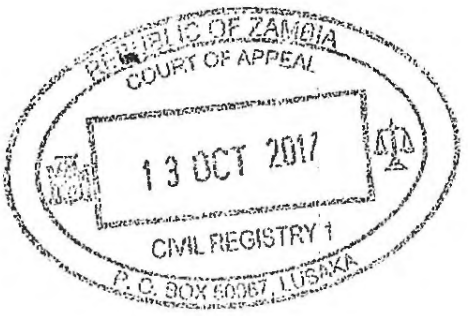
**IN THE COURT OF APPEAL** **APPEAL NO 38/2017**
**HOLDEN AT LUSAKA**
*(Civil Jurisdiction)*




**RICHARD MWAPELA** **APPELLANT**

**AND**

**CHEN XIAN HUA** **RESPONDENT**

**DAVISON JERE (PARAMOUNT CHIEF MPEZENI)** **THIRD PARTY**

***Coram: Chisanga, JP, Chishimba and Sichinga JJA***

***On the 6th day of June 2017 and 13th October, 2017***

*For the Appellant:* *N/A*
*For the Respondent:* *L. Linyama of Messrs Eric Silwamba Jalasi and Linyama Legal Practitioners*
*For the Third Party:* *N/A*

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## JUDGMENT

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**Chisanga, JP,** delivered the judgment of the court.

**Cases referred to:**

1. ***Admark limited vs Zambia Revenue Authority (2006) ZR 43***
2. ***Cavmont Merchant Bank vs Amaka Holdings SCZ Judgment No. 12 if 2001***
3. ***Anderson Mazoka and others vs Levy Mwanawasa & others (2005) ZR 183***
4. ***Mpongwe Farms Limited vs Dr Farms Transport Limited, Appeal No. 208 of 2015***
5. ***Mweempe vs Attorney General. Interpol and another, Appeal No. 15 of 2008***
6. ***Carver Joel Jere vs Shamayuwa and Attorney General (1978) ZR 208***
7. ***Kumar vs Mutale, Appeal No. 35 of 2011***
8. ***Attorney General vs Tall and another Appeal No. 77 of 1994***
9. ***Scott LJ's words in Applesen vs H Littlewood Limited (1939) 1ALL ER 464***
10. ***Rankine vs Garten Sons & Company Limited, (1979) 2 ALL ER 1185***

**Other Authorities Referred to:**

1. **Bullen and Leak and Jacob's precedents on pleadings 1.**
2. **H Jacobs (975) 12th Edition Sweet & Maxwel, Pages 919-924**
3. **Halsbury's Law of England Vol. 1 4th Edn Para 91**

This is an appeal against the order of the learned judge in the court below, whereby she entered judgment on admission against the appellant, who is the defendant to the action, on an application by the respondent, who is the Plaintiff.

The claim arises in the following alleged circumstances. The defendant purported to be a businessman duly registered to deal in raw timber including the mukula tree, which he expressly represented he was licensed to export. On that premise, the parties entered into an agreement in which the defendant would secure and export five containers of mukula tree logs every fortnight Free on Board (FOB) Durban in the Republic of South Africa.

To that effect, a written contract of agency dated 25th July, 2015 was drawn in the above stated terms, including the terms of payment, which were that an advance payment of 30% would be made to the defendant, with 35% of the consideration being paid upon receipt of the requisite Bills of Lading.

It was an express term of the contract that the timber to be conveyed was properly licenced for export. The defendant further indicated that he was sourcing the timber from Paramount Chief Mpezeni, a legitimate source, and holder of a valid export permit.

The defendant fraudulently represented himself as having valid licenses for exportation of mukula tree, and that he would purchase and deliver Mukula timber to the Plaintiff through Durban in the Republic of South Africa for onward transmission to China. Relying on that misrepresentation, and pursuant to the agreement of 25th July, 2015, the plaintiff made the following payments:

US $ 20,000.00 on 25th July, 2015

US $ 23,750.00 on 27th July, 2015

ZMW 300,000.00 on 10th August, 2015

ZMW 159,200.00 on 18th August, 2015

ZMW 300,000.00 on 18th August, 2015

ZMW 101, 833.00.00 on 28th August, 2015

US $ 2,500.00.00 on 26th October, 2015

Additionally, a sum of ZMW 300,000.00 was deposited into a bank account in the names of Lungowe Mwapela who was introduced as the defendant's spouse. Despite these payments, the defendant has not delivered the mukula tree, and his total indebtedness now stands at US $ 46, 250.00 and ZMW 701, 833.00 respectively, which has remained unpaid, despite the defendant undertaking to pay the same through his lawyers. The Plaintiff thus claimed the said sums.

In his defence, the defendant denied acting dishonestly in the execution of the agency agreement, or ever representing himself as a dealer in mukula logs, or as authorised by the Government of Zambia to deal in this protected species of trees.

He went on to aver that the seller of the mukula logs, and recipient of the consideration was Paramount Chief Mpezeni, who had refused or neglected to perform his part of the bargain, and not the defendant.

The defendant went on to state that he made no admissions as to the excuriae efforts which were in any event privileged. He denied the alleged liability, loss and damage and denied all allegations as though they were set out and traversed seriatim.

The defendant also took out a third-party notice against Davison Jere (Paramount Chief Mpezeni). Therein, he claimed indemnity against the Plaintiff's claims in that the said Davison Jere had been paid the sums in issue for the purchase of mukula logs.

After the defendant had filed the defence and taken out the third-party notice, Mr Linyama, learned counsel seized with conduct of this matter on behalf of the Plaintiff, took out summons for entry of judgment on admission pursuant to Order XXXI rule 6 of the High Court Rules as read with Order 27 Rule 3 RSC 1999 edition. In the affidavit in support of the application, learned counsel noted that the defendant did not dispute collecting the stated funds from the Plaintiff, but averred that the recipient of the funds was Chief Mpezeni. He also noted that the defendant had taken out a third-party notice, seeking indemnity against the third-party. In learned counsel's view, the defence and third-party notice revealed that there was no complete traverse of the Plaintiff's claim as liability was being

apportioned by the defendant and third-party on their own admission. He thus urged the Court to enter judgment on admission.

This application was opposed by the affidavit sworn by the defendant. He deposed therein that the contract entered between him and the Plaintiff disclosed that he was merely acting as an agent for Paramount Chief Mpezeni who was to supply the mukula timber. Under clause 6 of the agreement, payment to Chief Mpezeni was to be made through him. This is what occurred, as the payments were made through the defendant, and received by the third-party, whose identity the defendant disclosed in the agreement between the Plaintiff and the defendant.

Upon hearing the application, the learned trial judge observed that the defence did not traverse specifically or otherwise, the allegations of fact contained in paragraphs 7, 8, 9 and 10 of the statement of claim, as the defendant had admitted them. She as a result, entered judgement on admission for the Plaintiff in the sum of United States Dollars US $ 46, 250.00 and ZMW 101,833.00. The rest of the claims were remitted to trial.

The defendant was dissatisfied with that ruling, and now appeals against it on the following grounds:

1. The learned judge in the Court below erred in law and in fact when she held that the defence of agency was not available to the appellant because it had not been pleaded in the defence.
2. The learned judge in the Court below erred in law and in fact when she held that by not specifically traversing paragraphs 7, 8, 9 and 10 of the Plaintiff's

statement of claim the defendant had admitted liability when the defendant had expressly stated that the seller of the mukula logs and recipient of the money paid by the respondent was the third-party.

3. The learned judge erred in law and fact when she ignored the third-party proceedings and proceeded to enter judgment against the defendant in spite of the pending third-party proceedings.

Heads of argument were filed in by both parties.

In arguing ground 1 on behalf of the appellant, reference is made to an averment in the defence, wherein the defendant stated that the seller of the mukula logs and recipient of the consideration was Paramount Chief Mpezeni who had refused or neglected to perform his portion of the bargain and not the defendant.

It is then argued that this averment provides the basis for the defence of agency pleaded by the appellant, and gives rise to the defence of agency. It is further argued that a defence of agency is a point of law as it is settled law that where an agent discloses the identity of the principal on whose behalf he is contracting, the agent is not liable on the contract.

Learned counsel's further contention is premised on the principle that a trial Court is not precluded from considering evidence on a matter not pleaded where such evidence has been adduced and not objected to. Reference is also made to the principle that failure to plead a defence does not *ipo facto* exclude such defence

from being admitted. ***Admark limited vs Zambia Revenue Authority***[1], ***Cavmont Merchant Bank vs Amaka Holdings***[2], ***Anderson Mazoka and others vs Levy Mwanawasa & others***[3], ***Mpongwe Farms Limited vs Dr Farms Transport Limited***[4], ***Mweempe vs Attorney General, Interpol and another***[5], and ***Jere vs Shamayuwa and Attorney General*** [6] are prayed in aid for these arguments. Learned counsel contends that on the strength of these authority, even assuming without admitting that the defence of agency was not pleaded, the defence of agency should on the strength of the authorities cited, have been admitted by the learned judge in the Court below.

The arguments on ground two are that by stating that the seller of the mukula logs and recipient of the money was Chief Mpezeni, and that it was Chief Mpezeni who had failed or neglected to perform his portion of the bargain, the appellant had responded to and traversed the issues or allegations contained in paragraphs 7, 8, 9 and 10. The issues were covered by the averment reproduced above.

Learned counsel further contends that Order 53 Rule 6(2) HCR does not require a defendant to respond to each paragraph of the statement of claim. It is sufficient if the defendant traverses the allegations of fact made in the statement of claim. It is submitted further that it was an error to expect the defendant to address paragraphs 7, 8, 9 and 10 as opposed to considering whether the allegations of fact in these paragraphs had been traversed by the appellant.

Turning to ground three, learned counsel's argument is that as the identity of the supplier of the mukula logs was disclosed and made known to the Plaintiff, the appellant as agent could not be held liable under the contract, per ***Cavmont Merchant Limited vs Amaka Holdings***[2]. It is argued that the Supreme Court has emphasised that in the interest of justice, and to avoid multiplicity of actions, claims involving similar parties and similar issues should be tried together. ***Kumar vs Mutale***[7] and ***Attorney General vs Tall and another***[8] are relied upon in that respect.

In learned counsel's view, as the issues between the parties and the third-party are interrelated, it is in the interest of justice that the matter between the three parties is heard at the same time.

In responding to the arguments on grounds 1 and 2 of the appeal, it is argued, on behalf of the respondents that the appellant did not plead agency in his defence, contrary to the requirements that it be specifically pleaded, per **Bullen** And **Leake and Jacob's precedent's on pleadings**[1]**. H Jacobs (975) 12th Edition Sweet & Maxwell**[2]. Reliance is equally placed on Order 18 Rule 11 RSC 1999. It was therefore not open to the learned judge to review the defence filed in the court below by considering matters that were not specifically pleaded.

Regarding the argument that evidence not objected to would be considered by the Court even though it was not pleaded, learned counsel's response is that objection was made to the proposed introduction of the purported defence of agency.

Learned counsel's further argument is that in considering the application before her, the learned judge was restricted to examining the defence and assessing whether it was a bare denial.

It is argued that the appellant admitted having received the funds paid by the respondent. The defence was not a traverse at all, and the Court rightly entered judgement on admission. We are urged to uphold the said judgment.

The opposing arguments on ground three are that the third-party admitted receiving funds from the appellant, but denied the existence of agency. The appellant failed to dispel or traverse the third-party's assertion. It is submitted that the mere fact that a third-party notice is issued does not insulate a defendant from entry of judgement on admission pursuant to the applicable rule. According to learned counsel, as both the appellant and the third-party clearly admitted the allegations in paragraph 7, 8, 9 and 10 of the statement claim, there was no issue to be determined by the trial Court.

We have considered the arguments of both parties. The first paragraph of the defence is of relevance to the first ground of appeal. It was averred therein as follows:

1. ***The defendant denies that he has in any way acted dishonestly against the Plaintiff in the execution of the agency agreement or ever represented himself as a dealer in mukula, or in any manner authorised by the Government of Zambia, to deal in this protected species of trees.***

By this averment, the agency agreement was brought to the fore. It in fact became part of the defence, and the learned judge in the Court below was obliged to refer to the same, in determining the application for entry of judgement on admission. The agency agreement was exhibited to the affidavit in opposition to the said application. ***Scott LJ's words in Appleson vs H Littlewood Limited (1939)[9]***, are Instructive and persuasive. He said, at page 466:

> ***"..... Under modern pleading, a reference in the pleading to a document in the nature of a contract brings into the pleading the whole document, so that the Court can refer to that as a part of the pleading just as if it had been set out under the old pre-judicature Act procedure of setting out a document on oyer. Consequently, the statement of claim itself must be treated as containing the rules which I read from para 6 of the defence."***

Similarly, in the instant case, the agency agreement executed by the parties required to be adverted to by the learned judge in the Court below, and not ignored as was done. This is because by referring to it, the defendant brought that document into the pleading.

It will be seen that by the agency agreement produced as exhibit RM, the appellant was named agent of CHEN XIANG HUA. The appellant was required to undertake specified tasks. He was to arrange five containers of timber from Paramount Chief Mpezeni of Chipata District to supply to an unnamed designation every two weeks. 35% down payment was to be advanced to the agent when signing the contract.

Five days later, the appellant was required to ensure that the timber was at the loading bay in Durban, in readiness to depart to the Durban Port. Within five days from the date of payment, the agent was to mobilise the containers from the shipping agency/transporters to the loading bay in Chipata. After five days, site inspection would be conducted by the buyer together with the agent and the buyer would be responsible for the logistics and accommodation for both parties until the containers leave the Durban Port.

Upon verification of the stock by both parties, 30% payment would be paid to the suppliers through the agent before the truck leaves for Durban with 25 tons container each. The remaining 35% of the payment would be made to the agent after the buyer would have been availed the Bill of Lading. The agent was to be paid his commission of one thousand five hundred Dollars (US$ 1,500).

A cursory glance at the agency agreement which was signed by the appellant as agent, and pursuant to which the payments were made to him suggests that the seller of the goods was Paramount Chief Mpezeni. The agent was to arrange timber from the stated seller. Paragraph 6 of the agreement indicates that the payment was to be made to the seller. It appears that the agent was to procure timber from the named seller on behalf of the buyer, who is respondent to this appeal. He would be paid a commission for undertaking these tasks. On the foregoing, the learned judge clearly erred in finding that agency was not pleaded, as the agency agreement, having been referred to in the defence, was imported into the pleading.

In our considered view, paragraph 2 of the defence, though terse, sufficiently answered paragraphs 7, 8, 9 and 10 of the statement of claim. Paragraph 2 of the defence bears repetition, and reads:

> ***The defendant avers that the seller of the mukula logs, and recipient of the consideration, is Paramount Chief Mpezeni, who has refused or neglected to perform his portion of the bargain and not himself.***

By this averment, the appellant was tacitly acknowledging having received the tabulated amounts but went on to impliedly state that the consideration was passed on to Paramount Chief Mpezeni who had refused or neglected to do his part. This was not a bare denial at all, as it spoke to the material averments in the stated paragraphs whose contents were that the defendant had been paid US$46,250 and ZMW 701,833.00 but had not delivered the timber.

The application for judgement on admission was made pursuant to Order 53 rule 6 HCR. That provision states:

> ***"(2) The defence shall specifically traverse every allegation of fact made in the statement of claim or counterclaim as the case may be;***
>
> ***(3) A general or bare denial of such allegation or a general statement of non-admission of them shall not be traverse thereof:***
>
> ***(4) A defence that fails to meet the requirement of this rule shall be deemed to have admitted the allegations not specifically traversed;***

*(5) Where defence falls under sub-rule (4) the plaintiff or defendant or the court on its own motion, may in an appropriate case, enter judgment on admission."*

Order 18/13 RSC is in the following terms:

13-*(1) Any allegation of fact made by a party in his pleading is deemed to Be admitted by the opposite party unless it is traversed by the party in his pleading or a joinder of use under rule 14 operates as a denial of it.*

*(2) A traverse may be made either by a statement of non-admission and either expressly or by necessary implication.*

*(3) Every allegation of fact made in a or a counterclaim which the party on whom it is served does not intend to admit must be specifically traversed by him in his defence or defence to counter claim, as the case may be; and a general denial of such allegations, or a general statement of non-admission of them, it not a sufficient traverse of them.*

We have opined above that the appellant answered the paragraphs in issue, and it will be noticed that Order 18/13/2 recognises that a traverse may be made by necessary implication. This is what the defendant did.

It is settled law that agency is in the nature of a contract for personal services. When money is placed in the hands of the agent for a specific purpose, he becomes a trustee of the principal. No agent is under any personal liability to his principal upon any contract made by him on his behalf unless he is made personally liable by usage or unless he is acting as a del credere agent or unless he otherwise contracts to be so liable see **Halsbury' Laws of England [3].**

A del credere agent is an agent employed to sell goods who undertakes that purchasers he procures will pay for any goods they take. He only undertakes that they will pay, and does not make himself liable to his principal if his buyer refuses to take delivery.

On the foregoing, it is undeniable that on the facts as disclosed on the pleadings in the present case, judgement on admission could not properly be entered. We would refer to ***Rankine vs Garten Sons & Company Limited***[9] in that connection. It was held by the Court of Appeal inter alia that:

> **"Where admission of fact had been made by one party the Court was empowered under RSC Order 27 Rule 3 to give the other party only <u>such judgement or order upon these admissions he may be entitled to</u>".** (underlining ours for emphasis)

Facts in the matter were that the Plaintiff was employed by the defendants as a lorry driver. He brought an action against them claiming damages for personal injuries sustained as a result of their negligence. In his statement of claim he

alleged that, on dismounting from his lorry, he had slipped on a pool of glucose lying on the floor of the defendants' filling shed and injured his shoulder. The defendants served a defence in which they (i) made no admissions as to the alleged incident, (ii) denied that they had been negligent and/or alternatively that any negligence on their part had caused or contributed to the alleged accident, and (iii) alleged that even if the Plaintiff had sustained injury in the manner alleged the injury was caused or contributed to by his own negligence.

The defendants' solicitors subsequently sent the Plaintiff a letter stating that they were authorised to inform him that *'notwithstanding the terms of the defence the defendants now admit that the incident alleged in the statement of claim resulted from negligence for which they were responsible'*. The solicitors went on to say that when they received the medical report they would be reporting to their clients *'who will no doubt be giving us instructions to explore the possibilities of amicably terminating the proceedings'*.

The Plaintiff, believing that the defendant had thereby admitted liability, applied under RSC Ord 27, r 3[a] for an order giving him leave to enter judgment with damages to be assessed. The master made the order. The defendants appealed, contending that the order ought not to have been made because they had merely admitted negligence and not that the plaintiff's injuries resulted from their negligence. The appeal succeeded as no admission had been made concerning the alleged injuries.

In the instant case, the facts as pleaded do not amount to an admission, as earlier stated. Grounds 1 and 2 of the appeal are thus allowed. We should remark that reference to those cases that establish that evidence not objected to when led falls to be considered by a trial court was misplaced. The reason is that no trial was held at which unpleaded matters were referred to. Rather, the application before the court was one on the papers, and there could be no question of letting in unpleaded matters. The cases were therefore cited out of context.

Grounds 1 and 2 having succeeded, it is otiose for us to consider ground 3. The appeal is accordingly allowed with costs to the appellant to be agreed and in default taxed.

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**F. M. CHISANGA**
**JUDGE PRESIDENT**
**COURT OF APPEAL**

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**F. M. CHISHIMBA**
**COURT OF APPEAL JUDGE**

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**D. L. Y. SICHINGA**
**COURT OF APPEAL JUDGE**