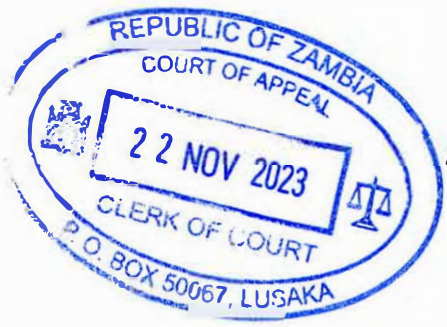
IN THE COURT OF APPEAL OF ZAMBIA **Appeal No. 240/2022**

HOLDEN AT NDOLA

(Civil Jurisdiction)

BETWEEN:



GNM PRODUCTS LIMITED **APPELLANT**

AND

TOTAL ENERGIES MARKETING LIMITED **RESPONDENT**

CORAM: **CHASHI, NGULUBE AND PATEL, JJA**

On 15th & 22nd November 2023

For the Appellant: Mr. A. Chileshe

Messrs. Kasama Chambers

For the Respondent: Mr. M. Machaya

Messrs. Equitas Legal Practitioners

JUDGMENT

Patel, JA, delivered the Judgment of the Court

Cases Referred to:

1. Jamas Milling Company Limited v Imex International Limited (2002) Z.R. 79
2. China Henan International Economic Technical Cooperation v Mwange Contractors (2002) Z.R. 28
3. Chazya Silwamba v Lamba Simpito (2010) Z.R. Vol. 1 at page 475
4. Mohamed v The Attorney General (1982) Z.R. 49
5. Finance Bank Zambia PLC v Lamasat International Limited -CAZ Appeal No. 27/ 2018
6. China Copper Mines Limited v Tikumbe Mining Limited -CAZ Appeal No. 17/ 2017
7. Himani Alloys Limited V Tata Steel Limited (SCI) Civil Appeal No.5077/ 2011
8. Zega Limited v Zambezi Airlines and Diamond General Insurance Limited -SCZ Appeal No. 39/ 2014
9. Freshview Cinema's Limited v Manda Hill Limited -SCZ Appeal No. 174/2013

Legislation referred to:

1. The High Court Act, Chapter 27 of the Laws of Zambia
2. The Limitations Act, 1939 (UK)
3. The Supreme Court Practice (White Book) 1999

Other Works referred to:

1. Halsbury Laws of England, Volume 24 page 208, paragraph 376
2. Black's Law Dictionary

1.0 INTRODUCTION

This is an appeal against the Judgment of **Mbewe B. J.** delivered on 14th April 2022, on an action filed on 18th February 2022 in which Judgment on Admission was entered in favour of the Respondents and is now the subject of this appeal.

2.0 BACKGROUND

2.1 The Plaintiff, (now Respondent) commenced these proceedings against the Defendant (now Appellant), by way of Writ of Summons and Statement of Claim filed on 18th February 2022 claiming the following reliefs:

i. *An Order for the payment by the Defendant of the sum of **ZMW 8, 080, 696.30** being the purchase price of fuel and other lubricants supplied to the Defendant;*
ii. *Damages for breach of contract;*
iii. *Interest on the amount found due on the recoveries;*
iv. *Costs of and incidental to these legal proceedings;*
v. *Any further or other relief that the Court may deem fit.*

2.2 The Plaintiff pleaded that sometime in 2016, the Plaintiff and the Defendant entered into a contract for the purchase and supply of fuel and lubricants.

2.3 According to the Statement of Claim, the Plaintiff supplied the Defendant fuel worth **ZMW 8,080,696.30.** The Defendant was making monthly payments in or about 2019, but stopped, and has not made any payments since.

2.4 The particulars of the breach, was a failure on the part of the Defendant to pay the price of **ZMW8,080,696.30** following the delivery of fuel by the Plaintiff, and that the Defendant ignored and neglected reminders to settle the outstanding value of the fuel supplied and by reasons of which failure, the Plaintiff suffered loss and damage.

2.5 The Defendant filed its defence on 11th March, 2022 and disputed the accuracy of the amount of **K8,080,696.30** as the value of fuel supplied.

2.6 It was averred that employees of both the Plaintiff and the Defendant were involved in pilferage and siphoning of fuel. It was further averred that some former employees of the Defendant were colluding with employees of the Plaintiff to get cash from the Plaintiff's filling stations.

2.7 It was the defence that the foregoing malpractices were brought to the attention of the Plaintiff as well as reported to the Police but the Plaintiff continued billing the Defendant for fraudulent transactions, forcing them to stop making monthly payments, pending investigations by the Police.

2.8 The matter was scheduled for a Scheduling Conference on 14th April 2022, on which date, the lower Court entered Judgment on Admission, which forms the main subject of this appeal.

3.0 DECISION OF THE COURT BELOW

3.1 The trial Judge having considered the pleadings, interrogated the defence, and was of the considered view that the defence consisted of bare denials and did not meet the requirements of **Order 53 rule 6 (2) to (4) of the High Court Rules**[1].

3.2 The lower Court entered Judgment on Admission for the Respondent under **Order 53 Rule 6 of the High Court Rules**[1].

3.3 The lower Court was of the settled mind that it should invoke **Order 53 Rule 6 (2)**[1], and relied on the case of **Jamas Milling Company Limited v Imex International Limited**[1] in which the Supreme Court spelt out the purpose for which the Commercial Division was established as a fast track court and the spirit in which the Court was established, not to allow dilatory conduct and delay of proceedings.

3.4 The lower Court referred to the decision of the Supreme Court in the case of **China Henan International Economic Technical Cooperation v Mwange Contractors**[2] in which the Court held inter alia that:

"Judgment on admission can in appropriate cases be entered at the scheduling conference because this is the time the Court considers the pleadings and directions the matter should take."

3.5 The lower Court found that the Appellant's defence did not deny receiving fuel but sought to dispute the accuracy of the quantities that may have been delivered without stating the quantities it believes it actually received. The lower Court acknowledged the Appellant's allegation that there were malpractices carried out between the Appellant's own employees and

those of the Respondents. It was the Court's observation that the Appellant did not allege that it invoked its right to terminate the contract or take specific action against the Respondent for the actions of their employees, but merely alluded to reporting the matter to the Police.

3.6 In the Court's view, the Appellant did not deny owing the Respondent but alluded to there being a possible discrepancy of quantities and thereby the sum owed which the Appellant did not traverse or plead with sufficient clarity as to what it alleges to owe, how much it paid for and the balance that may be due.

3.7 It was the lower Court's view that the Appellant's defence did not disclose a defence on the merits to the Respondents claims, and that there was no issue that should proceed to trial and relied on the decision of **Chazya Silwamba v Lamba Simpito**[3].

3.8 In arriving at its conclusion, the lower Court also found that the Respondent's claim for damages succeeded and having found that there was no defence, the Learned Judge, entered judgment on admission in favor of the Respondents for the sum of ZMW8, 080, 696.30.00, with interest as per the Judgment Act. The lower Court also awarded the Respondent damages for breach of contract to be assessed by the Hon. Registrar of the Court and awarded costs.

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 28th June 2022, advancing three (3) grounds of appeal:

1. *That the Respondent's action having been founded on contract is statute barred in that out of the Respondent's 26 claims of debt as evidenced by the dates on the invoices indicated on the list of documents which were to be relied on by the Respondent at trial, 20 of the claims premised on the dates of the said invoices are statute barred as the claims are being made more than 6 years from the cause of action in 2015.*

2. *The Honourable Judge in the court below erred in fact and law when despite the Advocate for the Appellant having brought to the judge's attention at the Status Conference the fact that the action was statute barred and that a preliminary issue would be formally raised, the Honourable judge ignored this fact and still went ahead to enter judgment in admission.*

3. *That the Honourable Judge in the Court below erred in law and fact when he entered judgment on admission for the Respondent in the sum of K8,080,696.30 when in fact the Appellant disputed the value of the fuel supplied and the Appellant justified its action by halting payments.*

5.0 APPELLANT'S ARGUMENTS IN SUPPORT OF THE APPEAL

5.1 We have duly considered and appreciated the Appellant's Heads of Arguments filed on 19th October 2022 and Arguments in Reply filed on 9th December 2022 respectively, which will not be recast, save for emphasis as necessary.

6.0 RESPONDENT'S HEADS OF ARGUMENT

6.1 We have fully considered and appreciated the Respondent's Heads of Argument filed on 26th November 2022, which will equally not be recast, save for emphasis as necessary.

7. THE HEARING

7.1 At the hearing of the appeal, Counsels placed reliance on their respective heads of arguments and made oral submissions in support. Counsel Machaya appeared to place great importance on the issue of limitation and invited the Court to note that the limitation period had been extended by the conduct of part payment by the Appellant.

7.2 When asked by the Court to point to a document before the lower Court that confirms the date on which payment was stopped, Counsel referred to the bank statement listed in the Appellant's list of documents, as being the source of its submission.

7.2 Counsel Chileshe countered that submission by arguing that the bank statement referred to by the Respondent, as proof of the dates at which payments were made, at page 21 of the Record of Appeal, does not in fact show the dates when payments were made or stopped, as it is only listed as a list of documents, and had not been produced.

8. DECISION OF THIS COURT

8.1 We have carefully considered the grounds of appeal reproduced in *paragraph 4* above, the impugned Judgment on Admission and the

arguments of the Parties. We intend to interrogate ground three of the appeal, as the whole appeal hinges on one primary issue, namely:

Was this an appropriate case for the entry of Judgment on Admission?

If we opine in the affirmative, we will then interrogate the grounds pertaining to the statute of limitations and the propriety of entering Judgment on the amount claimed, with interest and damages.

8.2 We have noted above that the action was filed on 16th February 2022 and Judgment on Admission, the subject of this appeal, was entered on 14th April 2022, by the Court, *suo moto,* and at a Scheduling Conference.

8.3 It has been argued by the Appellant that they informed the Court that they intended to raise the issue of (some of) the claims being statute barred, as it was noted that of the 26 invoices listed in the accompanying list of documents, 18 related to periods in 2015 which were time barred at the date of action. The Respondent has countered that there was no such submission and has urged the Court to look at the Record of Proceedings in support of the argument that a matter not raised in the Court below, cannot be raised on appeal.

8.4 For the reasons that will become apparent, we will not comment on whether some of the claims were caught up in the statute of limitation, as argued by the Appellant, as per **section 2 (1) of the Limitations Act,**[2] or whether the cause of action was deemed deferred, as argued by the Respondent, to the date when payment was stopped, in accordance with **section 23 of the Limitations Act,**[2] dealing with acknowledgment and part payment. Reference was also made to the learned authors, **Halsbury's**

Laws of England[1] which guide that where there is an acknowledgment in writing or part payment, a fresh cause of action accrues.

8.5 We have noted the arguments advanced by the Respondent, that payments for the delivery of fuel having stopped sometime in 2019, that it must follow that the action accrued on the last date of the part payment made on 23 February 2019, as per the bank statement in the Appellant's list and description of documents. We refer to **paragraph 1.9** of the Heads of Argument. We have scrutinised the Pleadings before the lower Court, including the list of documents of both parties. The Statement of Claim refers to a contract for the supply of fuel and lubricants, entered into sometime in 2016 under which the Appellant is said to have made monthly payments in or about 2019, which payments it stopped making. *(paragraphs 3,4 & 5 refer).*

8.6 The defence avers that payments were stopped, upon the Appellant noting the rampant malpractice, including allegations of pilferage and siphoning of fuel involving the collusion of the employees of both Parties. There is no date in the Pleadings when payments were apparently stopped. Further, the Appellant's list of documents, item 2, at **page 21** of the Record of Appeal, refers to a bank statement showing payments made to the Plaintiff, and makes reference to a statement dated 23 February 2021. The only logical conclusion on which the Respondent in **paragraph 1.9** of its heads of argument, draws the inference of the date of 23 February 2019 being the date on which the last payment was made, can only be a

submission from the Bar, as it is not supported by any evidence that was available to the lower Court, at the time it entered Judgment on Admission.

8.7 We also note that the Appellant in its List of Documents, listed a schedule of payments made to the Respondent and a Police Report on the malpractices in the delivery of fuel, as documents it intended to produce and place reliance on at the trial of the matter.

8.8 We have examined the reasons advanced by the lower Court in proceeding in the manner that it did. We are alive to the principles and philosophy for the creation of the Commercial Division of the High Court. We are fully alive to the principles espoused by the Supreme Court in its decision in the cited case of **Jamas Milling Company Limited v Imex International Limited**[1]. We are also aware of the powers conferred by **Statutory Instrument 58 of 2020 of the High Court Rules**[1] which calls on the trial Courts, in the exercise of case management, to move matters to conclusion. We do not challenge or usurp those powers in any way, save to state that the same must be exercised following established rules and following proper principles of law.

8.9 **Order 53 rule 6 (4) of the High Court Rules** states that a defence that fails to meet the requirements of this rule shall be deemed to have admitted the allegations not specifically traversed. **Order 53 rule 6 (5)** provides:

"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 emphasis is ours).

8.10 We note that the lower Court used the decision of the Apex Court in the case of **China Henan International Economic Technical Cooperation v**

Mwange Contractors[2] as authority for the principle that Judgment on admission, can, ***in appropriate cases,*** be entered at the scheduling conference. (the emphasis is ours). The issue of what is an appropriate case, is what needs to be examined by the lower Court placing adequate attention to the pleadings at that stage and keeping in mind the established fundamentals of the discharge of the burden of proof.

While conceding the power of the Court to enter Judgment on Admission *suo moto*, the Appellant has submitted that the admission must be clear and express. Reference was made to the provisions of **Order 27 rule 3 of the Rules of the Supreme Court**[3]**.**

8.11 The case *classicus* which deals with judgment on admission, is the case of **Chazya Silwamba v Lamba Simpito**[3]**.** The lower Court correctly cited it and quoted the 8 points of importance and which need to be substantiated, before a court may enter judgment on admission. We are of the considered view that had the lower Court carefully analysed the principles settled by the case of **Chazya Silwamba**[3], it may not have entered judgment on admission, and especially at the stage in the pleadings, where so few details were available, and evidence not tested. We remind ourselves that the matter was scheduled for a Scheduling Conference and the court notes that are available were simply notes taken in long hand by the Hon Judge himself.

8.12 It is cardinal, that a Plaintiff is not automatically entitled to Judgment, even if a defence has failed. Ngulube D.C.J. as he then was, in the case of **Mohamed v The Attorney General**[4] stated as follows:

"An unqualified proposition that a plaintiff should succeed automatically whenever a defence has failed is unacceptable to me. A plaintiff must prove his case and if he fails to do so, the mere failure of the opponent's defence does not entitle him to judgment. I would not accept the proposition that even if a plaintiff's case has collapsed of its inanition or for some reason or other, judgment should nevertheless be given to him on the ground that defences set up by the opponent has also collapsed. Quite clearly a defendant in such circumstances would not even need a defence."

8.13 We have stated above that the facts as pleaded, did not necessarily prove that the Respondent was owed the sums of money that it had claimed, the list of documents, (the argument on limitation aside), only provided the Invoice Numbers without the corresponding amounts. Further, the Statement of Claim also pleaded that some payments were made before they were stopped, without so much as a schedule or any averments to what amounts were paid. That alone, should have informed the lower Court that a claim for the sum of ZMW 8, 080,696.30 had not been proved and or substantiated to the level required.

8.14 The Appellant has also relied on the case of **Finance Bank Zambia PLC v Lamasat International Limited** [5] in which it was 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."

8.15 We refer to our decision rendered in the case of **China Copper Mines Limited v Tikumbe Mining Limited,**[6] in which we cited with approval, the holding in the Indian case of **Himani Alloys Limited vs Tata Steel Limited**[7] on the issue of the admission being a discretionary remedy, and the requirement that the admission should be unequivocal, when it stated as follows:

"It should be a conscious and deliberate act of the party making it, showing an intention to be bound by it. The Court on examination of 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 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. In short, the discretion should be used only when there is a clear admission which can be acted upon."

8.16 The same approach was adopted by the Supreme Court in the case of **Zega Limited v Zambezi Airlines and Diamond General Insurance Limited**[8] and the case of **Freshview Cinema's Limited v Manda Hill Limited**[9]**.** What is fundamental, is that for the purpose of entering judgment on admission, the admission must be unconditional and or unequivocal. The learned authors of **Black's Law Dictionary**[2] define the terms as follows:

''Unconditional- not limited by a condition, not depending on uncertain event or contingency absolute

Unequivocal- unambiguous, clear, free from uncertainty''

8.17 It is as clear as day, that the *''admissions''* that the lower Court sought to rely on were not plain, clear or unequivocal, and indeed may have needed a magnifying glass to establish its meaning. Further, and as we have stated, it is trite that the Respondent's claims had not been proved, simply in the face of a failed defence.

8.18 In our considered view, at this stage of the proceedings, the Respondent's evidence had not yet been tested, the only material before the Court was a list of Invoices, whose values were yet to be verified and whose total value was not yet proved. We are of the considered view that entering Judgment on Admission, at this stage, was premature and that the defence, no matter that it may not have been properly cast, the burden of proof had not yet been discharged. We hold the view that there were triable issues and that admissions of having received fuel, were not clear and unambiguous. We refer to paragraphs 4 to 7 of the defence.

8.19 For the reasons above, we answer the issue raised in the negative, and are of the considered view that this was not an appropriate case for the entry of judgment on admission, not especially at the stage at which it was entered. Whilst we do not in any way wish to fetter the exercise of discretion reposed in trial courts, we caution that the same must be exercised, in a manner consistent with the law and on a case-by-case basis. A one-size fits all, approach does not work in the circumstances of this case. Accordingly,

we set aside the Judgment on Admission. For reasons stated above, we will not interrogate the other grounds on limitation, as the same are best resolved by the trial Court.

9.0 CONCLUSION

We therefore allow the appeal, set aside the Judgment on admission, and refer the matter back to the High Court for re-hearing before another Judge of the Commercial Division.

Costs in this Court shall abide the outcome of the proceedings in the Court below.

J. CHASHI
COURT OF APPEAL JUDGE

P.C.M. NGULUBE
COURT OF APPEAL JUDGE

A.N. PATEL S.C.
COURT OF APPEAL JUDGE