SCHWEPPES ZIMBABWE (PVT) LTD
versus
BLAKEY INVESTMENTS (PVT) LTD

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 6 September, 7 September and 27 October 2021

Civil Trial

Adv *T. Mpofu,* for the plaintiff
Adv *F Girach,* for the defendant

CHITAPI J: The plaintiff company Schweppes Zimbabwe Limited is a duly incorporate company in accordance with the laws of Zimbabwe and is domiciled in Harare Zimbabwe where it carries on business. The defendant Blakey Investments (Proprietary) Limited is a duly incorporated company according to the laws of South Africa and carries on business in Durban, South Africa.

The plaintiff caused summons to be issued *in casu* against the defendant. The plaintiff claimed the following relief as set out in the prayer to the declaration:

> "WHEREFORE plaintiff prays for judgement as follows:
> a) An order declaring the supply agreement purportedly entered into between the plaintiff and the defendant on 8 May 2018 and as varied on 30 May 2018, 26 June, 2018 and on 19 March 2019 respectively, illegal, invalid and of no force and effect.
> b) Costs of suit."

The plaintiff and the defendant entered and executed a purchase and supply agreement on 8 May, 2018. In terms thereof the plaintiff would, purchase packaging material in agreed quantities from the defendant at agreed prices. The plaintiff and the defendant subsequently varied the initial agreement on 30 May, 2018. Variations made in material areas increased the duration of the initial contract from 18 months to 5 years. The initial contract had been due to expire on 31 December, 2019. In terms of the variation to duration, the agreement was now due to lapse on 30 June, 2023. The variations also resulted in an increase in the volume of product to be delivered by the defendant as well as price variations. The variations also added a new product namely, a machine stretch wrap which was not included in the initial contract.

The contract was further varied on 26 June, 2018. The variation concerned an increase in the price of the products with such increase to take effect from 1 July, 2018. The details of the increased prices are not material to the determination of the issue that requires to be answered.

On 19 March, 2019, the parties further executed another variation agreement which was headed "2019 Shrink Wrap Purchase Agreement." In terms thereof the parties agreed to review minimum quantities of the Shrink Wrap to be supplied as well as pricing. Again the details of the actual variations in content are not necessary to the determination of the issue to be answered.

It is the plaintiff's case on the pleadings that certain key terms of the initial agreement were not varied and remain extant. The plaintiff pleaded in para (s) 6-1 and 6-2 of the declaration as follows:

> "6. The following terms were not varied and to date form part of the initial purported agreement:
> 6.1 That the plaintiff would pay the purchase price for the packaging material supplied by the defendant from time to time into an account nominated by the defendant in the Republic of South Africa.
> 6.2 Plaintiff would be liable to pay interest on any amount that remains unpaid after due date"

The plaintiff pleaded that it, being a Zimbabwean resident, it was bound by the Exchange Control regulations S.I 109/1996. The plaintiff also pleaded that the defendant was a foreign resident for the purposes of the said regulations. The plaintiff pleaded that both itself and the defendant violated s 11 of the Exchange Control Regulations aforesaid in that they entered into the supply chain agreement before they both or one of them obtained exchange control approval prior to executing the agreement. They pleaded in para 8 of the declaration as follows;

> "8. Section 11 of the Exchange Control Regulations prohibits all Zimbabwean residents from incurring any obligations to make a payment outside Zimbabwe unless authorised by an exchange control."

The plaintiff pleaded that the supply chain agreement *in casu* resulted in "the plaintiff incurring obligations to make a payment outside Zimbabwe without exchange control authority.

The plaintiff pleaded that because neither party had obtained exchange control approval prior to the date of execution of the supply chain agreement, the ensuing agreement was ": illegal invalid and unenforceable" thereby rendering it of no force or effect, hence the declaration sought by the plaintiff.

The defendant in its plea pleaded that this court did not have jurisdiction to hear the claim because of an arbitration clause in the agreement. The defendant pleaded that the

arbitration clause in the supply chain agreement provided that disputes arising from the agreement would be resolved by arbitration in terms of the South African Arbitration Act, 1965, or its successor. It was further pleaded that the agreement was in terms of its provisions to be governed in terms of the laws of the Republic of South Africa. The defendant further pleaded that there were ongoing arbitration proceedings between the parties in South Africa. The defendant on that score objected to the jurisdiction of the court to hear the matter.

In respect of variations to the agreement as pleaded by the plaintiff, the defendant pleaded that the last variation was repudiated by the plaintiff with the result that the parties reverted to the original terms of the agreement as varied by the first variation. The defendant also pleaded to agreement as varied by the first variation. The defendant also pleaded further that further provisions of the agreement were not varied in addition to the ones pleaded by the plaintiff. The defendant stated in para 18 of the plea two unvaried terms of the agreement as follows:

> "18.1 the minimum quantity and prices for the shrimp wrap for 2020 – 2023; and
> 18.2 the minimum quantity and prices for the balance of the commodities."

In the same manner that I commented on the allegations of variations made to the initial agreement as pleaded by the plaintiff, the observation is made that the variations were of no great moment to the issue for determination, namely, the legality or otherwise of the agreement for being non-complaint with the s 11 of the Exchange Control regulations.

The defendant disputed that the agreement was concluded without prior Exchange Control approval. It denied the plaintiffs allegations that the agreement was illegal, invalid or unenforceable. The defendant averred that the plaintiff had failed to aver its place of residence.

The defendant further pleaded that in terms of s 15.1 of the agreement, the plaintiff gave a number of warranties on matters which relate to the legality of the transaction. The material provisions of s 15 of the agreement as appears in both the initial agreement and the first variation dated 26 April, 2018 provide as follows:

> "Each party warrants, represents and undertakes to the other parties that:
> (a) ……
> (b) ……..
> (c) The execution of and performance by it of its obligations under this agreement:
> (i) Does not contravene any law or regulation to which it is subject;
> (ii) Does not contravene any provisions of its founding or governing documents
> (iii) Will not conflict with, or result in a breach of any of the terms or constitute a default under any agreement or other instrument to which it is party or is subject
> (d) It will have all necessary contents, licences and approvals required in connection with the entry into and performance of its obligations under this agreement.

(e) The terms of this agreement are and will remain legally binding on it and the exercise and performance of all rights and obligations conferred or imposed on it pursuant to this agreement.

15.2 …….

15.3 Each party

(a) acknowledges that each representation warranty and undertaking given by it in terms of clause 15.1 is a separate representation warranty and undertaking which induced the other parties to enter into this agreement; and

b) Acknowledges that the other parties relied on the representations warranties and undertakings given by it in terms of clause 15.1 in entering this agreement."

The defendant pleaded that the plaintiff was estopped from denying liability to the defendant because the plaintiff induced the defendant to enter into the agreement upon giving warranties to the effect that the defendant had obtained all necessary consents; licences and approvals required to enter into the agreement and the ability to perform its obligations had been given by the plaintiff.

The defendant further pleaded that the provisions of S.I 109/96 did not render an agreement concluded without Exchange Control approval invalid or illegal. The defendant pleaded in the alternative that should the court determine that the agreement in issue is unforceable by reason of being in contravention of the provisions of the Exchange Control Regulations, the court should relax the *pari delicto potior est conditio possidenti* rule. The defendant pleaded that it would amount to unjust enrichment and be contrary to public policy and a grave injustice were the plaintiff to be allowed to prejudice the defendant of ZAR 247 054 711 due to it in terms of the performance by the defendant of its obligations in terms of the agreement for which the amount was due as payment. For the reasons given the defendant pleaded that the plaintiff's claim be dismissed to prevent an injustice to the defendant.

The defendant also pleaded that the plaintiff had refused to negotiate so that the agreement remained extant as opposed to have it declared invalid, unenforceable, invalid or illegal. The defendant pleaded that the plaintiff's refusal to negotiate as aforesaid was contrary to the terms of s 21.7 of the agreement which provide as follows:

"21.7. If any part of this agreement is for any reason whatsoever, including a decision by any court, any legislation or any other requirement having the force of law, declared or becomes unenforceable, invalid or illegal, the Parties must negotiate and effect an amendment of this Agreement such that it is unlawful and enforceable retaining its essential terms or failing such agreement between the parties, as afar as possible this agreement must be interpreted so as to exclude the offending provision but retain the essential terms of the agreement."

In its replication on material issues, the plaintiff averred that as regards the point *in limine* raised in the plea, the defendant did not follow the correct procedure for raising the point

in limine. The plaintiff pleaded that the plaintiff ought to have filed a special plea, exception or an application to strike out if it intended to raise an objection which does not touch on the merits of the matter to be decided. In my view, the point *in limine* raises questions of law and either party would be permitted to raise a point of law at any stage of the proceedings. Whilst ordinarily the point *in limine* as raised by the defendant would best have been raised by way of special plea, exception or application to strike out, the court has a discretion to condone the way that the point *in limine* was raised in the plea. The decision to condone is largely informed by the consideration whether or not there would be irreparable prejudice to the opposite party. Such prejudice is not apparent from the papers and in any event, the plaintiff did not allege any prejudice to its ability to answer the point *in limine*.

The plaintiff also pleaded that it had in arbitration proceedings underway in South Africa brought in terms of clause 20 of the agreement between the parties objected to the jurisdiction of the arbitrator on the basis that the arbitrator had no jurisdiction to determine the matter on account of the invalidity of the agreement. The plaintiff denied that the invalidity of the agreement could be determined by the arbitrator and had applied in the High Court in South Africa to interdict the arbitration proceedings.

In regard to subsequent variation agreements signed after the initial agreement, the plaintiff in its replication pleaded that such agreements were to be read together with the original agreement. The variations were to be considered as being illegal, invalid and unenforceable for the reason that since the original agreement was a nullity, it could not be varied nor could it be repudiated as claimed by the defendant against the plaintiff.

The plaintiff averred that even if the court was to find that the agreement was valid, and enforceable, the same had been terminated on notice on 2 April, 2020 and as such, it no longer existed. On whether or not the plaintiff has sufficiently established that it was a resident for purposes of the Exchange Control Regulations, the plaintiff replied that the issue was properly pleaded between the parties and was in any event, common cause.

The plaintiff averred that the warranties in the agreement did not render the agreement valid and enforceable. It pleaded that the defendant was aware or ought to have been aware that exchange control approval was required in order to enter into a valid agreement with the plaintiff. The plaintiff averred that the defendant's averment that there be a relaxation of the *pari delicto* rule was not properly grounded because the doctrine could only be relaxed for purposes of restoration or restitution. Plaintiff also averred that it would not be in the interests of public policy to enforce a contract that was invalid for want of exchange control approval. In

para 30 of the replication, the plaintiff admitted that it refused the invitation extended by the defendant to resolve the issue of invalidity of the agreement because non-compliance with the Exchange Control regulations was incapable of retrospective amendment.

The parties held at pre-trial conference before MUZOFA J on 15 June, 2021. The issues for trial were set out as follows:

> "1. ISSUES
> 1.1. Does the agreement entered into between the parties offend against the provisions of section 11 of the Exchange Control Regulations, 1996. If so, is the agreement illegal, invalid and of no force and effect.
> 1.2. Whether the court has jurisdiction to preside over the present matter.
> 1.3. Have the requirements for declaratory relief been met."

In para 6 of the joint pre-trial conference minute, admissions were recorded as follows-

> "6.1. ADMISSION SOUGHT
> 6.1. Plaintiff sought an admission to the effect that neither the plaintiff nor the defendant sought and obtained exchange control approval for the conclusion of the supply agreement.
> 6.2. Defendant admits that it had not sought and obtained exchange control approval prior to the conclusion of the Supply Agreement and was not required to do so."

The parties agreed at the pre-trial conference to the amendment of the defendant's plea in para 6 of the declaration as follows-

> "18.1 The contents of this paragraph are denied as if specifically traversed and plaintiff is put to the proof thereof.
> 18.2. Defendant avers that in any event, by virtue of the provisions of clause 21.1 of the agreement entered into between the parties, the agreement must be interpreted and construed in accordance with the laws of the Republic of South Africa.
> 18.3. Further and in any event defendant avers that no illegality appears *ex facie* the agreement and the agreement is accordingly valid and enforceable."
> 31. Defendant avers that the claim to a declaratory as prayed for does not meet the requirements at law for such and accordingly the relief sought is incompetent."

Both parties led oral evidence at the trial. The plaintiff led evidence from its Managing Director, Charles Msipa. He confirmed that the defendant was a supplier of wrap material to the plaintiff over a long period. He stated that the Supply Chain Director at the relevant time one Chamu Madamombe is the one who was responsible for sourcing materials and negotiating with approved suppliers both local and internal. In this regard the Supply Chain Director would seek advice from the Finance Director and the plaintiff's legal advisors. The Supply Chain director would then refer the procurement matters to the witness who in turn would take the issue up with the Board of Directors. He testified that he was not aware of the agreements pleaded herein as being invalid until October, 2019 when auditors highlighted the agreement. The long and short of the witness evidence in regard to the execution of the agreements was

that Chamu Madamombe, the Supply Chain Director executed the agreements without the knowledge of the plaintiff. In this regard it is noted from the joint pre-trial conference minute that Chamu Madamombe was listed as a witness for the plaintiff. However he was not called to testify. The issue of whether or not Chamu acted with or without authority therefore remained hanging. I however hold the view that from the evidence of the plaintiff witness, the pleadings and the issues for trial as agreed, the issue of authority is not material because the real question is as stated in the first issue. The question of the effect of the first issue as stated is one of interpretation on given facts. The court must recognize the existence of the agreement sought to be declared invalid. The court must then determine whether the agreement contravenes s 11 of the Exchange Control Regulations and the consequences of such contravention if proved.

The witness agreed in cross examination that the plaintiff sought a declaration of nullity of the agreement by relying on s 11 of the Exchange Control regulations and on no other ground. The witness agreed that the plaintiff had input in the preparation of the agreement as evidenced by e-mail communications which related to proposals and counter proposals on issues forming part of the agreement like prices for the goods and payment terms. The agreement was a joint effort agreement.

The witness was asked whether the agreement obligated that payment is made outside Zimbabwe. The witness responded that he was not aware of any physical presence of the defendant in Zimbabwe. When pressed further to confirm that the agreements did not expressly provide that payment is made outside Zimbabwe, the witness answered that it was his expectation that payment was to be made outside Zimbabwe because the invoices for payment were dominated in rands.

In relation to modalities for payment, the witness stated that the defendant would present its tax invoice, delivery note and customs clearance documents. It would thereafter become the duty of the plaintiff to deal with its bankers for payment to be made. In re – examination the witness stated that the plaintiff case was not that the plaintiff made payments to the defendant without Exchange Control approval but that the plaintiff concluded the contract without having obtained exchange control approval.

The witness gave evidence well and in any event the evidence was not seriously in dispute if it was at all. In summation, his evidence was to the effect that the agreements which form the subject matter for the prayer for cancellation of the same are in contravention of s 11 of the exchange control regulations. The issue of how Chamu Madamombe ought to have

complied with the internal processes of the company is insignificant because the declaration of nullity is not sought on the basis of the Supply Chain Director not having complied with the plaintiff's internal procedures for entering into a supply agreement with an external party save perhaps for the need to obtain the exchange control approval alleged by the plaintiff. The witness gave satisfactory evidence and clearly so.

The defendant led evidence from a South Africa based lawyer Brewster (*sic*). The witness was called to give evidence to assist the court in determining the second issue of the jurisdiction of the court to deal with the matter in view of the provision in the agreement that the law of South Africa would govern the agreements. The witness was called as an expert witness. He was admitted to the Durban Bar as a practicing lawyer in 1980 and was made senior counsel since 21 years ago. He did not have a written opinion. He however testified after he had been availed the agreement involved in this dispute to study the same and express a view on how South African Law would be applied to the agreements.

The witness testified in material particular that South African Law would recognize the choice of the law which parties covenant as the one which governs their agreement. He also stated that South African Law recognized the importance and validity of a warranty given in an agreement and that the warranty given in para 15 (d) of the agreement to the effect that the parties will have obtained necessary consents, licences and approvals in connection with entering the agreements would be given effect to under South African law.

The witness also testified that the place of payment was not stipulated in the agreement. The witness stated that under South African Law, there was no requirement for prior written exchange control approval to enter into a contract involving a South African entity and a foreigner. The transaction is done through the bank which processes the payments. In this regard, I must state that there was no evidence led to the contrary on the important question of whether there is a requirement under South African Law for parties to an export contract to have for purposes of its validity sought exchange control approval before concluding a contract that involves the incurring of obligations to make payment outside the country.

It was put to the witness whose evidence was straightforward that his evidence was unnecessary and immaterial because this court was familiar with South African law. In this regard the Civil Evidence Act, [*Chapter 8:01*] provides that the court does not take judicial notice of foreign law nor presume that the foreign law is identical to that of Zimbabwe. The simple position of law is that foreign law is proven through the adduction of evidence given by an expert in that foreign law. See *Mokbel v Mokbel* HH 192-15.

In determining the dispute, I must answer the issue whether the agreements violate s 11 of the Exchange Control regulations. The provisions of s 11 provide as follows:

"(1) Subject to subsection (2), unless otherwise authorized by an exchange control authority, no Zimbabwean resident shall –

(a) make a payment outside Zimbabwe; or

(b) incur any obligation to make a payment outside Zimbabwe.

(2) subsection (1) shall not apply to –

(a) any act done by an individual with free funds which were available to him at the time of the act concerned; or

(b) any lawful transaction with money in a foreign currency account."

Turning to the factual evidence, the agreement sought to be cancelled as varied provided as follows in relation to payment in clause 11.5:

> "Amounts due to Blakey Mastics by the customer under this Agreement shall be paid into a bank account nominated in writing by Blakey Plastics within 30 days from the date of the statement of account without deduction or set off."

The witness Charles Msipa agreed that the above clause did not specify that the payment due on any invoice should be done outside the country. Equally, no foreign account was nominated for payment by the defendant. In fact Msipa stated that it was his assumption that payment would be made outside the country because prior to the agreement, the plaintiff had made payments to the defendant outside the country. The plaintiff argued in its closing submissions that the question to be answered was whether in concluding the contracts, the plaintiff incurred an obligation to make payment outside Zimbabwe. It was submitted that the mere fact of incurring an obligation to make payment outside is proscribed. It was further submitted that the duty of the defendant being to provide the product which was not locally available and the duty of the plaintiff being to make payment, the following factors be considered:

"(a) that payment is to be made in South African Rands,
(b) that defendant has no local account,
(c) that all payments were in fact made to an account domiciled in South Africa and that such proof exists in the defendant's even bundle,
(d) that defendant collects Value Added Tax on the payments in accordance with its South African Registration and obligations,
(e) the defendant is at present suing the plaintiff in South Africa so that the sums it claims as due are paid in South Africa.
(f) Indeed if the position were otherwise, the contract would have been taken within the currency changes drill and defendant would have been paid in the RTGS$ at parity – *Zambezi Gas (Private) Limited* v *N.R Barber & Anor* SC 3/20."

It appears to me that there was need for evidence from an exchange control authority to establish the illegality of the agreement as alleged by the plaintiff. This was necessary in my reasoning because whatever payments were or could be made were to be done through the plaintiff's bank. Exchange Control Authority as defined in the Exchange Control regulations refers to:

> "(a) the Minister in relation to every provision of these regulations; and
> (b) the Reserve Bank in relation to such of the provisions of these regulations as the Minister may specify by Statutory Instrument, and
> (c) in relation to any particular provision of these regulations, any authorized dealer that is declared by order, to be an exchange control authority for the purposes of the provision;"
>
> Under the sane regulations; authorized dealer is defined as:
> "authorized dealer" means –
> (a) the Reserve Bank; and
> (b) any commercial bank or accepting house; or any class thereof, which the Reserve Bank, by order declares to be an authorized dealer for purposes of these regulations."

There are disputes of fact and law between the parties. The plaintiff takes the position that before any obligation to make a payment outside Zimbabwe is incurred, there should be exchange control authority obtained. The defendant averred that it was not required to obtain such authority. The defendant also argued that the plaintiff in any event warranted that it had obtained all approvals and authorities required to enter into the agreement so as to give it legal force.

It appears to me that the plaintiff took too simplistic a view of the alleged violation of s 11 of the Exchange Control Regulations as a ground to declare the agreement invalid. In view of the definitions of Exchange Control Authority as set out above, it was necessary in my view for the plaintiff to lead evidence on how s 11 is applied in practice. It is the appropriate Exchange Control Authority which ought to have given evidence of how the authority envisaged is obtained, by who, its form and content and whether the authority is obtained prior to the entering into contracts or the authority referred to relate to the making of payment out of the country only. Ordinarily it ought to have been the Exchange Control authority which should have raised the red flag on the legality of the agreements. The plaintiff did not explain how it allegedly made previous payments through its bankers without exchange control approval. That being, it could not be said that the plaintiff did not have exchange control approval without the defendant having been shown to have nominated an account outside the country and directed that payments be directed into that account. The obligation to pay into that account would not arise unless instructions for payment were given. The plaintiff also failed to lead evidence from the then Supply Chain Director to establish that there was no exchange control approval.

In my view the plaintiff seeks that the court should decide an academic issue whether or not the agreement contravenes s 11 of the Exchange Control Regulations based on assumptions. The agreements are to hand. The Exchange Control Authorities as defined are available. It is not apparent from which of the various Exchange control authorities even assuming that authority to enter into the agreements was necessary before the agreement was concluded, the authority would have been sought. It was necessary for the plaintiff to show the type of authority envisaged in s 11 of the Exchange Control Regulations whether it was by the Minister, the Reserve Bank or authorized dealer. I am not persuaded that it would be proper for the court to make a declaration of illegality, nullity and/or unenforceability of agreements on which Exchange control has not expressed an opinion. What if Exchange Control is of a different view? Without evidence of the nature of the authority envisaged in s 11 aforesaid, the court is not placed in a position to say that the plaintiff proved on a balance of probabilities that the agreements offended s 11. Section 11 aforesaid provides exceptions on when authority of Exchange Control is not required like where the transaction involves funds in a foreign currency account. There was no evidence led to show that the transaction could not have fallen in exception in s 11(2)(b) of the Exchange Control Regulations. To simply state that s 11 was not complied with without evidence on the modalities of what ought to have been done by the plaintiff, the defendant or both, it becomes academic to answer the question whether or not there has been a contravention of s 11. This is even so, because the court is left in a position where it cannot even say what amounts to Exchange Control authority is this or that or whether the agreement was one for which the undefined authority was required to be obtained. The court cannot decide a case on assumptions when evidence could have been led by the plaintiff to give the court an informed position from which to make a proper determination. He who alleges must prove. The plaintiff failed to prove its averment on the alleged illegalityto the agreement for contravening s 11 of the Exchange Control Regulations. In the case of *ZUPCO Ltd* v *Park horse services (Pvt) Ltd* SC 13/17the Supreme Court stated;

> "The cardinal rule on onus is that a person who claims something from another in a court of law has to satisfy the court that he is entitled to it. See *Pillay* v *Krishna* 1946A, 946 ant 952. It is also settled that he who alleges must prove. See *MB Investments (Pvt)* Ltd v *Oliver & Partners 1974* (3) SA 269 (RA)"

I turn to the issue of whether or not the court has jurisdiction to determine this matter. This issue appears not to have been persisted in. The point was futile because there did not appear to have been any sound ground to oust the court's jurisdiction save that the defendant had in the pleadings averred that the matter be referred for arbitration. I however agreed with

the plaintiff's contentions that the question of whether or not the agreements were illegal for violating the Statute law of Zimbabwe and whether or not a declaratur be issued as prayed for were matters on which this court would have jurisdiction with arbitration arising after a declaration of validity of the agreement was made.

I am mindful that the expert witness indicated that there is no similar provision is South African Law to s 11 of the Exchange Control Regulations. The plaintiff was content to argue that there was no need to relate to South African Law because here was nothing novel about the South African position. The evidence of the witness that South African law would not require prior exchange control approval was not controverted. Therefore in applying South African law, the agreement would not be illegal and the prayer for a declaratur on this basis too would fail.

The last issue was whether or not the relief sought had been established. I think not. The requirements for a declaratur are clear in our law. The applicant must show that:

(i) he or she is an interested person;
(ii) has a right or obligation which informs the subject of the enquiry;
(iii) is not approaching the court for what amounts to seeking a legal opinion on an abstract or academic matter'
(iv) there are interested parties on whom the declaration will be binding;
(v) public policy favours the grant of the declaratur.

See *MDC* v *President of Zimbabwe* 2007(1) ZLR 257, *Munn Publishing (Pvt) Ltd* v *ZBC* 1994(1) ZLR 337(s).

I must state that I agree with the plaintiff's submission that an agreement in breach of a peremptory provision of a statute is void because courts do not have the equitable discretion to dispense with strict compliance with statute see *Mtetwa & Anor* v *Mupamhadzi* 2007(1) ZLR 253. *In casu* the court does not have sufficient evidence from which to hold that the statute in issue was not complied with. The absence of evidence of Exchange Control Authority put paid to the plaintiff's case. It is in my view not the policy of the Exchange Control Regulations to assist contracting parties in business to renege on obligations which arise in terms of their concluded contracts. A party to a contract should not be allowed to seek to invoke the Exchange Control regulations as a way out of an obligation and where that party seeks to do so., there must be cogent evidence to show that indeed the law was contravened. It was not enough for the plaintiff to simply plead that there was no exchange control authority to enter into the

contract without anything further and to seek a declaration of invalidity of the contract upon a generalized basis.

The *declaratur* sought apart from the criticisms I have made would be contrary to public policy if issued. The parties are agreed that there are ongoing arbitration and court proceedings in South Africa and that the agreements herein are subject of those judicial processes. To grant the declaration even if a case had been made for the *declaratur* would render ongoing judicial processes academic. I would not favour such a course in the interests of justice and public policy which favour that ongoing judicial processes be allowed to run their course. The *declaratur* being a matter of the court's discretion to issue, it or refuse to do so. I am of the view that it is not in the interests of justice to exercise the court's decision in favour of issuing the *declaratur* in the circumstances of this case.

In conclusion it is my judgment that the plaintiff has not made out a case for the issue of the *declaratur* as sought. This leaves the quantum of costs which are in the discretion of the court. I consider that the costs should follow the event and it will be so ordered.

IT IS ORDERED THAT:

"The plaintiff's claim be and it is hereby dismissed with costs."

Wintertons, plaintiff's legal practitioners
Atherstone & Cook, defendant's legal practitioners