

FREDERICK CHARLES MOSES MUTANDA
and
FREDEX FINANCIAL SERVICES (PVT) LTD
versus
THE PRESIDENT
and
THE MINISTER OF FINANCE & ECONOMIC DEVELOPMENT
and
RESERVE BANK OF ZIMBABWE N.O
and
THE GOVERNOR OF THE RESERVE BANK OF ZIMBABWE
and
THE ATTORNEY GENERAL N.O

HIGH COURT OF ZIMBABWE
CHIWESHE JP
HARARE, 17, 21, 22 and 28 November 2016

Urgent chamber application

Adv F Girach assisted by *O Drury*, for the applicants
F Chimbaru, for the 1st, 2nd & 5th respondents
Adv T Mpofu assisted by *G.N Mlotshwa* & *Miss N Machekano* for the 3rd & 4th respondents

CHIWESHE JP: The applicants seek, on an urgent basis, a provisional order couched in the following terms:

“TERMS OF THE FINAL ORDER SOUGHT

That you show cause to this Honourable Court why a final order should not be made in the following terms:

1. That it be and is hereby declared that the Presidential Powers (Temporary Measures) Act Chapter 10:20 (hereinafter called “the Presidential Powers Act”) is ultra vires the Constitution of Zimbabwe, null and void and of no force or effect on account that the Presidential Powers Act violates the Constitutional values and principles of “good governance” including the “observance of the principle of separation of powers” as provided for in section 3 (1) (h) and section 3 (2) (e) of the Constitution.

2. That the Presidential Powers Act in its effect and implementation is ultra vires the Constitution of Zimbabwe and is null and void and of no force or effect on account that it seeks to derogate Parliament's primary law-making power as provided for by section 134 (a) of the Constitution to the President.
3. That it be and is hereby declared that the Presidential Powers (Temporary Measures) (Amendment of Reserve Bank of Zimbabwe Act and Issue of Bond Notes) Regulations published as Statutory Instrument 133 of 2016 is ultra vires the Presidential Powers Act and a nullity as the prior requisites mentioned in section 2 (1) (a) – (c) inclusive of the Presidential Powers Act have not been complied with or satisfied.
4. That it be and is hereby declared that the promulgation of the Presidential Powers (Temporary Measures) (Amendment of Reserve Bank of Zimbabwe Act and Issue of Bond Notes) Regulations published as Statutory Instrument 133 of 2016 is null and void and of no force or effect for want of procedural compliance with section 3 of the Presidential Powers Act.
5. That it be and is hereby declared that the issuance of legal tender through or in the form of bond notes and bond coins by Statutory Instrument 133 of 2016 is unlawful and of no force or effect on account that such purported legal tender falls outside all recognised legal tender and currencies as recognised and provided for by section 40 and section 41 of The Reserve Bank of Zimbabwe Act Chapter 22:15 (hereinafter called "the Reserve Bank Act") or in terms of any other legal tender provision of the Reserve Bank Act and accordingly such bond notes are ultra vires enabling law and are a nullity.
6. That respondents jointly and severally – the one paying the others to be absolved – pay applicants' cost of suit.

INTERIM RELIEF

Pending the determination of this matter applicants' are granted the following interim relief:

- a) That respondents or one or other or all of them be and are hereby interdicted from issuing out or causing the issuance or circulation of bond notes for the purposes of legal tender in all transactions in Zimbabwe or of treating such bond notes to the same extent as the prescribed currencies mentioned in section 44A of the Reserve Bank Act.

Or alternatively and in the event that the said bond notes are already in circulation as at date of this provisional order, then Applicants are granted the following relief:

- b) The Respondents be and are hereby ordered and directed to withdraw from circulation in Zimbabwe all and any bond notes and are directed to refrain and desist from issuing out or causing the issuance or circulation of any further bond

notes for the purposes of legal tender in all transactions in Zimbabwe or of treating such bond notes to the same extent as the prescribed currencies mentioned in section 44A of the Reserve Bank Act.”

The founding affidavit to this application is sworn to by one Frederick Charles Mutanda, the first applicant. He is a citizen of Zimbabwe by birth and resides in Harare. He has a substantial interest in the second applicant, a duly registered company licenced by the Reserve Bank of Zimbabwe to operate as an authorised dealer. Its main portfolio is the receipt of diaspora funds for onward payment in United States dollars to beneficiaries resident in Zimbabwe.

The applicant is irked by the publication in the Government Gazette Extraordinary dated 31 October 2016 of Statutory Instrument 133 of 2016, that is, “The Presidential Powers (Temporary Measures) (Amendment of Reserve Bank of Zimbabwe Act and Issue of Bond Notes) Regulations, 2016”. This Statutory Instrument amends the Reserve Bank Act [*Cap 22:15*] by the insertion of a new section 44B so as to provide a legal framework for a species of legal tender called bond notes. The Statutory instrument has been issued in terms of section 2 of the Presidential Powers (Temporary Measures) Act [*Cap 10:20*].

The applicant notes that the introduction of bond notes into the monetary system is imminent. Indeed both the Minister of Finance and the Governor of the Reserve Bank have made public statements to the effect that the bond notes would be introduced in November 2016.

The applicants’ submissions in the main are four fold. Firstly it is contended that the Presidential Powers (Temporary Measures) Act, in terms of which the Statutory Instrument is published, is itself unconstitutional. In any event, argue the applicants, the Presidential Powers (Temporary Measures) Act cannot be construed to be in conformity with the new Constitution, and for that reason must be declared ultra vires the Constitution.

Secondly, it is contended that even if the Act were to be held to be consistent with the Constitution, the Statutory Instrument is ultra vires the provisions of section 2 (1) of the Act, which stipulates that the Act may be resorted to where:

“(a) a situation has arisen.....which needs to be dealt with urgently.....in the economic interests of Zimbabwe or the general public interest; and

(b) the situation cannot adequately be dealt with in terms of any other law; and

- (c) because of the urgency, it is inexpedient to await the passage through Parliament of an Act dealing with the situation”.

Thirdly, it is contended that the inserted section 44B is itself ultra vires the Reserve Bank Act in that while section 41 of that Act empowers the Bank to make bank notes and other legal tender, the bond note is only a mirror of a bank note. It is not itself a bank note.

Fourthly, it is contended that the introduction of bond notes would adversely impact the applicants and the public at large.

It is on the basis of the above averments that the applicants seek the relief set out in the draft provisional order.

The respondents have opposed this application. They have raised a number of preliminary issues chief among which is the question of urgency. They argue that the Presidential (Temporary Powers) Act has been on our Statutes before and after the new 2013 Constitution. The applicants had more than ample opportunity all along to challenge its constitutional validity. In any event, the introduction of bond notes has been on the cards since May 2016. Again, the respondents contend, the applicants should have acted well before hand. I agree with the respondents in that regard. The requirements for urgency are aptly set out in the famous case of *Kuvarega v Registrar General and Anor* 1998 (1) ZLR (H)188 AT 193 FG where the court stated:

“What constitutes urgency is not only the imminent arrival of the day of reckoning; a matter is urgent, if at the time the need to act arises, the matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated by the rules.”

Secondly, and perhaps more importantly, the applicants have not established, to the satisfaction of the court, that the introduction of bond notes would cause them irreparable harm. The third and fourth respondents have clearly spelt out, as monetary authorities, the objectives sought to be met by the introduction of bond notes. The first, second and fifth respondents state, under para 11 of their opposing affidavit, as follows:

“The conclusion reached by the applicants, that the character and value of their banking accounts expressed in United States dollars will be affected is, with respect, simply not correct. Bond notes are intended to operate alongside the currencies within the multi- currency system and will be at par with the United State dollars just in the same way as the bond coins which are already in circulation”.

The concerns of the applicants are not based on any objective facts. What the applicants foresee as the inevitable consequence of the introduction of bond notes is, to all intents and purposes, based on speculation.

I am satisfied that the requirements for urgency have not been met in this application. For that reason the application cannot succeed.

Accordingly, it is ordered that the application be and is hereby dismissed with costs.

Honey & Blanckenberg, applicants' legal practitioners
Civil Division of the Attorney General's office, 1st, 2nd & 5th respondents' legal practitioners
G.N. Mlotshwa & Company, 3rd & 4th respondents' legal practitioners