INNOCENT GONESE
versus
MINISTER OF FINANCE AND ECONOMIC DEVELOPMENT

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 16 March 2021 & 27 April 2022

Opposed Application – *Declaratur*

Mr T. Biti, for the applicant
Mr J. Bhudha, for the respondent

MUSITHU J:

BACKGROUND

The applicant is a Member of Parliament, human rights lawyer and a constitutional rights activist. The respondent is the Minister of Finance and Economic Development in the Government of Zimbabwe. Part of his responsibilities includes the formulation and management of the country's macroeconomic policies, exercising an oversight role over the country's finances and other economic related matters. He is also responsible for administering revenue related legislation, and one such key legislation is the Finance Act[1] (hereinafter referred to as the Act or the charging Act). Section 3 of the Act allows the respondent to make such regulations as he may consider necessary or expedient to achieve the objectives of that law. This application challenges the powers that are reposed in the respondent by virtue of section 3 aforementioned, as well as some regulations made thereunder. The relief sought is couched as follows:

> "IT IS ORDERED THAT
> (1) The Finance (Amendment of Sections 22E (1) and 22H of Finance Act) Regulations, 2020 published as SI 123A of 2020 be and are hereby set aside and declared a nullity.
> (2) The Finance (Amendment of Sections 22E (1) and 22H of the Finance Act) Regulations, 2020 published as SI 145 of 2020 be and are hereby set aside and declared a nullity.
> (3) Section 3 of the Finance Act [Chapter 23:04] be and is hereby set aside or alternatively is amended to read as follows:-
>
> > *"Provided, he is not amending or repealing any provision in an Act of Parliament, the Minister responsible for Finance may make such regulations as he or she may consider necessary or expedient for the administration of this act and the better carrying out of these purposes."*

[1] [*Chapter 23:04*]

(4) The respondent pays cost of suit on a scale as between attorney and client."

The application was opposed.

THE APPLICANT'S CASE

The applicant contends that s 3 of the Act permits the respondent to make regulations whose effect is far reaching. In essence, the regulations override an Act of Parliament. The applicant contends that the wide scope of s 3 makes it unconstitutional.

The second leg of the applicant's challenge pertains to two statutory instruments the respondent made under the impugned s 3 of the Act. These are the Finance (Amendment of Sections 22E (1) and 22H of the Finance Act) Regulations, 2020, Statutory Instrument 123A of 2020 (SI 123A of 2020) and the Finance (Amendment of Sections 22E (1) and 22H of the Finance Act) Regulations, 2020 (SI 145 of 2020). I now turn to consider the applicant's attack on the propriety of these regulations separately.

Statutory Instrument 123A of 2020

According to the applicant, sometime in 1990, the Income Tax Act[2] (the ITA) was amended by the insertion of section 36(E) in that law. The new law created an obligation for the collection of a carbon tax in accordance with the Twenty-Eighth Schedule of the ITA, at a rate fixed from time to time in the charging Act. Following this new law, carbon tax was levied on diesel and petrol at the rate of five cents and three cents per litre irrespective of whether funds used to import the fuel were free funds or not.

On 5 June 2020, the respondent published SI 123A of 2020. That instrument created a new taxation regime in respect of carbon tax and the NOCZIM Redemption Levy. That new obligation is dependent on whether one is using free funds or not. The new regime had the following effect: those importing fuel using free funds would continue paying carbon tax at the rate of 0.03 cents per litre per petroleum product or 5% of the cost. Those importing fuel other than through free funds would pay thirty two point five Zimbabwean cents per litre of diesel and one hundred Zimbabwean Cents per litre of petrol.

In addition to the foregoing, the respondent also created a new tax known as the NOCZIM Debt Redemption and Strategic Reserve Levy (the NOCZIM levy). The new NOCZIM levy was provided for in terms of section 22 (H) of the Regulations, and it provided that the levy in respect of those importing fuel using free funds would be calculated at the rate

[2] [*Chapter 23:06*]

of one point three United States cents per litre of diesel and five point seven United States Cents per litre of petrol. For those importing fuel other than through free funds, they are required to pay thirty two point five Zimbabwean cents per litre of diesel and one hundred and forty two point five Zimbabwean cents per litre of petrol.

The applicant contends that the respondent has no power to amend an Act of Parliament. He further contends that the respondent has no power to bifurcate the tax or impose a carbon tax between those importers who use free funds and those who do not. The applicant also argues that the respondent cannot create a new tax, as he did with the NOCZIM levy in terms of section 22H of SI 123A of 2020. Only Parliament had the prerogative to do that in terms of section 134 of the Constitution of Zimbabwe (hereinafter referred to as the Constitution). To that end, SI 123A of 2020 was therefore *ultra vires* the Constitution. Section 3 of the Finance Act, in terms of which the SI 123A of 2020 was made was also unconstitutional.

Statutory Instrument 145 of 2020

The applicant contends that SI 145 of 2020 was fatally defective as it did not contain a specific repeal of SI 123A of 2020. He further submits that the new law amended section 22E of the Finance Act, but however left intact SI 123A of 2020 with respect to carbon tax on fuel imported using free funds. According to the applicant, the carbon tax on fuel imported through funds other than free funds is now levied at the rate of seventy-four point six Zimbabwean cents per litre of diesel and two hundred and twenty nine point four Zimbabwean cents per litre of petrol of the cost. SI 145 of 2020 merely increased the rate of tax on fuel imported otherwise than through free funds from thirty two point five Zimbabwean cents per litre of diesel and one hundred Zimbabwean cents per litre of petrol to seventy four point six Zimbabwean cents per litre of diesel and two hundred and twenty nine point four cents per litre of petrol.

SI 145 of 2020 also amended the NOCZIM levy, with the effect that in respect of fuel imported other than through free funds, the levy was to be calculated at the rate of seventy four point six Zimbabwean cents per litre of diesel and three hundred and twenty six point nine Zimbabwean cents per litre of petrol. As for fuel imported through free funds, the rate is one hundred and seventy two point one Zimbabwean cents per litre of diesel and one hundred and seventy two point one Zimbabwean cents per litre of petrol. The differences between SI 123A of 2020 and SI 145 of 2020 on the NOCZIM levy were that: SI 123A of 2020 imposed the levy in US$ for fuel imported using free funds and that SI 145 of 2020 increased the levy in respect of fuel imported using funds other than free funds.

The applicant contends that SI 123A of 2020 and SI 145 of 2020 characterise an abuse of power and the law. The respondent could not amend an Act of Parliament as he had done. His conduct ignored the fact that the Constitution was anchored on the principle of separation of powers as espoused in s 3(2) (e) of the Constitution.

To that end, the applicant avers that the respondent's actions constitute a serious infringement of his right to equal protection of the law. He further contends that such actions deny him the protection accorded by s134 of the Constitution.

Section 3 of the Finance Act

The applicant contends that s 3(2) of the Finance Act is unconstitutional to the extent that it permits the respondent to amend charges even those made by Parliament. The applicant averred that even if he was wrong in so asserting, the respondent made a substantive policy decision of declaring liability for carbon tax between that category of importers using free funds and those not using such funds. He argues that it was the prerogative of parliament to do so.

It was in view of the foregoing that the applicant sought a *declaratur* to the effect that the regulations were a nullity. He also sought a *declaratur* that section 3 was unconstitutional in the event that the court found that it gave the respondent wide powers to amend any law including an Act of Parliament. The applicant also submitted that he had no qualms with the court applying the blue pencil test assuming it found otherwise.

The Respondent's Case

In his opposing affidavit, the respondent denied acting contrary to the law or that his conduct in implementing the law amounted to an abuse of his powers. He averred that the provisions of s 3 of the Act permitted him to amend tax rates. The amendment of tax rates was done in terms of s 3 which gave him the power to amend or change any rate of tax levied in terms of that law. The respondent averred that s 3 defined and delineated what it is he could do in the exercise of his powers. It reposed in him the power to amend or replace any rate of tax through regulations. The respondent denied that he created new taxation under the new regulations. He was simply exercising his duties that broadly entailed the formulation of the country's macro-economic policy. Such policies included the Fiscal Measures for Reversing Fiscal Dis-equilibrium announced on 1 October 2018, which targeted amongst other things the volatile fuel sector.

The Reserve Bank of Zimbabwe (RBZ) was solely responsible for sourcing and allocating foreign currency for fuel consumption on a monthly basis, which was proving to be an onerous task. Fuel dealers would buy the commodity and sell in local currency while the RBZ provided the foreign currency component. Policy reforms by the RBZ allowed private players to import fuel using free funds. That necessitated a change in the rate of tax provided in sections 22E and 22H of the Finance Act. The respondent claimed that there was now disparity between dealers who imported fuel using free funds and selling in foreign currency and those importing through the RBZ and selling it in local currency. Those importing the fuel using free funds and selling in foreign currency were required to pay tax in foreign currency, while those importing through the RBZ and selling in local currency paid tax in local currency.

The respondent contended that he merely changed the rate of tax in terms of s 3 of the Finance Act. The rate so changed was published in the said regulations. Parliament had, for good measure, granted the respondent powers to change the rate of tax in terms of section 3 of the Finance Act. The regulations made in terms of s 3 were subject to confirmation by Parliament through an Act of Parliament within the timeframes prescribed by the law. That safeguard meant that Parliament's law making role was not usurped. The procedure for amending the rate of tax was spelt out in s 3 of the Finance Act. Those rates were then confirmed through an Act of Parliament. The Finance Bill which sought to confirm the said rates had since been gazetted. Parliament had debated the bill within the confines of the law and it was awaiting Presidential assent. The only way to change the rate of tax was to make regulations as provided for in the Finance Act. Further changes in the rate of tax were made in compliance with s 134 of the Constitution. They were therefore lawful. The applicant had no cognisable cause of action under the circumstances.

The respondent denied that its conduct violated s 56(1) of the Constitution. In any case, the applicant had failed to demonstrate in what respect that section of the Constitution had been offended. The respondent insisted that s 3 of the Finance Act was lawful. There was no need to have it set aside or modified otherwise. The application was therefore hopeless and baseless. The court was urged to dismiss it with costs on the higher scale.

Applicant's Reply

The applicant persisted with its claim that s 3 of the Act was unconstitutional as it allowed regulations made by the respondent to override an Act of Parliament. It could be set aside completely or modified in accordance with the blue pencil test, subject to confirmation

by the Constitutional Court in accordance with s 175 of the Constitution of Zimbabwe. The applicant remained adamant that the aforementioned regulations were unconstitutional. The same Minister not only amended an Act of Parliament. He also created a tax. This was the prerogative of Parliament.

The applicant had erred when he bifurcated the original fuel levy and made a distinction between fuel that was imported through free funds and non-free funds. He also went on to create a new tax called the NOCZIM levy, in terms of s 22H of the regulations. The applicant's point was that Parliament had, in terms of s 22 of the Finance Act, created a fuel levy. The respondent should not have bifurcated the original fuel levy and make a distinction between fuel imported through free funds and non-free funds. The applicant's gripe was that over and above increasing the rate, the respondent went on to bifurcate between fuel imported from free funds and fuel imported through non free funds. That was a major policy decision that required Parliament to undertake.

The Submissions and the Analysis

At the commencement of oral submissions, Mr *Bhudha* for the respondent applied for condonation to file the respondent's heads of argument which were 15 days out of time. The application was not opposed by Mr *Biti* who acknowledged that the matter was of national interest and required that both parties be heard. The respondent's heads of argument were accordingly tendered by consent.

In their submissions, counsels by and large persisted with the parties contentions as set out in the papers. This was justifiably so as the dispute essentially turns on the interpretation of the law. From the counsels' submissions, two key issues arise for determination. These are:

- *Whether s 3 of the Finance Act is unconstitutional in that it allows regulations made by the respondent to override an Act of Parliament; and*
- *Whether* ***SI 123A of 2020*** and ***SI 145 of 2020*** *are unconstitutional in that they allow the respondent not only to amend an Act of Parliament, but also to create a tax.*

The court will now proceed to consider these issues seriatim.

Whether s3 of the Finance Act is unconstitutional

The power to make, amend and repeal laws is the domain of Parliament in keeping with the principle of separation of powers as espoused in s 3 (2) (e) of the Constitution. It is one of the key tenets of a constitutional democracy. Section 3 (1)(a) of the Constitution ingrains the supremacy of the Constitution in the Zimbabwean legal system. Section 117 (1) of the

Constitution vests legislative authority in the Legislature. In terms of s117(2)(b)(c) the Legislature is vested with powers *"to make laws for the peace, order and good governance of Zimbabwe"* as well as *"to confer subordinate legislative powers upon another body or authority in accordance with section 134".*

Section 134 of the Constitution which permits the exercise of delegated legislative powers by other bodies provides as follows:

> "**134 Subsidiary legislation**
> Parliament may, in an Act of Parliament, delegate power to make statutory instruments within the scope of and for the purposes laid out in that Act, but—
> (*a*) Parliament's primary law-making power must not be delegated;
> (*b*) statutory instruments must not infringe or limit any of the rights and freedoms set out in the Declaration of Rights;
> (*c*) statutory instruments must be consistent with the Act of Parliament under which they are made;
> (*d*) the Act must specify the limits of the power, the nature and scope of the statutory instrument that may be made, and the principles and standards applicable to the statutory instrument;
> (*e*) statutory instruments do not have the force of law unless they have been published in the *Gazette;* and
> (*f*) statutory instruments must be laid before the National Assembly in accordance with its Standing Orders and submitted to the Parliamentary Legal Committee for scrutiny. (Underlining for emphasis).

The exercise of delegated powers as it relates to the making of statutory instruments, is subject to safeguards that recognise Parliament's supreme role as a law making organ. It is also consistent with the rule of law. It is in the context of the above constitutional foundation that s3 of the Finance Act must be viewed. The preamble to the Finance Act, states that the Act seeks ***"to make provision for the revenues and public funds of Zimbabwe and to provide for matters connected therewith or incidental thereto."*** It is in connection with matters that are concerned with or are incidental to the smooth administration of the Act that a Minister is accorded powers to make subsidiary legislation. The rationality is not difficult to decipher. It eases the workload on Parliament, and allows experts to legislate on technical matters that would absorb most of Parliament's time to consider in a short space of time. It is worth reciting the provisions of s 3 hereunder. It provides as follows:

> "**3 Regulations**
> (1) The Minister responsible for finance may make such regulations as he or she may consider necessary or expedient for the administration of this Act and the better carrying out of its purposes.
> (2) Regulations made in terms of subsection (1) may amend or replace any rate of tax, duty, levy or other charge that is charged or levied in terms of any Chapter of this Act, and the rate as so amended or replaced shall, subject to subsection (3), accordingly be charged, levied and collected with effect from the date specified in such regulations, which date shall not be earlier than the date the regulations are published in the *Gazette*.
> (3) If any provision contained in regulations referred to in subsection (2) is not confirmed by a Bill which—

> (*a*) passes its second reading stage in Parliament on one of the twenty-eight days on which Parliament sits next after the coming into operation of the instrument; and
> (*b*) becomes law not later than six months after the date of such second reading;
> that provision shall become void as from the date specified in the instrument as that on which the rate of tax, duty, levy or other charge shall be amended or replaced, and so much of the rate of tax, duty, levy or other charge as was amended or replaced, as the case may be, by that provision shall be deemed not to have been so amended or replaced."

The first leg of the applicant's argument is that s 3 gives the respondent unfettered powers to make law as well as amend an Act of Parliament. He further argues that the section effectively clothed the respondent with primary law making powers. That was the preserve of Parliament. The Constitution entrenched this position. That primary law making role was also non-delegable. It is axiomatic from a reading of sections 117(2) (c) and 134 of the Constitution that it is only in respect of subordinate legislation that Parliament may delegate its law making powers. The question that needs to be answered is whether s 3 ascribes to the respondent powers to make law, or put differently, powers to make regulations that override or amend an Act of Parliament. Mr *Biti* submitted that the much reviled section had that effect. It had to be struck down to the extent that it sought to arrogate to the respondent powers that are a preserve of Parliament. For the respondent, Mr *Bhudha* submitted that s 3 was in consonant with s 117(2)(c) of the Constitution. It had an inbuilt mechanism that restrained the respondent from acting otherwise. Any statutory instrument had to undergo Parliamentary scrutiny. It had to be confirmed by Parliament, failing which it would be deemed not to have been promulgated.

In *Mfundo Mlilo v Minister of Finance and Economic Development*[3], the court was invited to consider whether the Finance (Rate and Incidence of Intermediated Monetary Transfer Tax) Regulations, 2018, made in terms of s 3 had the effect of amending section 22G of the Finance Act. Section 22G set the rate at which the intermediated money transfer tax was to be calculated. In his judgment, ZHOU J said of the regulations and the preceding policy framework that gave birth to the regulations:

> "As concluded above, the effect of the impugned Regulations was to amend an Act of Parliament by repealing the existing rate of the Intermediated Money Transfer Tax of 5 cents per transaction and replacing it with 2 cents per dollar transacted. Repealing an Act is the prerogative of Parliament which according to s 134(a) may not be delegated. That only the power to make subsidiary legislation can be delegated by Parliament is equally clear from s 117 of the Constitution.
> …….
> It is therefore only subordinate legislation in respect of which the Legislature can delegate the authority to make to another body. To the extent that Clause 35 of the 'Fiscal Measures for Reversing Disequilibrium' policy document and s 2 of the Finance (Rate and Incidence of

[3] HH 605/19 at page 8 of the cyclostyled judgment

> Intermediated Money Transfer Tax) Regulations, 2018, amend s 22G of the Finance Act [Chapter 23:04] they contravene the provisions of s 134(a) as read with s 117(1) of the Constitution of Zimbabwe. Although the Regulations do not purport to be an Act of Parliament they do amend an Act of Parliament."

As regards s 3 of the Finance Act, the court had this to say:

> "That section cannot be read as granting to the Minister power to make Regulations which amend an Act thereby exercising Parliament's primary law making power. To do so would undermine the separation of powers principle which is the very basis upon which our nation is founded and the government is structured. A Minister, who is a member of the Executive, or any other arm or agency of Government does not have the power to amend, repeal or enact an Act of Parliament. Only the Legislature has that power. The Legislature is precluded by the constitution from delegating that power to any other authority. The respondent cannot therefore claim to have been authorised to exercise that power by s 3 of the Finance Act."

That judgment was appealed to the Supreme Court on 4 October 2019 under SC 543/19, and the matter is pending for hearing by that court. Be that as it may I fully associate myself with the findings and conclusions on the law by the learned judge. The power to levy income tax with specific reference to rates set out in the Act is provided for in section 7(1)(b) of the Income Tax Act. That section states as follows:

> "**7 Calculation of income tax**
> (1) The income tax with which a person is chargeable shall, subject to section *fifty*, be calculated in accordance with the charging Act by reference to—
> (*a*) ……; and
> (*b*) the appropriate rates of income tax fixed by the charging Act relating to that year; and
> (*c) ……."*

Section 14 of the Act makes provision for rates of Income Tax and other taxes levied under the Income Tax Act. Generally rates of tax are levied through a Finance Act. Both the Income Tax Act and the Finance Act are Acts of Parliament. Amendments to these Acts is ordinarily done through a Finance Act that is passed by Parliament. Section 3(2) of the Finance Act gives the respondent powers to make regulations that *"may amend or replace any rate of tax, duty, levy or other charge that is charged or levied in terms of <u>any Chapter of this Act</u>….."* The section goes on to state that the rate so amended or replaced shall be charged, levied or collected with effect from the date specified in the regulations. This of course is subject to the limitation that the provisions of the regulations must be placed before Parliament within the timeframe stipulated in section 3 (3) of the Act. A literal interpretation of s 3(2) of the Act yields one clear result. It gives the respondent powers to amend or replace any rate of tax, duty levy or other charge that may have been levied under the Act.

As already noted, rates of tax are delineated in the Act as read together with the Income Tax Act. Subsections 2 and 3 of s 3 of the Act were added through the Finance Act No.8 of 2007, published in the Government Gazette of 19 October 2007. Prior to that date, the old s 3 only contained a single provision which is now s 3(1). It is without doubt that the amendment expanded the scope of the respondent's powers to include the amendment or replacement of any rates of tax charged or levied by Parliament under the Act. Mr *Bhudha* did not find anything wrong with that. He argued that s 3 as presently couched was in consonant with s 117(2)(c) of the Constitution. He further pointed to subsection 3 which requires any provision of the regulations to be laid before Parliament and confirmed by a Bill. Mr *Biti* on the other hand argued that s 3 was too wide as it effectively gave the respondent powers to amend an Act of Parliament.

It is implicit from a reading of s 134 of the Constitution that Parliament has the power to delegate subordinate legislative powers to the executive. That is absolutely necessary for effective law making. The crucial issue that stands out is whether such subordinate legislative powers bestowed on the Executive extend to amending Acts of Parliament. The starting point is s 2 of the Constitution which entrenches the supremacy of the Constitution[4]. The legislative powers to make laws is derived from the Constitution and has to be exercised in accordance with the Constitution. The same applies to the conferment of subordinate legislative powers upon another body or authority by the Legislature. That the exercise of legislative powers must be confined to the limitations defined under the Constitution is clear from s 117 (1) of the Constitution. It reads:

> "(1) The legislative authority of Zimbabwe is derived from the people of Zimbabwe and <u>is vested in and exercised in accordance with this Constitution</u> by the Legislature" (Underlining for emphasis).

Legislative powers are therefore exercised subject to the Constitution which reaffirms the supremacy of the Constitution as already noted. It is clear from a reading of s 3(2) of the Act that the respondent enjoys powers to amend an Act of Parliament. By giving the respondent powers to amend or replace any rate of tax, duty, levy or other charge that was levied or charged in terms of the Act, s 3(2) effectively gives the respondent powers to amend rates of tax, duties,

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[4] Section 2 of the Constitution states as follows:
"2 Supremacy of Constitution
(1) This Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency.
(2) The obligations imposed by this Constitution are binding on every person, natural or juristic, including the State and all executive, legislative and judicial institutions and agencies of government at every level, and must be fulfilled by them."

levies or other charges contained in the Act as read together with the Income Tax Act. In short, the respondent is vested with powers to amend an Act of Parliament. The question that immediately arises is whether the exercise of powers conferred under s 3(2) is consistent with section 134 of the Constitution as read with s 117 thereof? Section 117 ensconces Parliament's law making role. Section 134 (a) reaffirms that role by asserting that that primary law making power must not be delegated.

It is common cause that it is within the domain of Parliament to amend Acts of Parliament and the rates of tax established therein. Yet s 3 (2) effectively confers such powers on the respondent. Permitting the respondent to amend or replace rates of tax, duties, levies or other charges imposed by Parliament following its deliberations, is tantamount to a delegation if not a usurpation of Parliament's primary law making role. Mr *Bhudha's* argument that the respondent's exercise of powers under s 3(2) of the Act is subject to Parliamentary oversight under s (3)(3) does not in the court's view bring s 3 (2) within the ambit of the aforementioned Constitutional provisions that provide for the conferment of subordinate legislative powers upon other bodies, and the exercise of such powers. The position of the law was reiterated in the South African Constitutional Court case of *The Executive Council of the Western Cape Legislature & Four Others v The President of the Republic of South Africa & Four Others*[5] where the court said:

> "[62] The new Constitution establishes a fundamentally different order to that which previously existed. Parliament can no longer claim supreme power subject to limitations imposed by the Constitution; it is subject in all respects to the provisions of the Constitution and has only the powers vested in it by the Constitution expressly or by necessary implication. Section 37 of the Constitution spells out what those powers are. It provides that:
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> > The legislative authority of the Republic shall, subject to this Constitution, vest in Parliament, which shall have the power to make laws for the Republic in accordance with this Constitution.
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> The supremacy of the Constitution is reaffirmed in section 37 in two respects. First, the legislative power is declared to be "subject to" the Constitution, which emphasises the dominance of the provisions of the Constitution over Parliament's legislative power, *S v Marwane* 1982(3) SA 717(A) at 747 H - 748 A, and secondly laws have to be made "in accordance with this Constitution." In paragraph [51] of this judgment we I pointed out why it is a necessary implication of the Constitution that Parliament should have the power to delegate subordinate legislative powers to the executive. To do so is not inconsistent with the Constitution; on the contrary it is necessary to give efficacy to the primary legislative power that Parliament enjoys. But to delegate to the executive the power to amend or repeal Acts of Parliament is quite different. To hold that such power exists by necessary implication from the terms of the Constitution could be subversive of the "manner and form" provisions of sections 59, 60 and 61. Those provisions are not merely directory. They prescribe how laws are to be made and changed and are part of a scheme which guarantees the participation of both houses

[5] CCT 27/95

> in the exercise of the legislative authority vested in Parliament under the Constitution, and also establish machinery for breaking deadlocks. There may be exceptional circumstances such as war and emergencies in which there will be a necessary implication that laws can be made without following the forms and procedures prescribed by sections 59, 60 and 61."

The important principle that emerges from the above authority is that legislative powers themselves are a product of the Constitution and must be exercised within the limits prescribed by the same Constitution. The legislature cannot delegate legislative powers to subordinate bodies beyond what is prescribed by the Constitution. A reading of the Constitution shows that the power to make laws, and by extension the power to amend and repeal those laws is the prerogative of Parliament as set out in the Constitution. In the court's view, the Legislature cannot delegate its powers to make, amend and repeal a law, or a provision of that law to a subordinate body or authority through a statutory instrument or subordinate legislation. Doing so is *ultra vires* the provisions of the Constitution that clearly define and delineate legislative authority. Section 3(2) of the Act must therefore be understood in that sense. The Constitution does not permit the Legislature to delegate to subordinate bodies or the Executive to be more specific, its powers to make, amend or replace rates tax, duty, levy or other charges made by Parliament in the exercise of its powers to make or replace such rates under the Act.

Once this court finds that the rate of tax, duty, levy or other charge was made by Parliament in an Act of Parliament, in the course of exercising its primary law making role, then it follows that it is only Parliament that is imbued with powers to amend or repeal that which it made in the course of exercising its Constitutional mandate. The respondent cannot amend or replace rates or levies that were made by Parliament in the course of exercising its constitutional role.

As regards s 3(3) of the Act, the court's view is that it is intended to subject to Parliamentary scrutiny, the exercise of powers by the respondent under s 3 (2) in respect of those matters in which the respondent was legitimately acting under delegated authority as permitted by the constitution. It is consistent with section 134 (f) of the Constitution which requires that statutory instruments must be laid before the National Assembly in accordance with its standing orders for scrutiny by the Parliamentary Legal Committee.

Mr *Biti* submitted that the entire s 3 of the Act was unconstitutional. From his submissions in court as well as the applicant's heads of argument, this court did not find any basis upon which section 3 (1) and (3) are impugnable. The applicant's case is an outright onslaught on the constitutionality of s 3(2) of the Act. It is the same section in terms of which

the two statutory instruments referred to earlier were made. In the final analysis, this court is satisfied that s 3(2) of the Act, as currently structured is unconstitutional as it confers upon the respondent powers to amend an Act of Parliament. It offends section 134 (a) as read with section 117(2)(c) of the Constitution. This finding is subject to the confirmation by the Constitutional Court in terms of section 175 (1) of the Constitution[6].

In paragraph 3 of the draft order, the applicant sought the setting aside of s 3 of the Act, or alternatively that it be amended in a manner that confines the exercise of the respondent's powers to those matters that do not involve the amending or repealing of any provision of an Act of Parliament. That part of the relief sought is impracticable to the extent that it requires this court to amend an Act of Parliament. That is the prerogative of the Legislature in the exercise of its constitutional mandate. In *Commissioner of Taxes v (W) (Pvt) Ltd*[7], the court held that:

> "Ordinarily, where a court is called upon to adjudicate on the effect of a legislative measure, it is concerned only with the validity of the measure and its application. It is not concerned with the wisdom or even its reasonableness. These are normally matters solely within the legislative domain." (Underlining for emphasis).

This court cannot arrogate to itself the exercise of powers that are constitutionally a preserve of another arm of Government.

Whether the SI 123A of 2020* and *SI 145 of 2020 are unconstitutional in that they allow the respondent not only to amend an Act of Parliament, but also to create a tax.

Once this court determines that s 3 (2) of the Act is unconstitutional for reasons explained above, the fate of the two Statutory Instruments is sealed to the extent that the respondent seeks to regulate through them, matters that are the preserve of Parliament. SI 123A of 2020 sought to amend s 22E and s 22H of the Act. Section 22E set the rate for carbon tax while s 22H set the rate for the NOCZIM debt redemption and strategic reserve levy. Through SI 123A of 2020, the respondent sought to amend section 22E of the Act, as well as repeal section 22H of the Act and substitute it with a new s 22H. In doing so, the respondent was repealing and amending an Act of Parliament through a statutory instrument.

Similarly through SI 145 of 2020, the respondent sought to amend again, section 22E of the Finance Act, as well as repeal and substitute s 22H of the same Act. Again, such changes

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[6] Section 175(1) states as follows:
"(1) Where a court makes an order concerning the constitutional invalidity of any law or any conduct of the President or Parliament, the order has no force unless it is confirmed by the Constitutional Court." See also *Mupungu v Minister of Justice Legal & Parliamentary Affairs & 6 Others* CCZ 07/21

[7] 1989 (3) ZLR 361 (S) at 370F; 1990 (2) SA 245 (ZS) at 266D:

were made through the medium of a statutory instrument. They had the effect of making changes to an Act of Parliament. As already observed in this judgment, the Constitution does not permit the Legislature to delegate legislative powers to subordinate bodies or authorities whose effect is to allow such subordinate bodies to repeal or amend Acts of Parliament. If it was the intention of the draftsmen of the Constitution to allow a delegation with such ancillary powers, then that would have been expressly stated.

In view of the conclusion to which this court has come regarding the constitutionality of s 3(2) of the Act in terms of which SI 123A of 2020 and SI 145 of 2020 were made, it is not necessary to decide on the propriety of the substantive matters that the two instruments sought to regulate. The finding of this court on the status of s 3 (2) of the Act strikes at the heart of the two instruments. It is the section in terms of which the respondent exercised his powers to regulate the matters contained in the two instruments. Once the court finds s 3(2) unconstitutional, it follows that the two instruments are bereft of any legal foundation and they must fall.

COSTS

The applicant sought costs on the higher scale of attorney and client. The general rule is that the successful party is entitled to costs on a scale which must be determined depending on the nature of the case and the manner in which litigation was conducted. An award costs on the attorney and client scale is not lightly granted by the court and the tendency is to do so in rare occasions, where the conduct of a litigant necessitates such an award. Courts have been slow to award costs in public interest litigation, of which I consider this one to be one such case. I do not consider the respondent's case to have been frivolous or vexatious. Having considered the significance of the case, I find it befitting to order that each party bears its own costs of suit.

DISPOSITION

Resultantly it is ordered that:

1. Section 3 (2) of the Finance Act [*Chapter 23:04*] be and is hereby declared to be inconsistent with section 134 (a) as read with section 117 (2)(c) of the Constitution of Zimbabwe, and consequently unconstitutional.
2. The Finance (Amendment of Sections 22E (1) and 22H of Finance Act) Regulations, 2020 published as SI 123A of 2020 be and are hereby declared a nullity and are set aside.

3. The Finance (Amendment of Sections 22E (1) and 22H of the Finance Act) Regulations, 2020 published as SI 145 of 2020 be and are hereby declared a nullity and are set aside.
4. The Registrar of the High Court shall place this judgment before the Constitutional Court for confirmation of the order of invalidity.
5. Each party shall bear its own costs of suit.

Tendai Biti Law, applicant's legal practitioners
Civil Division of the Attorney General's Office, respondent's legal practitioners