

## **THE END OF FUNGIBILITY OF SHARES IN ZIMBABWE? GENERAL NOTICE 583/2020 AS A TEST CASE.**

On the 15<sup>th</sup> of March 2020, two weeks before the advent of the initial twenty-one (21) day lockdown, the Minister of Finance and Economic Development issued the Exchange Control (Suspension of Fungibility of Certain Shares) Order, 2020. The order was gazetted through General Notice 583 of 2020 (hereinafter 'the General Notice').

The import of the General Notice was to suspend, for a duration of twelve (12) months, the fungibility of shares of three (3) entities listed on the Zimbabwe Stock Exchange. The three (3) companies targeted by the directive are Old Mutual Limited, PPC Limited and SeedCo International Limited.

In order to understand the import of the General Notice it is a prerequisite to undertake a definition exercise of the key terms found therein. A useful starting point is a determination of what a share is before delving into its fungibility.

A share is a financial instrument that represents a percentage of someone's ownership in a certain company. Shares can be held by both natural and juristic persons – the latter referring to corporations, trusts, associations, etc. Furthermore, shares are a tradable commodity capable of being bought, sold and exchanged between persons – natural or otherwise.

A share can be partially fungible or fully fungible. When a share is fully fungible, it means that the share can be bought on one Stock Market or exchanged and sold on another Stock Market. This is possible when there is a dual listing of shares of a certain company. An illustration of this is that one can buy shares in an entity listed on the Zimbabwe Stock Exchange (hereinafter 'ZSE') and be able to sell or exchange those shares of the same entity on the Johannesburg Stock Exchange (hereinafter 'JSE') as long as that entity is listed on both Stock Exchanges.

When a share is partially fungible it can only move in one direction. However, this piece will not focus on partially fungible shares and the respective entities in Zimbabwe.

At present fungibility on the ZSE is regulated by the Reserve Bank of Zimbabwe Exchange Control Regulations, namely, Exchange Control Directive GR699 of June 2016. It is noteworthy that before shares are moved out of Zimbabwe there is an underlying process for the approval of such a transaction.

The key consideration for approval is whether the investor is a local or foreign investor. If one is a local investor the shares may be sold offshore if there is no local uptake and the offshore price is higher. The process is more stringent for foreign investors as they have the burden of proving that the shares have been bought by funds which came through normal banking channels with the provision of documentary evidence being paramount before the shares may be moved out of Zimbabwe.

Fungibility of shares creates opportunities for what is called Arbitrage Trading. This is a position where shares are bought on the ZSE at a lower price and then sold on the JSE for a higher price. Arbitrage is thus considered risk free profit for a trader.

It is our respectful opinion that this may be the mischief that the Minister of Finance and Economic Development may be trying to curb due to the existence of what is regarded as the Old Mutual Implied Rate (hereinafter 'OMIR'). The OMIR is an unofficial rate which is used by investors to compare share price movement of Old Mutual Shares on the ZSE, JSE and London Stock Exchange – the latter two (2) being the major Stock Markets on which Old Mutual Holdings shares trade.<sup>1</sup>

Arbitrage Trading was becoming a headache in the Zimbabwean market due to the return of the Zimbabwe Dollar as it created a loophole which fuelled the upsurge of the black-market exchange rate. This is because the OMIR was in some quarters being deemed to be a true measure of the performance of the Zimbabwe Dollar against free market currencies and inadvertently pushing the black-market rate up. Naturally, the market regulator was having none of it, in the face of the interbank exchange rate which was widely regarded as suppressed and a false reflection of the performance of the market

With the issuance General Notice 583/2020 the Minister of Finance and Economic Development effectively suspended the fungibility of the shares of the three (3) companies referred to above. However, the order did not affect the settlement of any transaction which had been conducted on or before the 13<sup>th</sup> of March 2020 in respect of which settlement was outstanding, provided that settlement would be effected on or before the 18<sup>th</sup> of March 2020.

A question of the legality of this move has been posed by several individuals. The legality question is couched in an entity's right to freedom of trade guaranteed under section 64 of the Constitution of Zimbabwe. Such a right can only be limited by a law of general application per section 86, subsection 2 of the Constitution of Zimbabwe.

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<sup>1</sup> Old Mutual Holdings Shares also trade on the Malawi and Namibia Stock Exchanges.

This means that a law that is made to limit a right must apply to all in the target demographic. It is our learned view that the law complies with this constitutional regiment as it targets only those companies listed on the ZSE with fully fungible shares.

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