

## **SI 85/2020 & EXCHANGE CONTROL CIRCULAR 3/2020. IS ZIMBABWE REVERTING TO MULTI CURRENCIES VIA THE BACKDOOR?**

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### **1. INTRODUCTION**

Governments across the globe are working hard to curb the social and economic impact of COVID-19, to ease access to food and basic essentials needed in this difficult time whilst people remain safe. Efforts are being made to ensure ease of access to all essential services. In South Africa for example, funds were available in the National Disaster fund which according to their minister of finance were immediately allocated to deal with the crisis among a raft of other measures to ensure that business and vulnerable individuals are assisted to bridge past the period of disruption caused by the virus. In Rwanda, the country's president Paul Kagame ordered free door-to-door food distribution for the most vulnerable since the country is in the middle of a lockdown. He further announced plans to provide essential services such as the supply of water and electricity for free so that people do not face challenges in acquiring these. Faced with similar public dislocation in Zimbabwe, the government announced on the 26<sup>th</sup> March 2020 that it would bring convenience to the transacting public by allowing free funds (specific forms of foreign currency defined by law) to be used to purchase goods and services that are denominated in local currency.

The statement by the central bank reads in part that *“The dispensation to use free funds will not only make payment for goods and services but will also promote social distancing...”* Government also suspended the floating exchange rate and adopted a hard peg of 1:25 which will be the rate of exchange for any such transactions in foreign currency. This comes less than a year after Zimbabwe outlawed the use of foreign currencies in local transactions, and now the government indicates that the use of free funds of foreign currency will ease the plight of the citizenry as part of measures to mitigate against the hardship caused by the coronavirus. This was done through SI85/2020, Exchange Control (Exclusive Use of Zimbabwean Dollar for Domestic Transactions) (Amendment) Regulations, 2020 (No. 2) which is to be read with Exchange Control Circular No.3/2020 that was subsequently issued by the Reserve Bank of Zimbabwe. Other measures have since been introduced by the Government but it is S. I85/2020 that we comment on herein.

## **2. SCOPE**

Our analysis will include an explanation of the extent of changes to the currency regime in Zimbabwe that has been brought about by the new instrument. We shall further look at the congruence of the amendment under S.I 85/2020 when viewed in the greater scheme of the currency matrix in Zimbabwe, given that a mono currency was introduced barely a year ago.

## **3. WHAT ARE THE PROVISIONS OF S.I 85/2020?**

Structurally, the statutory instrument is quite simple. All it does is to amend SI212/19 by insertion of new section 6 that introduces two exceptions to the general rule that had obtained through S.I 212/20 outlawing use of foreign currency in domestic transactions. These are;

- a. Foreign currency can be used to purchase goods and services charged in local currency as long as free funds are used and the obtaining exchange rate shall determine the conversion.
- b. Payment may be done electronically, or in cash.

We have previously written extensively about the currency reforms in Zimbabwe and specifically SI 212/19 and will briefly give a historical background of the currency reforms in Zimbabwe preceding the present interventions.

## **4. BRIEF BACKGROUND**

The starting point for any currency discussion in Zimbabwe at this point is of course, the infamous, SI 142/19 which introduced and deemed the Zimbabwean dollar to be the sole legal tender in Zimbabwe. To concretise this, amongst other measures, SI 212/19 and 213/19 which introduced a civil penalty system and empowered the Reserve Bank of Zimbabwe (hereinafter, RBZ) to enforce the same were also promulgated. SI 213/2019, the Presidential Powers (Temporary Measures) (Amendment of Exchange Control Act) Regulations, 2019 reinforced the civil penalties for charging or purchasing in foreign currency. The present amendment through SI85/2020 simply adds a new exception to what is allowable in terms of transacting in foreign currency under SI212/19.

## **5. WHAT DOES S.I 85/2020 MEAN**

The new instrument has been quoted by many to mean that the country has re-dollarized. Simple questions arise. Can a person buy foreign currency off the street and use it to buy groceries now? Has the government effectively reverted to the

multicurrency system via the backdoor? An analysis of the one-page long instrument reveals that this is not a return to the multi-currency system. It however also reveals policy inconsistencies that have now seen exceptions to the prohibition on trade in multi-currencies becoming more and more numerous that the general rule is evidently applying in less and less circumstances. It may be evidence of increased pressure on the foreign currency starved fiscus which is forcing some major policy backtracking on the exclusive use of the Zimbabwean Dollar, but it certainly is not a wholesale re-dollarization.

As to the meaning of the instrument, it is as confusing as the set of laws it seeks to amend. Our reasons for saying so are as follows. The intervention is made to allow use of only what are called free funds in domestic transactions. It is therefore not every foreign dollar that can be used to transact domestically. It is not all foreign currency that a person has in his possession that constitute free funds. Free funds are defined in the Exchange Control Regulations 1996, S.I 109/96 as follows;

*“money which is lawfully held outside Zimbabwe by a Zimbabwean resident and which was acquired by him otherwise than as the proceeds of any trade, business or other gainful occupation or activity carried on by him in Zimbabwe”.*

The fundamental identifying features of free funds include the fact that they must be held lawfully, outside Zimbabwe, by a Zimbabwean resident, and must be acquired by him otherwise than as the proceeds of any trade or business carried out in Zimbabwe. The new Statutory Instrument 85/2020 extends this definition of free funds by adding that free funds include funds lawfully held or earned in foreign currency. This is an important addition because it makes locally held funds or earned funds that are in foreign currency to be free funds for the purpose of transacting in Zimbabwe. It rather confuses the foreign currency regime in that it allows use of two types of money, the first being earned foreign currency, which in itself presents no problems but when further provides for use of foreign currency ‘lawfully held’ in Zimbabwe, that creates a conceptual problem in many respects.

It appears to be indiscriminate regarding the source of such funds. Therefore, money earned and held by a person is covered by this provision, so is money obtained in other means as long as it is lawfully held. Does money bought from the illegal market qualify as money lawfully held for purposes of these regulations? The legislature probably did not intend to legitimise black market foreign trading but the framing of the definition creates scope for argument. SI 85/2020 does not relate to foreign currency lawfully acquired. It says nothing about the legality of acquisition. It speaks only of currency lawfully held. The distinction is far from academic. If therefore a person acquires money from the parallel market illegally

and gives that money to his mother, is that money lawfully held by her or not as defined in the law, or does the law trace the acquisition process as well regardless of the fact that it does not state so in the text of the regulations. The second complication is that unless a person is actually physically caught purchasing currency, how exactly do the authorities even begin the inquisition of the source of funds when the statutory instrument does not speak of the acquisition process.

One major loophole that will hamper enforcement of this instrument is the fact that under the multi-currency system, everyone actually possessed foreign currency lawfully. If a person is thus confronted now regarding his possession of foreign currency and makes the bald assertion that it constitutes his savings in physical cash from the multi-currency era, there appears to be nothing that outlaws his holding of the said currency now, neither is there an easy way to disprove this assertion. Theoretically therefore, the authorities will have difficulty in narrowing the funds that are lawfully held for the purposes of S.I 85/2020 from those that are not lawfully held.

This statutory instrument blows the definition of free funds wide open and essentially means all foreign currency from whatever source, as long as same is lawfully held in Zimbabwe is free funds since proving the illegality of the holding of foreign currency will not be an easy thing to do. It also appears that the instrument was introduced out of the desperate need to have foreign currency being circulated in the economy so as to widen the government's ability to correct hard currency. It may therefore not be in the interest of the State at this point to question the legality or source of funds lest people fear using it for trade and the purpose of the instrument be negated.

Another complication that arises is that the expanded definition of free funds under S.I 85/2020 is by no means an amendment of the exchange control regulations' definition of free funds. This creates undesirable inconsistency which can arise as follows. One may possess foreign currency in Zimbabwe and use it to transact without offending the transacting law under SI85/2020 while on the other hand still offending the exchange control law which still prohibits exchange of foreign currency with a person who is not an authorised dealer. To explain this further, one must look closely at the provisions of the Exchange Control Regulations of 1996 which provides in s4 as follows;

*(1) Subject to subsection (3), unless permitted to do so by an exchange Control authority;*

*(a) no person shall, in Zimbabwe;*

*(i) buy any foreign currency from or sell any foreign currency to any person other than an authorised dealer; or*

*(ii) borrow any foreign currency from, lend any foreign currency to or exchange any foreign currency with any person other than an authorised dealer;*

It still remains an offence under the exchange control regulations to exchange foreign currency with any person other than an authorised dealer. To put this into context, if a person used foreign currency to buy medicine in Zimbabwe, being money lawfully held by that person in Zimbabwe, is that transaction lawful under the exchange control law? Is the pharmacy from which he buys an authorised dealer under the exchange control regulations? The answer is certainly negative. However, S.I 85/2020 is authorising persons to use funds that are lawfully held in Zimbabwe to transact here, regardless of retailers not being authorised dealers. There is evidently major discord between the new SI85/2020 and the exchange control regulations which have not to date been repealed or amended.

## **6. CONSISTENCY OF S.I 85/2020 WITH RELATED CURRENCY LEGISLATION**

SI 212/2019- Exchange Control (Exclusive Use of the Zimbabwe Dollar for Domestic Transactions) Regulations, 2019 is the principal Statutory Instrument which is sought to be amended by SI 85/2020. Section 3 of S.I 212/19 provides as follows;

### **3. Exclusive use of Zimbabwean currency for domestic transactions**

(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.

(2) In particular (without limiting the scope of subsection (1) no person shall—

(a) quote, display, label, charge, solicit for the payment of, receive or pay the price of any goods, services, fee or commission in any currency other than the Zimbabwe dollar; or

(b) Settle any obligation by barter or otherwise for a consideration that is not denominated by, or is not valued in, the Zimbabwean dollar; or

(c) receive, demand, pay or solicit for payment by means of any token, voucher, coupon, chit, instrument, unit S.I. 212 of 2019 1357 of account or other means or unit of payment (whether material or digital) that is pegged to, referable to or used in substitution for any foreign currency or unit of a foreign currency.

(3) Any person who contravenes subsection (1) shall be liable to—

(a) A category 1 civil penalty if the contravention is completed but irreparable; or

(b) A category 4 civil penalty if the contravention is a continuing one.

Section 4 then 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.

Looking closely at s3(1) of SI212/2019, it prohibits any party to a domestic transaction from paying or receiving foreign currency in exchange for any goods or services. This prohibition affects both the buyer and the seller. As indicated, civil penalty orders are levied against any person who contravenes these provisions in terms of SI 212/2019 and SI 213/2019. At this juncture, we need to analyse the effect of SI85/2020. It provides that any person may pay for goods and services in foreign currency using free funds. It is vital to note that SI85/2020 does not give a similar exemption to a seller as it does to a purchaser. While a purchaser is allowed to buy using free funds, SI 85/20 does not allow a seller to receive foreign currency. This distinction is vital because under SI212/19 and 213/19, stiff penalties attach to any person who either sells or buys in foreign currency. The amendment under S.I 85/2020 does not protect the seller buy would in theory protect the purchaser.

Another startling feature of SI 85/2020 is that it does not purport to repeal any part of S.I 212/2019 or S.I 213/2019. If one consolidates S.I 212/2019 with its amendment S.I 85/2020, what emerges is a mass of inconsistencies with the same law still containing s3(1) which prohibits the selling or buying in foreign currency, while it also goes on through its amendment to allow purchasers to buy in foreign currency. While the amendment states that the allowance of purchase in foreign currency is 'notwithstanding these regulations' the result of the amendment is to simply mystify the law and leave the transacting public subject to the subjective interpretation of an officer of what is or is not allowable.

Further, a seller cannot therefore charge or sell in foreign currency since this was prohibited under SI 212/19, but can be paid for goods charged in local currency in foreign currency at a rate of 1:25 to the United States Dollar under S.I 85/2020.

Why would a law hide realities of the market in such a clumsy way? Why should a person not display a price in a currency that the buyer is allowed to tender in settlement of the purchase? These are the hallmarks of bad policy, bad legislation and even worse drafting. A good law must speak for itself. It must not be contradictory and provide so many exceptions as to nullify its own prohibition. The general public are not all lawyers and need not be in order to obey a good law. The present set of regulations are a complete mess and even lawyers will argue on the meaning attributable to the same without end. An easy way to establish just how ineffectual the regulations have been is that since the promulgation of SI 212/19 and 213/19 that brought civil penalty orders for trading in foreign currency, there has not been any publicly reported cases where any person has been compelled to pay the said penalties, and yet businesses on the ground are trading in foreign currency, some openly so. The Government must be worried about constantly enacting laws which are openly disregarded without consequence.

The government of Zimbabwe must simply answer simple questions. What is the legal tender in Zimbabwe? Is foreign currency lawful tender? Can the economy function in light of their answers to the two questions? The law must not create criminals out of its citizenry, and in the context of Zimbabwe's recent foreign exchange history, the law certainly should not be a stratagem to deprive people of value that they lawfully held in one currency by forcing exchange in unsustainable false rates. Fairness is a fundamental hallmark of good governance and a state that consistently legislates unfair laws which lopsidedly unhinge value from the public while replacing that value with a unit that does not represent corresponding value does so to the detriment of its own reputation locally and internationally, and affects the perception of international investors in the country.

Probably seeing some of the limitations of S.I 85/2020, the Reserve Bank of Zimbabwe proceeded to issue Exchange Control Circular 3/2020. The circular allows for *payment* for goods and services using free funds just as S.I 85/20. Corporates receiving said funds will have to deposit them into Nostro accounts and such accounts shall be treated as 'green flagged' and the 30 day liquidation of unutilised foreign currency provisions suspended until the economy *stabilises from the effects of Covid 19*.

It is from this premise that we turn now to analyse SI 85/2020 as read with the ExCon circular.

## **7. DOES SI 85/2020 ASSIST THE TRANSACTING PUBLIC TO TRANSACT EASIER IN VIEW OF COVID-19**

The rationale for SI 85/2020 has been stated to be to assist trade in light of the devastating effects of COVID – 19. It is difficult to see how this instrument will provide relief to the transacting public. The generality of people in the country do not earn foreign currency. Those that access it would mostly have done so on the illegal market or from illegally charging for their goods and services in foreign currency, or from diaspora remittances. It is not as if the general transacting public has foreign currency at hand and due to COVID has been unable to trade their currency. These regulations have been made with COVID-19 as an excuse and not a reason for a policy backtrack which is potentially embarrassing since very bald pronouncements were made very recently that the Zimbabwe currency was holding its own and there would n=be no return to foreign currency being legal tender.

In fact, these regulations may have the unintended consequence of sellers refusing to sell in local currency hence forcing buyers to buy foreign currency on the only market that it is available, being the black market. This may fuel inflation and push exchange rates on the parallel market to unsustainably high levels. Further, the regulations provide a new hard peg of 1:25 which is simply an unfair rate at which a buyer would be expected to part with foreign currency that fetches up to \$40 on the informal market. It is a fact that the formal market has failed to achieve required liquidity since its inception in 2019 such that persons seeking foreign currency have always been forced to go to the parallel market to access currency for their needs.

This is a fact well known to the government, hence asking a person who is known to have purchased currency at going rates of around 40 to lose that currency at a rate of 25 is simply unconscionable. The government should take charge and create exchange rates that are truly reflective of the strength of the currency that it administers in the country and just stop fictitious pegs which have no co-relation to the value of the currency. Persistence with this approach will continue to scare both local and foreign investors as it gives the legitimate fear that the government of Zimbabwe will continue to fiddle with the value of money and forcibly cause persons to lose their hard earned value by in this case, disposing of currency at an unreasonably low rate by force of law.

## **8. CONCLUSION**

ExCon circular 3/2020 as read with SI85/20 are both rushed pieces of legislation that fail to adequately cover all essentials to efficiently allow for the use of foreign currency which had been outlawed by SI 142/19 and other enactments thereafter. The gaps in the law are simply unbelievable. The confusion created by the amendment is unprecedented. What makes it worse is that the excuse for the



intervention being COVID – 19 has no demonstrable link to the measures undertaken by the government. Simple inconsistencies such as allowing a buyer to buy in foreign currency but having the same instrument penalising a seller for receiving that currency show that legislation is being passed without being thought through and gives the legitimate impression that the law is simply being used as a tool to mask deteriorating economic performance. The enactments are careless with details and appear very rushed. The basic conclusion that cannot be denied is that since the introduction of the mono currency in 2019, Government has been widening the scope of exemptions where foreign currencies are permitted in local transactions, giving the impression that the Zimbabwe Dollar was probably introduced prematurely and the pressure on the currency shows in the constant changes through which foreign currency use is creeping back into the economy.

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