of his motor vehicle, the applicant was forced to part with US\$80 which was said to be number plate fee. The essence of the applicant’s application is that the first respondent’s actions in levying charges in United States Dollars is unlawful and illegal. The applicant contends that the sole legal currency operating in Zimbabwe is the Zimbabwean dollar formerly known as the RTGS\$. In the light of this background, the Applicant then sought a declaratory order which culminated in the aforesaid order that I granted on 14 April 2021.

The case for the respondents

It is noted that the first respondent chose not to file any papers in opposition to this application. This was despite being subtly encouraged to do so by the second respondent (as evidenced by the contents of the second respondent’s opposing affidavit). The thrust of the second respondent’s opposition was to rigorously defend and justify the levying of certain fees in foreign currency in Zimbabwe. Whilst accepting that in terms of s 23 of the Finance Act, 2019, the Zimbabwean Dollar is the sole legal currency in this country, the deponent argued that that Act provides exemptions in terms of which fees and levies may be charged in foreign currency. He stated that in his view s 4 (e) of S.I 212 of 2019 as read with s 52 of the Vehicle Registration and Licencing Act [*Chapter 13:14*] empowers the first respondent to make regulations for the levying of registration fees in foreign currency. Consequently, so the second respondent argued, that what the first respondent did was perfectly lawful. In expanding his argument, the deponent stated that the applicant misunderstood that while s 23 of the Finance (No 2) Act speaks to the Zimbabwe Dollar, being the sole legal tender in any transactions in Zimbabwe, it provides for exemptions in s 4 (e) of S.I 212 of 2019 which was made in terms of the Exchange Control Act [*Chapter 22:05*]

which allows certain payments to be made in foreign currency covering the issue complained of by the Applicant.

The legal arguments

The main argument of Mr *Biti*, who appeared for the applicant, was that the decision taken by the first respondent through SI 166/2030 of imposing fees for vehicle registration in United States Dollars was a nullity since it lacked any legal backing. He maintained the argument that the sole currency in force in Zimbabwe is the Zimbabwean Dollar, which for all intents and purposes refers to the use of bond notes and coins, electronic currency (RTGS dollars) and the Zimbabwe dollars themselves. Mr *Biti* anchored his argument on s 44C of the Reserve Bank Act as amended by the Finance Act No. 2 of 2019 which makes it abundantly clear that the sole currency and the sole legal tender in Zimbabwe is the Zimbabwean dollar. Counsel went further to argue that the Reserve Bank Act itself, through amendments in terms of the Finance Act, allows and provides exceptions in respect of which foreign currency will be used and the Zimbabwean Dollar not used. Mr *Biti* further submitted that all these exceptions do not cover the situation that affected the Applicant, namely the forced payment of US\$80 as vehicle number plate fee.

On the other hand, Mr *D Jaricha*, who filed heads of argument on behalf of the respondents a day before the hearing and my subsequent to granting of the order, justified the conduct of the first respondent by relying on the exemptions in s 4 (e) of SI 212 of 2019, which he argued were made in terms of the Exchange Control Act [*Chapter 22.:05*]. Taking a leaf from the Finance Minister, Mthuli Ncube, who is the second respondent in this case, Mr *Jaricha* argued that the first respondent in issuing the Statutory Instrument authorizing it to collect US Dollars from among other vehicle owners, was guided by the Vehicle and Licensing Act which he argued empowers it to make provision for payment in foreign currency other than Zimbabwe Dollars. The respondents' Counsel also sought to rely on Part 2 of the Exchange Control Act, which deals with the Regulatory Powers of the President. He argued that the powers the President has authorized the issuance of S.I 212 of 2019 which according to him allows for a law to be created by the first respondent to authorize the specific payment in issue in foreign currency.

Assessment of the submissions

There can be no doubt that in terms of s 44C of the Reserve Bank Act as amended by the Finance Act No. 2 of 2019, the sole currency and the sole legal tender in Zimbabwe is the Zimbabwean Dollar. That section as amended reinforces the point and goes on to define the Zimbabwe Dollar, as reflective of Zimbabwe dollars, bond notes and coins, as well as the electronic currency in the nature of RTGS which are at par with the Zimbabwe dollar. A further perusal of the Reserve Bank Act, through various amendments in terms of the Finance Act, allows and provides for exceptions in respect of which foreign currency will be used at the expense of the Zimbabwean dollars. These exceptions are clear and limited and are apparent from the Act itself. A perusal of such exceptions show that payment of vehicle licensing charges is not one of them.

If it is accepted (as it must be) that neither the Finance Act nor the Reserve Bank Act specially provided for such an exception, then in my view it defeats common sense and logic to imagine that the first respondent, which relies on delegated legislation, would be allowed or authorized to impose a charge not authorized by the enabling Act. Such conduct in my view can never be justified. It is not well anchored. Such actions by the 1st are clearly illegal. If the first respondent desires to levy such charges in foreign currency, he must seek to have the enabling legislation amended first.

In conclusion, I firmly take the view that Parliament in its wisdom, through the Finance Act and the Reserve Bank Act, has specified those transactions in respect of which foreign currency can be transacted in. Reference to the Exchange Control Act [*Chapter 22:05*] as alluded to by Mr *Jaricha* cannot advance the respondents' case any further. This is precisely because the regulatory powers of the President specified therein are restrictive and they do not include the prescribing of foreign currency for vehicle licensing.

Disposition

It was for these reasons that I granted the order set out in the beginning of this judgment.

Biti Law Chambers, applicant's legal practitioners
Civil Division of the Attorney General's Office, respondents' legal practitioners