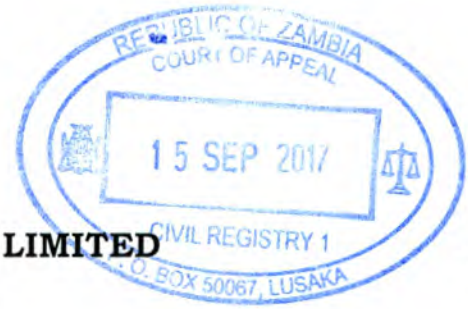
IN THE COURT OF APPEAL FOR ZAMBIA **APPEAL NO. 017/2017**

HOLDEN AT KABWE

(Civil Jurisdiction)



BETWEEN:

CHINA COPPER MINES LIMITED **APPELLANT**

AND

TIKUMBE MINING LIMITED **RESPONDENT**

CORAM: Mchenga, DJP, Chashi and Mulongoti, JJA
on 4th May and 14th September, 2017

For the Appellant: *K. M. Shepande, Messers Shepande and Company*

For the Respondent: *W. Banda, Messrs Wilson and Cornhill Legal Practitioners*

J U D G M E N T

CHASHI, JA delivered the Judgment of the Court.

Cases referred to:

1. ***Harrison v Bottenhein (1878) 26 WLR 326***
2. ***Krakaver v Katz (1954) 1 All ER, 244***
3. ***Chazya Silwamba v Lamba Simpito (2010) ZR, Vol. 1, 534***
4. ***Clement H. Mweemba v The Attorney General, International Police and Avis Rent a Car (2010) ZR Vol. 2, 68***
5. ***Ellis v Allen (1911 – 13) All ER, 906***
6. ***Himani Alloys Limited v Tata Steel Limited (2011) 3, Civil Court Cases, 721***

7. ***Zega Limited v Zambezi Airlines Limited and Diamond General Insurance Limited – SCZ Appeal No. 39/2014***
8. ***American Cyanamid Company v Ethicon Limited (1975) A.C, 396***

Legislation referred to:

9. ***The Supreme Court Practice (White Book) 1999***
10. ***The High Court Act, Chapter 27 of the Laws of Zambia***

The Appellant who was the Defendant in the Court below, appeals against the Judgment of the High Court on appeal which upheld the ruling of the learned Deputy Registrar to enter Judgment on admission against the Respondent herein.

For convenience, we shall refer to the Appellant as the Defendant and the Respondent as the Plaintiff, for that is what they were in the court below.

The brief facts leading to the appeal are that the Plaintiff commenced an action in the court below by way of Writ of Summons, seeking the following reliefs:

1. *A declaration that the Defendant's operations and mining activities on an area defined by Licence No. 8390-HQ-SML Fitula area in Chingola are illegal.*

2. *An Order of injunction to restrain the Defendant either by itself, its agents, servants or licencees from interfering with the Plaintiffs rights in respect of Licence 8390-HQ-SML.*
3. *Damages in respect of the loss suffered by the Plaintiff in consequence of the Defendant's actions.*
4. *Any other reliefs the Court may deem fit.*
5. *Costs.*

According to the accompanying Statement of Claim, both parties had their own respective licences and their areas of mining as defined by coordinates were adjacent to each other. In 2013, the Plaintiff discovered that the Defendant had encroached and was mining in its area. The Plaintiff alerted the Ministry of Mines, who intervened and instructed the Defendant to restrict itself to its defined area. However, the Defendant ignored the instruction and continued mining.

When the Defendant settled its Defence, it admitted certain paragraphs in the Statement of Claim to the effect that both parties were licenced and had their own area of mining which were adjacent to each other. They also admitted encroaching and mining in the Plaintiff's area. The Defendant then went on to aver that they were mining in the Plaintiff's area because the Ministry of Mines

had cancelled the Plaintiff's mining licence and the area had subsequently been allocated to the Defendant.

The Defendant also pleaded the defence of *res judicata.* Save for these admissions the defendant denied each and every allegation contained in the Statement of Claim as though the same were specifically set forth, traversed and denied *seriatim.* The Defendant went on to counter claim damages and loss of business.

As regards the relief for an injunction, the learned Judge vide its ruling delivered on 5th August, 2014, granted the Plaintiff an Interlocutory Injunction.

Prior to that the Plaintiff had applied for disposal of the matter on a point of law pursuant to Orders 14/A/1 and 33/7 of ***The Rules of the Supreme Court (RSC)***[9], which application was dismissed vide ruling dated 31st October, 2014. The learned Judge then ordered that the action should proceed normally to trial although she did not preclude the Plaintiff from making any appropriate interlocutory application in the matter.

On 17th February, 2015, the Plaintiff took out an application before the learned Deputy Registrar for Judgment on admission and

striking out the defence for being fanciful, which application was opposed by the Defendant.

The learned Deputy Registrar granted the application and entered Judgment on admission and referred the matter for assessment of damages.

In arriving at his decision, the learned Deputy Registrar heavily relied and extensively made reference and quoted from the ruling of the learned Judge in respect to the interlocutory Injunction which dwelled into and dealt with the merits of the main cause and made findings of fact, namely that the defence of *res judicata* failed. Further, that since the Plaintiff's licence was reinstated, the Defendant was mining illegally and on that basis ruled that the whole defence had fallen away.

Dissatisfied with the decision of the learned Deputy Registrar, the Defendant appealed to the learned Judge, who upheld the ruling of the Deputy Registrar.

In doing so, the learned Judge reiterated her findings of fact and the law in her ruling relating to the Injunction.

Disenchanted with the Judgment of the learned Judge in the Court below, the Defendant has now appealed to this Court advancing five grounds of appeal in the memorandum of appeal as follows:

1. *The learned trial Judge erred in law and fact by entering Judgment on admission when there was no clear and unequivocal statement admitting liability for damages.*
2. *The learned Judge misdirected herself both at law and facts by holding that the issue of the Respondent not being in actual possession of the licence after the letter reinstating the licence is an administrative issue and does not have to be determined at trial, therefore the issues raised in the defence are no longer in issue for the matter to proceed to trial.*
3. *The learned trial Judge misdirected herself in fact and law when she held that it was her considered view that the Deputy Registrar was on firm ground when he found that there were no triable issues between the parties.*
4. *The learned trial Judge misapprehended the facts and the law when she held that the appeal had no merit when the disputed facts of ownership of the mine were not given a hearing as a trial was denied.*
5. *The learned trial Judge misdirected herself in law and fact by contradicting her own ruling dated 31st October, 2014, where she held that the action should proceed to trial.*

At the hearing of this appeal, both Counsel for the parties relied solely on the filed heads of argument. In the arguments, ground one and two were argued together by the Defendant. In support, it

was submitted that there was a triable issue over the ownership of the disputed mine licence No. 8390-HQ-SML.

According to the Defendant, the matter could not be disposed of under summary procedure and affidavit evidence in light of the Defence in which each and every allegation in the Statement of Claim, was specifically traversed and denied *seriatim*.

Further, that the Defence contains a Counter Claim which ought to be tried and determined.

The Defendant argued that the Defence and Counter Claim was to the effect that the Plaintiff's licence has been revoked/cancelled, to which, the Plaintiff responded that their licence was subsequently reinstated. The Defendant contended that they are in possession of a document from the Ministry of Mines which casts doubt on that licence and are desirous of a trial to enable them an opportunity to produce it and that therefore the issue has not been resolved.

It was further argued that the letter from the Solicitor General dated 9th November, 2015, and the one from the Ministry of Mines dated 4th May, 2015, will show that when the Judgment on admission was

entered, the issue regarding the revocation/cancellation of the Plaintiff's licence had not been resolved.

Grounds two and four were also argued together. Our attention was drawn to Order 55 Rule 7 ***RSC*** which gives the High Court power to receive further evidence on the hearing of an appeal as the court may direct. The Defendant submitted that they purchased the dump, OB 11 from Mimbula Mining Consortium Limited as far back as 2010, which issue was not taken into account by the court below. That the position only changed because of the Judgment in the court below which was in favour of the Plaintiff.

According to the Defendant, the contract of transfer of the mining rights in the area in contention was only executed between the Plaintiff and Mimbula Mining on 15th October, 2015 after the aforestated Judgment, as it was not in existence at the time the Plaintiff commenced its action.

Further that the application for Judicial Review made in 2013, against the decision of the Director of Mines to cancel the licence held by the Plaintiff shows that as at 2013 the licence in favour of the Plaintiff was cancelled and the matter under cause

2013/HP/0078 relating to reinstatement remained on going. That although the Plaintiff's licence was subsequently renewed on 7th June, 2013, the letter from the Attorney General dated 9th November, 2015, shows that at the time the matter regarding the cancellation was yet to be concluded.

According to the Defendant, although the Plaintiff had received a letter which purportedly reinstated their licence, the dispute over the licence still raged on and the Defendant insisted on a trial because it is only there that they would have exhibited documents to show that the Plaintiff in fact did not have a licence to operate the mining dump in dispute.

It is the Defendant's contention that they reasonably and properly require to interrogate or cross examine the Plaintiff in order for the case to be brought to a justifiable conclusion. The case of **Harrison v Bottenhein**[1] was cited in that respect.

On the issue of further evidence, reliance was placed on the case of **Krakaver v Katz**[2] and Order 14/4/45 ***RSC***.

On the need for matters to be allowed to proceed to trial and be heard on their merits, where no prejudice would be caused to the

Plaintiff, our attention was drawn to the Supreme Court decision in the case of **Water Walls Limited v Jackson**[3]. It was submitted that, in casu, there were no Orders for Directions nor bundles of documents filed to help the court below reach a justifiable Judgment.

As regards ground five, it was submitted that the learned Judge had earlier ruled that the matter should proceed normally to trial. That it was thus a contradiction of her ruling to uphold the Deputy Registrar for entering Judgment without the matter being heard by way of a normal trial.

Counsel for the Defendant, Mr. Shepande urged us to allow the appeal and allow the matter to proceed to trial.

In response, the Plaintiff in its heads of argument addressed each ground of appeal separately.

In response to ground one, it was submitted that both the **High Court Rules (HCR)**[10] and **RSC** expressly allow for applications for entry of Judgment on admission. Our attention was specifically drawn to Order 21 Rules 1 and 6 ***HCR***, Order 27/3 ***RSC***, the High Court case of **Chazya Silwamba v Lamba Simpito**[3] and the Supreme Court case of **Clement H. Mweempe v The Attorney General, International Police and**

Avis Rent a Car[4], and Counsel submitted that the admissions by the Defendant in the Defence are unequivocal and unambiguous.

It was submitted that in her ruling on the Injunction, the learned Judge in the Court below, found as a fact that the Defendant had not denied mining in the Plaintiff's area and that, the argument that the Plaintiff's licence was cancelled cannot hold water in the face of uncontroverted evidence that the said licence was reinstated. According to Counsel these findings of fact have not been a subject of an appeal, and were reiterated in the Judge's Judgment.

In conclusion the Plaintiff's argument on this ground is that the Defendant expressly admitted to conducting illegal mining as a consequence of which the Plaintiff is entitled to damages.

In response to ground two, reliance was again placed on the case of **Chazya Silwamba**[3] and submitted that, once issues have been admitted, it no longer becomes relevant to proceed to trial as that would be time wasting as the pleadings will have disclosed the parties position to help the Court determine the issues in contention.

As regards ground three, it was reiterated that the findings of fact and law in the ruling on the Order for an Interlocutory Injunction were not a subject of an appeal by the Defendant. That the issues of the validity of the Plaintiff's mining licence and whether there were triable issues were all covered in the said ruling, as such there were no further issues to be submitted to trial.

Further, that the ruling of the learned Deputy Registrar relied on the findings of fact and law by the learned Judge on an application for Interlocutory Injunction which findings were not impugned or appealed against. As such, the Defendant is using this appeal to try and re-litigate the issues which they lost during the hearing of the Injunction.

In response to ground four, it was submitted that, in the **Clement Mweempe**[4] case the Supreme Court emphasized on the need for a party to answer to all the allegations contained in the Statement of Claim and that a party is not allowed to sneak in fresh allegations which were not pleaded without an appropriate application in that regard.

The Plaintiff's submissions on grounds two and three were then reiterated.

In response to ground five, it was submitted that, this ground of appeal is incompetent and should not be sustained on the basis that the ruling of the learned Judge was not appealed against by the Defendant.

Mr. Banda, Counsel for the Plaintiff urged us to dismiss the appeal with costs.

We have seriously considered the appeal together with the arguments in the respective heads of argument and the authorities cited. We have also considered the Judgment of the learned Judge in the court below. It is our considered view that the first four grounds of appeal are interrelated as they raise similar issues. We shall therefore consider them together. The four grounds of appeal raise two central questions, namely:

1. Whether there was an unequivocal and clear admission of liability by the Defendant in its Defence.

2. Whether in determining an application for Judgment on admission, the Court can rely on its findings of fact and law on an application for Interlocutory Injunction.

As regards the first question, Order 21 ***HCR*** and Oder 27/3 ***RSC*** provide for entering of Judgment on admission by a party to a cause or matter on application either by the pleadings or otherwise.

The jurisdiction of the court is discretionary. Order 27/3/2 **RSC** states that admissions may be express or implied but they must be clear on the meaning of *"either by the pleadings or otherwise."* Order 27/3/4 ***RSC*** states that such admissions may be made express in a Defence or in a Defence to a Counter Claim or by virtue of the rules as where the Defendant fails to traverse an allegation of fact in a Statement of Claim or there is a default of a Defence or a Defence is struck out and accordingly the allegations of fact in the Statement of Claim are deemed to be admitted.

The rule also goes on to state that the admission may be made in a letter before or since the action or even orally if the admission can be proved.

The case of **Ellis v Allen**[5] confirmed the object of the rule as being to enable a party obtain a speedy Judgment where the other party has made a plain admission entitling the Plaintiff to succeed and that it applies where there is a clear admission on the face which it is impossible for the party making it to succeed.

The aforestated position was confirmed in the case of **Himani Alloys Limited v Tata Steel Limited**[6] where in emphasizing that this is a matter of discretion and not a right, the court had this to say:

> *"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 the 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."*

The aforestated authorities were the subject of consideration by the Supreme Court in the case of **Zega Limited v Zambezi Airlines and Diamond General Insurance Limited**[7] where they had this to say:

> *"We wish to state from the outset that it is true that under both Order 21/6 **HCR** and Order 27/3 **RSC** the Court is empowered to*

enter Judgment in favour of a party based on admissions of fact made by the other party on its claim(s).

However, we must also hasten to mention that the position of the law as spelt out under Order 21/3/2 ***RSC*** *is that admissions of liability by the party against whom Judgment on admission is sought to be entered may be express and or implied and the admission must be clear. This position was echoed in the case of* **Himani Alloys Limited**[6] *in which the Supreme Court of India made it clear inter alia that the admission must be a conscious and deliberate act of the party making it and showing an intention to be bound by it. And that unless the 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 against him"*

The Supreme Court went on to state that:

"the purpose and applicability of the rule relating to admissions which may be relied upon in an application for Judgment on admission was discussed in the **Ellis case**[5] *and from the above, it is clear that the admission(s) relied upon must be unconditional and/or unequivocal. The learned authors of* ***Black's Law Dictionary by Brian A. Garner 9th edition****, at page 1663 and 1667 define the terms "unconditional" and "unequivocal" respectively as follows:*

"Unconditional – not limited by a condition, not depending on an uncertain event or contingency; absolute"

Unequivocal – unambiguous, clear, free from uncertainty"

It is clear from the authorities aforestated that the power of the court to enter Judgment on admission is discretionary and that in order for the Court to exercise its discretion to enter Judgment on

admission, the admission(s) relied upon must not be limited by any conditions and that it must be clear."

In this case, a perusal of the Defence and Counter Claim, as earlier alluded to, shows that there was an averment from the Defendant that it had engaged in the alleged or purported illegal mining because the Ministry of Mines had cancelled the licence to the Plaintiff and allocated it to the Defendant. In addition, the Defendant pleaded the defence of *res judicata* and went on to specifically set forth, traversed and denied *seriatim* every allegation in the Statement of Claim. In addition, the Defendant counter claimed.

In view of the aforestated, the admissions were not clear, unambiguous and unconditional. Neither can the said admissions be said to be conscious and a deliberate act of the Defendant showing an intention to be bound by them, so as to deny the Defendant the valuable right to contest the claim against it.

On the second question, it is common cause that the learned Deputy Registrar when determining the application to enter Judgment on admission relied on the findings of fact and law which

were made by the learned Judge on the determination of an application for an Interlocutory Injunction.

It is those same findings of fact and law which the learned Judge reiterated and placed reliance on, in upholding the Judgment on admission by the Deputy Registrar on appeal.

At the stage of determining an application for an interim or Interlocutory Injunction, it is not the duty of the Court to dwell or delve so much on the facts of the case as regards the merits in the main cause, except where it is necessary and unavoidable to do so in determining whether an Injunction should be granted or not.

In other words, at that stage, it is not the duty of the Court to pronounce orders that will determine any of the reliefs being sought or triable issues, except the one relating to the injunction.

In the celebrated case of **American Cyanamid Co. v Ethicon Limited**[8], two of the key principles derived from the speech of Lord Diplock in the granting of an interlocutory application in determining whether there is a serious question to be tried were as follows:

> *"1. The evidence available to the Court at the hearing of an application for an interlocutory injunction is incomplete. It is given on affidavit and has not been tested by oral cross examination.*
>
> *2. It is no part of the Court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed arguments and mature considerations. These are matters to be dealt with at the trial."*

Arising from that, it was therefore incorrect and improper for the court below to embark on serious findings of fact and law at the interlocutory stage of an application for an Interlocutory Injunction and to later rely on the same findings in upholding the appeal for the entering of Judgment on admission.

In our view, in determining the application to enter Judgment on admission, the court should have restricted itself to the pleadings before it and not the affidavit evidence at the stage of the granting of the Interlocutory Injunction.

In the view that we have taken, grounds one to four of the appeal are allowed.

It would be otiose to deal with ground five in view of grounds one to four having succeeded. Equally the issues raised as to the power of

the High Court to receive further evidence are incorrectly before us as they were issues not raised in the court below.

The net result is that this appeal is allowed, the Judgment on admission is set aside and the matter sent back to the High Court at Kitwe before another Judge for issuance of Orders for Directions, so as to enable the matter proceed to trial.

Costs of this appeal shall be in the cause.

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C.F.R. MCHENGA
DEPUTY JUDGE PRESIDENT
COURT OF APPEAL

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J. CHASHI
COURT OF APPEAL JUDGE

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J. Z. MULONGOTI
COURT OF APPEAL JUDGE