

IN THE COURT OF APPEAL OF ZAMBIA

HOLDEN AT LUSAKA

(Civil Jurisdiction)

APPEAL NO. 140 OF 2021

GAZ/08/172/2021

BETWEEN:

FATHER RODGERS HANSINI BANDA

(Sued in General Secretary of Zambia
Anglican Council)



APPELLANT

AND

SIMON CHISI (Dr)

RESPONDENT

Coram: *Sichinga, Ngulube and Banda-Bobo, JJA*
on 24th March, 2022 and 19th July, 2022

For the Appellant: Mr. F.E. Mulenga Jnr. of Messrs August Hill and Associates

For the respondent: Dr. H. Mbushi, SC of Messrs HBM Advocates

JUDGEMENT

Sichinga, JA delivered the Judgment of the Court.

Cases referred to:

1. *Stanley Mwambazi v Morester Farms Limited* (1977) ZR 108
2. *Waterwells v Jackson* (1984) ZR 98
3. *Leopard Walford (Z) Limited v Unifreight* (1985) ZR 203
4. *Zambia Revenue Authority v Jayesh Shah* (2201) ZR 60
5. *Kapoko v The People* 2016/CC/0023
6. *Chazya Silwamba v Lamba Simpito* (2010) ZR 475 Vol. 1
7. *Ellis v Young* [1914] 1 Ch 904

8. *Dockland Construction Limited v Maureen Mwanawasa (sued in her capacity as Trustee and Chairperson of the Maureen Mwanawasa Community Initiative) SCZ Appeal No. 36 of 2018 (unreported)*
9. *Abel Charles Mwewa v Barclays Bank Zambia Plc SCZ Appeal No. 36 of 2018*
10. *Zambia Breweries Plc v Sakala (2012) Volume 2 ZR 460*
11. *Kusensela v Mvula SCZ Appeal No. 32 of 2011*
12. *Leasing Finance Company Limited v Zarold Limited SCZ Appeal No. 88 of 2011*
13. *National Milling Corporation Limited v Macadams Bakery and Aziz Kapdi 2008/HPC/0402 (unreported)*
14. *Costa Tembo v Hybrid Poultry Farm Limited (2003) ZR 98*
15. *Kuta Chambers (sued as a firm) v Concillia Sibulo (suing as Administratrix of the estate of the late Francis Sibulo) SCZ Judgment No. 86 of 2015*
16. *Himani Alloys Limited v Tata Steel Limited (2011) 15 SCC 27*
17. *Zega Limited v Zambezi Airlines Limited and Diamond General Insurance Limited SCZ Appeal No. 39 of 2014*
18. *Finance Bank Zambia PLC v Lamasat International Limited CAZ Appeal No. 175 of 2017*

Legislation referred to:

1. *The Rules of the Supreme Court of 1965, 1999 Edition (White Book)*
2. *The High Court Rules Chapter 27 of the Laws of Zambia*
3. *Constitution of Zambia Act, Chapter 1, Laws of Zambia as amended by Act No. 2 of 2016*
4. *The High Court (Amendment) Rules 2020, Chapter 27 of the Laws of Zambia*
5. *The Law Reform (Miscellaneous Provisions) Act, Chapter 74 of the Laws of Zambia*
6. *The Judgments Act, Chapter 81 of the Laws of Zambia*

Other works referred to:

1. *Zambian Civil Procedure – Commentary and Cases (Volume 1) LexisNexis, 2007*
2. *Oxford Advanced Learner’s Dictionary Turnbull J, et al, 8th Edition, Oxford University Press, 2015*

1.0 Introduction

- 1.1 This is an appeal against the Ruling of the High Court (Mwikisa J) delivered on 29th March, 2021 in which the lower court ordered that judgment on admission be entered in favour of the plaintiff.

2.0 Background

- 2.1 On 24th November, 2020, the plaintiff, Simon Chisi (now respondent) commenced an action by way of amended writ of summons, against the defendant, Father Rodgers Hansini Banda (now appellant) in the High Court at Lusaka, seeking the following reliefs:
- i. Payment of full terminal benefit package of K156,000;
 - ii. Interest from the date of termination of contract;
 - iii. Costs of the action;
 - iv. Any other relief; and
 - v. Legal costs.
- 2.2 A defence was filed by the defendant on 23rd January, 2021 denying each and every allegation in the statement of claim. On 1st March, 2021, the defendant paid the principal sum of K156,000 into the plaintiff's account and a receipt of the same was issued by the plaintiff's advocates. On 22nd March, 2021, the plaintiff applied by summons to enter Judgment an admission pursuant to **Order 27 Rule 3 of the Rules of the Supreme Court (White Book)**¹ and **Order 21 Rule 5 of the High Court Rules**².
- 2.3 The defendant did not file an affidavit in opposition to the summons to enter Judgment on admission. The defendant's counsel informed the trial court that instructions were being sought from the client, which came late

on 26th March, 2021. Counsel informed that court that they sought to file the affidavit in opposition the same day, but unfortunately, the High Court was closed for fumigation. Counsel attempted to file the following day, and the registry officers refused to accept the documents because the matter was scheduled for hearing that morning.

- 2.4 Mwikisa J proceeded to render her Ruling in which she found that the defendant had not complied with the orders for directions dated 16th December, 2020. She entered Judgment on admission in favour of the plaintiff.

3.0 The appeal

- 3.1 Dissatisfied with the outcome of the lower court's Ruling, the defendant appealed to this Court raising five grounds of appeal as follows:

1. *The lower court erred in law and in fact when it refused the appellant (defendant in the lower court) leave to file its opposition notwithstanding that one of the reasons for the appellant's failure to file the same was that the High Court registry was closed for fumigation to deter the spread of COVID – 19 on 26th day of March, 2021;*
2. *That the lower court erred in fact and in law when it entered Judgment on admission based on a technicality that no opposition had been filed and therefore deprived the appellant of having its case heard on the merits;*
3. *That the lower court erred in fact and in law when it precluded the appellant through its counsel from defending the respondent's application on Judgment on Admission on points of law;*

4. *That the lower court erred in fact and in law when it entered Judgment on Admission without interrogating whether the respondent had established his entitlement to an award of Judgment on Admission; and*
5. *That the lower court erred in fact and in law when it entered Judgment on Admission in line with all the paragraphs in the affidavit in support of leave to enter judgment on admission filed on 22nd March, 2021, in relation to the interest and costs in liquidated amounts without the process of assessment of damages and taxation respectively, having been undertaken.*

4.0 Appellant's heads of argument

- 4.1 The appellant filed heads of argument on 20th June, 2021. The arguments begin with a brief background which we have already highlighted at the commencement of this judgment. Grounds one, two and three of appeal were argued as one, and grounds four and five were argued separately.
- 4.2 From the outset, it was submitted that it is the court's duty to determine matters before it and ensure that they are determined on the merits especially where the failure to file an affidavit in opposition, is not as a result of any improper conduct on the part of a defaulting party. In support of this submission reliance was placed on the cases of ***Stanley Mwambazi v Morrester Farms Limited¹*** and ***Waterwells v Jackson²*** where the Supreme Court held that it is desirable for matters to be determined on their merits in finality rather than on technicalities and piece meal.
- 4.3 For the submission that a breach of a rule should not always be fatal, especially where such a rule is regulatory in nature, we were referred to the case of ***Leopard Walford (Z) Limited v Unifreight³*** and the case of ***Zambia***

Revenue Authority v Jayesh Shah⁴. The import of these authorities being that matters must be determined on the merits. It was submitted that this principle is underscored by the ***Constitution of the Zambia***³ in ***Article 118(3)*** and the case of ***Kapoko v The People***⁵.

- 4.4 It was submitted that the appellant's default in the court below was neither intentional nor did it amount to an unreasonable delay. Counsel contended that the learned Judge should have taken counsel's explanation into account and ensured that the matter is determined on the merits by allowing the appellant to file its affidavit in opposition.
- 4.5 On the strength of these submissions we were urged to allow grounds one, two and three of the appeal.
- 4.6 With respect to ground four, we were referred to ***Order 21 Rule 6 of the High Court Rules supra*** and ***Order 27 Rule 3 of the Rules of the Supreme Court supra*** on the court's powers to grant an application for Judgment on Admission. It was submitted that certain essentials conditions must be satisfied before the court can grant the application. We were referred to the learned author of ***Zambian Civil Procedure – Commentary and Cases***¹ where he states at page 609 that:

"The essential conditions that must be satisfied before a court pronounces judgment upon admission are –

- a) The admission must have been made either in pleadings or otherwise;*
- b) The admission must have been made orally or in writing;*
- c) The admission must be clear and unequivocal; and*

- d) *The admission must be taken as a whole and it is not permissible to rely on a part of the admission, ignoring the other part.*
- e) *The jurisdiction to pronounce judgment on admission made by a party is discretionary and, in the absence of reason to the contrary, the judgment ought to be pronounced in order to save time and costs."*

4.7 To emphasise the applicable conditions we were also referred to the cases of ***Chazya Silwamba v Lamba Simpito***⁶ and ***Ellis v Young***⁷.

4.8 It was also submitted that in his defence the appellant did not make an unequivocal admission of liability, therefore, the opposing factual variances could only be determined at trial. Reliance was placed on the case of ***Dockland Construction Limited v Maureen Mwanawasa (sued in her capacity as Trustee and Chairperson of the Maureen Mwanawasa Community Initiative)***⁸ the import of which, the Supreme Court held, was that an admission must be clear.

4.9 Further, it was submitted that it was incumbent on the lower court to ensure that the respondent had properly and efficiently prosecuted his case before entering admission on his behalf. Counsel contended that a receipt from the respondent's advocates fell short of the standard prescribed by the courts in this jurisdiction to prove any sort of admission. In support of this submission reliance was placed on the case of ***Abel Charles Mwewa v Barclays Bank Zambia Plc***⁹ on the requirement for one to prove his case.

4.10 We were urged to allow this ground of appeal.

4.11 On ground five, it was submitted that although the courts have wide discretion to award interest on any debt or damages claimed, the discretion in the court below is governed by **Order 36 Rule 8 of the High Court Rules** *supra* which provides as follows:

"Where a judgment or order is for a sum of money, interest shall be paid thereon at the average short-term deposit rate per annum prevailing from the date of action or writ as the court may direct of judgment."

4.12 We were then referred to a number of cases including **Zambia Breweries Plc v Sakala**¹⁰, **Kusensela v Mvula**¹¹ and **Leasing Finance Company Limited v Zarold Limited**¹² on the court's discretion in awarding interest.

4.13 On the issue of costs, it was submitted that they ought to be awarded to a successful party upon conclusion of a matter. Reliance was placed on a number of cases *inter alia* **National Milling Corporation Limited v Macadams Bakery and Aziz Kapdi**¹³, **Costa Tembo v Hybrid Poultry Farm Limited**¹⁴, and **Kuta Chambers (sued as a firm) v Concillia Sibulo (suing as Administratrix of the estate of the late Francis Sibulo)**¹⁵. It was submitted that in the absence of an agreement between the parties, the lower court should have proceeded to either give direction as to how it arrived and agreed on the costs pegged by the respondent or order that the parties expressly proceed to taxation.

4.14 We were urged to allow ground five.

4.15 Counsel prayed that the impugned Ruling be set aside with costs to the appellant, and the matter be sent back to the High Court for trial.

5.0 Respondent's heads of argument

5.1 The respondent relied on his heads of argument filed on 22nd July, 2021. Grounds one and three are argued together, and grounds two, four and five are argued separately.

5.2 In response to grounds one and three, it was submitted that the impression created by the appellant was that the judgment entered by the lower court was a default judgment. It was submitted that the cases of ***Stanley Mwambazi v Morester Farms Limited supra***, ***Water Wells v Jackson supra*** and ***Kapoko v The People supra*** were based on considerations of entering judgments on default of some pleadings, in that the courts did not take into account the defences or that judgments were based on technicalities. The questions put forward for our consideration were:

- *Whether the payment of the principle sum of K156,000 into the account of the respondent was not an admission of the claim by the respondent? And*
- *Whether the said money did not come from the appellant?*

5.3 It was submitted that a sum of K156,000 was deposited into the respondent's account as shown at page 29 of the record of appeal. That the explanation for the said payment is at page 26 of the record of appeal and the confirmation of the payment is at page 18 of the supplementary record of appeal.

5.4 Counsel contended that the appellant was relying on ***Order 21 Rule 5 of the High Court Rules supra*** which only considers admission by way of putting it in writing, whereas ***Order 23 Rule 3 of the Rules of the Supreme Court***

supra encompasses other acts. It was submitted that the appellant did not dispute the claim as confirmed by the letter at page 7 of the supplementary record of appeal.

5.5 In response to the second ground of appeal, it was submitted that the appellant did not appear to appreciate the importance of a status conference. It was contended that on 29th March, 2021, the matter was scheduled to come up for a status conference and a notice of hearing was issued to that effect as shown at page 12 of the supplementary record of appeal.

5.6 It was submitted that ***Order 39 Rule 3 (2) of the High Court (Amendment) Rules of 2020*** provides as follows:

“A Judge may, in addition to any other general power, exercise the following power, at a scheduling conference:

(a) Deal with any interlocutory applications for the expeditious disposal of these applications.”

5.7 It was further submitted that the respondent took advantage of the occasion to deal with the application. That the application for judgment on admission was properly before the lower court and was dealt with accordingly.

5.8.1 In response to ground four, it was submitted that the appellant is not able to distinguish the contents of ***Order 21 Rule 5 of the High Court Rules*** from ***Order 21 Rule 6 of the High Court Rules***. That the latter is in tandem with ***Order 27 Rule 3 of the Rules of the Supreme Court (White Book)*** which states that admission can be made *otherwise*. It was submitted that the

term '*otherwise*' is ably defined by *Turnbul J, et al, Oxford Advanced Learner's Dictionary*² at page 1077 where it states:

"Otherwise used to refer to something that is different from or the opposite of what has just been mentioned."

- 5.9 It was argued that **Order 21 Rule 5 of the High Court Rules** speaks to signing a statement, however, '*otherwise*' is by other means of admission. It was argued that depositing or making payment of the claimed principal sum of the claim is another way of admitting. That this method of admission is more than unequivocal.
- 5.10 Counsel submitted that the jurisdiction to pronounce judgment on admission. That it's within the court's discretion to do so, in the absence of any reason to the contrary, in order to save time and costs.
- 5.11 It was contended that the appellant had not demonstrated to this court that the lower court was either biased or acted *mala fides*.
- 5.12 It was submitted that the claim by the appellant that it did not employ the respondent was not true as the record shows otherwise and it should be dismissed.
- 5.13 With respect to the final ground of appeal it was submitted that the **section 4 of the Law Reform (Miscellaneous Provisions) Act**⁵ gives the court discretion, which can only be challenged, where there is bias or mala fides. It was submitted that the appellant had not shown that such situation had arisen.
- 5.14 On the issue of costs, counsel submitted that the lower court had made it clear that if there was any disagreement, the costs should be taxed.

5.15 We were urged to dismiss the appeal with costs as it had no merit.

6.0 Decision of the Court

6.1 We have given this appeal our due consideration. We have considered the grounds of appeal, the arguments by counsel, authorities cited, the evidence on record and the impugned Judgment. We shall address grounds one to four together as they are interrelated. The issue on this appeal, as we see it is whether the respondent was entitled to an order of Judgment on Admission.

6.2 It is trite law that a court has power to enter judgment on admission where the evidence reveals that the admission is clear and unequivocal. The court may enter judgment without waiting for the determination of any other question between the parties. We refer to ***Order 27 Rule 3 of the Rules of the Supreme Court, supra***, which provides as follows:

Where admissions of fact or of part of a 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 such judgment, or make such order, on the application as it sees just."

6.3 In the case of ***Himani Alloys Limited v Tata Steel Limited***¹⁶ the Supreme Court of India held as follows:

"Where admission of facts have been made in the pleadings or otherwise, whether oral or in writing, the court may at any stage of the

suit either on the application of any party or of its own motion and without waiting for the determination of any other question between the parties, make such order or give such judgment as it may see fit, having regard to such admission."

- 6.4 In this jurisdiction, the Supreme Court cited the *Himani Alloys case* with approval in the case of *Zega Limited v Zambezi Airlines Limited and Diamond General Insurance Limited*¹⁷ when it held as follows:

The court, on examination of the facts and circumstances has to exercise its judicial discretion, keeping in mind that a judgment on admission is a judgment without trial which permanently denies any remedy to the defendant, by way of an appeal on merits. Therefore, unless the admission is clear, unambiguous and unconditional, the discretion of the court should not be exercised to deny the valuable right of the defendant to contest the claim. In short, the discretion should be used only where there is clear admission which can be acted upon."

- 6.5 Bound by the Supreme Court's guidance we stated the following in the case of *Finance Bank Zambia PLC v Lamasat International Limited*¹⁸:

"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."

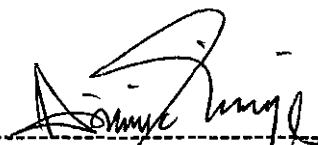
- 6.6 We accept the submissions of Dr. Mbushi, SC, counsel for the respondent, that the appellant has created the impression the lower court entered a default judgment. The authorities cited by the appellant relate to judgments in default, which is not the case in the circumstances of this matter. Typically, a judgment in default is entered where a defendant fails to defend a claim. It produces a judgment in favour of a plaintiff without holding a trial. The subtle difference is that where there is no real defence, a party may apply for summary judgment on the basis of admissions made formally in pleadings or informally.
- 6.7 In the instant case the document which the lower found that the appellant had unequivocally admitted to the claim is found at page 29 of the record of appeal. The same is a receipt from the respondent's advocates acknowledging settlement of the claim by the respondent save interest and costs. Further at page 18 of the supplementary record of appeal is a bank statement showing the deposit of the respondent's claim into the respondent's bank account showing the source of funds as the appellant.
- 6.8 Upon a careful perusal of these documents, the view we take is that the appellant acknowledged its indebtedness to the respondent in clear and unambiguous terms and accordingly settled the principal claim save interest and costs. Therefore, we cannot fault the learned trial Judge for entering judgment on admission in favour of the respondent.
- 6.9 As regards the argument that the lower court entered judgment on admission in line with all the paragraphs in the affidavit in support, we are of the view that this was a misdirection on the part of the lower court. After


considering the application before her the learned Judge stated the following:

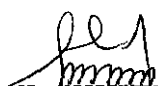
"I am of the considered view that the Defendants have not complied with the rules in failing to file an affidavit in opposition and arguments in opposition. Further, the Defendants have not complied with the orders for directions dated 16th December, 2020. I therefore order that judgment on admission be entered in favour of the Plaintiff in line with all the paragraphs in the affidavit in support of the application for leave to enter judgment on admission filed with court on 22nd March, 2021."

- 6.10 The learned judge ought to have considered what an admission by conduct is. If she had done so she would have worded the order differently and still come to the same conclusion. We accordingly set aside the order and in its place order that judgment on admission is hereby entered in favour of the respondent.
- 6.11 In view of the forestated we find no merit in grounds one to four of the appeal.
- 6.12 Turning to the issue of interest and costs, the principles of law espoused by the appellants in their heads of argument are not in dispute. Given the order we have made above we find that the principal claim, constitutes a debt repayable to the appellant with interest at the rate prescribed in the *Judgments Act*⁶ of six (6) per centum per annum from the date of the lower court's Ruling to date of settlement of the claim.

6.13 On the considerations we have made, we dismiss the appeal with costs to the respondent to be taxed in default of agreement.



D.L.Y. Sichinga, SC
COURT OF APPEAL JUDGE

P.C.M. Ngulube
COURT OF APPEAL JUDGE

A.M. Banda-Bobo
COURT OF APPEAL JUDGE