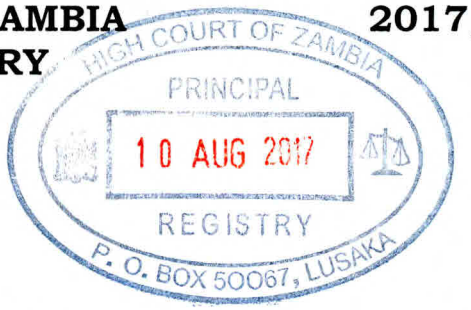
IN THE HIGH COURT FOR ZAMBIA **2017/HP/0504**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)



B E T W E E N:

CONTINENTAL GRAINS TRADING LIMITED **PLAINTIFF**

AND

LAYBON MUDENDA **DEFENDANT**

Before Honorable Mrs. Justice M. Mapani-Kawimbe in Chambers on the 10th August, 2017

For the Plaintiff : *Mr. F. Chombo, Messrs Chombo and Partners*
For the Defendant : *Mr. G. Miti, Messrs L.M Chambers*

R U L I N G

Case Authorities Referred To:

1. *Mbikusita Lewanika and Others v Chiluba and Others (1998) ZR 79*
2. *Jamas Milling Company Limited Vs Imex International (Pty) Limited 2002 Z.R 79*
3. *Walusiku Lisulo Vs Patricia Anne Lisulo (1998) ZR 75*
4. *Zambia Telecommunications Company Limited Vs Mulwanda and Ngandwe SCZ/8/63/2009*

Legislation Referred To:

1. *High Court Act, Chapter 27*

This is the Defendant's application for review of the judgment on admission dated 26th May, 2017. It is filed pursuant to Order 39 of the High Court Rules and is supported by an Affidavit.

The Affidavit in Support is sworn by **Laybon Mudenda** who deposes that the Plaintiff sued him for the sum of K109, 627.50. He states that after receiving the originating process, he filed a Memorandum of Appearance and Defence on 20th April, 2017. That at the time of filling his Defence, he had not sought any legal representation, hence the statements made in lay man's language.

The deponent states that the Court entered a Judgment on Admission in favour of the Plaintiff on 26th May, 2017 based on his Defence. He states that he supplied the Plaintiff about 20 truckloads of maize at his own expense in sometime in December 2015. That after supplying the maize, Mr. Nyati the Company's director told the deponent to supply more maize in return of a commission of soya beans. The deponent avers that he entered into a written contract with the Plaintiff wherein it agreed that he would be paid K36,000 for supplying 562.5 x 50kg bags of white maize. He avers that he never agreed with the Plaintiff that he would accept a

payment of soya beans. Further, that the 25 x 50kg of fertilizer valued at K 18, 750.00 was to be paid from the K 36, 000.

The deponent further avers that sometime in June, 2015, he delivered the maize to the Plaintiff's place of business to honour his contractual obligations but found the premises closed. The deponent states that this fact was confirmed by Mr. Phiri, a former employee of the Plaintiff Company. He states that he called Mr. Nyati who informed him that he was in South Africa and that the Company was undergoing some operational challenges.

The deponent avers that after Mr. Nyati returned to Zambia in August, 2016. He informed him that he had 270 bags of maize ready for delivery but he refused the overture alleging that the Defendant had breached the contract which was to be performed by 30th June, 2016. That Mr. Nyati demanded for a cash payment for the breach. The deponent avers that sometime in 2016 at Mr. Nyati's direction he paid the Plaintiff Company K 1,400 through its driver and K500 through SHOPRITE money, but misplaced the receipts.

The deponent avers that he has made a further payment to Mr. Nyati through ZOONA money service as shown in the exhibit marked "**LM1**'. He avers that he has paid Mr. Nyati money a sum excess of K19, 700.00 from the time he made his demands but cannot locate the receipts. He also states that on 4th June, 2017 he deposited K6, 000 into Commodity Harb account No. 016-1613916 Barclays Bank. The deponent disputes the sum of K109, 672. 50 in the claim and avers that he did not breach the contract but failed to supply the maize because the Plaintiff Company had closed its offices. The deponent avers that he only owes the Plaintiff K16, 300 and not K109, 672. 50 as claimed. He prays to the Court to review the Judgment on Admission entered on 26th May. 2017.

Daniel Nyati swore an Affidavit in Opposition on behalf of the Plaintiff Company. He states that the sum of K109, 675.50 stipulated in the Plaintiff's Statement of Claim is a liquidated demand clearly provided with particulars of how the consumption was arrived at. Further, that claims 2, 3, 4 and 5 endorsed on the Writ of Summons are unliquidated and will have to be assessed by Learned Deputy Registrar. The deponent states that paragraphs 5

to 10 of the Defence of the Affidavit in Support are contradictory and amount to further admissions of the Plaintiff's claims as follows:

i) Whilst paragraph 5 of the Defence denies that the Defendant breached the contract between the parties, a further statement is made within the paragraph that the Defendant fulfilled his obligation by delivering 216 x 50 kg of white maize to the Plaintiff when he discovered that the Company had closed down.

ii) The fact that the Defendant sold his stock to other grain buyers subsequent to his preconceived belief that the Plaintiff Company had closed down, does not absorb his liability under the contract.

iii) That an admission is made in the statement by the Defendant under paragraph 7 of the Defence attributing his breach of the contract to unfavorable weather conditions which resulted in him not having a good maize yield.

The deponent avers that the admissions made in the Defence were brought to the Court's attention by its Learned Counsel at the hearing of this cause on 26th May 2017. The deponent states that the Court on being satisfied as to genuineness of the signature of the Defendant in Defence and the accompanying statements thereon; before whom such statement was signed, entered judgment for the Plaintiff. The deponent states that it is immaterial as to the form of application the admissions are brought to the attention of the Court.

The deponent avers that the Defendant is justly indebted to the Plaintiff according to the particulars of the Statement of Claim and based on admissions signed by the Defendant in his Defence. He avers that it is inconceivable that the Plaintiff will be unjustly enriched as the same demand on the endorsement of claim is what the Plaintiff is entitled to. He prays to the Court to dismiss the application with costs.

Both Learned Counsels filed written submissions for which I am indebted. Learned Counsel for the Defendant stated that Order 39 Rule 1 of the High Court Rules empowers the Court to review its

decision on sufficient grounds. Counsel cited the case of **Mbikusita Lewanika and Others v Chiluba and Others**[1] where the Supreme Court stated that under Order 39, the Court had an obligation to find sufficient grounds on which it could review its decision.

Counsel submitted that the facts of this matter were that the Defendant was not given an opportunity to be heard on the merits as he was absent at the hearing. He cited Order 21 Rule 6 of the High Court Rules which provides that:

> **"6. A party may apply on motion or summons, for judgment on admission where admissions of fact or part of a case are made by a party to the cause or matter whether by his pleadings or otherwise."**

Counsel submitted that because the Defendant was not served with any notice or summons of judgment on admission he had no opportunity to be heard on the application. Counsel cited the case of **Jamas Milling Company v Imex International (Pty) Limited**[2] where the Supreme Court reiterated the legal principles of review. He contended that the Defendant had demonstrated in the Affidavit in Support that he did not breach his contractual obligations.

Counsel submitted that the Defendant would not be said to have a second bite of the cherry if the Court exercised its power of

review. He also stated that there were triable issues in this matter which could only be resolved if this Judgment on Admission was reviewed.

In response, Learned Counsel for the Defendant stated that the jurisdiction to enter Judgment on Admission was vested in the discretion of this Court. He submitted that under Order 21 Rule 5 of the High Court Rules, the Court could enter judgment upon sighting an admission in a party's pleading or statement. A Plaintiff (or party in whose favour the judgment would be entered) could only be called upon to give consent to such judgment.

Counsel further submitted that Order 27 Rule 3 (4) of the Rules of the Supreme Court clearly provides that entering Judgment on Admission is the discretion of the Judge who " finds it just" to do so, in order to save on time and costs. Counsel stated that the Court's discretion to enter Judgment on Admission could not be a ground on which to seek review, when the Defendant in his pleading (Defence) admitted liability. In response to the Defendant's averment that the matter should have first gone for assessment,

Counsel submitted that Order 27 Rule 3(3) permitted the entry of Judgment on admission on the following terms:

> **"3. .....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 thinks just".**

He contended that the Defendant's assertion for assessment before entry of judgment was misplaced given that a liquidated amount does not require to be heard by the Deputy Registrar for assessment.

Counsel submitted that that orders for review were granted at the discretion of the Court. However, the Defendant had not availed sufficient facts upon which the Court could review its earlier decision. He stated that it was not clear whether the Defendant was denying the admissions in his Defence or he wanted to improve the admitted facts into contentious legal issues.

Counsel submitted that the philosophy underlying review was not to irreversibly bind a Court into making a ruling or judgment on circumstances that were well known to the Defendant at the material time. He argued that the Defendant's Affidavit did not disclose fresh evidence but merely expanded on the admissions

earlier stated in his Defence whilst adding lengthy contradictions. He also stated that the Judgment on Admission was entered on the basis of the Defence filed into Court by the Defendant. He contended that the Defendant should not be allowed to attack the Court when he had an opportunity to file a lucid Defence when he was served the originating process.

I have seriously considered this application together with the contents of the Affidavits filed herein and Skeleton Arguments advanced by the parties. The issue that falls for determination is, whether this is a proper case where I can exercise my discretionary power to review the Judgment on admission entered on 26th May, 2017.

Order 39 of the High Court Rules states thus:-

"***1. Any Judge may, upon such grounds as he shall consider sufficient, review any judgment or decision given by him (except where either party shall have obtained leave to appeal, and such appeal is not withdrawn), and, upon such review, it shall be lawful for him to open and rehear the case wholly or in part, and to take fresh evidence, and to reverse, vary or confirm his previous judgment or decision:***

Provided that where the judge who was seised of the matter has since died or ceased to have jurisdiction for any reason, another judge may review the matter.

2. ***Any application for review of any judgment or decision must be made not later than fourteen days after such judgment or decision. After the expiration of fourteen days, an application for review shall not be admitted, except by special leave of the Judge on such terms as seem just".***

In the case of **Walusiku Lisulo Vs Patricia Anne Lisulo**[3] the Supreme Court held that:

"1. The power to review under Order 39 Rule 1 is discretionary for the Judge and there must be sufficient grounds to exercise that discretion.

3. Order 39 Rule 1 of the High Court Rules is not designed for parties to have a second bite. Litigation must come to an end and successful parties must enjoy the fruits of their judgments".

In the case of **Zambia Telecommunications Company Limited Vs Aaron Mweene Mulwanda and Paul Ngandwe**[4] the Supreme Court reiterated that:

"For review under Order 39, Rule 2 of the High Court Rules to be available, the party seeking it must show that he has discovered fresh material evidence, which would have material effect upon the decision of the Court and has been discovered since the decision

but could not, with reasonable diligence, have been discovered before".

It is my firm view that from these authorities a Judge can only review a decision if there is fresh evidence, which must have been in existence at the time of the decision but had not been discovered before. By implication therefore, Order 39 of the High Court Rules has a very limited scope.

I have paid the closet attention to the Defendant's Affidavit in Support and find that it contains extensive details on the background facts of this matter, which ostensibly should have been presented in his Defence. The Defendant states that he drafted his defence as lay person. In my view, this cannot be the basis for seeking review because I consider that what he expressed in his own hand would have been his instructions of his Defence. As a result, he is not absolved from the admissions that he stated in his Defence and upon which the Court entered Judgment on admission.

It is trite law that the principles of review are founded on the basis that fresh evidence, which the Court did not have at the time of its ruling, has been discovered. A perusal of the Affidavit in Support shows that it does not reveal any fresh evidence but expands some of the admissions that are contracted by other statements made in the same Affidavit. All in all, I find that the Affidavit in Support is devoid of fresh evidence that can bring this application into the realm of Order 39 of the High Court Rules so as to invoke my discretionary power of review.

I hold that this application is misconceived, vexatious and frivolous. I accordingly dismiss and award the Plaintiff costs to be taxed in default of agreement.

Leave to appeal is granted.

Dated this 10th day of August, 2017.

M. Mapani-Kawimbe
HIGH COURT JUDGE