REPORTABLE (47)

MAGIC SOFTWARE ENTERPRISES LIMITED
v
NEDBANK ZIMBABWE LIMITED

SUPREME COURT OF ZIMBABWE,
UCHENA JA, KUDYA JA & CHATUKUTA JA
HARARE 25 OCTOBER 2024 & 30 MAY 2025

T. Magwaliba, for the appellant.

T. Mpofu, for the respondent

UCHENA JA:

[1] This is an appeal against the whole judgment of the High Court ("court *a quo"*) dated 29 June 2024 in which, it dismissed the appellant's application for a declaratory order.

[2] Magic Software, (the appellant) had sought declaratory relief in the following terms; -

> "1. The Application for a declaratory order be and is hereby granted.
> 2. Applicant`s funds in the sum of USD 1,996 723, 02 which were deposited with the respondent constitute a foreign loan and foreign obligation.
> 3. The conversion of Applicant`s funds from United States Dollars to RTGS Dollars is hereby declared unlawful and *ultra vires* s 44C (2) (b) of the Reserve Bank of Zimbabwe Act [*Chapter 22:15*].
> 4. The respondent is indebted to the Applicant in the sum of USD 1, 996 723, 02.
> 5. The respondent shall pay Applicant the sum of USD1, 996 723, 02
> 6. There shall be no costs of suit unless the application is opposed."

FACTUAL BACKGROUND

[3] The appellant is an information technology company registered in terms of the laws of Israel. The respondent is a commercial bank registered in terms of the laws of Zimbabwe.

[4] The appellant and its Zimbabwean client, Tel-One entered into a Leap Billing Upgrade Agreement. The Leap Billing Upgrade Agreement was an agreement wherein the appellant would provide an upgrade of Tel-One's Leap Billing System and conduct all additional enhancements to Tel-One's operations.

[5] Tel-One incurred an obligation to pay the appellant for the services rendered. At the initial stages Tel-One was making payments to the appellant in foreign currency.

[6] According to a letter dated 20 January 2021 (Annexure G), written to the Exchange Authority by the appellant's Legal Practitioners, Tel-One later failed to make payments to the appellant due to the scarcity of foreign currency in the country, leading to the need to open the Bank Account in which Tel-One deposited the disputed funds from its RTGS platform.

[7] The appellant's Legal Practitioners in Annexure G, stated that the money in the account, would on the eventual allocation of foreign currency be repatriated to the appellant in Israel.

[8] To enable Tel-One to make these payments into a bank account the appellant claims that it applied to the respondent for the opening of a United States dollar denominated non-resident escrow account in its name.

[9] On being approached by the appellant for the opening of the bank account, the respondent allegedly advised the appellant to open a non-resident escrow account.

[10] The appellant's Legal Practitioners explained to the Exchange Control Authority in Annexure G how the account was conceived and was intended to operate in view of the difficulties Tel-One was facing in raising foreign currency to pay the appellant. They in that letter said:

> "Due to the foreign currency shortages prevailing in Zimbabwe in 2016 Tel-One began to face challenges remitting funds offshore to our Client. In light of the fact that the currency in use in Zimbabwe, at the time was the United States Dollar, Tel-One and our client came to the agreement that our client would open a non-resident escrow account in Zimbabwe and that Tel-One would settle its obligations into that account. **As and when the foreign currency would be allocated, our client was then to remit the funds to itself offshore, having secured that Tel-One had honoured its obligations as and when they fell due**." (Emphasis added)

[11] The opening of the account was preceded by communication between the appellant and the respondent's employees, Shorai Dube and Tawanda Chikwanda. According to the emails attached to the application for a declaratur, Shorai Dube in Annexure B merely advised the appellant of the outstanding documents required for the opening of the account. Chikwanda in an email of 12 May 2017 attached to the appellant's application to the court *a quo*, as Annexure C communicating with the appellant about the documents required for the opening of the account and the appellant's completion of the forms on the basis of which the account would be opened said:

> "Please find attached all necessary documents required in order to open a Non-Resident account in our books…
>
> In order to expedite the opening of the account and to avoid any delays, once all the account opening documents have been collated these can either be scanned and emailed or faxed to us to check. Once we have vetted and confirmed that all is in order then can you submit your forms, only once we have received all the original account opening documents will we be in a position to open the account and confirm account details".

[12] In terms of Chikwanda's email the submission of the documents and completed and signed forms to the respondent would on their acceptance by the respondent constitute the contract between the appellant and the respondent.

[13] The appellant did not attach the completed forms which according to Annexure D it completed and send to Chikwanda for compliance checks before it finally submitted them

for the opening of the account. These forms once signed by both parties, constitute the agreement and contract between them.

[14] Subsequent to the opening of the account, Tel-One, which in Annexure G is said to have been having problems in sourcing foreign currency, which circumstances led to the opening of a local Bank Account by the appellant,, made, deposits into the appellant's United States dollar denominated account by electronic transfers from its Account on a local RTGS payment platform.

[15] On 4 October 2018, when the Reserve Bank of Zimbabwe (RBZ) issued Exchange Control Directive RT 120/18 ('RT 120/18'), the appellant's account had a balance of USD$1, 996 723.02. Paragraph 2 of the RBZ's Directive RT 120/18, instructed all banks to undertake a re-designation of foreign currency accounts ('FCAs') based on the source of the deposits. Consequently, the respondent re-designated the appellant's account into an RTGS FCA and the balance in the account was denominated as a local currency.

[16] In its pleadings the appellant alleged that it was the respondent's responsibility to apply to the Reserve Bank for exchange control approval before the opening of the non-resident escrow account.

[17] *Per contra,* in its pleadings the respondent alleged that it was the responsibility of the appellant to apply to the Reserve Bank for exchange control approval before the opening of the non-resident escrow account.

[18] The dispute between the parties arose in June 2019 when the appellant could not withdraw and repatriate the money in its account. The respondent informed the appellant that its account had been re-designated into an RTGS Foreign Currency Account, and the funds in its account had been denominated into Zimbabwean dollars in terms of the RBZ's directive RT 120/18.

[19] In a bid to access the funds, in United States dollars, the appellant and Tel-One made an application to the Exchange Control Authority for the blocking of the funds in the appellant's account.

[20] The appellant and Tel-One also applied to the RBZ for the allocation of foreign currency to it in US dollars at the rate of 1 is to 1 to enable it to withdraw the money in its account as foreign currency for repatriation to itself in Israel.

[21] The application did not succeed. In its response, the RBZ advised the appellant that its account was not registered and controlled in terms of the Exchange Control Act [*Chapter 22:05*].

[22] Aggrieved, the appellant in Annexure G appealed to the review authority against the decision of the RBZ in terms of s 43 of the Exchange Control Regulations, 1996. Whilst that appeal was still pending, the appellant applied to the High Court for a declaratory order. In terms of the draft order, the appellant sought a declaratory order to the effect that RT 120/18 was unlawful and that the respondent pay to it the sum of US$1, 996 723,02 which was deposited by Tel-One into its account.

SUBMISSIONS BEFORE THE COURT *A QUO*.

[23] Mr *Magwaliba,* counsel for the appellant submitted that the appellant's account with the respondent constituted a foreign loan and foreign obligation in terms of s 44C (2) (b) of the Reserve Bank Act [*Chapter 22:15*] (the RBZ Act). He further submitted that the respondent had breached its duty to ensure that the appellant could access the money in its account and that the money would remain in United States Dollars. Counsel also argued that the respondent was obliged to pay the funds in United States dollars because it failed to advise the appellant to obtain Exchange Control approval before opening the non-resident escrow account. Mr *Magwaliba* further submitted that the respondent

neglected to timeously submit an application for the registration of the appellant's funds as 'blocked funds' with the RBZ. He also submitted that the directive under RT 120/18 did not convert its United States Dollar balances in the non-resident escrow account into RTGS dollars.

[24] Mr *Mpofu*, counsel for the respondent, raised two preliminary objections. Firstly, he submitted that the appellant's claim had prescribed. He argued that the three (3) year prescription period had run from 4 October 2018 when the Reserve Bank of Zimbabwe (RBZ) issued the exchange control directive RT 120/18, to 4 October 2021. Thus, the litigation should have been brought before the courts on or before 4 October 2021. Secondly, he contended that there was no valid application before the court because Yael Sara Ilan Chaimovsky, who was the appellant's Chief Executive Officer had sworn and deposed to the appellant's founding affidavit without the appellant's authority. On the merits, Mr *Mpofu* submitted that the appellant had failed to attach the contract that resulted in the opening of its account as well as refer to the specific provisions that it relied upon for its claim. He argued that the appellant had failed to prove that its account constituted a foreign loan and foreign obligation in terms of s 44C (2) (b) of the RBZ Act. In conclusion, he submitted that the appellant's claim was just a contestation against RT 120/18 and its effects.

DETERMINATION BY THE COURT *A QUO*.

[25] The court *a quo* held that the funds which were in the respondent's account on 4 October 2018 when the Exchange Control Directive RT 120/18 was issued, gave rise to the cause of action. It held that the respondent had the onus to prove the date when the appellant became aware of or discovered the facts necessary to establish the debt or cause of action. It found that the respondent failed to prove that it had made the appellant aware of the

directive on a date earlier than 26 November 2019. The court accepted the explanation that the appellant, which was based in Israel did not know of this directive until 26 November 2019 when it was informed of it by the respondent and this was after several attempts to repatriate the money in its account. The Court *a quo* therefore, dismissed the preliminary issue on prescription.

[26] With regards to the second preliminary objection, the court *a quo* reasoned that the disparity in dates between Chaimovsky's affidavit and the Board Resolution was of no consequence. What mattered was that the deponent to the founding affidavit was authorised by the board to institute proceedings on behalf of Magic Software. Therefore, the court ruled that the second preliminary objection raised by the respondent had no merit.

[27] On the merits of the application, the court *a quo* held that Tel-One made deposits into the appellant's account from a local RTGS payment platform. It further held that a party seeking declaratory relief ought to first clarify and establish the foundation or source of the rights or interest that it seeks to assert. It further held that the applicant should in the second stage satisfy and persuade the court to exercise its discretion favourably, based on the foundation of the substantive right or interest established in the first stage. It held that the appellant had not established the rights or interests on the basis of which it sought the declaratory order.

[28] In respect of the appellant's claim under s 44C (2) (b) of the RBZ Act, the court *a quo* reasoned that the appellant failed to furnish the court with contractual documents for the opening of its bank account. Therefore, the court could not ascertain the parties` rights and obligations. The court held further that it was not persuaded that the appellant had properly established a claim of rights based on the alleged contract. It concluded that the

declarations sought by the appellant could not be granted due to the meritorious opposition mounted against them.

[29] In conclusion, the court *a quo* held that in terms of s 44C (5) of the RBZ Act, escrow account balances in accounts whose deposits were made from RTGS platforms were no longer foreign currency. On that basis, the court found that no case had been properly established to warrant its discretionary intervention to declare the rights and interests claimed by the appellant. The court *a quo* therefore dismissed the appellant's application. Aggrieved by the decision of the court *a quo*, the appellant noted an appeal to this Court on the following grounds.

GROUNDS OF APPEAL

[30] The appellant's grounds of appeal are as follows:

1. Having found that it was common cause that the respondent and the appellant established a banker-customer relationship on the understanding that the account concerned was a non-resident escrow foreign currency account, the High Court grossly erred in finding that funds credited to such an account could be lawfully converted to RTGS dollars in terms of exchange control directive RT120/18.(*sic*)
2. Having found that the Appellant is a foreign corporation, domiciled in the State of Israel which provided goods and services to Tel-One, a local entity and which had no other business interests or presence in Zimbabwe and that the debt owed to the Appellant by Tel-One was a foreign obligation as contemplated in s 44C (2) (b) of the Reserve Bank Act [*Chapter 22:15*], the court *a quo* erred in finding that the funds sitting in the non-resident escrow foreign currency account in issue were not a foreign obligation.(*sic*)

3. In any event, the court *a quo* grossly erred in not finding that the respondent was liable in terms of the banker-customer relationship with the appellant in respect of the sum of US$ 1,996 723.02 in foreign currency.(*sic*)
4. Consequently, the court *a quo* grossly erred in failing to find that the appellant had established the requirements for a declaratory order and the payment of the sum of US$1 996 723.02 to it by the respondent.(*sic*)

RELIEF SOUGHT

[31] The appellant seeks the following relief:

1. The appeal be allowed with costs.
2. The judgment of the High Court be set aside and substituted with the following:-

> "1. The application for a declaratory order be and is hereby granted with the respondent bearing the costs.
> 2. The sum of US$1 996 723.02 which was deposited with the respondent constitutes a foreign obligation in terms of s 44C (2) (b) of the Reserve Bank Act [*Chapter 22:15*]. (*sic*)
> 3. **The conversion of the sum of US$1 996 723.02 in the non-resident escrow account of the applicant to RTGS dollars by the respondent be and is hereby declared as unlawful and *ultra vires s* 44C (2) (b) of the Reserve Bank Act.**
> 4. The respondent be and is hereby ordered to pay the applicant the sum of US$ 1 996 723.02." (Emphasis added)

SUBMISSIONS ON APPEAL

[32] Mr *Magwaliba*, counsel for the appellant submitted that the court *a quo* erred when it found that it could not grant a declaratory order sought because the appellant had not placed its completed and accepted bank account opening forms on record. He submitted that the appellant is a foreign company that rendered services to Tel-One a local institution. Counsel contended that the deposits made into the appellant's account as payment for these services were a foreign obligation. He stated that the Exchange

Control Directive RT 120/18 (RT 120/18) and the Real Time Gross Settlement Electronic Dollars (RTGS Dollars) Regulations, 2019 (SI 33/19) did not affect foreign obligations held in foreign currency designated accounts. He further submitted that there was a banker and client relationship between the parties, in terms of which the respondent should have applied for the blocking of the funds in the appellant's account. Counsel further submitted that the respondent should be ordered to pay the appellant in United States dollars as Tel-One had deposited United States dollars into the appellant's account. He submitted that the respondent was negligent in opening an account on the RTGs platform.

[34] *Per contra,* Mr *Mpofu,* counsel for the respondent submitted that the appellant's application for a declaratory order did not establish the foundation of the right which can be declared in terms of s 14 of the High Court Act *(Chapter 7:06)* (the High Court Act). He further submitted that RT 120/18 had the effect of separating funds according to their source and not their intended destination. He argued that the fact that the deposits were intended for a foreign company is immaterial. He submitted that the deposits in the appellant's account were made from several local RTGS electronic transfers therefore they were not a foreign obligation. On the parties' banker client relationship he submitted that the parties' rights could only be established from the contract which the appellant did not produce in the court *a quo*.

ISSUES FOR DETERMINATION

[35] The following issues arise for determination in this appeal:

1. Whether or not the appellant established a right to a declaratory order?

2. Whether or not the respondent correctly acted in terms of the contract when it in terms of RT 120/18 re-designated the appellant's account into an RTGS foreign currency account.

APPLICATION OF THE LAW TO THE FACTS

Whether or not the appellant established a right to a declaratory order?

[36] Section 14 of the High Court Act in terms of which, the appellant applied for a declaratory order to the court *a quo* provides as follows:

> "14. The High Court may, in its discretion, at the instance of any interested person, inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination."

[37] The section gives the High Court, a discretion, to at the instance of an interested person inquire, into and determine any existing, future or contingent right or obligation. The court does so at the instance of the interested person (the applicant) who must establish the existence of the right or obligation to enable the court to declare the existence of the right or obligation. The court can only declare an established right or obligation. If the applicant fails to establish the right or obligation the court cannot make a declaratory order. The success of the applicant therefore depends on the cogency of the evidence led. If the evidence led does not establish a right or obligation the Court cannot grant a declaratory order.

[38] In *casu* the Court *a quo* commenting on the evidence led to prove the right the appellant sought to be declared said:

> "[52]. In addressing that issue, I start by reverting, for the last time, to Mr *Mpofu*'s submission quoted in paragraph [31] above. Counsel attacked Magic Software's cause of action- as well as manner in which such was pleaded- in a number of ways. **To begin with, counsel argued that although the claim was based in contract, the terms thereof were not placed before the court.**

[53] **I agree with counsel that the contractual details were not furnished. In that respect, it was impossible to ascertain the parties` rights and obligations, especially given the claim and its contestation. The banker-client mandate and duty buttressing the claim was not be *(sic)* established beyond the common cause. What exactly were the banking arrangements agreed upon in setting up the escrow account? Was it a retention of funds arrangement only, or a retention and remit offshore? As matters stand, there are seriously contested issues.**

[54] Nedbank avers that Magic Software ought to have obtained exchange control approval before opening the escrow account. Magic Software retorts that Nedbank rendered incompetent advice on that aspect, in addition to failing to submit the appeal to Exchange Control timeously. How then are these counter-accusations to be resolved in the absence of a reference point to ascertain each party`s obligations? Importantly, were the parties *ad idem* in the first instance?

[55] These questions bring to the fore, considerations on the parties` respective duty of care and that duty could only have emanated from their contract. Contract forms the mainstay of the banker-customer relationship is contract. This was the view taken by Professor Lovemore Madhuku writing many years ago, in the *Zimbabwe Law Review* where the learned author stated that:

> 'The banker-customer relationship is largely a matter of contract. Although there are other special contracts which arise in specific transactions, the main contract is that of debtor and creditor.'" (Emphasis added)

[39] A reading of the record establishes that in an email dated 10 June 2017 attached to the appellant's application as Annexure B, Shorai Shelter Dube, an employee of the respondent, informed the appellant of the outstanding documents and requirements towards the opening of the account. It does not give any other information on the rights and obligations of the parties in terms of the contract the parties intended to enter into.

[40] The next communication from the respondent was another email in Annexure C from Tafadzwa Chikwanda another employee of the respondent, in which the appellant was advised of the documents required for the opening of the account and the forms to be completed which on being correctly completed would on acceptance by the respondent, constitute the contract between the parties. A reading of Annexures B and C while

confirming the common cause fact that the parties entered into an agreement to open a "None Resident Escrow Account", does not prove the terms of the agreement. Annexure C only refers to the account as a "New Business Account" and a "Non- Resident Account". A reading of Annexure B does not also support the appellant's averments on the terms of the contract.

[41] The communication from Tafadzwa Chikwanda dated 12 May 2017 marked Annexure C does not contain the information the appellant said it contains.

[42] These facts must be assessed against the appellant's cause of action. In paras 9 to 11 of its founding affidavit the appellant said:

> "9. At respondent's instance and advise, applicant was advised to open a foreign currency designated account called a "non-resident escrow account" to suit the applicant's need. I point out that respondent advised at that time that they were able to accommodate the requirement outlined. Respondent proceeded to share with the applicant the requirements for opening this "non-resident escrow account". I attach a copy of an email dated June 2017 from respondent detailing the requirements to open the account, marked Annexure "C". I also attach hereto an email from the respondent's representative, Tafadzwa Chikwanda, dated 12 May 2017 advising that the account is indeed, a non-resident escrow account. (Marked Annexure "D")
>
> 10. I therefore, aver that at all material times, respondent was aware that applicant (the account holder) is a foreign entity and that it intended to remit funds to Israel in United States Dollars in terms of the Agreement between it and Tel-One.
>
> 11. Further, in persuading and instructing applicant to open the account the, respondent made it known to Mr Kachlon that they were a reputable commercial Bank with access to foreign currency as they were a subsidiary of the NedBank Group, an established financial services provider, headquartered in Johannesburg, South Africa."

[43] It is apparent from the above that the appellant's application for a declaratory order is not only premised on the account which was eventually opened but on the promises and advice given by the respondent to the appellant before the opening of the account. The allegations of being given wrong advice and promises were not substantiated by evidence

through the production of the contract of the parties. The court *a quo* therefore correctly held that the appellant did not prove that it had rights which could justify the granting of a declaratory order.

[44] Further on at para [74] of its judgment the court *a quo* made further comments about the inadequacy of the application for a declaratory order. It said:

> "Had this claim been as against Tel-One, the aforegoing conclusions might quite likely have disposed of it. But the present claim is against Nedbank. It is predicated on the money reposed in a bank on the basis of arrangements between the parties. **But as already asked and answered above; - the court was not presented with sufficient *factual circumstances* and *material substance* to enable the ascertainment of the *nature of the transaction* between the parties. Additionally, there is nothing to offset the conclusion that the debt herein is not at all denominated in foreign currency**." (Emphasis added)

[45] The court *a quo's* comments are supported by evidence on record. It is common cause that the account was opened to enable Tel-One to make deposits from its RTGS platform as it had failed to raise foreign currency to pay the appellant. The appellant's lawyers in Annexure G confessed that the money deposited by Tel-One could only be repatriated when foreign currency was allocated to enable the appellant to repatriate the money to Israel. The payment from Tel-One's RTGS platform is evidence that the money deposited by it into the appellant's account was not foreign currency from offshore nor real foreign currency deposits of actual United States dollars into the appellant's account. This is supported by the fact that Tel-One no longer had such foreign currency. When it had it there was no need to deposit any money into a bank account. It used to directly discharge its obligations by paying directly to the appellant in foreign currency.

[46] The failure to produce the contract together with lack of details in Annexures B and C supporting the appellant's allegations, plus other deficiencies of the evidence led by the appellant justifies the court *a quo's* finding that there was no evidence to enable it to grant the declaratory order applied for by the appellant. A failure by the appellant to lead

evidence to prove the rights it sought to be declared by the court *a quo* disentitled it from being granted the order sought.

[47] There is no reason why costs should not follow the result.

DISPOSITION

[48] In view of the finding that the appellant's failure to place the contract before the court *a quo* and its failure to prove the allegations it had said were contained in Annexures B and C, there is no need to determine the issue on whether or not the respondent correctly acted in terms of the contract when it, in terms of RT 120/18 re-designated the appellant's account into an RTGS foreign currency account. The appeal should be dismissed because the appellant did not place before the court *a quo* evidence on which a declaratory order could be granted.

[49] It is therefore ordered as follows:

"The appeal be and is hereby dismissed with costs."

KUDYA JA : I agree

CHATUKUTA JA : I agree

Manokore Attorneys, appellant's legal practitioners

Scanlen & Holderness, respondent's legal practitioners