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IMPROVING THE INVESTMENT CLIMATE – SUGGESTIONS ON LEGAL ASPECTS OF PUBLIC DEBT MANAGEMENT

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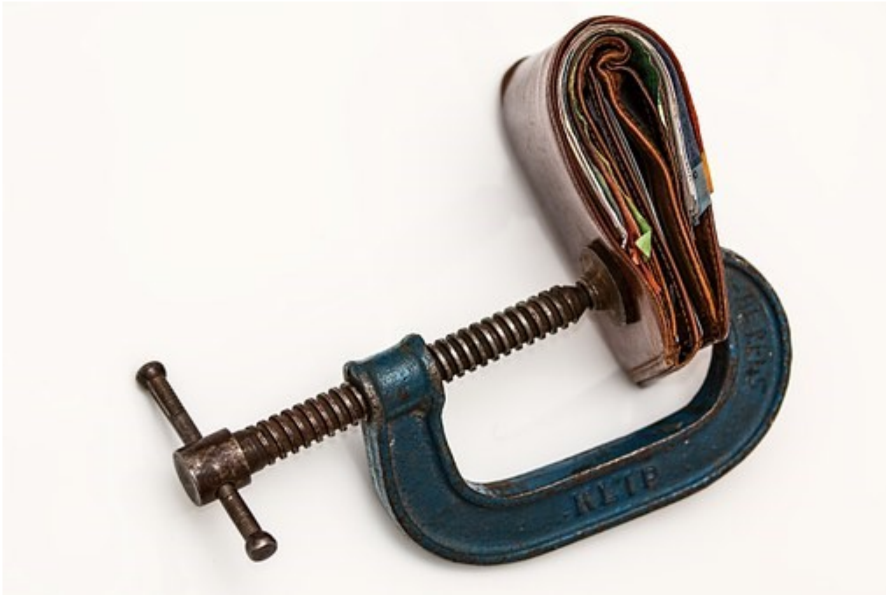
The present government has emphasised repeatedly its desire to attract investment into the economy in the hope that this will among other virtues, create jobs, increase production, generate exports, decrease imports, resolve the trade deficit issues and ultimately breathe life back into economic environment. Since November 2017 when power changed hands in Zimbabwe, there has been a shift from worldwide excitement to scepticism about the sincerity of the new government, and now to investor apathy which characterises the present day investor attitudes towards Zimbabwe.

Instead of pretending that all is well, all participants in the economy must locate the issues and painstakingly deal with each until the environment is right. Sadly, the problems are so numerous that they can not be dealt with in one conversation. From currency issues, inadequate investor protection, government borrowing, excess government wage bill, general government overspending, budget deficits, trade deficits, regressive taxation, uncompetitive foreign exchange rates, foreign currency supply problems only to mention a few, the resolution of this country's problems will indeed involve a much greater and more encompassing project than is presently being undertaken. In this piece however, we wish to focus on legal aspects of public debt management which in our experience affect investor perception of the country and inform would be investors of the responsibility levels of the government.

Government borrowing has been identified, even by the government itself as a central problem affecting key economic fundamentals. Government's access to foreign lines of credit has been limited due to factors beyond the scope of this piece and as a result, Government has turned inward for satisfaction of its borrowing needs. However the levels of borrowing have revealed unbridled and irresponsible governance and management of public debt. Between January and August 2018, treasury bills in the sum of $2.5 billion had been issued. It is impossible to explain the purpose of such borrowing given that there is little meaningful happening by way of public works or infrastructure programs. What alarms investors is that the total public debt as at August 2018 was $17.69 billion, 54% of which is domestic debt and the balance being foreign. The amount of Treasury bills maturing at present mean that Government will need to start paying this massive debt or seek to restructure this local debt which is looking less and less attractive to domestic lenders given the runaway inflation which has beset the country. Given these circumstances, further bor-



The national purse requires prudent management

> **"You cannot just keep borrowing more and more and keep spend-ing more and more without eventually having a day of reckoning" -**
>
> **Wilbur Ross**

rowing cannot be ruled out in order to cover maturing obligations, unless further taxes or another source of funds can be sought urgently. The numbers will do little to ease the nerves of the investor. This unfavorable investment climate is however not without legal framework and if the law is to be followed to the letter, this gloomy state of affairs is capable of resolution.

WHAT DOES THE LAW SAY ABOUT GOVERNMENT BORROWING & PUBLIC DEBT MANAGEMENT

A number of provisions govern public management and these will be considered vertically from the parent provisions in the constitution of Zimbabwe down to the legislation made in terms thereof.

Section 300 **the Constitution of Zimbabwe Amendment (No. 20) Act, 2013** (herein after *"the Constitution"*) regulates the limits of State borrowings, public debt and State Guarantees by providing as follows:

> *"1. An Act of Parliament must set limits on-*
> *a. borrowings by the State;*
> *b. the public debt; and*
> *c. debts and obligations whose payment or repayment is guaranteed by the State;*
> *and those limits must not be exceeded without the authority of the National Assembly.*
> *2. An Act of Parliament must prescribe terms and conditions under which the Government may guarantee loans.*
> *3. …*
> *4. The Minister responsible for finance must—*
> *a. at least twice a year, report to Parliament on the performance of--*
> *i. loans raised by the State; and*
> *ii. loans guaranteed by the State;*
> *b. at the same time as the estimates of revenue and expenditure are laid before the National Assembly in terms of section 305, table in Parliament a comprehensive statement of the public debt of Zimbabwe."*

What the Constitution is basically saying is that there must be a law regulating public debt levels, secondly that the levels must not be exceeded without national assembly authority, that the act must provide conditions under which Government can guarantee loans, and finally that the Finance minister must be accountable for the state of public debt in the country.

Section 298(1) of the Constitution of Zimbabwe sets out principles of public finance management as follows:

> *"(a) there must be transparency and accountability in financial matters;*
> *(b) The public finance system must be directed towards national development…*
> *(c) the burdens and benefits of the use of resources must be shared equitably between present and future generations;*

> *(d)public funds must be expended transparently, prudently, economically and effectively;*
> *(e) Financial management must be responsible, and fiscal reporting must be clear;*
> *(f) public borrowing and all transactions involving the national debt must be carried out transparently and in the best interests of Zimbabwe."*

If the principles in Section 298 (1) of the Constitution are followed to the letter, we should see more accountability, more transparency, more direction of resources to national development rather than non-essential budgetary items which have traditionally taken the lion's share of the national budget, more information regarding where all the public debt goes, the identity of individuals and corporates whose debt is assumed or guaranteed by the public and such like matters.

Further, section 299 of the Constitution, vests Parliament with power to oversee government expenditure in the following terms:

> *"Parliament must monitor and oversee expenditure by the State and all Commissions and institutions and agencies of government at every level, including statutory bodies, government-controlled entities, provincial and metropolitan councils and local authorities …"*

As indicated earlier, one major source of the huge public debt is the issuance of treasury bills. In this respect, the Reserve Bank plays a key role in the legislated controls and should provide a buffer in times of runaway borrowing. Section 7 (2) of the Reserve bank of Zimbabwe Act [Chapter 22:15] which provides;

"(2) The Bank ***shall not****—*

(a) lend or advance moneys to or directly buy, discount or re-discount bills, notes or other obligations from, the State or any fund established by the State so that the amount outstanding at any time exceeds the equivalent of twenty per centum of the previous year's ordinary revenues of the State; or

(b) lend or advance money to the State or any fund established by the State unless—

(i) the money is denominated in Zimbabwe currency; and (ii) the loan or advance is either—

A. repayable within twelve months after the end of the financial year in which it was made; or

B. convertible at the end of the financial year in which it was made into negotiable bearer securities issued by the State and delivered to the Bank; or

(c) subject to paragraphs (a) and (b), lend or advance money to any statutory body unless the loan or advance—

(i) has been approved by the Minister; and

(ii) is repayable within twelve months from the date on which it was made; and

(iii) if not repaid within the period referred to in subparagraph (ii), is convertible into negotiable bearer securities issued by the State and delivered to the Bank."

The tabulated rule that the Reserve Bank should not allow borrowing in excess of 20% of the previous year's revenues of the state has routinely been violated in recent years. But this rule does not exist in isolation. It is complemented by the provisions of the Public Debt Management Act [Chapter 22:21], specifically section 11 (2):

> *"The aggregate of the amounts that may be borrowed in terms of subsection (1) in any financial year by way of loans shall not exceed the limit fixed by National Assembly, which limit the Minister may propose to the National Assembly for approval by resolution or by means of a provision in a Finance Bill: Provided that the limit fixed in terms of this sub-*

*section and section 300(1) of the Constitution may not result in the total outstanding public and publicly-guaranteed debt as a ratio of the gross domestic product at current market prices exceeding **70 percentum** at the end of any fiscal year, unless the Minister obtains a resolution of the National Assembly to do so under the one or more of the following conditions;*

(a) occurrence of natural disasters or other emergencies requiring exceptional expenditure; or

(b) where a large investment project in the public sector is deemed by Cabinet to be timely and prudent or

(c) in case of a general economic slow-down requiring fiscal and monetary stimulus"

Statistics show that by end of 2018, the aggregate of government borrowing had breached the 70% ratio of gdp. The issue which requires interrogation is the role of the national assembly in perpetuating these transgressions. Does the Assembly police Government spending and borrowing at all or does it simply rubber stamp excess borrowing whenever requests are brought to it? Is the authority of the national assembly sought at all when the Government is about to exceed statutory borrowing limits? These questions are fundamental to the investing and transacting public as the impact of excessive and unbridled government borrowing have a direct impact on the performance of the economy. We will examine the challenges of the present policing mechanisms and propose reform.

CHALLENGES INHERENT IN THE LAW

While there are provisions compelling the State to obtain National Assembly approval of borrowing in excess of the limits set by law, there are a number of limitations to the efficacy of these provisions. The first is the reality of recent parliaments which have been dominated largely by one dominant party which also constitutes the government. The incestuous relationship between a ruling party in its executive capacity and its members in the national assembly limits the independent exercise of oversight by the national assembly. The whipping system adopted in the national assembly further strengthens the loyalty to party rather than principle as members are more apt to vote in favor of a party position than a rational one.

Another problem that arises is the construction of the law itself. Section 11 (2) of the Public Debt Management Act provides only three circumstances where the ratio of 70% to GDP can be breached being natural disasters or emergencies requiring excess expenditure, to finance a big public investment project and finally limits can be breached for purposes of stimulating a stagnating economy. The problem with the three provisions is that they are wide and susceptible to various interpretation. Zimbabwe has been in economic turmoil for at least two decades now and the State can justify excess borrowing on the score of a stimulus package for a stagnating economy.

Further, the word 'emergencies' can mean anything, including public unrest or need to ensure food security among others. In short, it is easy to justify over-borrowing by stuffing the rationale into a pre-legislated justifiable category. Should the national assembly allow excess borrowing on false grounds and this is later discovered, such discovery may be too late as the borrowing would have taken place. There is also the problem that the law in question does not provide for personal liabilities and offences for significant and wanton breaches of the limits. This means that there no incentive to maintain good discipline as bad practices are not censured.

CONCLUSIONS

Until certain fundamental aspects of the investment climate are addressed, one can expect little by way of FDI or even domestic investment. For business persons, the numbers tell an entire story, and the numbers which show reckless and unchecked government appetite for money raises fears of that government's ability to protect investments.

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