**IN THE COURT OF APPEAL OF ZAMBIA** **APPEAL NO. 201 OF 2022**

**HOLDEN AT LUSAKA**

*(Civil Jurisdiction)*


**B E T W E E N:**

**RUBIS ENERGY ZAMBIA LIMITED** **APPELLANT**

**AND**

**SWISS SKY ENTERPRISES LIMITED** **RESPONDENT**

**CORAM: Chashi, Sichinga and Sharpe-Phiri, JJA**

**ON: 26th April and 8th June 2023**

*For the Appellant:* *N. Ngoma and M. Nkunika, Messrs Simeza Sangwa & Associates*

*For the Respondent: G. Chombo, Messrs Chombo and Partners*

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# J U D G M E N T

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**CHASHI JA**, delivered the Judgment of the Court

***Cases referred to:***

1. ***John Mugala and Kenneth Kabenga v Attorney General (1988-1989) ZR 171***
2. ***Murray & Roberts Construction Limited and Kaddoura Construction Limited v Lusaka Premier Health Limited and Industrial Development Corporation of South Africa Limited - SCZ Appeal No 141/2016***
3. ***Queens Royale International and Kennedy Mambwe v Alpha Commodities Limited - CAZ Appeal No. 25 of 2022***
4. ***Good Marks Investments Limited v Wu Xinghua - CAZ Appeal No. 3 of 2021***

5. ***China Henan International Economic Technical Cooperation v Mwange Contractors Limited (2002) ZR 28***

***Rules referred to:***

1. ***The High Court Rules, Chapter 27 of the Laws of Zambia***

## 1.0 INTRODUCTION

1.1 This is an appeal against the Judgment on admission granted on 27th June 2022, by the learned Judge of the High Court (Commercial Division), Honourable Mr Justice Lameck Mwale.

## 2.0 BACKGROUND

2.1 On 9th January 2022, the Respondent who was the plaintiff in the court below commenced a court action against the now Appellant, by way of writ of summons, claiming the following reliefs:

**(i) An Order for immediate payment of K198,972.00 owed by the defendant**

**(ii) Interest at the prevailing Bank of Zambia lending rate.**

2.2 According to the attendant statement of claim and germane to this appeal, the Respondent under paragraphs 4,5,6,7 and 8 averred as follows:

"4 On 11th November 2021, the defendant terminated the plaintiff's dealership appointment for Mufulira and Copperhill Mall stations alleging poor performance and slow payments for products by the plaintiff

5. The plaintiff will aver at trial that prior to the takeover of the Mufulira and Copperhill Mall stations, the following products and their values were left at the stations

(a) K774,767.90 of white products (diesel and petrol)

(b) K187,025 was secured and kept in the safe for the Mufulira and Copperhill Mall stations

(c) K80,000.00 worth of lubricants and liquified petroleum gas

6. The plaintiff will prove at trial that on 15th November 2021, the defendant sent an email containing the plaintiffs updated statement, covering the dealership period

prior to the unilateral termination. According to the combined statements, the balance owing by the plaintiff as at 15th November 2021, before deduction of products in paragraphs 5 above was K842,820.28

7. The plaintiff will aver at trial that after subtracting K1,041,792.90 (the grand total of products and monies in paragraph 5) from K842,820.28 (the money owed to the defendant by the plaintiff as at 15th November 2021), the plaintiff's account ends in excess credit of K198,897.20 which up to now remains wholly unpaid by the defendant despite persistent reminders to have the said balance settled.

8. As a result, the plaintiff has suffered loss and/or damage and claims the following reliefs:

**(i) An Order for immediate payment of K198,972.00 as owing by the defendant**

**(ii) interest..."**

2.3 The Appellant settled its defence and counterclaim on 28th January 2022. Of relevance to the appeal, are the averments in the defence in particular paragraphs 4,5 and 6 which reads as follows:

**"4. Paragraph 5 is denied. The defendant will say that, save for lubricants worth K80,000 taken over by the defendant, the rest of the claims are imaginary**

**5. Paragraphs 6 and 7 of the statement of claim are denied. The defendant will aver that the authenticity of the event referred to is questionable. In any event the claims in the said email could only have been induced for ill conceived motives.**

**6. The plaintiff is not entitled to any of the reliefs in paragraph 8 or at all.**

## 3.0 APPLICATION FOR JUDGMENT ON ADMISSION

3.1 On 31st January 2022, the Respondent filed into court by summons and notice, an application for Judgment on admission pursuant to Order 53/6 (5) of **The High Court Rules[1] (HCR),** on the grounds that the Appellant had admitted in paragraph 4 that they owed the Respondent K80,000 worth of lubricants. Further that the defence does not specifically traverse the allegations of facts contained in paragraph 5 (a), 5 (b) and 7 of the statement of claim. That paragraph 1-6 of the defence contains bare denials of allegation of fact and general statement of non-admission of the allegation of facts.

3.2 In opposing the application, the Appellant stated that, contrary to what is contained in the Respondent's affidavit, the Appellant did inform the Respondent that it had custody of documents that demonstrate the fictional nature of the plaintiff's claim set out in paragraph 5 of the statement of claim that were set out in the defendants list of documents filed into Court. Further that the Appellant was desirous of leading

evidence to demonstrate the fiction associated with the claim.

## 4.0 DECISION OF THE COURT BELOW

4.1 After considering the application, affidavit evidence and arguments by the parties, the learned Judge formulated the issue for determination as follows:

> **"Whether the defendant's defence bears any admissions to the plaintiffs allegations in the statement of claim."**

4.2 After perusal of paragraphs 5 (a), (b) and 7 of the statement of claim, the learned Judge opined that, a proper construction of the paragraphs, revealed that the Appellant did not admit owing the Respondent lubricants worth K80,000.00.

4.3 The learned Judge was of the view that the Appellant did specifically traverse the allegations and that therefore, there was no categorical admission

4.4 The learned Judge then proceeded to consider paragraph 6 of the defence to determine whether it contained bare denial of allegations of fact and a general statement of non admission of the allegation of facts in

paragraph 8 of the statement of claim. After considering Order 53/6 **(HCR)**, the learned Judge opined that a general or bare denial of allegations of fact or a general statement of non admission of the allegations is not a traverse thereof.

4.5 According to the learned Judge, the Appellant had not traversed the claim as contained in paragraph 8 of the statement of claim, going by the contents of paragraph 6 of the defence. Further that the Appellant had not narrowed the issue in contention in paragraph 8 of the statement of claim by its response in paragraph 6 of its defence. That therefore paragraph 6 met the threshold for the court to enter Judgment in admission and accordingly entered the same in the sum of K198,972.00 with interest and costs.

**5.0 THE APPEAL**

5.1 Dissatisfied with the Judgment, the Appellant has appealed to this Court advancing three grounds of appeal as follows:

***(1) The court below erred in law and fact when it volunteered its decision on the***

***alleged bare denials contained in paragraph 6 of the defence and counterclaim without allowing the Appellant and Respondent to address it on the issue.***

(2) ***The court below erred in law and in fact when it held that paragraph 6 of the defence and counterclaim contains bare denials that failed to specifically traverse the reliefs sought and contained in paragraph 8 of the statement of claim.***

(3) ***The court below erred in law when it held that paragraph 6 of the defence and counterclaim meets the threshold to warrant entry of Judgment on admission against the Appellant***

## 6.0 ARGUMENTS IN SUPPORT OF THE APPEAL

6.1 In arguing the first ground, the Appellant submitted that the jurisdiction of the trial court is confined to questions and/or issues raised in the application by the parties. In that regard, the cases of **John Mugala and Kenneth Kabenga v Attorney General**[1] and **Murray & Roberts Construction Limited and Kaddoura**

**Construction Limited v Lusaka Premier Health Limited and Industrial Development Corporation of South Africa Limited**[2] were cited. It was submitted that if the court considers that there is a pertinent issue that has not been raised, but is indeed critical, such an issue must be presented before the parties, who must then be given an opportunity to be heard. That the issue before the court was whether paragraph 4 of the defence and counterclaim failed to meet the requirements of Order 53/6 **HCR** for failing to specifically traverse paragraphs 5 (a) 5 (b) and 7 of the statement of claim. It was further submitted that the court below should have confined itself to the issues which were before it for determination.

6.2 That after finding that there were no admissions, the learned Judge went on a tangent of his own and began to determine the issue of whether paragraph 6 of the defence and counterclaim was an admission of paragraph 8 of the statement of claim, when none of the parties had raised such an issue.

6.3 It was submitted that the court below ruled on a matter which was not before it for determination, without affording the parties an opportunity to be heard, thus volunteered a ruling in total disregard of the rules of the court and numerous decisions from this Court and the Supreme Court.

6.4 The second and third grounds were argued together. Reference was made to Order 53/6 **HCR** and several cases, amongst them the cases of **Queens Royale International and Kennedy Mambwe v Alpha Commodities Limited**[3] and **Good Marks Investments Limited v Wu Xinghua**[4] and submitted that, by the provision of the law, a defence must traverse every allegation of fact. That additionally, the defence must not contain bare denials or general statements of non-admission. That therefore an averment on a point of law or statement outlining the reliefs sought such as paragraph 8 of the statement of claim does not require to be traversed as they are not factual allegations but reliefs sought.

## 7.0 ARGUMENTS IN OPPOSITION

7.1 In response to the first ground, it was submitted that the learned Judge did not volunteer any decision. Our attention was drawn to paragraph 6 of the affidavit in support of summons for Judgment on admission appearing at page 30 of the record of appeal (the record) and submitted that the Respondent deposed as follows:

> ***"That I am advised by Counsel and believe the same to be true that paragraph 1 to 6 of the defence contains bare denials of allegations of facts and general statement of non admission of the allegations of facts."***

7.2 We were further referred to page 34 of the record, where the Respondent in its skeleton arguments made the following prayer:

> ***"The plaintiff's case in this application is that the defendants have expressly admitted in paragraph 4 of their defence that K80,000.00 is owing. Further it has been argued in our submission that the defendant has failed to specifically traverse the allegation of facts contained in paragraph 5***

***(a) and (b) as well as paragraph 7 of the statement of claim and that the defence filed by the defendant contains general and bare denials as contained in paragraphs 1 to 6 contrary to the mandatory rules of this Court. We therefore pray that this is a suitable case for your Lordship to enter Judgment on admission against the defendant..."***

7.3 According to the Respondent, the Appellant filed an affidavit in opposition, with skeleton arguments, which appears at pages 37-44 of the record which indicate that the Appellant was aware of the issues raised by the Respondent and was allowed and given an opportunity to address the court on the same. It was further submitted that, the record will show at page 29 that the court below was properly moved by way of summons pursuant to Order 53/6 (5) **HCR** and both parties made their submissions and the court below accordingly rendered its Judgment on admission.

7.4 In response to the second and third grounds, it was the Respondent's submission that the court below did not err by holding that paragraph 6 of the defence and

counterclaim contained a bare denial of allegation of facts and a general statement of non admission of the allegation of facts. That the court was rightly guided by the holding in the case of **China Henan International Economic Technical Cooperation v Mwange Contractors Limited**[5] where it was held that:

> ***"The new dispensation in commercial matters is that parties must place their cards on the table early in the litigation to assist in narrowing issues in 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."***

7.5 It was the Respondent's contention that the court below was on firm ground, as the statement of claim shows that numerous statements of facts were made which all narrowed down to the claims in paragraph 8. That in contrast the Appellant's defence shows that paragraphs 1-6 contains bare denials of those facts and general statement of non-admission of the facts raised in the statement of claim

7.6 In conclusion, we were urged to dismiss all the three grounds of appeal as they are ill fated and lack merit.

**8.0 ARGUMENTS IN REPLY**

8.1 In reply to the arguments in opposition, the Appellant submitted that the only document that sets out the issues for determination is the notice of intention to raise issues in *limine* filed by the Respondent. That the lower court ought to have confined itself to the issues which were before it on the application for Judgment on admission.

8.2 The Appellant contended that, the lower court raised an issue not raised by any of the parties, as the question of whether paragraph 6 of the Appellant's defence and counterclaim contain any admission for failing to specifically traverse paragraph 8 of the statement of claim was not canvassed before the court by the Respondent.

8.2 The Appellant further submitted that paragraph 8 of the statement of claim does not contain any factual allegation capable of being traversed. That the circumstances of this case did not satisfy the threshold

requirement for a Judgment on admission. We were urged to allow the appeal with costs.

## 9.0 DECISION OF THE COURT

9.1 After considering the record and in particular the three grounds of appeal as contained in the memorandum of appeal and the arguments by the parties, we shall deal with the grounds, in the same manner as the parties have addressed them.

9.2 The first ground attacks the learned Judge for extending for determination, issues which were not before him, hence the parties not being given an opportunity to address the court on the said issues.

9.3 We note that in the affidavit in support of summons for Judgment on admission, in particular paragraph (6), the Respondent made averments to paragraphs (1) to (6) of the defence and counterclaim alleging that they contained bare denials of allegations of fact and general statements of non admission of the allegations of facts, and repeated this in its skeleton arguments and list of authorities. However, we note from the notice of intention to raise issues in *limine* at page 35 of the

record that the allegation by the Respondent was that the Appellant had failed to specifically traverse the allegations of facts contained in paragraphs 5 (a), 5(b) and 7 of the statement of claim. The notice did not make any mention of paragraph (1) to (6) of the defence and counterclaim.

9.3 The issue which then arises under ground one is whether the learned Judge was wrong in the manner that he approached this matter. We note that in formulating the issue for determination, the learned Judge *suo moto* decided to look at the defence and counterclaim holistically and not be limited to the portions of the defence and counterclaim which were in response to paragraphs 5(a), 5 (b) and 7 of the statement of claim which were being highlighted by the Respondent as being admissions.

9.5 This being a commercial matter, we see no wrong in the manner the learned Judge approached the matter. Order 53/6 (2) **HCR** states that the defence shall specifically traverse every allegation of fact made in the statement of claim or counterclaim, as the case may be.

Order 53/6 (3) states that a general or bare denial of allegations of fact shall not be a traverse thereof.

9.6 Order 53/6 (4) states that a defence that fails to meet the requirement of Rule 6 (3) shall be deemed to have admitted the allegations not specifically traversed. Order 53/6 (5) states as follows:

> *"Where a defence fails under sub-rule (4), the plaintiff or defendant or the Court on its own motion, may in an appropriate case, enter Judgment on admission"* (the underlining is ours for emphasis only)

9.7 In the **China Henan International Economic Technical Cooperation** case, one of the grievances by the Appellant was that judgment on admission ought to be entered upon application by a party and not by the court on its own motion. In considering Practice Direction 2 of **The Practice Directions Governing Commercial Matters**, which were applicable then, and which now has been taken replaced by Order 53/6 **HCR** as amended under **The High Court (Amendment) Rules, 2012 - Statutory Instrument No. 27 of 2012**, the Supreme Court had this to say:

**"In the context of commercial matters...If a defence fails to meet the requirements of practice Direction 2, the plaintiff may be entitled to enter Judgment on admission. This in our view, does not entail a party going back to take out a summons or a motion to enter Judgment on admission. The Judgment can be entered at the scheduling conference because this is the time when the court is considering, the pleadings; what directions to give and decide whether the matter should proceed further. The case flow management techniques at play requires the court to be in control of the pace of litigation and properly direct the course of events. It would be absurd to expect a court which is in control, to pause and wait for an application where clearly the defence is deemed to have admitted the claim. This is without prejudice to Order 27/3 of The Rules of the Supreme Court and Order 21/6 of The High Court Act where a plaintiff *"may"* apply by motion or summons to enter Judgment on admission."**

9.8 Although at the time, the learned Judge in the court below decided to deal with the defence, it was not at a

scheduling conference, he was however considering the pleadings, that is the statement of claim and the defence and counterclaim. He was therefore in order and in line with the **China Henan International** case at liberty to deal with the pleadings holistically. In the view that we have taken, we find no basis on which to fault the learned Judge for moving on his own motion in the absence of the parties. The first ground of appeal therefore fails.

9.9 The issue that arises for determination and we shall determine that under the second and third grounds of appeal, is whether this was an appropriate case for the learned Judge to enter judgment on admission.

9.10 A traverse in the strict technical meaning and more ordinary acceptation of the term signifies a direct denial in formal words *"without this, that etc."* We note that Order 53/6 **HCR** speaks to traverse of allegations of facts. Paragraph (8) of the statement of claim relates to the claim for the relief being sought. A relief in simple terms is a redress or benefit, a party asks of a court and cannot therefore be equated to an allegation of fact.

9.11 Paragraph (8) of the statement of claim is a summary of the relief the Respondent was seeking. It is in our view not an allegation of fact which needed to be specifically traversed. Therefore, the averment by the Appellant under paragraph (6) of the defence and counterclaim that "the plaintiff is not entitled to any of the reliefs claimed in paragraph 8 or at all" cannot be said to be an admission, bare denial of an allegation of fact which needed to be specifically traversed.

9.12 Furthermore, having made a decision from the particulars of the statement of claim and the defence and counterclaim and arriving at the decision that there were no admissions in the main body of the defence and counterclaim as stated at page R6 of the Judgment on admission where he stated as follows:

> **"Further as regards the plaintiff's contention that the defence does not specifically traverse the allegations of paragraph 5(a), 5 (b) and 7 of the statement of claim, as pointed out above, I am of the considered view that the defendant does specifically traverse the allegations."**

The learned Judge should have ended there and not proceeded to consider paragraph (8) of the statement of claim and paragraph (6) of the defence and counter claim as the foundation on which they were anchored had already been determined by the learned Judge. This therefore was not an appropriate case for entering Judgment on admission.

**10.0 CONCLUSION**

10.1 The second and third grounds of appeal having succeeded, this is a proper case to set aside the judgment on admission and refer the matter back to the same learned Judge for directions and we accordingly Order. Costs will abide the outcome of the matter in the court below.

**J. CHASHI**
**COURT OF APPEAL JUDGE**

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

**N.A SHARPE-PHIRI**
**COURT OF APPEAL JUDGE**