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ATTORNEYS



**LATEST ROUND OF  
CURRENCY REFORMS IN  
ZIMBABWE: AN ANALYSIS  
OF STATUTORY  
INSTRUMENT 142 OF 2019,  
RESERVE BANK OF  
ZIMBABWE (LEGAL TENDER)  
REGULATIONS, 2019**

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# **ANALYSIS OF STATUTORY INSTRUMENT 142 OF 2019**



On the 24<sup>th</sup> June 2019, Zimbabwe woke to news of a statutory instrument whose effects are clearly far reaching in the manner in which it alters the currency landscape. This instrument has been followed by directives from the Reserve Bank of Zimbabwe. Our brief views on the currency reforms follow;

### ***The Law Before 24 June 2019***

Prior to *Statutory Instrument 142 of 2019, Reserve Bank of Zimbabwe (Legal Tender) Regulations, 2019* gazetted on the 24<sup>th</sup> of June 2019, the legal tender in Zimbabwe included bank notes printed by the RBZ in terms of s41 of the Reserve Bank Act, vouchers printed by the RBZ in terms of s42B of the RBZ Act, coins of current mass in terms of s44 of the RBZ Act, foreign currencies as provided for in s44A of the RBZ Act and finally the RTGS dollar introduced as Section 4C (4) (1) of the RBZ Act via the now famous SI33.2019.



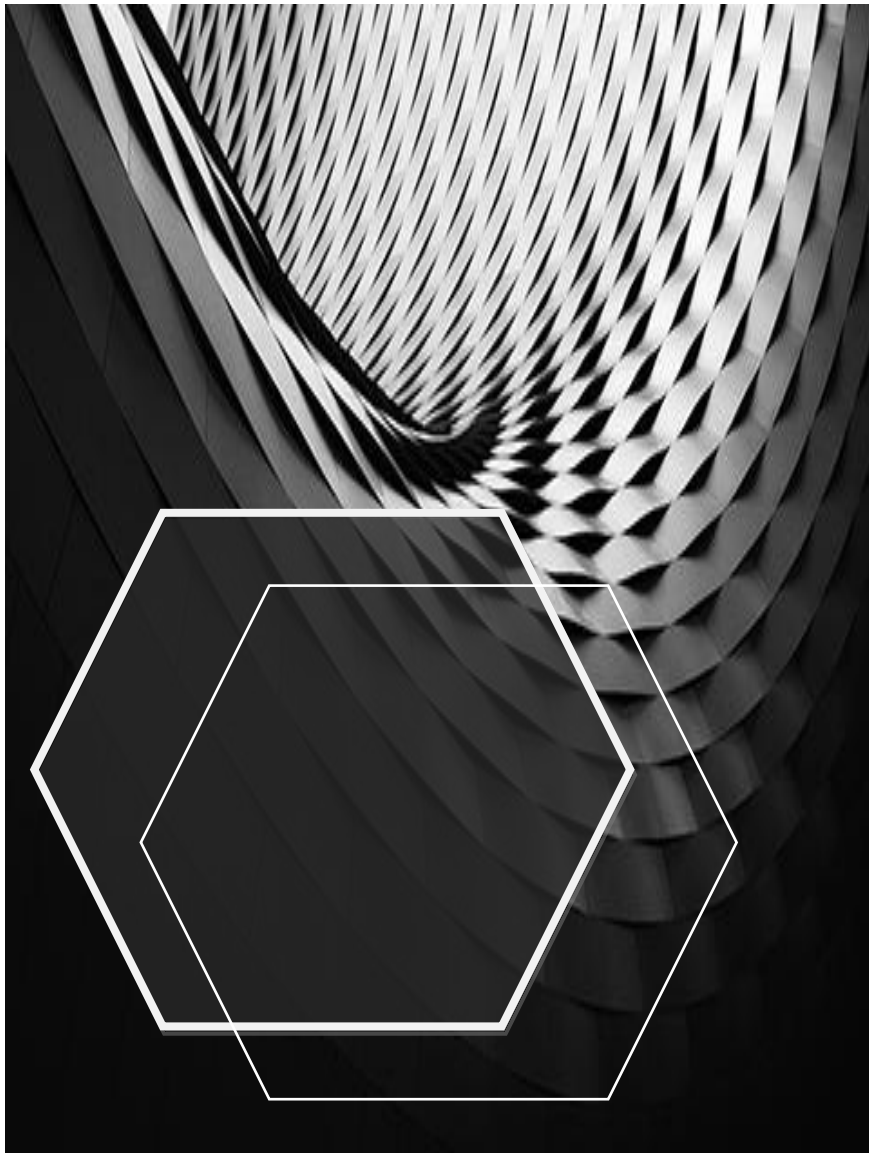
While s44A of the RBZ Act recognises that foreign currencies can be a form of legal tender, it requires the Minister of finance to make regulations specifying such currencies and their reach. Foreign currencies have thus far been legal tender since the demise of the Zimbabwean Dollar a decade ago.

However, that has been changed by the new Statutory Instrument 142 of 2019 (hereinafter, SI 142/2019).

### ***Changes Introduced by SI 142 of 2019***

In terms of section 64 as read with section 44A of the RBZ Act, the Minister of Finance & Economic Development is empowered to enact regulations on provisions that are spelt out in the RBZ Act. With effect from the 24<sup>th</sup> of June 2019, the new Statutory Instrument 142 of 2019 enacted by the Minister of Finance & Economic Development introduces the Zimbabwe Dollar as the sole legal tender. The Statutory Instrument does not define the “Zimbabwe currency” but it makes reference that it is equivalent to the bond notes, coins & RTGS Dollar.





### *Essential Features of The SI 142/2019*

The effect of SI 142/2019 is as follows;

- i. The Zimbabwe Dollar is the sole legal tender in any transaction in Zimbabwe. (“Transaction” is defined as an agreement between a buyer and a seller to exchange goods, services or financial instruments).
- ii. all other currencies (USD, South African Rand, Pula etc.) are no longer legal tender and cannot be used in settlement of obligations in Zimbabwe. (A “legal tender” is defined as any official medium of payment recognised by law that can be used to extinguish a public or private debt or meet a financial obligation).
- iii. The SI 142/2019 does not proscribe the **holding** of foreign currency. It only prohibits the settlement of obligations through foreign currency in Zimbabwe, save for limited circumstances defined in the instrument.
- iv. It appears that SI 142/2019 is a precursor to a fully-fledged return of the official currency which is to be termed ominously, the Zimbabwe Dollar.
- v. It must be highlighted that SI 142/2019 does not criminalise or outlaw the holding or owning of foreign currency.

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## EFFECTS OF THE SI 142/2019

SI 142/2019 has wide reaching effects on individuals and businesses alike. For a decade, people had ordered their affairs in such a manner that foreign money would settle their rights and obligations locally. Government itself was paying productive sectors like mining and agriculture some form of retention in foreign currency. It appears that the literal text of the instrument simply puts an end to all such forex settlements, save of course for the very limited exceptions provided therein.

SI 142/2019 has been promptly followed up by the Exchange Control Directive RU102/2019 which has curiously maintained retention thresholds for mining, exports, agriculture and other services. Herein lies a critical incongruence. Producers of gold are essentially selling their product to Fidelity and expect settlement of same in legal tender. The maintenance of retention in foreign currency means that the Exchange Control Directive is itself contrary to the SI 142/2019 in that it allows the settlement of obligations in a method that is no longer currency. It is unlikely that the miners or other beneficiaries of such retention shall complain, but the announcement of a policy by the central bank which gives preferential treatment to certain sectors in a manner not provided for by the SI 142/2019 it introduced just 24 hours earlier is fertile ground for legal attack in as far as there is unequal application of law.

The effect of declaring the Zimbabwe Dollar as the sole legal tender in Zimbabwe means that all other forms of money used hitherto are no longer considered as money by the law, but remain property and are protected by the Constitution of Zimbabwe against all forms of expropriation.





The effect of terminating the multi-currency regime has resuscitated the full extent of the Exchange Control Regulations SI109/1996 in respect of the exchange of currency. SI109/1996 was enacted in terms of section 2 of the Exchange Control Act [Chapter 22:05], which act criminalises certain foreign currency transactions and the public will be well advised to familiarise themselves with provisions of those regulations. For purposes of this piece though, we shall only indicate that the exchange control regulations do not go as far as dealing with sale of goods and services in foreign currency

### ***Legality of SI 142/2019***

The Minister of Finance & Economic Development (hereinafter referred to as the Minister) purports to have enacted the SI 142/2019 in terms of section 64 as read with section 44A of the RBZ Act. Section 44A provides as follows;

#### ***44A Legal tender of foreign currencies***

*The Minister may, in regulations made under section 64, prescribe that, subject to such conditions as may be specified in the regulations, a tender of payment in any currency other than Zimbabwean currency shall be legal tender in all transactions or in such transactions as may be specified in the regulations.*

Dissecting this provision will leave the sole conclusion that the Minister is only empowered to provide for the use of foreign currencies. This provision does not give the power to deregulate use of such foreign currencies. In other words, it is simply a positive power to cause recognition of foreign currency as legal tender but not a negative power to deregulate such status of foreign money. Section 64 provides that;

#### ***64 Regulations***

*The Minister, in consultation with the Board, may make regulations prescribing anything which in terms of this Act is required to be prescribed or which, in his opinion, is necessary or convenient to be prescribed for carrying out or giving effect to the provisions of this Act.*

The power to make regulations is therefore limited to anything that needs to be prescribed in terms of the Act. The removal of foreign currency from the status of legal tender is not provided for in the Act. Our view is that such would require an Act of Parliament and cannot be done by regulations as the Minister has purported to do. It is our considered view that the Minister may as well have acted *ultra vires* (beyond or in excess of his powers) in that he created the SI 142/2019 on a matter upon which he had not been given power to legislate in the enabling Act (the RBZ Act).

Another shortcoming of the law is that it violates the principle of just administrative action as enshrined in our Constitution and regulated by Administrative Justice Act [Chapter 10:28]. It is unfortunate that for several years now, the Government of Zimbabwe has proceeded on the assumption that the public is not deserving of notice or consultation in regards to major policy and legal changes. Surely the change of legal tender has far reaching consequences and something that business persons must be allowed to plan for over a reasonable time horizon. The government of Zimbabwe will be well minded to take a cue even from international events like Brexit which was notified to the public years in advance of its date of potential implementation. The reason is to ensure that people prepare and do not lose value as a result of regulatory changes. The Administrative Justice Act further legislates requirements for such notice. It simply a sign of respect for the governed to allow

them to know and prepare for what is coming. Governance is not a game of hide and seek. It deals with the real lives of people, their life savings and more often than not, life and death matters. To this end, the instrument falls short of principles of good administrative justice.



The final aspect on this point is that the statutory instrument purports to undo the multi-currency regime which was itself legislated by an Act of parliament, namely Section 17 of the Finance (No. 2) Act of 2009. The Statutory Instrument does not repeal the provisions brought about by Section 17 above and in any event would not have legal validity if it did. It is a long standing principle of law that subsidiary legislation cannot be used to amend provisions of an Act of Parliament. What therefore is the fate of the provisions of Section 17 which was passed by Parliament which is in contrast with the new instrument? In our view, the SI is susceptible to challenge on the grounds stated above as its validity is highly questionable.

Even of the Minister claims to have delegated authority to make regulations, this cannot extend to setting aside provisions of an Act of Parliament. Section 134(a) and (d) of the Constitution of Zimbabwe states that:

*“Parliament may, in an Act of Parliament, delegate power to make statutory instruments within the scope of and for the purposes laid down in that Act, but—*

- (a) Parliament’s primary law-making power must not be delegated;*
- (d) the Act must specify the limits of the power ... and the principles and standards applicable to the statutory instrument.”*

It is our considered view that the Minister acted outside the scope of his powers.

### **What Businesses & Individual Must Do**

As indicated above, it is never a good idea to contravene the laws of the land. It is however permissible to challenge them in the appropriate forum. From our reading of the new measures, we encourage businesses and individuals to;

Avoid panic and make rational decisions based on their market intelligence in respect of the disposal of foreign currency.

Be aware that it is not an offence (at the moment) to own and hold foreign currency and operate FCA accounts hence they can in theory do so in perpetuity or until new measures are introduced.

Avoid clashes with the authorities by continuing to sell goods and services in foreign currency. If one feels strongly about the issue, it may be wise to bring a formal challenge to the law than to invite conflicts with law enforcement authorities.

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