

IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

Appeal No. 50 of 2022

BETWEEN:

GROUP FIVE ZAMBIA LIMITED

Appellant

AND

NUCO INDUSTRIAL SERVICES LIMITED

Respondent



CORAM: Kondolo, Makungu and Sharpe-Phiri, JJA
on 21st September 2022 and 28th October 2022

For the Appellant: Mr. C.M Sianondo & Mr. G. Mileji of Malambo & Company

For the Respondent: Mr. H. Pasi of Messrs Mando & Pasi Advocates

JUDGMENT

SHARPE-PHIRI, JA, delivered the Judgment of the Court

Legislation referred to:

1. *The High Court Rules, Chapter 27 of the Laws of Zambia*
2. *The Rules of the Supreme Court, White Book, 1999 Edition*

Cases referred to:

1. *Zambezi District Council v Zolick Kazanda Chanyika III, Appeal No. 49/2018*
2. *Freshview Cinemas Limited v Manda Hill Limited Appeal No. 174/2013*
3. *China Henan International Economic Technical Cooperative v Mwange Contractors Limited SCZ Judgment No. 7 of 2002*
4. *Zega Limited v Zambezi Airlines Limited and Diamond General Insurance Limited, Appeal No 39 of 2014*
5. *Himani Alloys Limited v Tata Steel Limited (2011) 3, Civil Court Cases 721*
6. *Richard Mwapela v Chen Xian Hua and Another (2017) 3 ZR 270*
7. *Trans Trust S.P.R.L v Danubian Trading Company (1952) 1 ALL ER 970*

8. Sylvester Musonda Shipolo v Shadreck Maipambe *Appeal No. 01/2016*

1.0 **INTRODUCTION**

1.1 This is an appeal against the judgment of Patel, J delivered at the Kitwe High Court on 18th January 2022.

2.0 **BACKGROUND**

2.1 The background of the matter is that the respondent (plaintiff in the court below) had by way of writ of summons and statement of claim brought an action against the appellant (defendant in the Court below) on 25 February 2021. By the action, the respondent sought among other things payment of the sum of US \$524,994.79 purportedly owing to it by the appellant by virtue of a Final Payment Agreement made between the parties in respect of outstanding fees due for labour hire services provided by the respondent to the appellant at the New Synclinorium Concentrator Project at Mopani Copper Mines in Kitwe.

2.2 The respondent also claimed interest accruing on the outstanding instalments at the rate of 1% per month from the due date of the respective invoices as agreed by the parties in the said Final Payment Agreement which interest stood at US\$45,442.43 as at 22 February 2021 and continues to accrue

as aforesaid until payment of the debt. Plus interest on each sum adjudged to be payable to it pursuant to **Section 4 of the Law Reform (Miscellaneous Provisions) Act and the Judgments Act** and costs of the suit.

- 2.3 The appellant filed a defence dated 22 July 2021 contending that the Final Payment Agreement was made between the parties on a without prejudice basis in contemplation of settling the matter amicably.
- 2.4 Although denying the respondents averments, the appellant confirmed that it had subcontracted the respondent for some works to be done at the project, after concluding an agreement with Mopani Copper Mines Plc. A material term of their agreement was that the respondent would be paid after the appellant had been paid by the Mines and that the appellant had not been paid by the Mines to warrant a payment to the respondent.
- 2.5 The substance of the appellant's defence prompted the respondent to apply on 11 August 2021 for entry of judgment on admission of the sum of US\$524,994.79 and interest of US\$45,442.43 on the basis that the appellant signed an agreement admitting owing the said amounts.
- 2.6 The respondent also contended that the appellant's defence did not specifically traverse its claims in the statement of claim and

that the appellant had admitted that it had engaged the respondent to provide services for which the appellant was liable to pay the respondent.

- 2.7 In its evidence, the respondent averred that the appellant had been contracted by Mopani Copper Mines Plc to carry out construction and mechanical works at the New Synclinorium Concentrator Project at its mining site in Kitwe and the appellant had in turn subcontracted the respondent to provide labour hire services for the said project.
- 2.8 It was further stated that the respondent did provide the said services to the appellant and invoiced it accordingly. The said services were also certified by the appellant which had nonetheless refused, failed, or neglected to pay the respondent for the services it offered.
- 2.9 Further, that because of the appellant's failure to settle the sums due to the respondent, the parties entered into negotiations which culminated in a Final Payment Agreement whose terms were agreed between the said parties. The terms were that the principal sum of US\$ 524,994.93 (after discount) was payable by the appellant by 25 September 2020 and interest would accrue at 1 per cent per month from the original due date of the various invoices.

- 2.10 The respondent further exhibited an email from the appellant which was a response to its letter of demand in support of the contention that payment of the negotiated sum was not conditional.
- 2.11 The respondent further contended that paragraph 5c and 6 of the appellant's defence was a clear and unequivocal admission that the respondent was entitled to the sums it claims for services rendered. It was further added that the Final Payment Agreement and the schedule attached thereto was not conditional on the appellant being paid by Mopani Copper Mines Plc.
- 2.12 The appellant also relied on the case of **Zambezi District Council v Zolick Kazanda Chanyika III**¹ in which this Court upheld the entry of judgment on admission based on earlier correspondence.
- 2.13 The appellant opposed the arguments advanced by the respondent stating that whilst the respondent had provided the services as contracted, they had not received monies from the Mines, nor had they failed, refused or neglected to pay for the respondent's services.
- 2.14 The appellant insisted that the Final Payment Agreement indicated that the sum of US\$524,994.93 would be payable from funds collected by the appellant.

2.15 That it was a condition that the respondent would only be paid upon the appellant collecting funds from the Mines, which funds have not been collected yet.

2.16 The appellant averred further that the Final Payment Agreement was suspended until the appellant collected funds from the Mopani Copper Mines which had not happened.

3.0 **DECISION OF THE COURT BELOW**

3.1 The trial Judge determined the matter on the strength of all documents filed before her in accordance with the Orders for direction she had issued. She also considered the pleadings, affidavit evidence consisting of letters, the final payment agreement, and schedules thereto.

3.2 Having taken those into consideration, the learned Judge concluded that the only issue that lay for determination was whether the appellant had admitted the respondent's claim in such clear and unequivocal terms, that would mandate her to exercise her discretion and enter judgment on admission in favour of the respondent.

- 3.3 The trial Court considered that the Final Payment Agreement which showed the respective invoice numbers, the submission dates, the certificate approval date, the payment due date, the amount and under status/comments the following narration:

“due for payment within 2 weeks. Deadline 25.08.2020 if deadline is not met an additional 1% (monthly) interest will be charged from original payment due date.”

- 3.4 The Court considered that the appellant's submission on the definition of the word 'payable' was merely an attempt to add a 'post-script' meaning to the agreement entered by the parties. The Judge also took into account the appellant's letter responding to the respondent's letter of demand, which was signed by the appellant's Director, Zander Van Lingen, wherein the appellant stated that, *“We understand your position completely, it's been nearly a year without payment”*. The Court noted that there was no mention in this communication of the liability not having crystallized, nor of any condition precedent.
- 3.5 The Judge found that in whichever way the agreement between the parties would be construed, there was no condition attached to the payment which the appellant was attempting to introduce. The Court was satisfied that the threshold had been met as established in the case of **Freshview Cinemas Limited v Manda Hill Limited**² where it was held in relation to principles for

entry of judgment on admission, that the express or implied admission must be clear.

- 3.6 On that basis, the Judge concluded that there was adequate, clear and unequivocal admission by the appellant and that the defence it had raised lacked merit and was merely an attempt to drag litigation which had no merit. The learned Judge was of the view that on the authority of the **China Henan International Economic Technical Cooperative v Mwange Contractors Limited³** the defence should not be entertained in the Commercial Division.

4.0 **THE APPEAL**

- 4.1 Being dissatisfied with the judgment on admission of the lower Court dated 18 January 2022, the appellant filed a Notice of Appeal and Memorandum of Appeal on 31 January 2022 advancing two grounds of appeal namely:

(1) That the Court below erred in law and fact by:

- a. Construing the defence of condition precedent leading to the Court to wrongly enter judgment on admission in favour of the respondent.**
- b. Entering judgment on admission in favour of the respondent.**

(2) The Court below erred in entering judgment on admission in favour of the respondent and thereby denying the appellant the right to have its defence to be determined after trial.

5.0 ARGUMENTS IN SUPPORT OF THE APPEAL

- 5.1 The appellant filed heads of arguments on 4 March 2022 and argued the two grounds of appeal together.
- 5.2 The gist of its arguments was that the parties had agreed that the monies due and payable to the respondent was to come from funds collected by the appellant from Mopani Copper Mines Plc. Counsel for the appellant argued that the Final Payment Agreement made between the parties was subject to a condition of collecting funds by the appellant hence making the commitment in the agreement qualified and contingent on the funds being collected. The respondent could only receive payment when the appellant has been paid.
- 5.3 Counsel delved into detailed explanations of the meaning of the word 'payable' and argued that the agreement between the parties was clear to the effect that the amounts to be paid to the respondent must be funds collected by the appellant.

- 5.4 On the aspect of judgment on admission, Counsel cited the case of **Zega Limited v Zambezi Airlines Limited and Diamond General Insurance Limited**⁴ to illuminate the principles of judgment on admission. In that case, the Court cited the case of **Himani Alloys Limited v Tata Steel Limited**⁵, where the Supreme Court of India propounded that the admission must be a conscious and deliberate act of the party making it and showing an intention to be bound by it. According to counsel, the Indian Judges added that unless the admission is clear, unambiguous and unconditional, the discretion of the Court should not be exercised to deny the valuable right to an Appellant to contest the claim against him.
- 5.5 The appellant's counsel further argued that the defence exhibited in the record of appeal does not form an admission and relied on the case of **Richard Mwapela v Chen Xian Hua and Another**⁶ to support their contention.
- 5.6 They argued further that the law of conditional precedent was a total defence and that the nature of a condition precedent is one which describes a condition which does not prevent the existence of a binding contract, but which suspends the performance of it until the fulfillment of a condition.
- 5.7 In support of the arguments on the law of conditions precedent, Counsel cited the case of **Trans Trust S.P.R.L v Danubian Trading**

Company⁷ and the case of *Sylvester Musonda Shipolo v Shadreck Maipambe*.⁸

5.8 Counsel argued that in the present case, the appellant's defence raised a condition precedent and that the condition to fulfil the obligation created by the contract had not occurred. Thus, the appellant not having collected the funds to pay the respondent, the lower Court ought not to have entered judgment on admission. We were urged to allow the appeal.

6.0 **ARGUMENTS OPPOSING THE APPEAL**

6.1 The respondent filed its heads of argument and list of authorities on 11 April 2022. The gist of the respondent's arguments was that there was essentially only one ground of appeal that the lower Court erred in entering judgment on admission. That in deciding whether the appeal has merit, the Court ought to review whether there was an admission by the appellant of its indebtedness to the respondent; whether there was a condition precedent to the payment of the debt; and whether there were any triable issues to warrant a trial.

6.2 The respondent's counsel argued on the first issue of there being an admission of the debt by the appellant, that the Final Payment Agreement entered into between the parties was an admission of a debt by the appellant, which expressed clearly

that the appellant owed the respondent a sum of US\$524,994.93.

- 6.3 Counsel further contended that the appellant did not dispute the contents of the agreement and that this Court had already found that the Final Payment Agreement was validly executed between the parties and the issue of the outstanding debt had already been resolved between the parties.
- 6.4 The appellant having admitted its indebtedness to the respondent in the agreement and having admitted that the sum was due and payable to the respondent on 25 September 2020, it cannot be allowed to resile from such admissions by arguing that it was only liable to pay the respondent after it had been paid by the Mines.
- 6.5 With regard to the issue of whether there was a condition precedent for the payment of the debt, the respondent argued that contrary to the appellant's argument that its indebtedness was contingent upon the appellant being paid by the Mines, the Final Payment Agreement, clearly showed the appellant's admission of the debt and its willingness to settle the same within two weeks from 25 September 2020 from the monies it had already collected from the Mines. The schedule in the agreement made it clear when the sums under each respective invoice were to be paid.

In fact, the appellant did not challenge the respondent's evidence in the Court below that the appellant had already been paid by the Mine.

- 6.6 The respondent further argued that the contention of the condition precedent was absurd as it assumed that the respondent would not get paid if the Mines did not pay the appellant.
- 6.7 On the second ground of appeal, where the appellant argued that the Court below erred in entering judgment on admission and denying the appellant the right to have a trial, the respondent argued that there being no real dispute on the indebtedness of the appellant to the respondent in the sums claimed, there are no triable issues to warrant a trial.
- 6.8 The respondent also argued that even if the appellant was successful in its argument about the condition precedent and that the respondent could only be paid when the appellant is paid by the Mines, the respondent would still be entitled to a judgment for the debt in the sums not disputed.
- 6.9 In conclusion, the respondent contended that it was entitled to judgment on admission on the basis that the appellant had failed to satisfy the threshold for a defence for commercial matters.

We were urged to uphold the entry of judgment on admission and dismiss the appeal with costs to the respondent.

7.0 **OUR ANALYSIS AND DECISION**

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

7.2 We have carefully reviewed the evidence on the record of appeal, the judgment being impugned and the arguments and authorities of the respective parties.

7.3 A careful perusal of the appeal shows that the appellant is mainly challenging the way the lower Court entered judgment on admission by way of construing the defence of condition precedent in its pleadings considering the evidence of the agreement and correspondence between the parties.

7.4 In getting to the crux of this appeal, we begin by referring to **China Henan v Mwange**³ case referred to earlier, where the Supreme Court observed in relation to a provision in the practice direction before that Court which is similar to **Order 53 Rule 6 of the High Court (Amendment) Rules**, it stated as follows:

‘The new dispensation in commercial matters is that parties must place their cards on the table in the litigation to assist in narrowing issues of contention and for the real issues in dispute to surface, it is not prudent for a party to wait for trial before exposing their side of the story... in keeping with the practice directions, where a defence in a commercial matter does not satisfy the requirements of rule 2, the Court is entitled to enter Judgment on admission in an appropriate case.’

- 7.5 The foregoing case clearly establishes that an unclear and incoherent defence which fails to traverse the allegations in the statement of claim adequately may entitle the Court to enter judgment on admission in appropriate cases.
- 7.6 Furthermore, the courts are also empowered to look outside the pleadings in appropriate cases, such as drawing from evidence of prior correspondence between the parties as to the clarity of where liability is due. This is a position that was upheld by the Court of Appeal in the said **Zambezi District Council** case.
- 7.7 Having established that a trial Court is well within its right to enter judgment on admission in appropriate cases as advanced above, we are also mindful of the caution we gave in the exercise of the discretion by courts to enter judgment on admission.

7.8 In the Indian case of **Himani Alloys Limited v Tata Steel Limited**⁵, the Court observed that:

'... the Court on examination of facts and circumstances has to exercise its judicial discretion keeping in mind that the judgement on admission is a judgment without trial which permanently denies any remedy to the defendant, by way of a trial on merits. Therefore, unless an admission is clear, unambiguous and unconditional, the discretion of the Court should not be exercised to deny the valuable right of a defendant to contest the claim.'

7.9 Paragraph 5(c) and 6 of the appellant's defence reads as follows:

'5. The defendant in further denying paragraphs 6 to 10 of the statement of claim, the defendant further avers that:

....

(c) the agreed term is that the Plaintiff would only be paid after the defendant has been paid by Mopani Copper Mines Limited.

6. The defendant further avers the payment, from which the money due to the plaintiff should have come from and which work was done by the plaintiff has not been paid to the defendant.'

7.10 Contrary to the aforesaid averment in the appellant's defence, the correspondence, specifically the response of the appellant to the respondent's letter of demand makes a case of clear

admission of indebtedness of the appellant to the respondent without any conditions, save for the failure to have received money from a third party, Mopani Copper Mines Plc as the excuse for the non-payment.

7.11 Furthermore, the trial Court also had consideration of the fact that the final payment agreement showed the respective invoice numbers, the submission dates, the certificate approval date, the payment due date, the amount and under status/comments the following narration:

'due for payment within 2 weeks. Deadline 25.08.2020 if deadline is not met an additional 1% (monthly) interest will be charged from original payment due date.'

7.12 From the foregoing, the admission of liability from the parties' previous correspondence was clear and unequivocal and did not spell out any conditions precedent for the appellant to make payments to the respondent.

7.13 It is thus clear that the appellant's defence fell short of the expected level of defence established from the respondent's claim and the case constituted a fit and proper case for the trial Court to enter judgment on admission.

7.14 The Judge in the lower Court was on firm ground in entering judgment on admission after finding that there was adequate clear and unequivocal admission by the appellant. Based on the foregoing, we find that the two grounds of appeal herein fail.

7.15 The appeal therefore lacks merit and 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