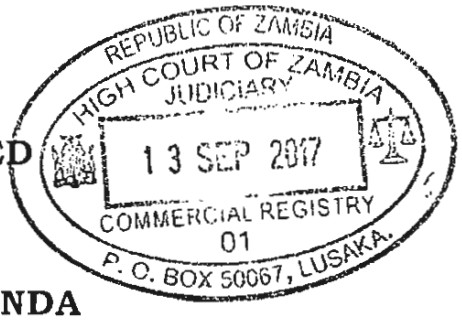
IN THE HIGH COURT FOR ZAMBIA **2017/HPC/0181**

AT THE COMMERCIAL REGISTRY

HOLDEN AT LUSAKA

(CIVIL JURISDICTION)

BETWEEN:



GOLDEN FIELDS LIMITED **PLAINTIFF**

AND

CHARLES HASTINGS BANDA **DEFENDANT**
(Trading as NATIONWIDE ESTATES AGENTS)

CORAM: Hon. Madam Justice Dr. W.S. Mwenda in Chambers at Lusaka on the 13th day of September, 2017

For the Plaintiff:	Ms. I. Nambule of Sharpe & Howard Legal Practitioners
For the Defendant:	Mr. D.K. Kasote of Messrs. Chifumu Banda & Associates

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RULING

Cases referred to:

1. *Technistudy Ltd v Kelland [1976] 3 All ER 632*
2. *Ash v. Hutchinson & Co. (Publishers) [1936] Ch.489, 503*
3. *Murphy v. Culhane [1976] 3 All E.R. 533, CA*

Legislation referred to:

1. *Order 21 Rule 6 of the High Court Rules, Chapter 27 of the Laws of Zambia*
2. *Order 53 Rule 6 of the High Court Rules, Chapter 27 of the Laws of Zambia*
3. *Order 27 Rule 3 of the Rules of the Supreme Court, 1999 Edition ("The White Book")*
4. *Order 18/13/4 of the Rules of the Supreme Court, 1999 Edition ("The White Book")*

Publications referred to:

1. *Bryan A. Garner (Ed), Black's Law Dictionary, 10th Edition [Thomson Reuters, 2014]*
2. *Halsbury's Laws of England, 5th Edition [RELX (UK), 2015], Vol. 12 par 709*

This is an application by the Plaintiff (the "**Application**") for an order to enter judgment on admission against the Defendant for the sum of Three Hundred and Forty Thousand Kwacha (K340,000.00) plus interest and costs of and incidental to these proceedings.

The background to the Application is that the Plaintiff issued a Writ of Summons from the Commercial Registry on 10th April, 2017 against the Defendant claiming the following relief:

(a) payment of the sum of Three Hundred and Forty Thousand Kwacha (K340,000.00), being monies held by the Defendant on behalf of the Plaintiff arising out of a sale by the Defendant of four (4) subdivisions of the Plaintiff's property known as Farm No. A/448a;

(b) interest on the sum specified at (a) above;

(c) any other relief the court may deem fit; and

(d) costs of and incidental to the action.

The Defendant, in turn, entered Defence on 3rd May, 2017 wherein he stated, as follows, in paragraph 6 of the said Defence:

> *"That it is admitted that the Defendant is still holding on to the money in the sum of K340,000.00 (Three Hundred and Forty Thousand Kwacha). In fact, it is the Defendant who informed the Plaintiff that there was money which is not yet deposited into the Bank Account of the Plaintiffs on grounds that the Plaintiff had not given the Defendant their current Escrow Account number in which the money was to be deposited because the old Account was not operational. Accordingly, the delay in depositing the money into the Plaintiff's Account was simply caused by the Plaintiffs."*

Further, in paragraph 7 of the Defence, the Defendant admitted the contents of paragraph 6 of the Plaintiff's Statement of Claim which stated as follows:

> *"In a report prepared by the Defendant to the Board of Directors of the Plaintiff Company for the year ended December 31st 2015, the Defendant admitted having received and still holding, on behalf of the Plaintiff the said sum of K340,000.00 (Three Hundred and Forty Thousand Kwacha)."*

On the basis of the said paragraphs 6 and 7 of the Defence, as referred to above, on 9th May, 2017 the Plaintiff took out a Summons to enter Judgment on Admission pursuant to Order 21 Rule 6 of the High Court Rules, Chapter 27 of the Laws of Zambia as read together with Order 27 Rule 3 of the Rules of the Supreme Court, 1999 Edition ("**The White Book**").

Order 21 Rule 6 of the High Court Rules provides as follows:

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

Similarly, Order 27 Rule 3 of the White Book provides as follows:

> *"Where admissions of fact or of part of a case are made by a party to a cause or matter either by his pleadings or otherwise, any other party to the cause or matter may apply to the court for such judgment or order as upon those admissions he may be entitled to, 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...An application for an order under this rule may be made by motion or summons."*

At the hearing of this Application, Counsel for the Plaintiff indicated that they had filed into court an affidavit supporting the Application, as well as Skeleton Arguments and a List of Authorities; and that they were relying on them. Similarly, Counsel for the Defendant, in

response, indicated that they had filed into court, an Affidavit in Opposition, but no accompanying Skeleton Arguments or List of Authorities; and that they were relying on the said Affidavit.

The grounds for the application as extracted from paragraphs 4 and 5 of the Affidavit in Support of the Summons to Enter Judgment on Admission, sworn by one Elvezio Gilardi, a director and shareholder in the Plaintiff Company, are that:

(a) The Defendant has, vide its Defence filed into court on 3rd May, 2017, the copy of which has been produced and exhibited as "EG2" in the Certificate of Exhibits appended to the Affidavit, admitted to owing the said sum of Three Hundred and Forty Thousand Kwacha (K340,000.00) to the Plaintiff; and

(b) The deponent verily believes that the Defendant has no defence to the present action, having admitted to owing the debt to the Plaintiff.

It is also the deponent's testimony that he vehemently refutes the Defendant's assertions that the delay in remitting the debt to the Plaintiff was occasioned by the Plaintiff as the Defendant never advanced such request to the Plaintiff and was fully aware that the Plaintiff's advocates at the time were Messrs OMM Banda & Company to whom the said monies ought to have been paid in the first place, to allow them hold the same as stakeholders pending completion of the respective conveyance.

The deponent further avers that the Plaintiff's advocates, on several occasions, requested payment of the debt from the Defendant to their firm, all in futility and without any response from the Defendant. In this regard, the deponent produced exhibit "EG3" described as copies of the said demands.

The Plaintiff augmented the application with Skeleton Arguments, also filed into court on 9th May, 2017. The gist of the said Skeleton Arguments is that the Defendant admitted to owing the sum of Three Hundred and Forty Thousand Kwacha (K340,000.00), but claimed that he was unable to remit the same to the Plaintiff on account of the Plaintiff's failure to furnish particulars of its bank account, which claim the Plaintiff has refuted.

It is the Plaintiff's Counsel's further submission that the admission by the Defendant demonstrates that there is no further evidence required to be produced to prove the Plaintiff's claim to the monies aforesaid. In the premises, the Plaintiff prays that the court enters judgment in favour of the Plaintiff for the said sum of Three Hundred and Forty Thousand Kwacha (K340,000.00) together with interest and costs of and incidental to this action.

Counsel for the Plaintiff also cited Order 27 Rule 3 of the White Book (already cited above) and Order 27/3/7 of the said White Book, quoted as follows:

"The jurisdiction of the court is discretionary, but in the absence of reason to the contrary the order is made so as to save time and costs."

The Defendant opposed the application and averred in paragraph 5 of his Affidavit in Opposition that it is not correct for the Plaintiff to state that the Defendant is owing the sum of Three Hundred and Forty Thousand Kwacha (K340,000.00) because the Plaintiff did not lend the money to the Defendant and the Defendant did not borrow the said money from the Plaintiff.

It is the Defendant's testimony that the Plaintiff had directed him to be paying money into the Plaintiff's bank account, and to this effect, the deponent has produced exhibit "HCB1", being a letter demonstrating the said directive.

In paragraph 7 of the Affidavit in Opposition, the deponent avers that there is nowhere in the Defence where it is admitted that he is owing the Plaintiff some money and that the Defendant clearly stated that he is holding on to the Three Hundred and Forty Thousand Kwacha (K340,000.00) because he could not bank it since the Plaintiff's bank account was never operational and that there were no instructions from the Plaintiff to cancel the previous payment arrangements between the Defendant and the Plaintiff.

It is the Defendant's further testimony that Counsel for the Plaintiff appear not to know the arrangements that existed between the Plaintiff and the Defendant regarding the payment of the money

realised from the sales of the pieces of land by the Defendant on behalf of the Plaintiff; and further avers that the said arrangements stipulated that the Defendant was to deposit the money into the Plaintiff's bank account only and no one else's.

The deponent has also testified that, in addition to having been directed not to pay money to anyone else other than as agreed, the Plaintiff's Escrow account was not operational and that as far as the Defendant could remember, the said payment arrangements had never changed. To this end, the deponent has produced exhibit "HCB3".

The deponent finally avers that OMM Banda and Company formally ceased to represent the Plaintiff on 23rd September, 2015 (in support of which the deponent has produced exhibit "HCB3") and that the new advocates for the Plaintiff were not introduced to the Defendant nor was the Defendant directed to pay the sales money to the said advocates; thus the Defendant was not obliged to send money to the Plaintiff's new advocates.

As earlier stated, Counsel for the Defendant did not file any Skeleton Arguments or List of Authorities in opposition to this Application. However, Counsel for the Defendant did, at the hearing of this Application, emphasize that the exhibits in the Affidavit in Opposition show that the Defendant was directed to channel the money to the Plaintiff and that the account in which he was supposed to pay the money was not operational.

Further, Counsel also stated that the Defendant admitted holding on to the money while awaiting instructions as to which account he was to deposit the money because the instructions were that he should not pay the money to the directors.

I have carefully considered the Plaintiff's Affidavit in Support of this Application, the Skeleton Arguments augmenting the same and the authorities. I have also carefully considered the Defendant's Affidavit in Opposition to the Application. From the foregoing, the questions for determination in this Application, in my opinion, seem to be the following:

(i) What constitutes an admission and what is its effect?

(ii) Whether the parties satisfied the elements of an admission and if so, to what the Defendant specifically admitted; and

(iii) the ramifications flowing from the responses in (i) and (ii) above.

Black's Law Dictionary, 10th Edition, defines an admission as follows:

> *"A statement in which someone admits that something is true or that he or she has done something wrong; especially any statement or assertion by a party to a case and offered against the party; an acknowledgement that facts are true."*

In describing the degree to which an admission may be made, the learned authors of Halsbury's Laws of England, Vol. 12, paragraph

709 on 'Evidence' state that a party may admit to the whole or any part of another party's case and may do so by giving notice in writing. Where such an admission is made, any other party may apply for judgment on that admission.

The net effect of the foregoing, therefore, is that an admission need not be in respect of an entire allegation. It can be made in respect of only a particular portion of an allegation of fact, while at the same time, refuting another portion of the same allegation.

Further, Order 27/3/2 of the White Book also establishes the requirement that an admission of a fact should be clear. It is to this end that Roskill LJ (as he then was), stated in the case of ***Technistudy Ltd v Kelland (1)*** that an order should only be made under the said Order if it is plain that there are either clear express, or clear implied, admissions.

One point worth noting from Order 27/3/2, above, is that an admission of fact can be express or implied; and a further point to note under the same Order is that, in addition to such admission being either express or implied, it must be clear.

It must be noted that this requirement for clarity does not only apply to a person making an admission. There is, in my view, an equal expectation placed on the person making an allegation to be clear in their expression of the said allegation. This is so as to avoid ambiguity and to define what exactly an admission may be made in respect of.

To this end, and with refence having been made to the case of ***Ash v. Hutchinson & Co. (Publishers) (2),*** Order 18/13/4 of the White Book provides as follows:

> *"A plaintiff must show that the matters in question are clearly pleaded in order to fix the defendant with an admission.*

In this Application, the Defendant's admission can be extracted from two paragraphs of his Defence, namely;

(a) paragraph 6 which is couched as follows:

> *"That it is admitted that the Defendant is still holding on to the money in the sum of K340,000.00 (Three Hundred and Forty Thousand Kwacha). In fact, it is the Defendant who informed the Plaintiff that there was money which is not yet deposited into the Bank Account of the Plaintiffs on grounds that the Plaintiff had not given the Defendant their current Escrow Account number in which the money was to be deposited because the old Account was not operational. Accordingly, the delay in depositing the money into the Plaintiff's Account was simply caused by the Plaintiffs."* and

(b) paragraph 7, in which he has wholly admitted the contents of paragraph 6 of the Plaintiff's Statement of Claim which is couched as follows:

> *"In a report prepared by the Defendant to the Board of Directors of the Plaintiff Company for the year ended December 31st 2015, the Defendant admitted having received and still holding, on behalf of*

the Plaintiff the said sum of K340,000.00 (Three Hundred and Forty Thousand Kwacha)."

On the construction of the two paragraphs, it is clear that the facts which the Defendant has admitted are that he received and is still holding on to the sum of K340,000.00 (Three Hundred and Forty Thousand Kwacha), which sum belongs to the Plaintiff. The Defendant seems to have raised issue in paragraphs 5 and 7 of his Affidavit in Opposition regarding the Plaintiff's use of the phrase 'owing money', in the Affidavit in Support; while the phrase used in the Statement of Claim to which the Defendant specifically admitted is 'holding money'.

Further, the Defendant has averred that the sum being held by him has still, to date, not been paid to the Plaintiff owing to the fact that the Plaintiff has failed to make available an operational Escrow account as per the parties' agreement exhibited as "HCB3", into which the Defendant can effect payment of the sum.

Since this Application arises from the premise of an admission at the stage of pleadings, it is inevitable for me to also consider Order 18/13 of the White Book, which is the Order dealing with pleadings. The said Order provides as follows:

"(1) Any allegation of fact made by a party in his pleading is deemed to be admitted by the opposite party unless it is traversed by that party in his pleading or a joinder of issue under rule 14 operates as a denial of it.

(2) A traverse may be made either by a denial or by a statement of non-admission and either expressly or by necessary implication.

(3) Every allegation of fact made in a statement of claim or counterclaim which the party on whom it is served does not intend to admit must be specifically traversed by him in his defence or defence to counterclaim, as the case may be; and a general denial of such allegations, or a general statement of non-admission of them, is not a sufficient traverse of them."

It is clear from the foregoing that in trying to establish whether a defendant's response to a plaintiff's allegation amounts to an admission or not, regard must be had to whether or not the defendant has actually traversed the said allegation. A general denial or general statement of non-admission, therefore, would not be a sufficient traverse.

In this regard, an examination of paragraph 6 of the Defence clearly shows that while the Defendant admitted holding the sum in question, he unambiguously raised a defence to qualify how he came to hold the money. The Plaintiff has traversed this defence in its Affidavit in Support of this Application, stating that it had on various occasions and in total futility, requested payment of the sum from the Defendant. To augment this assertion, the Plaintiff produced "EG3", described as copies of the said demands. However, I wish to state that I am not satisfied with the bulk of the said "EG3" as it is

merely a list of the purported documents rather than copies of the actual documents.

In the absence of the said documents, it would not be judicious for this court to speculate on what is contained in the documents that were not exhibited as evidence, merely because the deponent describes them through a summary list. The only exhibit worth considering in respect of the Plaintiff's testimony that it made demands for payment of the sum of K340,000.00 (Three Hundred and Forty Thousand Kwacha) is the letter from Sharpe & Howard Legal Practitioners, dated 12th October, 2016 and addressed to the Defendant. As for the letter dated 12th November, 2017 (also from Sharpe & Howard Legal Practitioners to the Defendant) and forming part of exhibit "EG3", I do not see how its contents amount to a demand for the payment of the sum in question. The letter seems to be a mere demand for the breakdown of the sum in question and not a demand for the payment of the said sum.

It is stated under Order18/13/2 of the White Book, that the essence of the foregoing stipulations is to bring the parties by their pleadings to an issue, and indeed to narrow them down to definite issues, and so diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing. This object is said to be secured by requiring that each party in turn should fully admit or clearly deny every material allegation made against him.

Assuming that the foregoing is satisfied, Order 18/13/3 of the White Book states that the effect of the defendant admitting the facts pleaded in the statement of claim is that there is no issue between the parties on that part of the case which is concerned with those matters of fact, and, therefore, no evidence is admissible in reference to those facts.

Therefore, a judgment on admission may be entered on the admitted facts in favour of the person alleging such facts. Further, where an admission of an allegation is made only to a certain degree, while traversing the remaining portion; judgement on admission may be entered with respect only to the portion admitted and the traversed portion being referred to trial.

To illustrate the effect of an admission being made only to a certain degree or extent, Order 27/3/2 of the White Book cites the case of ***Murphy v. Culhane (3),*** to which the following is attributed:

> *"...So, the widow of a deceased person who died as a result of an assault which occurred during a criminal affray is not entitled to judgment under this rule on the admission of the defendant that he had pleaded guilty to the manslaughter of the deceased, since the defendant may be able to defeat the claim or mitigate the damages or reduce them by alleging contributory negligence..."*

Beyond admitting only in part, the Defendant has gone on to make assertions qualifying the reason for the extent of his admission. The said assertions and the response thereto by the Plaintiff have, in my

opinion, raised issues worth investigating. In the said case of ***Murphy v. Culhane (3)***, the defendant was convicted on a plea of guilty of the manslaughter of the plaintiff's husband, M. By a writ, the plaintiff alleged that the defendant had unlawfully assaulted and killed M and claimed damages thereof. The defendant admitted that he had pleaded guilty to manslaughter and that M had died as a result of his assault, but alleged that the assault had occurred during a criminal affray which M had initiated with others for the purpose of assaulting the defendant. He contended that he was not liable to the plaintiff for M's death on the ground that he could avail himself of the defences of *ex turpi causa non oritur actio* and *volenti non fit injuria.* Alternatively, he claimed that M was guilty of contributory negligence in that his death was caused in part by his own fault in initiating or participating in the criminal affray. The plaintiff applied successfully to have judgment as to liability entered against the defendant on the basis of the admissions contained in the defence and the defendant appealed. On appeal, the judgment was set aside and Lord Denning MR had the following to say when delivering the judgment:

> *"Apart altogether from damages, however, I think there may well be a defence on liability. If M was one of a gang which set out to beat up Culhane, it may well be that he could not sue for damages if he got more than he bargained for. A man who takes part in a criminal affray may well be said to have been guilty of such a wicked act as to deprive himself of a cause of action or, alternatively, to have taken on himself the risk. I put the case in the course of argument: suppose that a burglar breaks into a house and the householder, finding him there,*

picks up a gun and shoots him, using more force maybe than is reasonably necessary. The householder may be guilty of manslaughter and liable to be brought before the criminal courts. But I doubt very much whether the burglar's widow could have an action for damages. The householder might well have a defence either on ground of ex turpi causa non oritur actio or volenti non fit injuria... even if Mrs. Murphy were entitled to damages..., they fall to be reduced because the death of her husband might be the result partly of his own fault and partly of the default of the defendant...So, in the present case it is open to Mr. Culhane to raise both those defences...It seems to me that this is clearly a case where the facts should be investigated before any judgment is given. It should be open to Mr. Culhane to be able to put forward his defences so as to see whether or not and to what extent he is liable in damages."

I am of the view that the parties have satisfied the elements of an admission. It is not in contention that the Defendant is holding on to the sum of Three Hundred and Forty Thousand Kwacha (K340,000.00) and that the said sum belongs to the Plaintiff. It is to this extent, specifically, that the Defendant has made his admission. I find, in light of this, that no further evidence ought to be given regarding this fact and judgment on admission may thus be entered on this fact alone.

In view of the foregoing discourse, I opine that, apart from the established express admission, both the Defendant and the Plaintiff in this Application, have raised enough contentious facts warranting investigation through trial. I therefore, order that Judgement on

Admission be and is hereby entered in respect only of the payment of the sum of K340,000.00 (Three Hundred and Forty Thousand Kwacha). As the parties have raised triable issues regarding how the Defendant came to hold the said sum, I make no order as to interest claimed on the said sum, until the facts in contention have been put to trial.

Cost shall follow the event.

Dated at Lusaka the 13th day of September, 2017.

W.S. MWENDA (Dr)
HIGH COURT JUDGE