

**IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA**

2015/HPC/0005

(Civil Jurisdiction)

BETWEEN:

ELECTRICAL MAINTENANCE LUSAKA LIMITED

PLAINTIFF

AND

**SAVENDA MANAGEMENT SERVICES LIMITED
DEFENDANT**

1ST

CLEVER MPOHA

2ND DEFENDANT

Before Hon. Mr. Nigel K. Mutuna this 17th day of June 2015.

**For the Plaintiff : Mr. M. Ndalameta of Messrs Musa
Dudhia**

& Co.

For the Defendant : N/A

R U L I N G

Cases referred to:

- 1) *John Lancaster Radiators Ltd vs. General Motor Radiator Company Ltd (1946) 2 ALL ER 685*
- 2) *Warner vs. Sampson (1959) 1 ALL ER 120*
- 3) *China Henan International Economic Technical Co-operation vs. Mwange Contractors Limited (2002) ZR 28*
- 4) *Technistudy vs. Kelland (1976) 3 ALL ER 632 C.A.*
- 5) *Ash vs. Hutchinson & Co. (Publishers) (1936) ch. 489*

Other authorities referred to:

- 1) *Supreme Court Practice, 1999 edition*
- 2) *High Court Act, Cap 27*

This is an application by the Plaintiff in which it seeks to enter judgment against the Defendants. The application is made pursuant to order 27 rule 3 of the **Supreme Court Practice**, 1999 edition (white book) as read with order 53 rule 6(5) of the **High Court Rules**.

The gist of the Plaintiff's application is that the amended defence filed by the Defendants is evasive, founded on general or bare denials and statements of non admission. It is contended further that the Defendants have admitted owing at least K242,330.30.

The evidence in support and opposition of the application is contained in the affidavits filed in support and opposition. The former is dated 23rd April 2015, and sworn by one Rohan Cassim, whilst the latter is dated 13th May 2015 and sworn by the Second Defendant.

The evidence of Rohan Cassim reveals that on divers days, the Plaintiff supplied various electrical parts and equipment to the First Defendant which it agreed to purchase on credit. That the Second Defendant agreed to guarantee the said credit sale up to the sum of K300,000.00. It also revealed that the amended defence filed by the Defendants in response to the Plaintiff's claim is evasive, founded on general or bare denials and statements of non admission. Further that, the Defendants have admitted owing the sum K242,330.30.

The evidence of the Second Defendant Clever Mpoha reveals that in relation to the K242,330.30 which it is alleged the Defendants have admitted is owing, the Defendant merely admits that some goods to the value of that amount were received. Further that, they paid cash for some of the goods and have requested the Plaintiff to provide a reconciliation statement which it has failed or neglected to do.

The evidence also reveals that the Defendants' amended defence has denied each and every allegation made by the Plaintiff in the statement of claim. Further that, the Plaintiff is not specific as to which paragraphs in the amended defence contain bare denials or admissions.

The matter came up for hearing on 19th May 2015. Counsel for the Plaintiff attended and relied on the skeleton arguments and affidavit in support. He also informed the court that counsel for the Defendants, had indicated to him that he would not be in attendance and would rely entirely on the affidavit in opposition and skeleton arguments in opposing the application.

In his arguments, Mr. M. Ndalameta argued that the standard that a defence on the Commercial List requires is set out in order 53 rule 6 of the **High Court Rules**. He argued that in paragraphs 8, 10, 12, 13, 14, 15, 18, 19, 21 and 22 of the amended defence the Defendants simply deny the Plaintiff's allegations without traversing them. It was argued that the Defendants must know how much cash was allegedly paid by them. He argued in this regard that in the case of **John Lancaster Radiators Ltd vs. General Motor Radiator Company Ltd (1)** the court explained the issue of evasive pleadings by stating, that there is an obligation upon the defendant to state what it is it owes or thinks it owes, if it denies a debt. Counsel argued that the contents of paragraphs 16, 17, 20 and 21 of the amended defence are also evasive because the Defendants chose not to comment. As was the case with paragraphs 1, 5 and 6 of the defence where the Defendants indicated that they were not admitting the claim. In concluding arguments on the issue of bare denials counsel drew my attention to order 19 rule 19 of the whitebook and the cases of **Warner vs. Sampson (2)** and **China Henan International Economic Cooperation vs. Mwange Contractors Limited (3)**. He quoted passages from the foregoing cases on the need for a defence to specifically traverse allegations and that judgment may be entered on admission where the defence falls short of the requirements of pleadings.

The second limb of counsel's argument was that the Plaintiff is entitled at the very least to entry of judgment in the admitted sum of K242,330.30. He relied on order 27 rule 3 of the whitebook.

Counsel's prayer was that the application should be allowed.

In the Defendant's skeleton arguments, reference was made to order 53 rule 6(1) of the **High Court Act** on the rules on pleading as read with

order 18 rule 7(1) of the whitebook. It was argued that these rules on pleadings show that a claim must state in clear terms the material facts upon which a party relies and show a clear cause of action. Where the pleadings fall short of this requirement they may be struck out or set aside. It was argued that paragraphs 3, 4, 5, 6, 7, 10, 12, 13, 14, 15, 16, 17, 18, 19, 20 and 22 of the statement of claim are repetitive, long winded, speculative and ought to have been condensed in a few short paragraphs with all the material facts. Further that the paragraphs also contain evidence and immaterial issues.

It was argued that the court's power to enter judgment on admission is discretionary and exercised for purposes of saving time and costs. That a reading of the defence indicates that it has raised sufficient objection to the statement of claim's material facts warranting the matter going to trial. As regards the purported admission of the sum of K242,330.30, it was argued that whilst the First Defendant admits receiving the goods it also states that cash payments have been made.

The Defendants prayed that the application should be dismissed.

I have considered the affidavit evidence and the arguments. Counsel for both parties have articulated the law and authorities well on the issue of settling of pleadings on the Commercial List. Put in summary form, a defendant must deny or traverse every allegation raised in a claim otherwise he may be amenable to judgment being entered against him.

Having confirmed that the parties are on firm ground in terms of the applicable law and authorities, I now turn to consider whether or not this a case fit for entry of judgment on admission. In doing this I will examine the amended defence to see if it conforms to the rules on pleadings or if it has any admissions.

The starting point is the allegation that the Defendants have admitted owing the sum of K242,330.30. The allegation from which this claim arises is contained in paragraphs 9, 10, 11 and 12 of the statement of claim and it is to the extent that the Plaintiff invoiced and supplied goods to the tune

of K242,330.30. That the First Defendant collected the said goods but fails and or neglects to pay for them. The Defendants response to the said paragraphs is at paragraphs 9, 11, 12 and 13. What is evident from the foregoing paragraphs is that the First Defendant does not deny that it ordered certain goods from the Plaintiff. The Defendants however deny that all the goods that they ordered were supplied. It is further alleged that certain payments were made towards the goods supplied and that the Defendants have requested the Plaintiff to reconcile the account so that if any moneys are found to be due, they would pay.

In my considered view, the position taken by the First Defendant on this issue cannot be termed an admission warranting entry of judgments. The view I take is that the First Defendant has accepted that indeed it did order goods and accepted to collect them. It has not admitted being indebted in the sum of K242,330.30 because it has traversed the allegations and stated that it has made certain cash payments and requested the Plaintiff to reconcile the account. There is an obligation placed upon the Plaintiff to clearly explain its claim and as such if a defendant requests for a reconciliation or clarification of the claim, such a request must not be considered as an admission. The whitebook at Order 27 rule 3 subrule 2 has defined an admission as it relates to pleadings. It states that *“such admissions may be express or implied, but they must be clear”*. (Underlining is the court’s for emphasis only). The case of ***Techinstudy Limited vs. Kelland (4)*** quoted in the same order of the whitebook puts the position in its proper perspective when Lord Roskill LJ states as follows:

“As the cases show, an order should only be made under that rule if it is plain that there are either clear express, or clear implied admissions.”

Similarly in an earlier case of ***Ash vs. Hutchinson (5)*** referred to in the same order, Greene LJ stated thus:

“A plaintiff who relies for the proof of a substantial part of his case upon admissions in the defence, must in my judgment, show that

the matters in question are clearly pleaded and as such clearly admitted; he is not entitled to ask the court to read meanings into his pleadings which upon a fair construction do not clearly appear in order to fix the Defendant with an admission”.

The view I take is that the contents of the paragraphs of the amended defence I have alluded to fall far short of the test laid down in these two cases. The admission, if it can be so called, is not clear because it is made subject to reconciliation of the account. Further, it calls into question the Plaintiff's pleading as per the **Ash** case, as it seeks clarification of the claim by reconciliation.

In view of the findings I have made in the preceding paragraphs, the claim as it relate to the K242,300.30 fails.

The next step is a consideration of the paragraphs complained of in the amended defence. The first ones complained of are paragraphs 1,5 and 6 of the amended defence. As regards paragraph 1 of the amended defence, it is a response to paragraph 1 of the statement of claim which describes the Plaintiff and states its line of business. In my considered view, the description of the Plaintiff and its line of business is not a matter in contention requiring the Defendants to specifically deny or traverse. The response given by the Defendants is the honest position they hold which is, that the description and line of business of the Plaintiff is in the Plaintiffs peculiar knowledge. As regards paragraphs 5 and 6 I find that there is sufficient denial of the contention made by the Plaintiff. This is on account of the fact that the Defendant specifically state that they do not admit the contention, which is a denial (as I shall demonstrate in the latter part of this ruling) and task the Plaintiff to specifically prove the contention of their having been a guarantee. The paragraphs are not in my considered view, bare denials or evasive.

I now turn to consider paragraph 16, 17, 20 and 21 where it is contended that the Defendants chose not to comment. The paragraphs in issue are a response to paragraphs 16, 17, 20 and 21 of the Plaintiff's statement of claim in which the Plaintiff makes averments of facts about certain steps it

took internally. These facts are facts that only the Plaintiff knows about and they are therefore in the peculiar knowledge of the Plaintiff. As such the responses by the Defendant are not in my considered view, bare denials, evasive or failure to traverse. The Defendants in the said paragraphs merely states the facts as they are which is, *“in the peculiar knowledge of the Plaintiff”*.

I now turn to consider paragraphs 8, 10, 12, 13, 14, 15, 18, 19 and 22 in which it is contended that the Defendants merely deny and do not specifically traverse the Plaintiff's allegations. Before I consider these paragraphs it is important that I define what constitutes a traverse. Order 18 rule 13 subrule 5 of the whitebook states that *“a traverse may be made either by a denial or non admission”*. While order 18 rule 15 subrule 6 states that *“every allegation of fact must be specifically denied or specifically not admitted”*. Therefore, in accordance with these two orders a defendant has an obligation to specifically deny an allegation in a statement of claim. Further, such denial can also take the form of a non admission. A perusal of paragraphs 8, 10, 12, 13, 14, 15, 18, 19 and 22 indicates that they all begin with the words *“The Defendants deny ...”* The paragraphs go further and state the Defendants' position in relation to the Plaintiff's allegation which they deny. To give but a few examples, in paragraph 8, the Defendants state further after the denial that the Plaintiff did not inform the First Defendant that the goods that the First Defendant required were sourced from outside the country as opposed to the Plaintiff's internal stock. Under paragraph 10, the Defendants state further that the Plaintiff failed to honor its obligations in accordance with the requirements for the various orders after the agreed delivery periods. This is the pattern adopted by the Defendants in all the paragraphs. In my considered view, the denials made by the Defendants in the said paragraphs are specific enough and comply with the rules of pleadings especially that after the denials they go further and state the Defendants' position on the allegation.

As regards paragraphs 3, 5 and 13, it is contended that the Defendants merely put the Plaintiff to strict proof thereof. The fate of these paragraphs is the same as the others I have considered. The Defendants have, in my considered view specifically denied the allegations made by the Plaintiff in the statement of claim.

The net result of my findings is that non of the paragraphs complained of fall short of the rules of pleadings. The application must therefore fail.

In arriving at the finding I have made in the preceding paragraph, I have considered the case of ***China Henan International Economic Technical Cooperation vs. Mwangi Contractors (3)*** which counsel for the Plaintiff relied upon heavily. Whilst I agree with the principles of law and practice on pleadings stated in the case, the facts and circumstances surrounding that case are distinct from this case. In that case the Supreme Court found that the defence fell far short of the rules on pleadings. The defence in issue was in response to a statement of claim which was very detailed and explained the facts upon which the Plaintiff relied and ended by claiming for damages for breach of contract. It contained three paragraphs as follows:

“1. The defendant admits paragraphs 1 and 2

2. The contents of paragraphs 3, 4, 5, 6, 7, 8, 9 and 10 are denied and the Defendant shall put the Plaintiff to strict proof thereof.

3. SAVE as hereinafter expressly admitted the defendant denies each and every allegation contained in the statement of claim ...”

In our case, the statement of claim filed by the Plaintiff is also very detailed and contains 23 paragraphs. The amended defence, is also equally detailed and contains an equal number of paragraphs. To this extent this case is distinguished from the ***China Henan*** case. I have also considered the case of ***John Lancaster Radiators, Ltd vs. General Motor Radiator Co. Ltd and Others (1)*** also relied upon by the Plaintiff. My finding is that the facts and circumstances in that case are distinguished from this case because in that case the defence did not set

out and deal specifically with every allegation. The court was prompted to hold that it was obligatory for the Defendant to deny, one by one, each allegation in a statement of claim. In our case, the Defendants have denied each allegation, one by one, and going paragraph by paragraph. This is as I have demonstrated in the earlier part of this ruling. To this extent this case is distinguished from the **John Lancaster** case.

I have also considered the case of **Warner vs. Sampson and another (2)** also referred to me by counsel for the Plaintiff. Quite frankly I do not see how the said case aids the Plaintiff's case.

I therefore, dismiss this application and award costs to the Defendants.

Dated at Lusaka this 17th day of June 2015.

**NIGEL K. MUTUNA
HIGH COURT JUDGE**