MAGIC SOFTWARE ENTERPRISES LIMITED
Versus
NEDBANK ZIMBABWE LIMITED

HIGH COURT OF ZIMBABE
COMMERCIAL DIVISION
CHILIMBE J
HARARE 25 October 2023 & 26 June 2024

Opposed application

T. Magwaliba for applicant
T. Mpofu for respondent

CHILIMBE J

BACKGROUND

[1] The germ seed of the dispute before me is foreign currency, an indispensable enabler of local and in particular, international trade and commerce.

[2] This resource is also regulated, and quite stringently too, by a compendium of instruments. These range from primary and subsidiary legislation, a raft of directives, measures and circulars, to periodic policy statements by treasury and the central bank. This background forms part of the wider discretionary considerations relevant to the resolution of the present dispute.

THE CLAIM

[3] This is an application for a declaratory order made in terms of section 14 of the High Court Act [Chapter 7:06]. The applicant "Magic Software" is an information technology company registered in the State of Israel. Respondent "Nedbank" is a commercial bank registered in terms of the laws of Zimbabwe and operating in the jurisdiction.

[4] The customer-banker relationship between the parties generated the present dispute. Magic Software now seeks declaratory relief in the following terms; -

1. The Application for a declarator be and is hereby granted.
2. Applicant`s funds in the sum of USD1,996 723,02 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 section 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 USD1,996 723,02.
5. The Respondent shall pay Applicant the sum of USD1,996 723,02.

THE DISPUTE

[5] The history of the matter goes thus; -in 2016, Magic Software was contracted to provide an upgrade to local telecommunications entity Tel-One`s "Leap Billing Services". The main and ancillary agreements constituting this relationship form part of the record. Magic Software thereafter approached Nedbank in 2017, in order to open an account into which Tel-One would effect payments due to Magic Software in terms of the Leap Billing Contract.

[6] In the founding affidavit filed on its behalf by its chief executive officer, Yael Sara Ilan Chaimovsky ("Chaimovsky"), Magic Software claimed that it communicated its requirement to open a United States Dollar escrow account to Nedbank`s officials. Specifically mentioned was one Tafadzwa Chikwanda, an employee of Nedbank.

[7] Magic Software attached to its papers, two emails exchanged between the parties` respective officers. In one dated 12 May 2017, the said Tafadzwa Chikwanda communicated to Magic Software's then CEO, A Mr Chavi Kichlon, the requirements for opening a "corporate current account". The second email dated 10 June 2017, was addressed by Nedbank`s Shorai Dube to Mr. Kichlon. It recorded the parties as having met the previous day and listed what the bank indicated as outstanding documents to the account opening.

[8] Magic Software alleges herein that Nedbank`s officials specifically advised and confirmed that they would avail a "non-resident escrow account". None of the two emails cited above refers directly and unequivocally to a "non-resident escrow account". An account was nonetheless, subsequently opened. It may be accepted as common cause that both parties proceeded on the understanding that the account concerned was indeed a non-resident escrow foreign currency account.

[9] In the present claim, Nedbank now claims that the account was irregularly opened for want of prior approval by the Reserve Bank of Zimbabwe (RBZ)`s Exchange Control department. It was Magic Software's responsibility to secure such authorisation, argues Nedbank.

[10] Magic Software refuted this claim and instead alleged that Nedbank failed to render correct advice on the requirements behind the opening of the escrow foreign currency account. In that regard, Magic Software entreated the court not to allow Nedbank to escape from obligation nor benefit from dereliction.

RBZ DIRECTIVE RT 120/18

[11] As noted, an account, (whatever its nature/status-I will refer to it as the escrow account) was opened to the name and credit of Magic Software in Nedbank`s books. Therein were deposited proceeds from Magic Software`s services to Tel-One. It is also common cause that the deposits into this United States Dollar denominated account were made from the RTGS payment platform and were entirely local.

[12] It was also not in contention, that the account was purely retentional. It recorded no other third-party transactional activity apart from the incoming Tel-One deposits. The escrow account`s transactional history is pivotal to the resolution this dispute. As at 4 October 2018, the balance therein stood at USD$1,996 723,02. That date is significant- being the day on which the RBZ issued Directive RT120/18 ("RT 120/18"). This Directive is also central to the conclusion of the dispute at hand.

[13] By paragraph 2 of Directive RT120/18, the RBZ instructed all banks to undertake a redesignation of foreign currency accounts ("FCAs") based on source of deposits. Magic Software's account, being constituted by on-shore deposits from Tel-One, was designated an RTGS FCA account. The result was that the funds were all but denominated as a local currency [see more on this below]. As such, Magic Software was unable to repatriate the money when it attempted to do so in June 2019. They account balances became what was known as "blocked funds".

[14] Several attempts at parley occurred between Magic Software, Nedbank, Tel-One and the RBZ in a bid to secure the release and repatriation of these blocked funds. These efforts included a formal application to the RBZ for authority to release the funds.

[15] I may also point out that Magic Software`s objective during those engagements was never to contest the redesignation, by RT120/18, of its escrow account at Nedbank, as a local RTGS FCA account. It merely sought a release of the blocked funds. That aside, the RBZ rejected

Magic Software`s pleas for exemption and advised as follows, in a letter addressed to Nedbank on 6 September 2021; -

> "…. We advise that Exchange Control is not agreeable to the registration of the blocked funds amounting to US$2,285,000 due to the following reason (s):
>
> i. The non-resident account held by the applicant is not sanctioned by Exchange Control;
> ii. The appeal is premised on the failure by Nedbank to properly advise the client of which Nedbank did not neither (sic) accept nor deny the issues raised by the applicant; and
> iii. The amount claimed of US$2,285,000 is not consistent with the balance of US$1,996 723,02 in the non-resident account as of 21 February 2019."

[16] Magic Software indicated that, as at the time of filing present application, it had an appeal pending against the Exchange Control ruling. It is not clear whether it had appealed this particular ruling of 6 September 2020, or other rulings in communicated to it by Nedbank`s Exchange Control Department which also forming part of the record.

[17] What is clear however, is that Magic Software have not approached the court under these proceedings, to contest nor impeach the RBZ. Quite obvious too, that the RBZ is not cited as a party to these proceedings. These seemingly obvious observations are necessitated by the relief sought. Particularly the prayer in paragraph 3 of Magic Software`s draft order.

[18] I may state that in its notice of opposition, Nedbank turned around to argue that the formal attempt to seek a release of the funds amounted to a waiver by Magic Software of any rights it may have had against Nedbank. Magic Software disputed this conclusion. It raised further allegations of breach of duty by Nedbank. It stated that in the first place, the responsibility to register blocked funds with the RBZ lay with Nedbank itself in its capacity as the Exchange Control Authorised Dealer. This position was prescribed by RBZ Directives RU 28/19 and RU 102/19, so argued Magic Software.

[19] Nonetheless, Magic Software`s present claim is anchored firstly, on the contention that Directive RT120/18 did not, as alleged by Nedbank, convert its United States Dollar balances in the escrow account into local RTGS dollars. As far as Magic Software was concerned, the balances in its account with Nedbank remained denominated in United States Dollars. It was

further argued on its behalf that the conversion of currencies (from the previous multi-currency regime obtaining in Zimbabwe since 2009) to RTGS dollars at the rate of one-is-to-one only occurred much later on 22 February 2019.

[20] This being the date when the Presidential Powers (Temporary Measures) (Amendment of Reserve Bank of Zimbabwe Act and Issue of Real Time Gross Settlement Electronic Dollars (RTGS Dollars)) Regulations, 2019 SI 33/19 ("SI 33/19") came into effect.

[21] Secondly, Magic Software contended that Nedbank was liable to restitute it to extent of the United States Dollar value in the escrow account for breach of contract in that it (i) failed to advise Magic Software to obtain Exchange Control approval prior to opening the escrow account and (ii) neglected to timeously submit the application for registration of blocked funds with the RBZ.

[22] Thirdly, Magic Software claimed that the funds in its escrow account at Nedbank constituted a foreign obligation in terms of section 44C (2) (b) of the Reserve Bank Act [Chapter 22:15] ("the RBZ Act").

[23] In summary, Nedbank's defence was that (i) Magic Software`s failure to attach the very contract itself as well as refer to the specific provisions relied upon were fatal to its claim. It had placed nothing before the court to found the terms, rights and obligations of the parties. And as (ii), Nedbank took the position that Magic Software`s claim was essentially a tangential contestation of RT120/18 and its effects.

[24] As such the failure by Magic Software to join the RBZ to these proceedings imperilled the present suit. As (iv), Nedbank dismissed the veracity of Magic Software's claim under section 44C (2) (b) of the RBZ Act on the basis that the funds neither constituted a foreign loan nor foreign obligation. These defences were however preceded by two points *in limine* which I deal with next.

THE FIRST POINT *IN LIMINE:* INVALID AUTHORITY

[25] As its first point *in limine*, Nedbank contended that Magic Software`s claim had prescribed. And as the second, Nedbank argued that there was in fact, no valid application before the court because the deponent to the founding affidavit lacked proper authority to institute the present proceedings.

[26] I start with the second objection as I believe it enjoys primacy over the first. Magic Software`s founding affidavit, deposed to by Chaimovsky on 12 March 2022, was authorised by a board resolution dated 30 March 2022. Nedbank averred that since the board resolution post-dated the founding affidavit, Chaimovsky had acted without authority by swearing to it. I may comment that the point *in limine* challenged Chaimovsky` s authority to institute proceedings rather than propriety to swear to the facts in the founding affidavit.

[27] Mr. *Magwaliba* for Magic Software, raised the following arguments in response; - the disparity in dates between Chaimovsky' s affidavit and 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. The resolution itself said so in the clearest of terms.

[28] Secondly and in any event, counsel submitted that the present proceedings were launched well-after the board issued the approval to Chaimovsky. It would have been an entirely different matter had the resolution succeeded the issuance of process on 22 April 2022.

[29] Counsel`s last point was that nonetheless, Chaimovsky had put matters beyond argument by filing an updated board resolution with the answering affidavit. This approval confirmed and ratified Chaimovsky` s authority. It further specifically refuted Nedbank`s allegation in the opposing affidavit that Chaimovsky lacked valid authority. Mr. *Magwaliba* referred to the remarks of GARWE JA (as he then was) in *Cuthbert Dube v PSMAS & Anor* SC 79-19.

[30] Mr. *Magwaliba`s* submissions find favour with the Court. I can do no more that refer to the above decision where the court held at *[38]* that; -

> *"[38]* The above remarks are clear and unequivocal. A person who represents a legal entity, when challenged, must show that he is duly authorised to represent the entity. His mere claim that by virtue of the position he holds in such an entity he is duly authorised to represent the entity is not sufficient. He must produce a resolution of the board of that entity which confirms that the board is indeed aware of the proceedings and that it has given such a person the authority to act in the stead of the entity. *I stress that the need to produce such proof is necessary only in those cases where the authority of the deponent is put in issue*. This represents

> the current state of the law in this country." [underlined and italicised for emphasis].

The above guidance applies to the very facts of the present matter. Nothing further needs be said on this point apart from stating that the objection is bereft of merit and must accordingly fail.

THE SECOND POINT *IN LIMINE*: PRESCRIPTION

[31] I find it useful, in addressing this point, to reproduce Mr. *Mpofu* (for Nedbank) `s opening address in his written submissions[1] wherein counsel stated thus; -

> "A mandate-mandatary relationship exists between applicant and respondent. Applicant sues on that relationship in the founding affidavit and on the aquilian action in the answering affidavit. The case is confused. The confusion that afflicts applicant is not easy to account for. Even more pernicious is its failure to understand the effect of the change in currency had on the relationship between the parties. It is submitted that the application is completely without merit and must be dismissed with costs. The fact that applicant has suffered losses is down to the law. Our courts have already held as much-*Akram v Mukwindidza & Anor* HH 522-21"

[32] Aside from its obviously partisan flechettes, the submission adverts to the complexities arising from to the causa. In addition to the resultant discretionary considerations applicable in this matter.

[33] Mr. *Mpofu* insisted that the cause of action sprang from the conversion of the funds in the Escrow account to local RTGS dollars by lawful operation of Directive RT120/18 issued on 4 October 2018. On that basis, he calculated the three (3) year prescription period as having run from 4 October 2018 to expire on 4 October 2021.I may mention at this stage the prescription plea did not extend to impeach Magic Software`s claim under section 44C (2) (b).

[34] Mr. *Magwaliba*` s argument as I understood it, was based on three heads. Firstly, he submitted that Magic Software received no notice of the publication of Directive RT 120/18.

[1] Paragraph 1.1 of respondent`s heads of argument at page 125 of the record.

Magic Software was based in Israel and the Directive was not circulated in that jurisdiction. Nedbank had furnished no proof of delivery of the Directive RT120/18 on Magic Software.

[35] In that regard, Magic Software had no knowledge of the Directive RT120/18 until 26 November 2019 when it was so alerted by Nedbank. In any event, argued counsel, Nedbank had not succeeded in offsetting, on the papers, the factual averments by and regarding lack of knowledge on the part of Magic Software. In fact, Nedbank could not succeed in doing so without leading evidence. This was a critical requirement which Nedbank failed to meet. And, on that basis, alone, the defence of prescription had to fall.

[36] Secondly, counsel contended that in any event, the cause of action derived not from Directive RT120/18, but from the parties` banker-customer relationship. Nedbank was the debtor, and Magic Software the creditor. This causa drew from the established legal position confirmed in *Standard Chartered bank Ltd* v *China Shougang*, 2013 (2) ZLR 385 (S)[2]. Thirdly, counsel submitted that Magic Software had an additional cause of action dawn from section 44C (2) (b) of the RBZ Act.

DETERMINATION OF THE SECOND POINT *IN LIMINE*

[37] The plea of prescription invites a brief examination of the applicable test. Section 16 of the Prescription Act [Chapter 8:11] sets the formular for the running of prescription. This provision was simplified into the "knowledge and discovery rule" in *Peebles v Dairibord Zimbabwe (Pvt) Ltd* 1999 (1) ZLR 41 (H).

[38] Under this rule, a party raising prescription must prove when the plaintiff became aware of, or discovered the facts necessary to establish the debt or cause of action. What constitutes these facts or "cause of action" was also fully articulated by the oft-cited dictum in this decision[3].

[39] In determining both the obligation, as well as test to prove when claimant knew, or is deemed to have known of the commencement of a causa, the court in *Peebles v Dairibord* held as follows at page 46; -

[2] The Supreme Court relied on a number of foreign decisions herein. Likewise, reference to China Shougang necessarily took the survey to other foreign decisions.
[3] See page 45 of 1999 (1) ZLR 41 (S)

> "The question for determination here is, when did Mr Peebles first have knowledge or is he to be deemed to have first had knowledge of the above-mentioned facts from which the debt arose? The onus is on Dairiboard, which raised the defence of prescription, to show that Mr Peebles first had knowledge or should be deemed to have first had knowledge of such facts on any date more than three years prior to the date on which the summons was served on it, that is to say, a date between 9 May and 30 September 1994 [Gericke v Sack 1978 (1) SA 821 (A); Brand v Williams 1988 (3) SA 908 (C) at 910B]. The rule applied is the discovery or knowledge rule. In the application of the rule contained in s 16(3) of the Act to decide whether Dairiboard has shown, on a balance of probabilities, that Mr Peebles acquired during the relevant period the requisite knowledge of the facts from which the cause of the action arose it is not necessary to seek knowledge of meticulous particulars of the cause of action. The court must look at all the circumstances of the case and decide whether Mr Peebles had or should be deemed to have had knowledge of the broad or material facts establishing the essential elements of the cause of action." [Underlined for emphasis]

[40] Nedbank argues that the debt fell due on 4 October 2018 with the publication of RT 120/18. In seeking to prove this, Nedbank stated as follows in the opposing affidavit[4] filed on its behalf; -

> "The directive was widely published in the media. This honourable court can take judicial knowledge of this fact. Banks in Zimbabwe including the respondent, published and distributed summaries to their customers".

[41] Two issues flow from this averment. Firstly, this explanation hardly suffices as proof of confirmation that Magic Software discovered or became aware of the issuance of Directive RT120/18. It would have been the simplest of matters for Nedbank to furnish proof of their communication to the customer. Or even tender the suggestion that such was done through the array of electronic broadcasts or other publications so commonplace in business today.

[42] Secondly, even if Magic Software had indeed become seized with knowledge of the Directive RT120/18, that position would not have triggered the running of prescription.

[4] Paragraph 2 of Chipo Masawi`s opposing affidavit at page 79 of the record.

Prescription in a banker-customer relationship is reckoned from the point that the customer issues a demand for its deposit with a bank. This is the position set out in the classic case of *Foley v Hill* (1848) 2 H.L. Cas.28[5] and enunciated as follows by the learned author Poh Chu Chai in his work, Law of Banker and Customer 5th Edition, Lexis Nexis, 2004 at page 48; -

> "The right of a customer to sue a bank for the return of his money is conditional upon the customer making a demand on the bank. This means that the making of a demand by a customer for the repayment of his money constitutes a condition precedent to the liability of the bank to repay the customer[6].If no demand is made by the customer, the liability of a bank does not arise. It follows that a customer has no right to bring legal proceedings against a bank for the return of his money until it is shown that a demand for payment has been refused by the bank. One implication flowing from this requirement is that time does not run against the funds deposited by a customer until repayment is refused by the bank." [emphasis added]

[43] In the present matter, Magic Software did make a demand, as recorded by Chaimovsky in the founding affidavit; -

> "On or about 27 June 2019 when the Applicant was seeking to effect the remittance of funds in a frontal meeting, Applicant was advised for the first time by Respondent that the funds being held in escrow had been redenominated to Zimbabwe Dollars and were no longer regarded as USD."[7]

This date and its events mark the point when prescription can arguably be said to have commenced to run. The present proceedings were instituted on 22 April 2022- within three (3) years of that date. With this observation, one might have closed the chapter and dismissed the plea of prescription. But there is an additional ground.

[5] Cited with approval in *Standard Chartered v China Shougang* (supra)
[6] *Bank of New South Wales v Laing* [1954] A.C 135

[7] Paragraph 13 of Chaimovsky`s founding affidavit at page 6 of the record.

[44] And this brings me back to Mr. *Mpofu*'s submission quoted in paragraph [31] above. The cause of action traverses breach of contract on two pillars, as well as claim of statutory rights. Part of the breach of contract was framed as follows in the founding affidavit; -

> "…As such Respondent, by its failure to register Applicant`s blocked funds in its name with the Reserve Bank of Zimbabwe as a foreign obligation, has resulted in loss to Applicant, entitling applicant to damages in the equivalent amount of the outstanding balance."

[45] This averment goes to the root of the parties` contract and therein, the causa. It alleges breach by Nedbank, of the banker`s duty of care in executing a customer mandate[8]. But this duty also entails the issue of certainty and clarity of customer instructions. These are the matters that would in fact, require interrogation of the merits of the dispute. Mr *Magwaliba*' s submission that- moving the preliminary objection on prescription without leading evidence was futile- carries merit. It is also a position supported by the approach laid down in *Nan Brooker v Mudhanda* 2018 (1) ZLR 33 (S).

[46] In any event, Magic Software`s claim carries a second head under the rights issuing from section 44C (2) (b). The objection on prescription did not attach itself to this second claim. For these reasons, the plea of prescription cannot stand and will be dismissed. I now turn to the arguments on the merits.

THE DISPUTE ON THE MERITS: REQUIREMEMTS OF A DECLARATORY CLAIM

[47] The essentials of declaratory relief[9] are set out shortly in section 14 of the High Court Act. These requirements were further elaborated in *Johnsen v AFC* 1995 (1) ZLR 65 (S) at page 72 as follows; -

> "The condition precedent to the grant of a declaratory order under s 14 of the High Court of Zimbabwe Act 1981 is that the applicant must be an ―interested person, in the sense of having a direct and substantial interest in the subject matter of the

[8] See *Redmond v Allied Irish Bank Plc* [1987] F.L.R 307.

[9] Before doing it is necessary to dispense of a point (not pursued by Adv *Magwaliba* but stated in the heads of argument) that declaratory relief is not subject to prescription as held in *Ndlovu v Ndlovu & Anor* HH 18-13. This court has since clarified the position in a number of subsequent decisions to the effect that access to declaratory relief is subject to the operation of prescription. See *Nguluwe & Anor v Dewa & Ors* HH 387-23.

suit which could be prejudicially affected by the judgment of the court. The interest must concern an existing, future or contingent right. The court will not decide abstract, academic or hypothetical questions unrelated thereto. But the presence of an actual dispute or controversy between the parties interested is not a prerequisite to the exercise of jurisdiction. See *Ex parte Chief Immigration Officer* 1993 (1) ZLR 122 (S) at 129F-G; 1994 (1) SA 370 (ZS) at 376G-H; *Munn Publishing (Pvt) Ltd v ZBC* 1994 (1) ZLR 337 (S) and the cases cited. It was rightly not in contention before the court a quo that the appellant was an interested person. Accordingly, the first stage in the determination of whether it was competent to grant a declarator was met.

At the second stage of the enquiry, the court is obliged to decide whether the case before it is a proper one for the exercise of its discretion under s 14 of the Act. *It must take account of all the circumstances of the matte*r. See Reinecke v Inc Gen Insurances Ltd 1974 (2) SA 84 (A) at 95C; Dyson v A-G Page 73 of 1995 (1) ZLR 65 (H) [1911] 1 KB 410 (CA) at 417; Burghes v A-G [1911] 2 Ch 139 at 156. What, in the end, constitutes a proper case is where some tangible and justifiable advantage to the applicant is shown to exist. See Adbro Invtm Co Ltd v Min of Interior & Ors 1961 (3) SA 283 (T) at 285B-C; Reinecke v Inc Gen Insurances Ltd supra at 93D-E." [Underlined and italicised for emphasis]

[48] These pre-requisites form a well-defined standard in our jurisdiction. A party seeking declaratory relief must firstly clarify and establish the foundation or source of the rights or interest that it seeks to assert. It must then secondly satisfy and persuade the court to exercise its discretion favourably, based on the foundation of the substantial interest laid.

[49] In exercising its discretion, the court is granted latitude to traverse the circumstances of the case, including public policy (see *Family Benefit Friendly Society v Commissioner for Inland Revenue & Anor* 1995 (4) SA 120.But this discretion, together with the wideness of the matters influencing its exercise, must both be underwritten or guided by the cause of action. That is my reading of *Johnsen v AFC* and related authorities as backed by *Peebles v Dairibord* (both supra).

[50] I am satisfied that stage one of the requirements of declaratory relief has been met in the present application and the following are my reasons. Magic Software premised its primary claim on its banker-customer relationship with Nedbank. The amount constituting the demand is not inconsequential at US$1,996 723,02.

[51] This relationship is not in issue, although its details are contested. The second claim is based in statute; -namely section 44C (2) (b) of the RBZ.I will delve deeper into this aspect in succeeding paragraphs. Suffice to say, I am satisfied that Magic Software has mounted a good basis to confirm existence of substantial interests in the matter. I now proceed to examine whether such interest can translate into the declaratory relief pursued by Magic Software.

THE BANKER-CUSTOMER RELATIONSHIP

[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 the 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 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."[10] [underlined for emphasis and see also paragraph [81] below]

[56] Additionally, the bank`s duty arising from such contracts- general or specialised-was described as follows in the English case of *Midland Bank Limited v Reckitt* [1968] 1 W.L.R 1555 at 1608; -

> "…a bank has a duty under its contract with its customer to exercise "reasonable care and skill" in carrying out its part with regard to operations within its contract with its customer. The standard of that reasonable care and skill is an objective standard applicable to bankers. Whether or not it has been attained in any particular case has to be decided in the light of all relevant facts, which can vary almost infinitely." [emphasis added].

[57] The above two authorities accentuate the relevance of placing before the court, facts necessary to establish, not just the parties` contract, but how it was performed. Herein, the factual foundation is insufficient to support a meaningful inquiry and conclusion in that regard. It is my view that these matters ought to have been canvassed more robustly. I may refer to the discourse and issues traversed, for example, in *Legacy Hospitality Management Services Limited v African Sun & Anor* SC 43-22

[58] Additionally, the effect of the administrative dimension on the present claim was also not fully addressed in Magic Software`s claim. The exact status of the blocked funds as well as outstanding appeal become issues relevant to the (wide) general inquiries necessitated by the declaratory relief sought, and specifically under section 44C (2) (b).

[59] To this extent, it might have been desirable, for completeness, for Magic Software to clarify further, why it had deigned to test the administrative decision to oust its application for blocked funds. The relationship between declaratory relief mounted as review proceedings is

[10] "*Banking Law and Public Policy: Recent Developments in Zimbabwean Law*"-L. Madhuku, Zimbabwe Law Review,1997 Vol 14, at page 226.

well-known, as discussed in *Geddes Ltd* v *Tawonezvi* 2002 (1) ZLR 479 (S) and other authorities.

[60] On the basis of the above, I am not persuaded that Magic Software properly established a claim of rights based on contract. Especially having regard to the gravity of the declarations sought, and opposition mounted against them. I thus move to examine the second aspect of Magic Software's claim that the funds constituted a foreign obligation as defined by section 44C (2) (b) of the RBZ Act.

WAS THE OBLIGATION A "FOREIGN LOAN AND FOREIGN OBLIGATION DENOMINATED IN FOREIGN CURRENCY"?

[61] I set out the requisite provision of the RBZ Act below; -

> 44C Issuance and legal tender of electronic currency
>
> (1) In addition to its powers to issue banknotes and coins in terms of this Act and subject to subsection (3), the Bank shall have the sole power to issue or cause to be issued electronic currency in Zimbabwe.
>
> (2) For the avoidance of doubt it is declared that the issuance of any electronic currency shall not affect or apply in respect of—
>
> (a) funds held in nostro foreign currency accounts, which shall continue to be designated in such foreign currencies; and
>
> (b) foreign loans and foreign obligations *denominated in any foreign currency*, which shall continue to be payable in such foreign currency.
>
> (3) The Bank shall not issue any electronic currency unless the Minister has, by statutory instrument specified—
>
> (a) the name of the electronic currency and its rate of exchange in relation to any other foreign or domestic currency; and Finance (No. 2) 461 2019 No. 7
>
> (b) the effective date of the issuance of the currency, from which date (or such other date as the Minister may specify in the statutory instrument) it shall be legal tender within Zimbabwe; and

(c) any transitional matters required to be prescribed in connection with the introduction of electronic currency, including the conversion of existing banking balances into the new currency.

(4) The Bank may, after consultation with the Minister issue any direction that, in its opinion, is in the public interest and will promote the objective and the smooth implementation of the provisions of this section.

(5) In this section— "nostro foreign currency account" means any foreign currency account designated in terms of Exchange Control Directive RT/120 of 2018, held with a financial institution in Zimbabwe, *in which money in the form of foreign currency is deposited from offshore or domestic sources*;" [underlined and italicised for emphasis]

[62] The net effect of Mr. *Mpofu`s* argument was that the escrow account, having been "denominated" in RTGS dollars by Directive RT120/18, was automatically descoped from 44C (2) (b). I must test the correctness of this conclusion (on the facts in the matter before me). Namely that a consideration of whether or not Nedbank`s debt to Magic Software is a foreign loan or foreign obligation must start, and possibly end with a decision regarding its "denomination". Put differently, if the status or nature of the debt`s denomination is ruled to be non-foreign currency, will this result obviate the inquiry into whether or not that debt is a foreign loan or foreign obligation?

[63] Indeed section 44 C (2) (b) does appear to set a prerequisite that in order to qualify as a foreign obligation, the obligation has to be" denominated" in foreign currency. So too does section 44C (5). It cannot be doubted that Directive RT 120/18 effectively ripped the skin off Magic Software's drum. It all but deleted the original United States Dollar valuation of the funds in the escrow account. The fact that the account retained the nominal title of a foreign currency or FCA account post the issuance of RT120/18 is of little consequence.

[64] What purpose then, would be served by conducting an inquiry into the foreign nature of the obligation in the face of the interdict that it was not denominated in foreign currency? Especially if it is clear, that as further suggested by section 44C (5) that the escrow account balances are no longer foreign currency? The validity and effect of Directive RT 120/18 were after all, confirmed beyond issue in *CABS v Stone & 4 Ors* SC 15-21.

[65] The answer to this question starts with a discourse into the meaning of the word "denominated". This word has, in my view, been variously applied to mean "denote, value, designate, express, calibrate or reference". See *Breastplate Service (Pvt) Ltd v Cambria Africa Plc SC 66/20; Zambezi Gas (Pvt) Ltd v N.R. Barber & Anor SC 3/20;* and *Mushayakurara v Zimbabwe Leaf Tobacco Company SC 108-21* among many others).

[66] In both *Breastplate* and *Mushayakurara*, (supra), the Supreme Court articulated the word "denominated" by use of terms like "valued", and "expressed and valued"-see *Mushayakurara* at page 6.

[67]. And going further, it appears that Mr. Mpofu's argument finds support from the Supreme Court decision of *Mushayakurara* v *Zimbabwe Leaf Tobacco (Private) Limited* SC 108-21. The reasoning therein suggests that it may not be necessary to delve into an inquiry into whether on not a debt is a foreign loan or foreign obligation if that debt is clearly not denominated in United States Dollars.

[68] But in case this reading of the authority is incorrect, the same decision went further to put matters beyond issue as regards the proper interpretational approach to take regarding section 44C (2) (b). The Supreme Court, per MALABA CJ, held as follows [at page 6] of that decision; -

> "The term *"foreign loans and obligations denominated in any foreign currency*", as it appears in s 44C (2) of the Reserve Bank Act, is not defined in SI 33 of 2019. As stated in the *Breastplate* case supra, its meaning in any given case *must be ascertained from the factual circumstances of the parties involved and the material substance of the transaction that they have entered into.* Section 44C(2)(b) of the Reserve Bank Act makes it clear that the issuance of any electronic currency, that is RTGS dollars, shall not affect or apply to any foreign obligation, *as the provision explicitly excludes foreign obligations valued and expressed in United States dollars* from the deemed parity valuation in RTGS dollars." [annotated, underlined and italicised for emphasis]

[69] What emerges from this guidance is that a court seized with a prayer under section 44C (2) (b) must conduct an exercise in pragmatism, the methodology of which is up to that court. It must, nonetheless, launch an examination into "... *the* ***factual circumstances*** *of the parties*

involved and the ***material substance of the transaction****"* That is the core exercise which a court dealing with a claim under section 44C (2) (b) must undertake. It must conduct a comprehensive assessment of the facts and circumstances of a matter.

[70] If the material substance of the transaction as emanating from the factual circumstances of this matter leads to a firm conclusion that the debt was not at all denominated in foreign currency, then the inquiry may usefully end there. But if the circumstances proffer a gainsay to suggest that notwithstanding the status of the funds, the parties unequivocally resolved in their contract that the debt would remain predicated in United States Dollars, the matter it may be prudent to invite a fuller examination of that agreement, as against the impact of the law.

[71] As regards the present application, the preceding paragraphs of this judgment record that the task of inquiring into the circumstances is largely complete. It is important to also recognise that the facts necessary to establish the rights under contract were the self-same matters needed to prove rights under section 44C (2) (b). Further, a re-look at the declaratory relief sought confirms the gravity of the onus reposed on Magic Software. In particular, the applicant requested, by paragraph 3 of its draft, the court to effectively declare RT 120/18 as invalid.

[72] In winding such up, I may observe the following; - it was not disputed that Magic Software is a foreign entity. Nor was it in contention that its presence in Zimbabwe was to offer services to Tel-One. The primary or underlying Tel-One debt and contract was clearly a foreign obligation. The effect of Tel-One`s emphatic submissions to the RBZ further serve to confirm that the proceeds into the escrow account undoubtedly constituted transit funds earmarked for eventual repatriation.

[73] In that regard, it cannot again be doubted that such understanding created a deeming that the primary obligation between Magic Software and Tel-One was denominated in United States Dollars. This was the pragmatic interpretation adopted by the Supreme Court in the "tobacco decisions"[11] , *Breastplate*, as well as *Salzman Et Cie SA v Manojkumar Jivan & Anor* SC 70. In the latter, the court, per CHATUKUTA JA, opined as follows at page 14, (laying out in the process, relevant public policy considerations); -

[11] See *Mushayakurara v Zimbabwe Leaf Tobacco Company* SC 108-21 and *Zimbabwe Leaf Tobacco (Private) Limited v Patricia Vengesayi & Anor* SC 149/21.

> "Foreign loans and obligations continue to be valued and payable in the foreign currency in which they are denominated. When courts interpret the provisions of Statutory Instrument 33 of 2019, they are obliged to give an interpretation that is commercially practicable. A commercially sensible interpretation is one that accepts that a Zimbabwean will still need to trade internationally, borrow money and lend money to foreigners. The Zimbabwe dollar cannot settle a loan denominated in United States dollars in Switzerland. Even if the court proceeded on the basis that the deed of settlement between the appellant and the first respondent constituted a compromise, this could not possibly extend to changing the source of the funds and the nature of the debt. It remained a foreign debt payable in the currency of the contract and not the local currency of Zimbabwe. Full recovery of funds secured offshore in foreign currency can only be in foreign currency and not RTGS dollars."

[74] 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.

DISPOSITION

[75] In saying so, it must again be recognised, as observed by Professor Madhuku, that indeed, banks go beyond the traditional or classic function as mere deposit takers. [see paragraph [55] above]. Section 7 (1) of the Banking Act [Chapter 24:20] lists no less than 14 types of banking products and services. And paragraph 4.1 of Directive RT 120/18, as a ready example, adverted to some of these and stated that; -

> "Authorised Dealers [namely banks] are advised that, high value payments should be processed using other forms of payments such as Letters of Credit, documentary credits and others".

Each of these arrangements presumably carry special terms, conditions as well as fees and charges for raising them. It was therefore imperative, coming to the escrow account under focus, for the terms between Nedbank and Magic Software to be explicitly set out before the court. The paucity characterising the two emails filed of record rendered them too shaky a pair of legs to convey the full terms and conditions of the contract.

[75] In that respect, the court was handicapped in the dual task of conducting (i) the wider considerations triggered by a declaratory claim and, (ii) the similarly wider sweep necessitated by section 44C (2) (b). On that basis, no case has been properly established to warrant the discretionary intervention of the court and assert the rights claimed by Magic Software. The relief sought is unreachable, and will thus be refused with costs

It is therefore ordered; -

1. That the application be and is hereby dismissed with costs.

Manokore and Partners-applicant`s legal practitioners
Scanlen and Holderness-respondent`s legal practitioners.

[CHILIMBE J___26/6/24]