**Appeal No: JCPC/2025/0062**

**IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL**

**ON APPEAL FROM THE SUPREME COURT OF MAURITIUS**

**BETWEEN:**

**RISK REDUCTION INTERNATIONAL LTD**

**Appellant**

v

**ABSA BANK (MAURITIUS) LIMITED**

**Respondent**

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# AGREED STATEMENT OF FACTS AND ISSUES

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## 1. Introduction

1.1. This appeal arises from the loss caused by the Respondent's breach of contract in failing to implement the Appellant's instructions to convert South African Rand ["**ZAR**"] into US dollars **["USD**"] at an agreed rate. In particular, the Appellant contends that it concerns the proper approach to mitigation where the claimant's predicament was caused by the defendant's breach, the test to be applied by an appellate court when reversing findings of fact, and the extent to which the Appellant's subsequent conduct reduced, if at all, its entitlement to recover the full measure of its loss. The Respondent disagrees with the Appellant's characterisation of the Appeal, and contends that there was no dispute whatsoever as to the "proper approach to mitigation" before the first instance court or on appeal before the Mauritian court of appeal (with the Appellant accepting that the issue of mitigation was "well taken" by the Respondent[1]) with the Appellant's submission before the lower courts being instead that the Appellant did not have a duty to mitigate the loss because it was acting on the advice of the Respondent's employees, a version that was rejected on the facts by both lower courts. It is therefore the Respondent's position that no question arises in this appeal about any alleged proper approach to mitigation, and that the

[1] Record, page 495 [HB/471]

Appellant is instead seeking to invite the Board to overturn concurrent findings of fact of the lower courts[2].

1.2. The appeal is brought against the judgment of the Court of Civil Appeal ["**the CCA**"] dated 13 December 2024 in consolidated appeal record nos. 1541 and 1542, by which the Court of Civil Appeal reduced the damages awarded to the Appellant at first instance from USD 1,669,243.05 to USD 357,023.956. Damages in the sum of USD 1,669,243.05 had been awarded by the Commercial Division in its judgment delivered on 5 November 2018 ["**Judgment**"].

1.3. The appeal challenges the Court of Civil Appeal's treatment of mitigation and appellate review on four grounds.

1.3.1. First, the Appellant contends that both courts below reached perverse findings that there was an unreasonable failure to mitigate, given the unrebutted evidence that the Appellant continued to act on the Respondent's advice as to exchange-rate movements.

1.3.2. Second, it contends that the finding of a failure to mitigate was perverse as it contradicted the Commercial's Courts determination that the Appellant acted reasonably due to the unforeseeable and fluctuating nature of the exchange rate during the early months of 2012 and the Respondent's reassurance.

1.3.3. Third and in the alternative, it contends that the Court of Civil Appeal applied the wrong test for appellate intervention.

1.3.4. Fourth it contends that the Court of Civil Appeal erred in failing to apply the legal principle that once a court identifies the point at which a claimant first failed unreasonably to mitigate, that fixes the measure of damages. The Commercial Division's undisturbed finding was that the failure to mitigate crystallised in January 2012 and so fixed the measure of damages at ZAR 7.80.

[2] For that reason, while the Respondent has not taken issue with the lengthy statement of facts set out in this Statement of Facts and Issue so as not to disrupt the processing of this appeal, it will be its position at the hearing that the facts and evidence are properly set out in the judgments below (and cannot be reopened).

1.4. On 27 December 2024, the Appellant applied to the Supreme Court of Mauritius ["**the Supreme Court**"] for leave to appeal to the Judicial Committee of the Privy Council ["**the Board**"] against the CCA Judgment. The Respondent did not object: [**939**]**.** On 13 January 2025, the Supreme Court (Mungly-Gulbul CJ) granted the Appellant's application for leave to appeal **[872] – [873]** to the Board pursuant to sections 81(1)(b) of the Constitution of Mauritius [**940**]. [HB/756–757] [HB/130]

1.5. The Appellant filed a notice of appeal with the Board on 4 July 2024. [HB/4–5]

## 2. The Facts

### The Appellant

2.1. The Appellant, Risk Reduction International Ltd ["**Risk Reduction**"], is a company incorporated in Mauritius ([**548**]) principally engaged in the mining business in Africa: [**76 (para 1)**]. The only person authorised to give instructions to the Respondent in relation to that account, was Mr Frederick Lutzkie, a South African national and the ultimate beneficial owner of Risk Reduction: [**550]**. [HB/137]

### The Respondent

2.2. The Respondent, Absa Bank (Mauritius) Limited ["**the Bank**"], is a bank incorporated and licensed in Mauritius: [**76]; [88**] which is a successor bank to Barclays Bank plc Mauritius branch and later Barclays Bank Mauritius Limited. There is no dispute that the Bank was the proper defendant before the Commercial Court, and that the acts and doings of Barclays Bank Plc, Mauritius branch, can be taken as being those of the Bank itself. For convenience, the Bank in the subsequent paragraphs shall be taken to also include Barclays Bank Plc, Mauritius branch prior to 2013. [HB/137] [HB/144]

### The Relationship Between the Parties and its Development

2.3. Risk Reduction's account was opened with the Bank in 2001: [**846**];[**850**]. In 2009, Mr Lutzkie was introduced to Ms Hema Kishto ["**Mrs Kishto**"], then Head of the Foreign [HB/702] [HB/732]

Exchange ["**forex**"] Department at the Bank and a treasury sales dealer: [**513**]; [**516**]. According to the Appellant, from December 2009, Mr Lutzkie engaged in a series of forex transactions through the account on the advice and recommendations of Mrs Kishto, acting in her capacity as a treasury sales dealer in the Bank's International Banking Division. [HB/708] [HB/711]

2.4. Mr Harish Bhoyroo ["**Mr Bhoyroo**"] was at all material times a Senior Relationship Manager at the Bank: [**851**]. Mr Bhoyroo acted as the primary liaison between Mr Lutzkie and the Bank's Treasury Department, transmitting Mr Lutzkie's instructions to the Bank and communicating information, rate updates, and advice from the Bank's treasury officers to Mr Lutzkie: [**556**] – [**558**]. [HB/733] [HB/506 - 510]

**Key Events: August to September 2011**

2.5. On 19 August 2011, acting (according to the Appellant) on the advice of Mrs Kishto, Mr Lutzkie gave verbal instructions to convert USD 37,058,882.44 held in Risk Reduction's account into ZAR at a rate of ZAR 7.25 per USD. The order was confirmed in writing on the same day [**551**]; [**851**]. [HB/498] [HB/733]

2.6. On 1 September 2011, Mr Lutzkie instructed the Bank to withdraw USD 2.5 million from the Appellant's account in order to acquire a helicopter **[514]**. [HB/709]

2.7. On 9 September 2011, the Bank converted Risk Reduction's USD into ZAR at a rate of ZAR 7.2510 per USD. On the same day Mr Lutzkie instructed the Bank to convert the ZAR back into USD at the rate of ZAR 7.10 per USD: [**553**]. Following 9 September 2011, the ZAR depreciated against the USD and the rate of ZAR 7.10 was not achieved: [**851**]. [HB/500] [HB/733]

2.8. It was the Bank's case at trial that, the sum referred to at paragraph 2.6 above having nonetheless been included in the amount converted into ZAR, there was a shortfall in the Appellant's account, which the Bank made good by reversing part of the transaction and suffered a loss of USD 200,000 **[516]**, **[517]**. [HB/711] [HB/712]

2.9. On 15 September 2011, Mr Lutzkie instructed Mr Bhoyroo by email to convert all of Risk Reduction's monies in the account from ZAR to USD at the rate of ZAR 7.32 per USD. Mr Bhoyroo responded on the same day, drawing Mr Lutzkie's attention to the fact that

conversion at that rate would entail a loss on the USD base given the rate at which the USD had originally been converted into ZAR. Later the same day, Ms Delanja Marais, Mr Lutzkie's personal assistant ["**Ms Marais**"], confirmed to Mr Bhoyroo on Mr Lutzkie's behalf that Mr Lutzkie *"said that the margins for the near future will be set between R 7.32 and R 7.50. Therefore he is willing to take the loss and to play on the high margins of R 7.30 and R 7.50"*: [**557**] . Mr Bhoyroo replied on the same day confirming that the Bank would proceed in accordance with Mr Lutzkie's instructions: [**554**] – [**558**]; [**851**]. [HB/508] [HB/502-510] [HB/733]

2.10. On 16 September 2011, Ms Shenaz Busawon ["**Ms Busawon**"], a Treasury Dealer at the Bank, sent an email to Mr Lutzkie confirming the new order to convert ZAR 277,857,345.10 into USD at the rate of ZAR 7.32 per USD, and stating that the Bank's treasury department would monitor rates daily in order to achieve the desired rate on a best-efforts basis: [**514]**; [**560**]. [HB/709] [HB/512]

2.11. On 19 September 2011, the target rate of ZAR 7.32 per USD was achieved in the market. The Bank did not execute the conversion in accordance with Mr Lutzkie's instructions: [**530**]. [HB/725]

2.12. On 20 September 2011, Ms Busawon sent an email to Mr Bhoyroo which read: "*Following the transaction effected yesterday, please confirm Rand amount in respect of Risk Reduction for which order below is valid*" [**572**]. Six minutes later, Mr Mungroo, Head of the Treasury Department at the Bank, sent an email to Ms Busawon and others, including Mr Bhoyroo, which read: "*Just keep on hold for now any order from that client*" [**573**]. The Bank did not thereafter execute the conversion instructed by Mr Lutzkie on 15 September 2011. [HB/535] [HB/536]

2.13. Mr Bhoyroo gave evidence explaining why the Bank had held back on the transaction. The trial court recorded that Mr Bhoyroo gave evidence explaining that the Bank had been displeased at having sustained the loss described at paragraph 2.8 above: [**521 – 522**]. [HB/716–717]

2.14. On 22 September 2011, Mr Lutzkie wrote to the Bank expressing his dissatisfaction and his intention to close Risk Reduction's account, stating that he had concluded that Mrs Kishto had been trading to the advantage of the Bank. On the same day, Mr Bhoyroo telephoned Mr Lutzkie and offered new products in an attempt to dissuade him from closing the account. Risk Reduction's account remained open with the Bank: [**561**] – [**562**]; [**851**]. [HB/514–516] [HB/733]

**Key Events: January to March 2012**

2.15. On 28 January 2012, Ms Marais received a message from the Bank stating: "*We confirm that the order has been hit (R 7.80). Please confirm if we credit the USD a/c with the USD equivalent*": [**567**] – [**568**]**;** [**851**]. [HB/526-527] [HB/733]

2.16. On 31 January 2012, the Bank converted the ZAR in Risk Reduction's account into USD at the rate of ZAR 7.80 per USD. On the same day, following correspondence between Ms Marais and Mr Bhoyroo, Mr Lutzkie sent a letter to Mr Bhoyroo and the ZAR conversion was reversed, returning Risk Reduction's funds into ZAR: [**571**];[**852**]. [HB/533] [HB/734]

2.17. Mr Lutzkie's evidence was that he requested the reversal as Mrs Kishto and Mr Bhoyroo had advised him that the ZAR/USD rate would continue to fall and that a rate of ZAR 7.25 per USD was achievable: [**792**]. [HB/652]

2.18. Between 10 and 29 February 2012, Mr Bhoyroo sent a series of emails to Ms Marais communicating the prevailing ZAR/USD exchange rates, which during that period moved between approximately ZAR 7.60 and ZAR 7.70 per USD, and noting that Mr Lutzkie was looking for a rate of ZAR 7.25 [**587**]; [**595 – 597**]; [**852**]. [HB/546] [HB/549–551] [HB/734]

2.19. On 1 March 2012, Mr Bhoyroo informed Ms Marais that the ZAR/USD rate had traded at ZAR 7.35 the previous day and was trading between ZAR 7.45 and ZAR 7.50 that morning, and that the Bank would continue to monitor [**588**]; [**852**]. [HB/549] [HB/734]

2.20. On 5 March 2012, Mr Bhoyroo informed Ms Marais that the ZAR/USD rate was trading between ZAR 7.55 and ZAR 7.65: [**588**]; [**852**]. [HB/548] [HB/734]

2.21. On 9 April 2012, Mr Bhoyroo informed Ms Marais that the ZAR/USD rate was trading between ZAR 7.87 and ZAR 7.90 and was far from the rate of ZAR 7.25, that the Bank would continue to monitor and would *"inform you as and when the rates are closing R7.25"*: [**594**]; [**852**]. That rate was not achieved. Risk Reduction's funds remained in ZAR. [HB/548] [HB/734]
On 22 May 2012, Mr Bhoyroo emailed Ms Marais stating that he had not heard from her regarding the ZAR amount currently on call account of the Appellant. On 17 and 24 August

2012, Mr Bhoyroo emailed Ms Marais with proposals for placing the Appellant's ZAR in interest-bearing deposits: [**598 – 606**]. [HB/553–562]

2.22. No further rate communications from the Bank were sent after April 2012, albeit that the above communications were sent in May 2012 and August 2012 concerned with placing the Appellant's ZAR into interest-bearing deposits. The funds remained in ZAR until the Bank's request for account closure in March 2015: [**852**]. [HB/734]

**Closure of the Account and Final Conversion**

2.23. On 18 March 2015, the Bank requested Risk Reduction to close its account. On 17 June 2015, the Bank converted all monies in Risk Reduction's account from ZAR to USD at the then prevailing rate of ZAR 12.4835 per USD, yielding USD 23,940,442.35 for Risk Reduction: [**563**] – [**566**]; [**852**]. [HB/518-522] [HB/734]

## 3. Proceedings before the Commercial Division

**The Claim**

3.1. Risk Reduction issued proceedings against the Bank in the Commercial Division. Risk Reduction claimed damages of USD 10,534,278.07, representing the difference between the amount it would have received had its ZAR been converted at the rate of ZAR 7.32 per USD on 15 September 2011 (USD 34,474,720.42) and the amount it actually received on conversion in June 2015 at the rate of ZAR 12.4835 per USD (USD 23,940,442.35). Risk Reduction alleged that the Bank had breached the banking contract between the parties by failing to comply with Mr Lutzkie's instructions to convert the ZAR held in the account into USD at the rate of ZAR 7.32 per USD, and that this breach had caused the loss claimed.

**The Defence**

3.2. The Bank denied breach of contract. It averred that both Risk Reduction and Mr Lutzkie were sophisticated investors who had made their own informed decisions about the relevant forex transactions. The Bank further averred that a step-by-step process existed for the completion of forex transactions of which Mr Lutzkie was aware, and that the instructions

given on 15 and 16 September 2011 had not been followed in accordance with that process. The Bank contended that the conversion rate of ZAR 7.32 per USD had not in any event been achievable at the relevant time. Further and in the alternative, the Bank averred that Risk Reduction had made no attempt to mitigate its alleged loss.

**The Trial**

3.3. The trial took place before Hon B.R. Mungly-Gulbul J (now Mungly-Gulbul CJ) in the Commercial Division.

**The Evidence**

3.4. Risk Reduction called two witnesses: Mr Lutzkie and Mr Bhoyroo, who was by that time no longer employed by the Bank: Judgment at 6.

3.5. The trial judge found Mr Lutzkie to be a credible and convincing witness who stood the test of cross-examination and who candidly answered the questions put to him. She accepted him as a witness of truth. She found his testimony to be corroborated by Mr Bhoyroo, whom she found to be a straightforward, convincing, reliable and truthful witness, and upon whose testimony she relied without hesitation. The trial judge found that Mr Bhoyroo, as Risk Reduction's relationship manager, had been a crucial link between Risk Reduction and the Bank, transmitting Risk Reduction's instructions to the Bank and passing on information between Risk Reduction and the Bank's Treasury team: Judgment at 7 and 8.

3.6. The Bank called five witnesses: Mr Francois Tse (Head of Commercial Operations), Mr Uday Ragoobur (General Manager of MCS), Mr Vikram Ramdaursingh (Head of Financial Institutions and Non-Bank Financial Institutions), Mr Atmanand Beehary (Head of IT, Change and Infrastructure), and Mr Vishal Joyram (Head of Global Markets): Judgment at 6.

3.7. As to the events of 19 and 20 September 2011, Mr Lutzkie gave evidence that Ms Busawon had telephoned him on 20 September 2011 and informed him that the transaction had been

done but thereafter that it had been put on hold pending a decision regarding the purchase of a helicopter by Risk Reduction: Judgment at 7.

3.8. Mr Bhoyroo gave evidence that he had received confirmation from the Bank's treasury dealer that the ZAR 7.32 deal had been concluded and further confirmation from Ms Busawon that the deal was done. He explained that Ms Busawon's email of 20 September 2011 confirmed that the conversion had been effected and was seeking confirmation of the precise ZAR amount so that accrued interest could be taken into account in computing the final USD figure. He further explained that Mr Mungroo's email of the same date directed that the transaction be kept on hold and not passed on to the client, and that the Bank's officers complied accordingly: Judgment at 7 - 9.

3.9. The trial judge observed that Mrs Kishto, Ms Busawon and Mr Mungroo were not called to give evidence by the Bank, notwithstanding that each had been directly involved in the relevant transactions, that Mrs Kishto was "*the officer who was directly involved with Mr Lutzkie for the purposes of his forex trading"*, and that Ms Busawon and Mr Mungroo were "the authors of the emails upon which the plaintiff is basing its case." The trial judge further observed that Ms Busawon and Mr Mungroo were still employed by the Bank at the time of trial and that no reason was advanced for the absence of any of them: Judgment at 12.

3.10. Mr Joyram gave evidence on behalf of the Bank that the rate of ZAR 7.32 per USD had not been achievable at the relevant time, producing Bloomberg exchange rate data for the period 16 to 18 September 2011. He did not produce data for 19 September 2011, the date on which Risk Reduction's case was that the rate had been achieved. Mr Joyram confirmed that he had not worked at the Bank at the relevant time, had no personal knowledge of the transactions in question, and had not discussed the matter with Ms Busawon. He confirmed that Bloomberg rates were averages across different traders and that the Bank dealt with different traders, some of whom offered prices below the average. He acknowledged that for transactions exceeding USD 5 million, rates were negotiated directly with the relevant trader.

3.11. In closing submissions, counsel for the Bank advanced two mitigation arguments. First, that Mr Lutzkie had acted unreasonably on 31 January 2012 in converting the currency into ZAR at ZAR 7.80, and that damages should accordingly be assessed by reference to that

rate. Second, that Mr Lutzkie had failed to mitigate by not giving instructions for conversion when favourable rates were available after January 2012, and that had he done so at a rate of ZAR 7.50 the loss would have amounted to only USD 357,023.96: [**484 - 486 (§§9.3 – 9.7)]; [736]**. [HB/459–461] [HB/596]

## 4. The Judgment

4.1.The trial judge held:

4.1.1. That Mr Lutzkie had on 15 September 2011 given clear, unambiguous, unequivocal and binding instructions to the Bank to convert the ZAR held in Risk Reduction's account into USD at the rate of ZAR 7.32 per USD, which instructions the Bank had acknowledged and agreed to monitor the exchange rates to achieve (Judgment at 18);

4.1.2. That the preponderance of evidence, as reflected in the tenor of the emails from the Bank's officers, established on a balance of probabilities that the Bank had achieved the rate of ZAR 7.32 per USD on 19 September 2011 but had failed to give effect to Risk Reduction's binding instructions, thereby committing a breach of the contract between the parties (Judgment at 18);

4.2. On the question of mitigation and quantum, the trial judge held:

4.2.1. That subsequent to Risk Reduction’s instructions in September 2011 to convert at 7.32, the Bank had converted Risk Reduction’s ZAR at the rate of 7.80 on 31 January 2012. On the same day, however, Mr Lutzkie requested that the transaction be reversed, which reversal was effected by the Bank. Thereafter, the money remained in ZAR, a fact of which Mr Lutzkie was well aware. Yet, his only instructions after 31 January 2012 was to convert at 7.25, a rate which was never reached (Judgment at 21);

4.2.2. Given that Mr Lutzkie followed the market trends on television and he was briefed regularly about the trading rates of the ZAR by Mr Bhoyroo, he would have been aware of the evolution of the ZAR and was thus in a position to give appropriate instructions

to convert ZAR at the best possible rate and minimise the USD loss. Had he done so, it would thereafter have been possible for him to claim the loss between the rate obtained and the 7.32 rate achieved in September 2011, from the Bank (Judgment at 21);

4.2.3. That Mr Lutzkie's version, that Mrs Kishto had advised him that the rate of 7.25 would be achieved and that he was waiting for Mrs Kishto's advice throughout this period, was difficult to accept given that ever since September 2011 Mr Lutzkie had lost trust in Mrs Kishto, as was apparent from his letter to the Bank on 22 September 2011 (Judgment at 21);

4.2.4. Whilst Mr Lutzkie was undoubtedly first introduced to the forex trade in 2009 by Mrs Kishto from the Bank's treasury department, as from August 2011, Mr Lutzkie engaged in substantial transactions on the exchange markets (Judgment at 21);

4.2.5. Mr Lutzkie himself stated that he followed the exchange market on television. Further, the tenor of the exchange between Mr Lutzkie and the Bank's employees and the instructions which he gave revealed that Mr Lutzkie was not an unsophisticated investor who would act blindly upon the information that Mrs Kishto or Mr Bhoyroo gave him. The recorded conversations reveal that he took an active part in the conversation with Hema Kishto when he issued his instructions for conversion and the conversation between the two was a spontaneous flow without any prompting. From the tenor of the language used by Mr Lutzkie, it was clear that he was not a novice in the subject and he appeared conversant with the foreign exchange market and was knowledgeable about its volatility. The Judge noted that Mr Lutzkie spoke about "playing on the market for the next couple of days" because he had information "that the market is gonna be very unstable" and his desire to make up for some of the loss. Mr Lutzkie expressed his opinion about the market trend and he stated, inter alia, that he was "patient that the ZAR is definitely going to get there 7.25" and that he was "watching about it all the time on the exchange as well" (Judgment at 21-22);

4.2.6. That even though Mr Lutzkie discussed foreign exchange trading with the officers at the Bank, at the end of the day he was the one who ultimately made the decisions and gave instructions concerning the money in Risk Reduction's account (Judgment at 22);

4.2.7. That Mr Bhoyroo was updating Mr Lutzkie and advising him that the rate had fallen from 7.60, 7.40 and 7.35 during that period, so that it was getting closer to the 7.25 rate at which he had left instructions for conversion; that Mr Bhoyroo's testimony confirmed the ZAR rate was going down very quickly; and that Mrs Kishto told Mr Lutzkie that 7.25 could be achieved (Judgment at 22);

4.2.8. That in view of the unforeseeable and fluctuating nature of the ZAR exchange rate during the early months of 2012 and the reassurance given by Mrs Kishto, it could not be said that Mr Lutzkie had acted unreasonably in omitting to give instructions for conversion at any precise point in time during the period following January 2012, and that there was no evidence as to the rate which the Rand achieved during the remaining months of 2012 or subsequent years at which Mr Lutzkie could have given instructions to mitigate the loss (Judgment at 22);

4.2.9. That Risk Reduction had acted unreasonably when Mr Lutzkie gave instructions to reverse the ZAR 7.80 transaction on 31 January 2012, and that this decision had resulted in avoidable dollar loss to Risk Reduction (Judgment at 22 – 23);

4.2.10. That Risk Reduction was accordingly entitled to damages representing the difference between the ZAR 7.32 rate in September 2011 and the ZAR 7.80 rate in January 2012, amounting to USD 1,669,243.05, together with interest from the date of judgment and costs (Judgment at 25).

## 5. Proceedings before the Court of Civil Appeal

5.1. Both parties appealed to the CCA. The Bank initially filed two grounds of appeal but abandoned its first ground pursuing its appeal on quantum only. Risk Reduction initially filed five grounds of cross-appeal but abandoned three of them contending that it was entitled to the full amount of damages claimed: CCA at [30] – [32].

### Grounds of the Bank's Appeal

5.2. The Bank's ground of appeal was:

5.2.1. That the trial judge had erred in concluding that, *"in view of the unforeseeable and fluctuating nature of the ZAR exchange rate during the early months of 2012 and the reassurance given by Hema Kishto, it could not be said that Mr Lutzkie had acted unreasonably in omitting to give instructions for conversion at any precise point in time during that period"*, such that any damages suffered by Risk Reduction ought to have been further reduced as a result of Risk Reduction's further failure to mitigate its losses in not giving instructions to convert the ZAR into USD after 31 January 2012: CCA at [31].

**Grounds of Risk Reduction's Cross-Appeal**

5.3.Risk Reduction's operative grounds of cross-appeal were:

5.3.1. That the trial judge had erred in law in concluding that Risk Reduction was responsible for all losses which occurred after 31 January 2012 inasmuch as the unrebutted evidence on record showed clearly that the Bank's officers, who had advised Risk Reduction to reconvert his monies which were in USD into ZAR on the basis that they had predicted that the exchange rate, would play in Risk Reduction's favour; and

5.3.2. That the figure of USD 10,534,278.07 represented the actual loss suffered by Risk Reduction and that Risk Reduction should accordingly have been awarded that amount together with interest by way of damages: CCA at [32].

**6. <u>The CCA Judgment</u>**

6.1.In a judgment dated 13 December 2024, the CCA dismissed Risk Reduction's cross-appeal in its entirety and allowed the Bank's appeal, substituting the award of USD 1,669,243.05 with an award of USD 357,023.96: CCA at [63], [73], [77] and [80].

6.2.The CCA held, in relation to Risk Reduction's cross-appeal:

6.2.1. That the trial judge's finding as to whose decision it was to reverse the ZAR/USD transaction on 31 January 2012 was not wrong and was not unsupported by the evidence. The trial judge had been sovereign in her appreciation of the evidence and

ample reasons had been given in support of her finding. The finding that Mr Lutzkie was the one who ultimately made decisions and gave instructions concerning the money in Risk Reduction's account was unimpeachable in the light of the evidence adduced (CCA at [61] – [62]);

6.2.2. That both grounds of appeal for Risk Reduction therefore failed and its cross-appeal was dismissed accordingly (CCA at [62]).

6.3.The CCA held, in relation to the Bank's appeal:

6.3.1. That the trial judge's finding at page 22 of the Judgment (that it could not be said that Mr Lutzkie had acted unreasonably in omitting to give instructions for conversion at any precise point in time during the early months of 2012, in view of the unforeseeable and fluctuating nature of the ZAR exchange rate and the reassurance given by Mrs Kishto) did not resonate with the trial judge's earlier findings at page 21 of the Judgment regarding Risk Reduction's failure to mitigate its loss (CCA at [68]);

6.3.2. That the trial judge's reliance on the reassurance given by Mrs Kishto in support of the finding that Mr Lutzkie had not acted unreasonably was flawed, contradictory, and difficult to reconcile with the earlier conclusion that the trial judge had disbelieved Mr Lutzkie's account that Mrs Kishto had advised him that the rate of ZAR 7.25 would be achieved and that he had been waiting for Mrs Kishto's advice throughout the relevant period, given that Mr Lutzkie had lost trust in Mrs Kishto since September 2011 (CCA at [69]);

6.3.3. That the trial judge had erred in rejecting the Bank's argument that Mr Lutzkie had failed to reduce the dollar loss by not giving instructions for conversion when the rates became favourable after January 2012 (CCA at [70]);

6.3.4. That therefore the weight of the evidence was "*plainly incompatible with the findings and computations of the court of first instance"*, and that this was accordingly a case where the trial judge ought to have extended her findings regarding Risk Reduction's duty to mitigate its loss to the period beyond January 2012 (CCA at [71] – [72]);

6.3.5. That for purposes of computing the appropriate award of damages, the relevant rate was that prevailing on 1 March 2012, which was trading between ZAR 7.45 and ZAR 7.50 per USD, and that it was fair and reasonable to adopt the base rate of ZAR 7.50, consistent with Mr Lutzkie's own indication in September 2011 that he would be willing to "play in high margins of R 7.30 and R 7.50" (CCA at [74] – [76]);

6.3.6. That Risk Reduction was accordingly entitled to damages of USD 357,023.956, representing the difference between the ZAR 7.32 conversion in September 2011 and a ZAR 7.50 conversion, together with interest save for the period between 3 October 2019 and 2 February 2023 (CCA at [77] – [80]).

## 7. Appeal to the Board

7.1. On 27 December 2024, Risk Reduction applied for leave to appeal to the Board [**872**] – [**873**] and the Bank did not object [**939**]. [HB/756-757]

7.2. On 13 January 2025, the Supreme Court of Mauritius (B.R. Mungly Gulbul CJ) granted Risk Reduction conditional leave to appeal to the Board pursuant to section 81(1)(b) of the Constitution of Mauritius [**940**]. Final leave to appeal was obtained from the Supreme Court on 12 May 2025. [HB/130]

7.3. Risk Reduction filed a notice of appeal with the Board on 4 July 2025. [HB/4–5]

## 8. Issues in the Appeal

8.1. The Parties have been unable to reach final agreement on the issues arising in this appeal, and their respective contentions are accordingly set out in the table below which identify the differences between the two formulations by way of highlighting in the Respondent's formulation:

| Claimant's formulation of the issues | Respondent's formulation of the issues |
|---|---|
| **Issue 1:** Whether the CCA and the trial court erred in holding that Risk Reduction had failed to mitigate its loss, in circumstances where the evidence established that Risk Reduction had followed the Bank's own advice throughout the relevant period and that the ZAR exchange rate was "unforeseeable and fluctuating… during the early months of 2012" and where the Bank's breach of contract in September 2011 was the operative and unbroken cause of the entirety of the loss (Grounds 1 and 2).<br><br>**Issue 2:** Whether, in the alternative event that any reduction for failure to mitigate was warranted, the CCA erred because the finding that there was an unreasonable failure to mitigate on 31 January 2012 crystallised the measure of damages at ZAR 7.80 under the principle in *Kaines* and by applying a lower threshold for appellate intervention than perversity as established in the case law, before proceeding to derive a substituted figure from a later date without principled evidential foundation (Grounds 3 and 4).<br><br>*The Respondent contends that it is not open to the Appellant to seek to argue points as to "the proper approach to mitigation" on this appeal, it being the Respondent's submission that there was no dispute as to the "proper approach to mitigation" before the Commercial Division or the CCA, and that the Appellant is instead seeking to invite the Board to overturn concurrent findings of fact of the lower courts.* | **Issue 1**: Whether it is open to the Appellant to seek to argue points as to "the proper approach to mitigation" on this appeal, it being the Respondent's submission that there was no dispute whatsoever as to the "proper approach to mitigation" before the first instance court or on appeal before the Mauritian court of appeal, and that the Appellant is instead seeking to invite the Board to overturn concurrent findings of fact of the lower courts.<br>**Issue 2:** Subject (in the Respondent's submission) to **Issue 1**, whether the CCA and the trial court erred in holding that Risk Reduction had failed to mitigate its loss, in circumstances where the evidence established that Risk Reduction had followed the Bank's own advice throughout the relevant period and that the ZAR exchange rate was "unforeseeable and fluctuating… during the early months of 2012" and where the Bank's breach of contract in September 2011 was the operative and unbroken cause of the entirety of the loss (Grounds 1 and 2).<br>**Issue 3:** Subject (in the Respondent's submission) to **Issue 1**, whether, in the alternative event that any reduction for failure to mitigate was warranted, the CCA erred because the finding that there was an unreasonable failure to mitigate on 31 January 2012 crystallised the measure of damages at ZAR 7.80 under the principle in *Kaines* and by applying a lower threshold for appellate intervention than perversity as established in the case law, before proceeding to derive a substituted figure from a later date without principled evidential foundation (Grounds 3 and 4). |

## ANNEX: CHRONOLOGY OF KEY EVENTS

| Date | Event | Record Ref | |
|---|---|---|---|
| 2001 | Risk Reduction opens account with Barclays Bank Mauritius Ltd (subsequently Absa Bank (Mauritius) Limited) | [846] | [HB/702] |
| 2009 | Mr Lutzkie introduced to Mrs Kishto, Head of Forex Department at the Bank; commencement of forex trading through Risk Reduction's account | [908] | [HB/708] |
| 19 August 2011 | Mr Lutzkie gives verbal instructions to convert USD 37,058,882.44 into ZAR at ZAR 7.25 per USD; order confirmed in writing on the same day | [55] | [HB/498] |
| 1 September 2011 | Mr Lutzkie instructed the Bank to withdraw USD 2.5 million from the Appellant's account to acquire a helicopter. | [514] | [HB/709] |
| 9 September 2011 | Bank converts Risk Reduction's USD into ZAR at ZAR 7.2510 per USD; Mr Lutzkie instructs conversion back to USD at ZAR 7.10 per USD | [553], [579]–[583] | [HB/500, 538–542] |
| 15 September 2011 | Mr Lutzkie, through his personal assistant Ms Delanja Marais, emails Mr Bhoyroo instructing conversion of all ZAR in account to USD at ZAR 7.32 per USD | [554]–[555] | [HB/502–504] |
| 15 September 2011 | Mr Bhoyroo emails Ms Marais querying the rate, noting that conversion at ZAR 7.32 would imply a loss on the USD base; Ms Marais replies on Mr Lutzkie's behalf confirming he is willing to take the loss and that margins will be set between ZAR 7.32 and ZAR 7.50 | [556]–[557] | [HB/506–508] |
| 15 September 2011 | Mr Bhoyroo confirms by email to Ms Marais that the Bank will proceed in accordance with Mr Lutzkie's instructions | [558] | [HB/510] |
| 16 September 2011 | Ms Busawon (Treasury Dealer) confirms by email to Mr Lutzkie the order to convert ZAR 277,857,345.10 at ZAR 7.32 per USD on a best efforts basis, with the Treasury Department monitoring rates daily from 08:30 and 18:00 Mauritius time | [560] | [HB/512] |
| 19 September 2011 | Rate of ZAR 7.32 per USD achieved by the Bank (as found by the trial court); transaction not credited to Risk Reduction's account | [530] | [HB/725] |
| 20 September 2011 (10:37) | Ms Busawon emails Mr Bhoyroo: "Following the transaction effected yesterday, please confirm Rand amount in respect of Risk Reduction for which order below is valid" | [572] | [HB/535] |

| Date | Event | Record Ref | |
|---|---|---|---|
| 20 September 2011 (10:43) | Mr Oumesh Mungroo (Head of Treasury) emails Ms Busawon and others including Mr Bhoyroo: "Just keep on hold for now any order from that client" | [573] | [HB/536] |
| 22 September 2011 | Mr Lutzkie writes to the Bank expressing dissatisfaction and his intention to close Risk Reduction's account; states he has realised Mrs Kishto was trading for the advantage of the Bank | [561] | [HB/514] |
| 22 September 2011 | Mr Bhoyroo emails Mr Lutzkie proposing new structured products with a view to persuading him to keep the account open; account remains open | [562] | [HB/516] |
| 28 January 2012 | Ms Marais emails Mr Lutzkie forwarding a message from the Bank: "We confirm that the order has been hit (R 7.80). Please confirm if we credit the USD a/c with the USD equivalent" | [567]–[568] | [HB/526–527] |
| 31 January 2012 | Bank converts ZAR in Risk Reduction's account into USD at ZAR 7.80 per USD | [569] | [HB/529] |
| 31 January 2012 | On Mrs Kishto's and Mr Bhoyroo's advice that ZAR 7.25 was achievable, Mr Lutzkie requests reversal of the ZAR 7.80 conversion; reversal effected; funds returned to ZAR. | [570]–[571], [586] | [HB/531–533, 544] |
| 10 February 2012 | Ms Marais writes to Mr Bhoyroo requesting exchange rate update; Mr Bhoyroo replies that the rate is moving between ZAR 7.60 and ZAR 7.70 and advises holding the ZAR until the rate moves closer to ZAR 7.25 | [587] | [HB/546] |
| 14 - 29 February 2012 | Mr Bhoyroo informs Ms Marais that ZAR/USD traded variously at ZAR7.70 (14th) ZAR 7.6640 (23rd) and between ZAR 7.48 and ZAR 7.50 (29th) | [595]-[597] | [HB/549–551] |
| 1 March 2012 | Mr Bhoyroo informs Ms Marais that ZAR/USD traded at ZAR 7.35 the previous day and is trading between ZAR 7.45 and ZAR 7.50 that morning; Bank will continue to monitor | [588] | [HB/549] |
| 5 March 2012 | Mr Bhoyroo informs Ms Marais that ZAR/USD is trading between ZAR 7.55 and ZAR 7.65; Bank will continue to monitor | [588] | [HB/548] |
| 9 April 2012 | Mr Bhoyroo informs Ms Marais that ZAR/USD is trading between ZAR 7.87 and ZAR 7.90; far from ZAR 7.25; Bank will continue to monitor | [594]–[597] | [HB/548–551] |
| 18 March 2015 | Bank writes to Risk Reduction requesting closure of its account | [563] | [HB/518] |
| 16 April 2015 | Meeting between Risk Reduction and Bank; Mr Lutzkie discovers that ZAR had not been converted at the instructed rate; demands conversion be effected at ZAR 7.32; Bank refuses | [515] | [HB/710] |
| 15 June 2015 | Mr Lutzkie gives instructions to convert Risk Reduction's funds to USD for transfer to another bank | [564] | [HB/520] |
| 17 June 2015 | Bank converts all ZAR in Risk Reduction's account into USD at ZAR 12.4835 per USD; Risk Reduction receives USD 23,940,442.35 | [565]–[566] | [HB/522–524] |

| Date | Event | Record Ref | |
|---|---|---|---|
| 20 November 2015 | Risk Reduction issues proceedings against the Bank in the Supreme Court of Mauritius (Commercial Division) | [10]–[17] | |
| 5 November 2018 | First Instance Judgment delivered by Hon. R. Mungly-Gulbul, Judge (Commercial Division); damages of USD 1,669,243.05 awarded to Risk Reduction | [513]–[535] | [HB/708–730] |
| 20 November 2018 | Bank files Notice of Appeal to the Court of Civil Appeal (Record No. 1541) | [538]–[541] | [HB/489–492] |
| 22 November 2018 | Risk Reduction files Notice of Cross-Appeal to the Court of Civil Appeal (Record No. 1542) | [687]–[690] | [HB/494-496] |
| 21 March 2022 | Sitting of Court of Civil Appeal; Bank abandons first ground of appeal; Risk Reduction abandons grounds 2, 3 and 4 of its cross-appeal | [760]–[763] | [HB/618-621] |
| 2 February 2023 | Final substantive hearing of appeal before the Court of Civil Appeal; judgment reserved | [819]–[842] | [HB/676–697] |
| 13 December 2024 | CCA Judgment delivered; Risk Reduction's cross-appeal dismissed; Bank's appeal allowed; award reduced to USD 357,023.956 | [850]–[869] | [HB/732–751] |
| 27 December 2024 | Risk Reduction applies for leave to appeal to the Board | [872]–[873] | [HB/756–757] |
| 13 January 2025 | Conditional leave to appeal granted by the Supreme Court of Mauritius (Hon. B.R. Mungly-Gulbul, Chief Justice) | [940] | [HB/130] |
| 12 May 2025 | Risk Reduction obtained final leave from the Supreme Court of Mauritius to appeal to the Board. | | [HB/4] |
| 4 July 2025 | Risk Reduction files Notice of Appeal with the Board | | [HB/4–5] |

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