IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA

Appeal No. 69 of 2021
CAZ/08/316/2020

(Civil Jurisdiction)

BETWEEN:

CHIMWENDA INVESTMENTS LIMITED **Appellant**

AND

CARMINE INVESTMENTS LIMITED **Respondent**

Coram: Kondolo, Makungu and Sharpe-Phiri, JJA on 21st September 2022 and 23rd December 2022

For the Appellant: Mr. S. A. G. Tumwasi of Kitwe Chambers
For the Respondent: Mr. E. C. Banda & Mr. N. Chaleka of ECB Legal Practitioner

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J U D G M E N T

Sharpe-Phiri, JA, delivered the Judgment of the Court

Legislation referred to:

1. *The Rules of the Supreme Court of England 1999 Edition (White Book)*
2. *The High Court Act, Chapter 27 of the Laws of Zambia*
3. *The Court of Appeal Act, Number 7 of 2016 of the Laws of Zambia*
4. *The Sale of Goods Act, 1893*
5. *The British Acts Extension Act, Chapter 10 of the Laws of Zambia.*

Cases referred to:

1. *Freshview Cinemas Limited v Manda Hill Limited Appeal No. 174/2013*
2. *John Paul Mwila Kasengele v Zambia National Commercial Bank Limited (2000) ZR 72*

3. *ZEGA v Zambezi Airlines SCZ Judgment No. 39/2014*
4. *Chazya Silwamba v Lamba Simpito (2010) ZR 475*
5. *China Henan International Economic Cooperation v Mwange Contractors Limited. SCZ Judgment No. 7 of 2002*
6. *Finance Bank Zambia Plc v Lamasat International Limited Appeal No. 175/2017; Appeal No. 27/2018*
7. *Queens Royale International and Kennedy Mambwe v Alpha Commodities Limited Appeal No. 025 of 2022*

1.0 INTRODUCTION

1.1 This is an appeal against a judgment of Justice Patel SC J, of the Commercial Division of the Kitwe High Court delivered on 13th July 2020.

1.2 By that judgment, the learned trial Judge entered judgment on admission in favour of the respondent against the appellant for payment of a sum to be determined by the District Registrar.

2.0 BACKGROUND

2.1 The brief background of the matter is that the appellant and the respondent entered into an agreement on 28th March 2017 for the sale of various equipment valued at US$586,647.79. Pursuant to the agreement, the appellant paid the respondent various amounts between 2017 and 2018 and the respondent delivered the equipment as contracted.

2.2 The appellant failed to settle the sums due to the respondent and in order to give the appellant more time to pay, the parties agreed to vary the terms of payment and they executed a variation agreement on 28th November 2017, allowing the appellant to make monthly instalments of US $15,000 over several months.

2.3 According to the respondent, the appellant failed to honour the variation agreement, prompting it to commence legal proceeding on 6th October 2019 against the appellant for recovery of the sum of US $406,067.24, being the outstanding amount which the appellant had failed and /or neglected to settle.

2.4 The appellant opposed the action by filing a memorandum of appearance and a defence on 7th November 2019, to which the respondent filed a reply on 26th November 2019.

2.5 Following the filing of pleadings, on 14th February 2020, the respondent applied to enter judgment on admission on the basis that the appellant had in its defence admitted liability to the respondent.

2.6 In opposing the application for judgment on admission, the appellant conceded that it had entered into an agreement with the respondent to supply various equipment but contended that the same ought to have been read with the principal agreement of 28th March 2017. It also contended that although there had been some non-payments on its part,

the outstanding sum did not amount to US$406,667.24 as some payments, more particularly the sum of US$25,000 and K45,000, had been paid to the respondent on 11th June 2018 and 12th June 2018, receipt of which the respondent had not acknowledged.

2.7 The appellant further argued that in the event of default, the respondent was only entitled to recover the equipment it had supplied and to treat all monies paid as rentals in accordance with the terms of the sale agreement.

2.8 It was also stated that the defence lay in the pleadings that the terms of the agreement were governed by clauses 6.1 and 6.2, as read with clauses 10.1 and 10.2 of the said Sale of Equipment Agreement.

3.0 DECISION OF THE COURT BELOW

3.1 The trial Court determined the matter based on the documents filed before her in accordance with the Orders for Directions issued pursuant to the *Judiciary (Coronavirus) May 2020 Guidelines*.

3.2 The trial Judge carefully considered the affidavit evidence consisting of letters and revised schedules demanding payment from the appellant for the balance outstanding. She also considered the Sale of Equipment Agreement, particularly clause 4 on price and payment and clause 10 on termination. She considered the Variation of Sale Agreement

in a letter dated 28th November 2017, which varied the amortization schedule and which sought to vary clause 4.5 under the sub heading 'Price and Payment'.

3.3 The learned trial Judge determined that an admission must be clear and unequivocal, and that the appellant's contention was not that it did not owe the sum claimed by the respondent but that it had not been paid by its main contractor. The Judge also took note of the appellant's argument that the respondent ought to have treated the payments paid as rentals towards the equipment and to take recovery of the said equipment.

3.4 The trial Judge found that having examined the admission as contained in paragraph 3 of the defence, she was satisfied that the appellant had clearly admitted non-payment to the respondent.

3.5 The appellant however explained that the non-payment was necessitated by the non-payment to it (the appellant) by a third party, which fact the trial Court found did not negate the appellant's liability to the respondent.

3.6 The trial Judge further determined that the remedies of the respondent under clauses 4 and 10 were separate and distinct and that the respondent could therefore choose to proceed to claim for non-payment as per clause 4 (as varied) or to terminate as provided for by clause 10 of the agreement.

3.7 The learned Judge concluded and found that the appellant had, in its pleadings, unequivocally and expressly admitted its indebtedness to the respondent, making a case for entry of judgment on admission.

3.8 The Judge added that a perusal of the letters and revised schedules which were signed and acknowledged by the appellant through Charles Chikwelete does not show any provision stating or implying that payments of the amounts outstanding were subject to any other conditions as was being raised by the appellant. She found that the appellant was merely attempting to depart from the terms of the Sale of Equipment Agreement as varied.

3.9 The trial Judge was guided by the Supreme Court decision in the case of **Freshview Cinemas Limited and Manda Hill Limited**[1], where it was held that, **'what is paramount in our view is that the express or implied admission is clear.'**

3.10 On the appellant's constraints to make payment, the trial Court was guided by the Supreme Court holding in the case of **John Paul Mwila Kasengele v Zambia National Commercial Bank Limited**[2] where it was held that: **'the respondent cannot be said to argue financial constraints or difficulties as the basis for non-payment of rentals. It is my view that the inability to pay has never been and is never a defence to a claim.'**

3.11 In summary, the Judge determined that since the appellant's admission sat in its defence, a pleading, that a proper case had been established for her to exercise her jurisdiction and accordingly entered judgment on admission against the appellant pursuant to **Order 27 Rule 3 of the Rules of the Supreme Court (RSC)**[1] in the sum to be determined by the learned Deputy Registrar.

4.0 THE APPEAL

4.1 Being dissatisfied with the judgment of the lower Court, the appellant filed a notice of appeal and memorandum of appeal on 12th August 2020, advancing one ground of appeal.

4.2 The sole ground of appeal was: **that the Court below erred in law and fact when it held that the admission sits in the defence of the defendant and entered judgment on admission in favour of the plaintiff against the defendant in the sum to be determined by the learned Deputy Registrar.**

5.0 ARGUMENTS IN SUPPORT OF THE APPEAL

5.1 The appellant contended in its arguments that the appeal before us rests on the interpretation of whether there was a clear, unambiguous, and unconditional admission of liability in its defence in response to the respondent's claim in the Court below.

5.2 Consequently, the appellants invited the Court to examine the respondent's claim as it appears on page 22 of the Record of Appeal where it was claimed, inter alia, *for 'payment of the sum of USD $406,067.24 or Kwacha equivalent being in respect of payment due to the Plaintiff for the agreement of sale of equipment which sums of money the defendant has failed and/or neglected to pay the plaintiff'*. It was argued that the claim should be viewed in relation to the purported admission of the appellant as contained at page 36 of the Record of Appeal in the judgment on admission in the Court below, which reads as follows - *'as regards paragraph 7, the Defendant will aver that they have not failed as payments were not made due to non-payment by their main contractor, a fact the plaintiff is aware of'*.

5.3 The appellant further argued that it had disputed the respondent's claim in the defence it filed, (see pages 61 - 62 of the Record of Appeal) clearly averred that, in the event of default, the respondent was entitled to recover the equipment. According to the appellant, the respondent's action in the Court below was therefore premature as title to the said equipment had not passed from the respondent to the appellant.

5.4 The appellant further relied on the Supreme Court holding in the case of **ZEGA V Zambezi Airlines SCZ**[3] where it was held that:

"We wish to state that it is true that under both Order 21/6 of the HCR and Order 27/3 of the RSC the Court is empowered to enter judgment in favour of a party based on the admissions of fact made by the other party on its claim(s). However, we must also hasten to mention that the position of the law as spelt out under Order 27/3/2 of the RSC is that the admission of liability by the party against whom judgment on admission is sought to be entered may be express and/or implied and that the admission must be clear.....'

5.5 Based on the foregoing authority, the appellant reiterated that its defence was that title in the subject equipment never passed from the respondent and that the respondent had a right to recover the same and treat all installment payments as rental payments rather than institute a liquidation claim.

5.6 It was further contended that the judgment on admission entered against the appellant denied it the valuable right to contest the claim against it by the respondent.

6.0 ARGUMENTS OPPOSING THE APPEAL

6.1 The respondent rebutted the appellant's arguments by filing its own arguments, in which it advanced that the action in the Court below was determined as a Commercial List action where strict rules as regards pleadings apply. Further, that the Court below entered Judgment on **'admission of**

liability' and ordered that the amounts due be assessed by the learned Registrar based on the respondent's application in the summons for entry of judgment on admission, which were styled as follows:

> **"...or Entry of Judgment on Admission of what is due to the Plaintiff on the grounds set out in the Affidavit in support hereof."**

6.2 The respondent submitted that its application for judgment on admission in the Court below was anchored on **Order 53 Rule 6(4) and (5)** and **Order 21 Rule 6 of the High Court Rules as read together with Order 27 Rule 3 of the RSC**.

6.3 The respondent also relied on the case of **Chazya Silwamba v Lamba Simpito**[4] where it was held in relation to **Order 27 Rule 3 of the RSC**, that:

> **"In terms of Order 27 Rule 3, it is permissible to enter judgment on admission where a party admits a fact of a case. The admission may be contained in a pleading or other form of communication. Further, the Judgment on admission may be entered notwithstanding the fact that there may be other questions to be determined".**

6.4 The respondent argued that the Court gave due consideration to paragraph 7 of the appellant's defence aforesaid and arrived at the conclusion that it contained a clear admission

of liability. The learned Judge viewed the appellant's argument that under the agreement, the appellant could receive, use and return the equipment as not only an erroneous construction of the evidence before the Court below but that it also defeated logic to justify such an argument.

6.5 The respondent further submitted that paragraph 5 of the statement of claim shown at page 24 of the record of appeal gives tabulations of the amounts paid by the appellant towards the debt. Under paragraph 2 of its defence, appearing at page 27 of the record of appeal, the appellant expressly admits to the contentions of the amounts paid and the balances due under the variation agreement.

6.6 The respondent further submitted that the appellant cannot in a commercial matter put up an evasive defence and, in the same breath, argue that the Court erred in entering judgment on admission. This Court's attention was drawn to the case of **China Henan International Economic Cooperation v Mwange Contractors Limited**[5] where it was held that the Court is entitled to enter judgment on admission in an appropriate case, where a defence in a commercial matter does not satisfy the requirement of rule 2.

6.7 The appeal was heard on 21st September 2022. Both Counsel for the appellant and the respondent were in attendance and relied on their respective arguments filed before Court.

7.0 **OUR ANALYSIS AND DECISION**

7.1 We have carefully considered the evidence on record and the parties' respective arguments. This appeal rests on the question whether *the learned Judge was on firm ground in entering judgment on admission against the appellant.*

7.3 There are several authorities that have provided guidance with regard to criteria or basis upon which a Court may exercise its discretionary power to enter judgment on admission.

7.4 **Order 21 Rule 6 of the HCR** provides:

> **'A party may apply, on motion or summons, for cancelled judgment on admission where admissions of facts or part of a case are made by a party to the cause or matter whether by his pleadings or otherwise.'**

7.5 **Order 27 Rule 3 of the White Book** provides that:

> **'Where admissions of fact or of part of case are made by a party to a cause or matter either by his pleadings or otherwise, any other party to the cause or matter may apply to the Court for such judgment or order as upon those admissions he may be entitled to, without waiting for the determination of any other question between the parties and the Court may give**

judgment, or make such order, on the application as it thinks fit.'

7.6 In the case of **Chazya Silwamba v Lamba Simpito**, the Court held that it is permissible to enter judgment on admission where a party admits a fact or part of a case or where the admission is contained in a pleading or other form of communication. This is notwithstanding the fact that there may be other questions to be determined.

7.7 Similarly, in the case of **Finance Bank Zambia Plc v Lamasat International Limited,**[6] we stated that:

> **'The court has discretionary power to enter judgment on admission under Order 27 of the High Court Rules. This power is exercised in only plain cases where admission is clear and unequivocal. An admission has to be plain and obvious, on the face of it, without requiring a magnifying glass to ascertain its meaning. Admissions may be in pleadings or otherwise. A court cannot refuse to grant judgment on admission in the face of clear admissions.'**

7.8 Also, in **Queens Royale International and Kennedy Mambwe v Alpha Commodities Limited,**[7] we held that:

> **'We are of the view that Order 21 Rule 6 of the High Court Rules and Order 27 Rule 3 of the Supreme Court Practice (White Book) are clear that an**

admission can be made in a letter or any other document by the parties. This may even be in default of defence. We opine that the lower Court was on firm ground when it entered judgment on admission by relying on the settlement agreement which is clear and shows that the appellant admitted their indebtedness to the respondent in an unequivocal manner.'

7.9 The foregoing authorities are instructive. A Court is empowered to enter judgment on admission without waiting for the determination of other questions between the parties.

7.10 In determining whether to enter judgment on admission on a matter, the Court is guided by several court pronouncements regarding the discretionary powers of the court to enter judgment on admission, where there has been an admission of a debt. It is also permissible to enter judgment on admission where the admission is contained in a pleading or other form of communication.

7.11 The evidence on record in this matter reveals that the parties entered into a Sale of Equipment Agreement on 28 March 2017 (as shown at pages 39-49 of the record of appeal). By virtue of that agreement, the respondent was to sell and deliver equipment to the appellant, which it did sometime in May 2017.

7.12 Pursuant to the agreement, the appellant was to pay the respondent for the equipment in accordance with an agreed amortization schedule in 7 monthly instalments between the periods of 31 March 2017 and 29 September 2017. The appellant defaulted in settling the purchase instalments on the due dates as agreed. This prompted the parties to vary the instalment payments by virtue of a Variation of Sale Agreement dated 28 November 2017 (shown at pages 52-53 of the record of appeal).

7.13 By this variation agreement, the respondent extended the payment terms of the appellant. The said document dated 28 November 2017 reads in part as follows:

'VARIATION OF SALE AGREEMENT

In reference to Clauses 11.3 of the sale agreement of equipment signed on 28 March 2017 and subsequent discussions, we hereby agree to vary the agreement as follows:

1. **Payments as amended in the amortization schedule attached.**
2. **Reference to Clause 4.5 under 'price & Payments.' This shall now read:**

   If a party fails to make any payment due to the other under the agreement by the due date for payment, then the defaulting party shall pay interest on the TOTAL AMOUNT OF THE OUTSTANDING DEBT UNTIL SUCH PAYMENT HAS BEEN CAUGHT UP. This interest charge will be in addition to interest charges calculated in the attached payment schedule which are included in the outstanding debt. The additional interest charge will be levied at the rate of 4% per annum above Standard Chartered Bank PLC lending rate from time to time. Interest

shall accrue on a daily basis from the due date until actual payment of the overdue amount, whether before or after judgment. A separate invoice will be made out at the end of each calendar month specifically for this additional interest charge should this clause become applicable.

Please note that all conditions in the sale agreement shall be enforceable henceforth and we are expecting $30,000 by the end of December 2017 because Carmine has been extremely flexible in helping you settle and grow your business.'

Signed
For & on behalf of Carmine Mining Limited
28 November 2017

Signed
For & on behalf of Chimwenda Investments Limited
18 December 2017

7.14 By subsequent written agreement dated 10 May 2018 (shown at pages 50-51 of the record of appeal), the appellant undertook to repay the debt in 7 instalments between 10 June 2018 and 10 December 2018. This agreement confirms that the total amount outstanding from the original sale agreement stands at US $438,647.79 and sets out a schedule of how this debt will be cleared over 7 monthly instalments from 10 June 2018 to 10 December 2018. The agreement was signed by Mr. Charles Chikwelete, the Managing Director of the appellant company.

7.15 The evidence before the lower Court clearly shows that the appellant had admitted its liability to the respondent in various communication outside of its defence.

7.16 The appellant's further argument was that the respondent was not entitled to payment for the equipment but instead the respondent ought to have collected the equipment supplied to the respondent in line with clause 10.2 of the Sale of Equipment Agreement.

7.17 The said clause in the Sale of Equipment Agreement states that the seller (respondent herein) shall be entitled to terminate the agreement should the buyer fail to unreasonably settle two consecutive instalment payments. It also provides that the Seller shall be entitled to recover the equipment and all instalment payments shall be treated as rental payments.

7.18 The respondent argued that the entitlement of taking the equipment back from the appellant was an option that the respondent could elect to exercise if it terminated the agreement, which it did not do.

7.19 We have considered the appellant's argument that the respondent (as seller) could only have exercised the option of taking the equipment back and not claim for the purchase monies.

7.20 The rights and remedies of a seller are aptly elucidated in **The English Sale of Goods Act, 1893,** which statute is applicable in our jurisdiction by virtue of the **British Acts Extension Act, Chapter 10 of the Laws of Zambia.**

7.21 **The Sale of Goods Act** which codifies the laws relating to the sale of goods, provides on the remedies of a seller under **Section 49** that:

> **'(1) Where, under a contract of sale, the property price, in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods.**
>
> **(2) Where, under a contract of sale, the price is payable on a day certain irrespective of delivery, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract.**

7.22 The foregoing authority is explicit. Notwithstanding any other rights and remedies that a seller may have under a contract i.e., in relation to the recovery of goods, a seller retains a right at law, to maintain an action against the purchaser for the price of the goods.

7.23 The appellant's argument that the respondent does not have a right to maintain an action for the recovery of the price of the goods but ought to have recovered the goods from it, is in our view illogical and disregards the legal doctrines in relation to the sale of goods.

7.24 Turning to consider the issue of whether the learned Judge in the Court below erred in entering judgment on admission, we also examine the pleadings and other correspondence between the parties to ascertain whether there was a clear, unambiguous, and unconditional admission of liability as envisaged by law.

7.25 Our attention is drawn to the pleadings, specifically to paragraph 3 of the defence, responding to paragraph 7 of the statement of claim, which reads as follows:

> **'The Defendant has failed to honour its obligation under the variation agreement and has only made payments as stated in paragraph 5 above. Consequently, the Defendant currently owes the Plaintiff an outstanding balance of USD406,667.24 of which the Defendant has failed and/or otherwise refused to pay in spite of numerous reminders by the Plaintiff and the Plaintiff's Advocates.'**

7.26 Responding to the above contention, in **paragraph 3 of its defence**, the appellant asserted that:

'As regards paragraph 7, the Defendant will aver that they have not failed as payments were not made due to non-payment by their main contractor, a fact that the Plaintiff is well aware of.'

7.27 The foregoing response from the appellant to the respondent's claim is clear and unambiguous.

7.28 The Court below noted that while the appellant had unequivocally admitted its indebtedness, it was attempting to justify its failure to pay the said debt to the respondent on account of financial constraints caused by a third party's failure to pay dues owed to it. This was contrary to the principles espoused by the Supreme Court in the **Kasengele** case.

7.29 We in turn note that the learned trial Judge quite correctly considered that the admission of liability for the sums due to the respondent was in fact contained in the appellant's pleadings.

7.30 Based on the foregoing, the provisions of **Order 27 Rule 3 of the RSC** and the **Chazya Silwamba** decision, we are of the firm view that the Judge in the lower Court cannot be faulted for holding as she did. She was on firm ground in exercising her discretion and entering judgment on admission based on the pleadings and evidence before her as there was a clear and unequivocal admission of the debt by the appellant.

8. **CONCLUSION**

Given our determination and conclusions above, we find no merit in the sole ground of appeal. The appeal is accordingly dismissed with costs to the respondent. The costs are to be agreed and in default to be taxed.

M.M Kondolo
COURT OF APPEAL JUDGE

C.K. Makungu
COURT OF APPEAL JUDGE

N.A. Sharpe-Phiri
COURT OF APPEAL JUDGE