IN THE HIGH COURT OF ZIMBABWE **CASE NO. /**
HELD AT HARARE
In the matter between:

BITFINANCE (PVT) LTD t/a GOLIX **APPLICANT**
And

RESERVE BANK OF ZIMBABWE **1st RESPONDENT**
And

THE GOVERNOR OF THE RESERVE BANK OF ZIMBABWE N.O **2nd RESPONDENT**

APPLICANT'S FOUNDING AFFIDAVIT

I, the undersigned Tawanda Kembo, do hereby take oath and state as follows,

1. I am the chief executive officer of the Applicant. I am authorised to depose to this affidavit by virtue of my aforesaid position. I attach hereto a resolution of the Board of Directors of Applicant authorising me to so act. I am also conversant with the facts relevant hereto.

2. The facts I depose to herein are to the best of my knowledge, information and belief true and correct. Where I make averments as to the law, I do so on the advice of Applicant's legal practitioners.

3. Applicant is BitFinance (Pvt) Ltd trading as Golix (hereinafter called Golix). Applicant is a duly registered company operating in Zimbabwe. Applicant's address for service is care of that of its attorneys Messrs Mutandiro, Chitsanga and Chitima of No. 3 St Quintin Avenue, Eastlea, Harare.

4. 1st Respondent is the Reserve Bank of Zimbabwe, a corporate entity created in terms of the Reserve Bank of Zimbabwe Act (Chapter 22:15). It is capable of suing and being sued in its own name. Respondent's address for service is Reserve Bank of Zimbabwe, 80 Samora Machel Avenue, Harare.

5. 2nd Respondent is the governor of the Reserve Bank of Zimbabwe. He is cited herein in his capacity as the head of the 1st Respondent who is overly in charge of the decisions which 1st Respondent makes.

6. This is an urgent chamber application for the setting aside of the decision by the 1st Respondent to ban the operations of the Applicant. The application is founded on section 3 as read with section 4 of the Administrative Justice Act (Chapter 10:28) as amplified by section 68 of the Constitution of the Republic.

7. The facts relevant hereto follow below,

8. Applicant is a registered Zimbabwean company. It is a start-up in the financial technology sector that was incorporated on 11 December, 2014. It operates from 1st Floor, Batanai Gardens, corner Jason Moyo/First Street, Harare. Applicant has a staff complement of 22 staff members.

9. Applicant is in the business of running a cryptocurrency exchange. Applicant's business is based on what is known as blockchain technology. I attach hereto as Annexures 'D1' to 'D6' writings which give an insight into what the blockchain technology and cryptocurrencies are.

10. Applicant has been running this exchange since September 2015. At the time of the ban by the 1st Respondent, Applicant had some 49 333 customers who were registered on its exchange carrying on business from it. The majority of these customers are Zimbabweans resident in Zimbabwe. A few numbers are Zimbabweans in the diaspora and nationals of other countries.

11. I give a narration of Applicant's business model below,

12. Applicant's exchange is an online marketplace where buyers and sellers of cryptocurrency meet. Cryptocurrencies are a digital representation of value which function as a medium of exchange, a unit of account and/or a store of value but do not have legal tender status in Zimbabwe yet.

13. To participate on the exchange, clients open accounts on Applicant's exchange. In opening the accounts, clients undergo a know your customer (KYC) exercise which is conducted by Applicant's staff members. In this exercise, Applicant requires a client's email address, phone number, copy of ID and proof of residence.

14. Once a client opens an account, they will be able to sell or purchase cryptocurrency on the exchange. Applicant does not determine the rates/ prices of the cryptocurrency. The clients themselves do on the basis of demand and supply.

15. There are buyers and sellers on the exchange. Sellers advertise their cryptocurrency for sale. Buyers purchase the cryptocurrency. In order for a buyer to purchase, they will deposit sufficient money in fiat currency into either of Applicant's bank accounts with CBZ Bank or Steward Bank. They can also deposit into Applicant's Ecocash account with Econet.

16. When Applicant's accounts aforementioned are credited with the buyer's deposit, Applicant will in turn credit the buyer's account on the exchange with the equivalent money. The buyer will then use their money now in their account on the exchange to purchase cryptocurrency from a willing seller. The seller may name their price which the buyer will accept or the buyer will propose a price at which they are willing to buy which the seller may accept.

17. The party who proposes or sets the price is called the 'maker'. The party who accepts the price is called the 'taker'. For its fees, Applicant levies a commission of 1% of the transaction value on the maker and 2% of the transaction value on the taker.

18. Applicant's exchange offers certain distinct solutions to its clients. Zimbabweans in the diaspora were using the exchange to remit money to their relatives in Zimbabwe. People in the diaspora would sell cryptocurrency on Applicant's exchange, deposit the proceeds of the sale in local bank or mobile money accounts from which the money would be accessed by their relatives as fiat currency locally.

19. The exchange was also being used to make international payments by Zimbabweans. For instance, a person in Zimbabwe intending to purchase a motor vehicle online from the Japanese used car exporter Be Forward, would buy cryptocurrency on the exchange. The Applicant would then send the cryptocurrency to the buyer's online wallet. The buyer in turn then purchases the motor vehicle from Be Forward using the cryptocurrency (Be Forward and several other international businesses accept cryptocurrency as a means of payment for goods and services).

20. Clients were also using the exchange as an alternative store of value. In this case, clients would simply use their fiat currency to purchase cryptocurrency which they would then store in their wallets as savings.

21. On the 17th of May 2018, 1st Respondent sent a letter via email to the Applicant. The letter banned, with immediate effect, the operations of the Applicant. For ease of reference, the letter from the 1st Respondent read in relevant portion as follows,

    "In line with the decision of the Reserve Bank of Zimbabwe to ban virtual currency exchanges and virtual currency transactions, all cryptocurrency exchange houses operating in the country, including Bitfinance (Private) Limited (also known as Golix), are required to cease all virtual currency exchange operations. All entities regulated by the Reserve Bank of Zimbabwe have been directed not to deal in virtual currencies or provide services to facilitate any person or entity dealing with or settling virtual currencies.

    In ceasing operations, you are required to take all the necessary steps to close cryptocurrency accounts or 'wallets' of your customers and to make good any funds currently held on behalf of customers."

22. I attach hereto a copy of the press statement as Annexure 'A'.

23. As fully emerges from Annexure 'A', 1st Respondent's ban was targeted at Applicant directly in several respects, namely, that Applicant was banned from operating, the transactions conducted on its exchange were banned and further it was ordered to close its clients' cryptocurrency accounts and refund the clients any monies it was holding on their behalf. Applicant was also banned indirectly in that all entities regulated by the 1st Respondent which had hitherto been dealing with Applicant were prohibited from further dealing with Applicant.

24. The ban was communicated to the Applicant by 1st Respondent through a letter that was sent to Applicant's Chief Executive Officer on the 17th of May 2018. I later learnt that the statement had been published in several local dailies on the 14th of May 2018. That notwithstanding, I submit that Applicant only became aware of the ban on the 17th of May when the letter was sent.

25. I humbly submit that the decision by the 1st Respondent aforesaid is in violation of both good administrative justice law and the constitution of the country. Applicant implores this honourable court, on an urgent basis, to set aside and reverse the decision by the Respondents.

26. I am advised that 1st Respondent is an administrative body as envisaged in the Administrative Justice Act (supra). Being an administrative body 1st Respondent has a duty, whenever it takes any administrative action which may affect the rights, interests or legitimate expectations of any person, to act lawfully, reasonably and in a fair manner.

27. I am further advised that for administrative action to be fair, the administrative authority must have given adequate notice of the nature and purpose of the proposed action, it must have given the affected person reasonable opportunity to make adequate representations and it must also give the person adequate notice of any right of review or appeal where applicable.

28. I further submit that there is now a constitutional right for all persons in Zimbabwe to proper administrative justice. Section 68 of the Constitution of Zimbabwe provides for a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair.

29. In the event that an administrative authority acts in violation of good administrative justice, any person affected thereby is entitled to approach the honourable court for the decision to be set aside inter alia.

30. I submit that the decision by the Respondents violated the Administrative Justice Act, the Constitution and common law principles on administrative law. In having violated the Constitution, the decision is therefore unconstitutional. I explain why below.

31. To start with, the decision was unlawful in that the Respondents lacked jurisdiction to make the decision. They acted ultra vires their enabling Act. The 1st Respondent is a creation of statute. It is created in terms of the Reserve Bank of Zimbabwe Act (Chapter 22:15). Its powers are to be found in this Act and other Acts falling under that Act in the financial services sector. Such other subordinate Acts include for instance the Banking Act (Chapter 24:20), the Bank Use Promotion and Suppression of Money Laundering Act (Chapter 24:24) and the National Payment Systems Act (Chapter 24:23).

32. The preamble to the Reserve Bank of Zimbabwe Act summarises the powers and jurisdiction of the Reserve Bank. The Bank is given power to, inter alia, regulate the issue of banknotes and coins; to provide for matters connected with banking, currencies, monetary policy and coinage; to provide for the supervision of banking institutions; to

authorise the provision of information to foreign regulatory authorities and to provide for matters connected with or incidental to the foregoing.

33. It is clear from the wording of the preamble that the 1st Respondent only has power to regulate the banking industry and currency in Zimbabwe. The banking industry is made up of banking institutions as defined in the Banking Act (supra). Currency, whose issue and use the 1st Respondent regulates, is defined in the Bank Use Promotion and Suppression of Money Laundering Act (supra) as the coins and banknotes of Zimbabwe (or of a foreign country) that has been designated as legal tender and is ordinarily used and accepted as a medium of exchange in the country of issue.

34. Other Acts subordinate to the Reserve Bank of Zimbabwe Act also underline the fact that 1st Respondent's jurisdiction pertains to the regulation of the banking industry (banks and financial institutions) and currency (legal tender). For instance, the preamble to the Banking Act is to the effect that the purpose of that Act is to provide for the registration, supervision and regulation of persons conducting banking business and financial activities in Zimbabwe. The preamble to the National Payment Systems Act summarises the purposes of that Act as being to provide, inter alia, for the recognition, operation, regulation and supervision of systems for the clearing of payment instructions between financial institutions, for the netting or other settlement of obligations arising from such clearing and the discharge of indebtedness arising from such netting or settlement and to make provision for the finality of payments and settlements made in accordance with such systems.

35. On its part, Applicant is not a banking or financial institution. It does not fall within the banking or financial services sector. Even though it partners with banks in serving its clients, Applicant is not a bank or financial institution as defined in the aforesaid Acts. Instead, Applicant is a start-up in the emerging financial technology industry. Applicant's business is founded in the emerging field of blockchain technology.

36. In Zimbabwe, like in most other countries in the world, companies like Applicant which are in the cryptocurrency business are yet to be regulated. As an emerging industry based on novel technology, governments across the world are still learning how the industry works with a view to crafting regulation and also on which department of the government should do the regulation.

37. For the Applicant, there has not yet been assigned a government department to which Applicant can go for licensing. Applicant has not been told by Respondents or any government department of the need for it to be licensed in order to operate. Applicant's exchange facilitates the trade of cryptocurrency. However, Respondents have not classified cryptocurrency as legal tender in terms of the aforesaid Acts. Respondents do not issue cryptocurrency.

38. Respondents themselves are not the regulatory body. As aforesaid, the Reserve Bank of Zimbabwe Act and the associated Acts do not give Respondents power to regulate the Applicant. Despite several meetings between Applicant and Respondents since Applicant began trading, Respondents themselves have never indicated to the Applicant

that they are the regulatory authority. They never requested Applicant to obtain any particular licence from them or anywhere to regularise its operations in case Applicant was operating illegally.

39. In fact, the last meeting between Applicant's officials and the 1st Respondent's officials was held at Respondents' offices on the 11th of May 2018, only 4 days before the ban was announced. However, issues to do with licensing or regulation were never discussed in that meeting. Specifically, Respondents never said that they were the regulators. I attended the meeting.

40. I have already mentioned earlier that Applicant began operations in 2015. We are now in 2018. For the entire 3 year period in which Applicant has been in operation, Respondents have never indicated to Applicant that they are the regulatory authority. With respect, the ban by Respondents is thus coming out of the blue. It is unclear from where Respondents have suddenly found authority to regulate Applicant's operations, let alone shut down its activities.

41. I submit that the ban in effect outlaws and classifies as illegal Applicant's operations. The Respondents are in fact purporting to classify the trade in cryptocurrency as illegal. That will amount to law making, a function that belongs to the legislature and not the Respondents. Respondents are thus clandestinely usurping Parliament's law making powers.

42. In the circumstances therefore, I humbly submit that the Respondents acted without jurisdiction. Their actions are ultra-vires the enabling Act. The actions are not based on any legal provision authorising Respondents to act as such. The ban is therefore unlawful for being ultra-vires Respondents' powers. The honourable court is invited to rescind the ban on this ground alone.

43. However, I submit that even if the court were to find that Respondents had jurisdiction over the matter, then the action would still be unlawful for several other reasons.

44. The ban by Respondents does not meet the criteria of fairness in terms of the Administrative Justice Act.

45. Even if it is to be accepted that Respondents had jurisdiction on the matter, the ban was unfair in that Respondents did not at all give Applicant notice of the nature and purpose of the ban before it was put in place. We cannot even begin to talk of the adequacy of the notice.

46. Applicant was never advised prior to the ban that it will be implemented even though Respondents had ample opportunity to advise Applicant of same. As aforesaid, the last meeting between the parties was held on 11 May 2018. Four officials from the Applicant including myself attended the meeting while fifteen officers, including the Registrar of Banking Institutions represented the Respondents. In that meeting, the discussions were more of Respondents wanting to learn and understand the technology behind our business and our business model.

47. The impression we got was that Respondents wanted to understand in order to begin working on regulation. No mention was made of any impending ban on our business.

48. The purpose of the ban was also not explained to us in advance. The letter sent to us advising of the ban does not explain the purpose of the ban either. It only advises of the ban. We can only speculate as to why we were banned.

49. In the absence of any warning about the ban, its purpose or the reasons behind it, Applicant cannot regulate its conduct appropriately in order to comply with any requirements. Applicant does not know what it needs to do in order for the ban to be reversed. Applicant could also not regulate its affairs in advance in order to prevent the ban by addressing the reasons for which it was being imposed.

50. The sudden and immediate nature of the ban is seriously and irreparably prejudicing Applicant's business for as long as the ban remains in place. Applicant was caught unaware. With respect, the nature of the ban suggests malice and bad faith on Respondents' part. One is left with a feeling that Applicant was deliberately not advised of the ban so as to maximise the damaging impact of the ban on Applicant.

51. Since the ban was announced, Applicants' customers have had a run on the exchange. They are disposing their cryptocurrency on the exchange and withdrawing the equivalent in fiat currency en masse. Since the ban was announced, a total of US$ 30,000 (thirty thousand United States dollars) per day has been withdrawn from the exchange. This represents 30% of all funds that were being traded on the exchange prior to the ban. As a result of the ban, Applicants' bankers CBZ Bank and Steward Bank have immediately closed Applicants' accounts with the banks. Applicant can no longer conduct any transactions through its bank accounts.

52. The net impact of the above is that Applicant's profitability has taken a huge knock. Trade has gone down on the exchange. Applicant's fees through commission have dropped correspondingly. Applicant risks failing to meet its monthly obligations to staff and other service providers should the illegal ban remain in place. Applicant is staring at closure and has been exposed to lawsuits by its creditors.

53. Applicant also had plans to launch its Initial Coin Offering (ICO) beginning on 14 May 2018. An ICO is an exercise by which a start-up company raises capital to fund its growth by selling digital assets which will have value on and be used on the company's product ecosystem. An ICO is the equivalent of an initial public offering in the case of traditional companies.

54. Applicant had already come up with a plan for its ICO. A copy of the whitepaper explaining the ICO, its timeframes and Applicant's purpose for launching the ICO is attached hereto as Annexure 'B'. In preparation of the ICO, Applicant had already entered agreements with its investors and other stakeholders. Some of the investors are from as far afield as the United States of America and the United Kingdom. The investors had bought into Applicant's business model and are keen on sponsoring Applicant's growth.

55. However, all this has been thrown off-rail by Respondents' sudden and rash ban. Had notice of the ban been given, Applicant would have adjusted its plans accordingly. Now the whole plan on the ICO has been thrown into confusion. Our investors and partners do not know what to do. It reflects badly on Applicant as a growing company trying to fund its growth by courting investors. Applicant's reputation has no doubt received a severe battering in the eyes of investors due to the ban. Investors will think Applicant was not candid with them in terms of the regulation of its business in Zimbabwe.

56. The ban is also unfair since Respondents did not give Applicant the opportunity to make representations. Dealing in technology which is as yet to be fully understood by most ordinary people and even governments throughout the world, it is understandable that the Respondents still needed to learn and appreciate the intricacies of Applicant's business.

57. Therefore, if Respondents thought is desirable to regulate or even ban Applicant, as it did, then it was only fair that Applicant would be heard before such a drastic measure was taken. This was not done.

58. Respondents should have advised Applicant that they wanted to ban its operations. They should then have solicited Applicant's representations on the ban. Had that happened, I submit that Applicant would have made a strong case against the ban.

59. There are compelling reasons why the ban should not have been put in place. These would have been presented to Respondents had they solicited Applicant's representations.

60. Applicant employs twenty two employees. It has five directors. Applicant pays monthly remittances to NSSA and PAYE to ZIMRA in respect of its employees. I attach hereto as Annexure 'C' documents to illustrate the payments made to NSSA and ZIMRA. Applicant's employees will lose their jobs as a result of the Respondents' ban. The statutory bodies will no longer receive the remittances from Applicant.

61. Applicant had also established a business ecosystem with other companies. It partnered with CBZ Bank and Steward Bank with whom it had bank accounts. It also partnered with Econet for transactions on the mobile platform Ecocash. It did business with Liquid Telecom and ZOL from whom it accessed internet services. It also rented office space from Old Mutual. All the business arising from these partnerships and the economic value from them will be lost as a result of the ban.

62. Applicant is a profitable organisation. The total value of transactions conducted on Applicant's exchange since the company began operations in 2015 is US$ 9.9 million. Applicant charges 3% of the value of transactions conducted on the exchange for its commission. For the entire period of its operation, Applicant has therefore realised revenue of approximately US$ 297 000.

63. Applicant's shareholders thus had an obvious and legitimate interest in being heard first before the ban was put in place.

64. The ban also means Applicant's customers are no longer able to use Applicant's services. Customers will not be able to send and receive money through the facility. They will not be able to make international payments through the exchange. Applicant had become a trusted and reliable service provider in its line of business. In fact, Applicant is the leading player in its industry. It was the first cryptocurrency exchange to be established and run successfully in Zimbabwe.

65. On behalf of its customers, Applicant thus had an obligation to make a case for the continuation of the exchange. Customers who had become accustomed to transacting on the exchange have been left in the cold.

66. It is common knowledge that there is a shortage of foreign currency in Zimbabwe. People are seriously constrained in making international payments. Banks in Zimbabwe can no longer assist clients in settling international payments. Applicant had become an innovative way for any person in the country to get around the challenge of making international payments for various purposes.

67. The decision to ban Applicant was therefore arbitrary and not fully informed. It is thus unlawful for being unfair.

68. The ban is also unfair because Respondents did not advise Applicant of any right of recourse against same. The correspondence in which the ban is announced does not say of any right of appeal or review against the ban. It does not say what Applicant needs to do in order to contest the ban. It also does not say what Applicant needs to do in order to regularise its operations so that it does not persist in the conduct offending the Respondents, in the case that Respondents have the mandate to regulate Applicant.

69. Applicant wishes to contest the ban. However, it has not been made aware of how to contest the ban. This honourable court is therefore at large to intervene.

70. I should point out that Respondents' failure to advise of any right of appeal or review also suggests strongly that Respondents do not yet have the power to regulate the Applicant. I am advised that whenever an administrative authority makes a decision, it is customary that the decision is accompanied by an indication of any right of appeal or review against the decision. The absence of a clear right of recourse in this case clearly shows that there is not yet a clear framework empowering Respondents to issue a ban such as it issued.

71. There is also a constitutional argument against the ban.

72. Section 68 of the Constitution requires that administrative action be lawful, reasonable, proportionate and procedurally fair. I humbly submit that Respondents' actions fell short of the standard required in the Constitution.

73. For all the reasons canvassed above, the decision by Respondents was unlawful, unreasonable, procedurally unfair and disproportionate.

74. I should explain why Applicant contends that the decision is disproportionate in the circumstances. First, the press statement issued by 1st Respondent does not state the purpose for which the ban was imposed. The reason why it was necessary to impose the ban is not stated in the press statement. We can only speculate as to why the ban was imposed.

75. In the absence of a clear reason for the imposition of the ban, it is really difficult to assess the proportionality of 1st Respondent's decision vis-a –vis the goal it was intended to achieve. Nonetheless, even in the absence of a clear reason for the ban, it is not difficult to see that the decision is disproportionate.

76. I can only assume that central to the decision to impose the ban is the suspicion by the 1st Respondent that the technology behind Applicant's business may be used to commit crime and destabilise the national payments system in the country. Given the decentralised nature of cryptocurrency, its autonomy from government control, that it is not issued by the government and that transactions in cryptocurrency are online and therefore cross border in nature, there is also the argument that cryptocurrency can be used for money laundering.

77. While there may be credence in the fears around the use of cryptocurrency, the ban imposed by 1st Respondent is not the best way to deal with such issues. It was important that Respondents understood the technology first and then cause for appropriate legislation to be put in place by the legislature. Banning operations can never be the way to deal with new technology. Banning technology whose use and adoption is rising rapidly will only lead to people going underground with their use of the technology. That will create more risk of crime and prejudice to the economy and to unsuspecting members of the public.

78. Be that as it may, the fears I referred to above have not been fully justified or explained. For instance, it is not certain how exactly Applicant's business may lead to money laundering or externalisation of forex. On its part, Applicant has means to ensure that its customers are bona fide. It conducts a know your customer interview on opening accounts for customers including requesting for identification documents. Applicant's partners, CBZ Bank, Steward Bank and Econet (Ecocash) also conduct their own due diligence in accepting deposits from Applicant's customers. Applicant thus relies on the system of its partners in vetting its customers.

79. Respondents also did not explore less drastic measures to achieve their goal. This was partly because it did not consult all relevant stakeholders, including Applicant, on how best to deal with the matter. Had this been done, I have no doubt less harmful measures would have been found.

80. For instance, in Mauritius the government issues what is called a 'regulatory sandbox license'. This license allows companies or projects dealing in new technologies, like cryptocurrency, to operate their businesses in a controlled environment while the

government supervises/monitors the businesses. The government may also impose certain specific control measures to ensure that members of the public are not prejudiced.

81. The Respondents could also have asked Applicant to comply with certain operational requirements in order for it to operate according to Respondents' expectation.

82. However, as it is, the ban is too drastic. Not only does it stop Applicant's operations, it also injures Applicant's reputation with its customers and investors. The ban is also contrary to government's drive to promote investment into Zimbabwe. The ban does not augur well with government's attitude of presenting the country as 'open for business'.

83. For all the foregoing reasons, the ban is thus unconstitutional.

84. Having submitted on the illegality of the ban, I submit that this matter is urgent and ought to be dealt with on an urgent basis. Applicant became aware of the ban on the 17th of May 2018. It acted immediately to contest the ban by approaching this honourable court.

85. Applicant also seeks the urgent intervention of the court on this matter. As aforesaid, the decision by the Respondents attacks the very existence of the Applicant. A run on the exchange by Applicant's customers has already begun. Some of Applicant's potential investors will definitely no longer be willing to inject capital into Applicant in light of the ban. Applicant also wanted to launch its ICO. Plans for the launch were already at an advanced stage. Applicant has already incurred significant expenses in preparing for the ICO.

86. The ban by Respondents means that Applicant is no longer a going concern. It will not be able to make money. Applicant will fail to pay its staff and service debts owed to other creditors. It is almost coming to the end of the month and Applicant will need to meet its monthly overheads.

87. All the above make for an urgent need for the court to intervene. The matter cannot wait to be determined in the usual way of following the court roll.

Wherefore, pleading as above, I pray for an order in terms of the draft.