

**IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

2019/HP/0929



BETWEEN:

**VYANSILATI ENTERPRISES LIMITED
MARVIN CHIBWE**

**1st PLAINTIFF
2nd PLAINTIFF**

AND

BERNADETTE DEKA ZULU

DEFENDANT

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA IN CHAMBERS THIS 16th
DAY OF MARCH, 2020**

For the Plaintiffs : Mr M. Sinyangwe, Willa Mutofwe and Associates

For the Defendant : Ms N. Tembo, Wilson and Cornhill

R U L I N G

CASES REFERRED TO:

- 1. Kearney and Company Limited v Agip (Z) Limited and Ashalt and Tarmac 1985 ZR 7*
- 2. London Ngoma and others v LCM and others 1999 ZR 95*
- 3. ZEGA Limited v Zambezi Airlines and Diamond General Insurance Appeal No 39 of 2014*
- 4. Kalusha Bwalya v Chadore Properties and Ian Haruperi SCZ No 20 of 2015*
- 5. China Copper Mines Limited v Tikumbe Limited Appeal No 17 of 2017*
- 6. Finance Bank PLC V Lamasat International Limited Appeal No 27 of 2018*

LEGISLATION REFERRED TO:

- 1. The High Court Rules, Chapter 27 of the Laws of Zambia**
- 2. The Rules of the Supreme Court of England, 1999 edition**

This is an appeal against the decision of the Deputy Registrar declining to grant an order for the entry of judgment on admission which was made on 14th November, 2019. The background leading to the application is that the 1st plaintiff commenced this action on 18th June, 2019 by writ of summons claiming;

- 1. Payment of K2, 675, 000.00 together with interest at the agreed rate of 15% of the total amount due per week from the date of default, being 27th April, 2019 to the date of the writ.*
- 2. Interest at the average short term deposit rate per annum from the date of the writ to the date of the judgment, and thereafter at a rate not exceeding the current lending rate as determined by the Bank of Zambia.*
- 3. Damages for breach of contract.*
- 4. Costs; and*
- 5. Any other relief that the court may deem fit.*

The defendant entered appearance and filed a defence on 28th June, 2019, and on 19th July, 2019, the 1st plaintiff applied for entry of judgment on admission. The application was heard on 14th November, 2019, and the Deputy Registrar declined to enter judgment on admission. Dissatisfied with that ruling, the 1st plaintiff appealed to a Judge at chambers on 20th November, 2019, and an application for

joinder of the 2nd plaintiff was made on 29th November, 2019. It was granted on 30th January, 2020.

At the hearing of the appeal, Counsel for the plaintiffs informed the court that they had filed three grounds of appeal which they would argue collectively. Counsel further submitted that they would also rely on the affidavit filed in support of the application before the Deputy Registrar, which was deposed to by Harold Chibwe, and was filed into court on 19th July, 2019.

Still in submission, Counsel stated that the exhibits to the affidavit showed that the defendant admitted that there was an agreement between the parties, which was exhibited as 'MC1'. Counsel argued that the said agreement was binding between the parties, and in support of that position, he placed reliance on the case of ***Kalusha Bwalya v Chadore Properties and Ian Haruperi*** ⁽⁴⁾.

It was his submission that in that case, the Supreme Court held that if there is one thing more than the other, that public policy requires, is that men of full age and competent understanding shall have the utmost liberty of contracting, and their contracts when entered into freely and voluntarily, shall be given force.

Counsel went on to submit that the affidavit in opposition which was filed on 9th August, 2019, does not dispute the contents of the contract, and that it was entered into freely and voluntarily. Therefore, the court must enforce the contract. It was added that a demand notice, exhibited as 'MS2' to the affidavit, was sent to the defendant, and there was an unequivocal response or admission by the defendant in her letter dated 29th May, 2019, which is exhibited as 'MS3'.

That in that letter, the defendant admits having received K1, 000, 000.00 and she agreed to pay back K2, 000, 000.00. Further, she undertook to pay back K2, 300, 000.00, the K300, 000.00 being interest. It was Counsel's submission that on the basis of that letter alone, the Deputy Registrar should have entered judgment on admission, as the admission was unequivocal.

Continuing with the submissions, Counsel stated that the defendant in the affidavit in opposition had not disputed the letter, and in paragraphs 3 and 5 of the defence that was filed on 28th June, 2019, the defendant admits the claim, and judgment on admission should have been entered. Reliance was placed on the case of **ZEGA Limited v Zambezi Airlines and Diamond General Insurance** ⁽³⁾, stating that it was held in that case that judgment on admission can only be entered on admissions that are clear.

Counsel's submission was that the documents earlier referred to were clear, and that in the case of **Finance Bank PLC V Lamasat International Limited** ⁽⁶⁾, the Court of Appeal stated that a court cannot refuse to enter judgment on admission in the clear case of admissions. Further, that the Court of Appeal in the case of **China Copper Mines Limited v Tikumbe Limited** ⁽⁵⁾ made reference to Order 21 of the **High Court Rules, Chapter 27 of the Laws of Zambia** and Order 27 of the **Rules of the Supreme Court of England, 1999 edition**, which govern the entry of judgment on admission.

It was submitted that the Court of Appeal in that matter stated that once an issue has been admitted, it would no longer be relevant to proceed to trial, as it would be time wasting. Counsel submitted that with the admissions on record, judgment on admission should have been entered.

In response, Counsel for the plaintiff stated that Vyansilati Enterprises, the 1st plaintiff, in this matter was not a party to the agreement exhibited as 'MC1' to the affidavit in support of the application. Further, that the defendant admitted owing only K1, 000, 000.00 to Mr Chibwe in her defence. However, Mr Chibwe was not the party that had applied for the entry of judgment on admission.

Relying in the doctrine of privity of contract, Counsel argued that the doctrine does not allow a person who is not privy to a contract to derive benefit from it. Thus, the admissions made by the defendant do not affect the 1st plaintiff, as it was not party to the agreement. It was also submitted that the Deputy Registrar was of the view that the application to enter judgment on admission should not be granted at the early stage based on the evidence that was produced, and their view was that the discretion was exercised judiciously.

In reply, Counsel for the plaintiffs stated that Mr Marvin Chibwe whom the defendant admitted owing K1, 000, 000.00 had since been made a party to the proceedings. Therefore, there being admissions on the record, judgment on admission should be entered. With regard to the argument that the 1st plaintiff was not a party to the agreement, Counsel stated that this was misleading as exhibit 'MC1' to the affidavit in support of the application states that it is Vyansilati Enterprises Limited, upon which contract Marvin Chibwe agreed with the defendant.

Therefore, the issue of privity of contract was a clear misdirection, and that even assuming that Marvin Chibwe was not party to the proceedings, he would have applied to be joined to the proceedings by virtue of the case of ***London Ngoma and others v LCM and others*** (2),

as the Supreme Court in the case held that an order for joinder of a party could even be made even after judgment.

Counsel went further to state that exhibited as 'HCM1' to the affidavit in reply was a money lenders certificate which gives Marvin Chibwe authority to trade as a money lender, under the name Vyansilati Enterprises. It was stated that judgment on admission should have been entered on the admitted sum, and that trial only proceeds with regard to the interest which was disputed.

I have considered the appeal. It is trite that an appeal against the Registrar's decision to a Judge at Chambers is a rehearing of the application. In the case of ***Kearney and Company Limited v Agip (Z) Limited and Ashalt and Tarmac*** ⁽¹⁾ it was held that;

“An appeal from deputy registrar to a judge in chambers is an entirely fresh application and it is not improper to lodge further affidavits which should be taken note of by the appellate judge”.

Therefore, in this appeal, I will consider the affidavits, skeleton arguments and list of authorities that were filed before the Deputy Registrar. The application for entry of judgment on admission was made pursuant to Order XXI Rule 5 of the ***High Court Rules, Chapter 27 of the Laws of Zambia*** and Order 27 Rule 3 of the ***Rules of the Supreme Court of England, 1999 edition***.

Order XXI Rule 5 of the ***High Court Rules*** provides that;

“If any defendant shall sign a statement admitting the amount claimed in the summons or any part of such amount, the Court or a Judge, on being satisfied as to the genuineness

of the signature of the person before whom such statement was signed, and unless it or he sees good reason to the contrary, shall, in case the whole amount is admitted, or in case the plaintiff consents to a judgment for the part admitted, enter judgment for the plaintiff for the whole amount or the part admitted, as the case may be, and, in case the plaintiff shall not consent to judgment for the part admitted, shall receive such statement in evidence as an admission without further proof”.

Order 27 Rule 3 of the ***Rules of the Supreme Court of England, 1999 edition*** on the other states that;

“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”.

In this case, the plaintiffs rely on paragraphs 3 and 5 of the defence, stating that in those paragraphs, the defendant admits owing the plaintiffs K1, 000, 000.00. Further, that even in the letter exhibited as ‘MC3’ to the affidavit to the affidavit in support of the application, the defendant admits owing K2, 300, 000.00. The defendant in the affidavit in opposition to the application however states that the agreement was between her and Marvin Chibwe.

That under that agreement, she borrowed K1, 000, 000.00 with K1, 000, 000.00 being payable as the interest. The defendant however avers that the agreement includes penal interest, which is unlawful. She denies having admitted owing the amount of K2, 300, 000.00 stated in the letter exhibited as 'MC3' to the affidavit in support of the application.

It is clear from the authorities cited, that judgment on admission is only entered where the admissions are clear. It is clear from paragraphs 3 and 5 of the defence that the defendant admits having borrowed K1, 000, 000.00 from Marvin Chibwe, the 2nd plaintiff herein. The defendant alleges that K1, 000, 000.00 payable as interest after one month, and thereafter the penalty at 15% per week upon default, is unconscionable.

Therefore, while exhibit 'MC3' to the affidavit in support of the application can be said to be an admission that the defendant owes the plaintiffs K2, 300, 000.00, there is a defence challenging the interest payable as well as the penal interest. It can thus be said that the defendant admits only owing the principal sum of K1, 000, 000.00 as that admission is clear.

While at the time the application for entry of judgment on admission was made, Marvin Chibwe who was the contracting party as seen on exhibit 'MC1' to the application, being the agreement, was not a party to these proceedings, he has since been joined.

I accordingly enter judgment on admission in favour of the 2nd plaintiff for the amount of K1, 000, 000.00. This amount shall carry interest at the average short term deposit rate from the date of issue of the writ until the entry of judgment on admission, and thereafter at the Bank of Zambia lending rate until payment.

The matter shall proceed for trial with regard to the interest claimed. I therefore issue orders for directions as follows;

1. That there shall be discovery of documents by 6th April, 2020.
2. That there shall be inspection of documents by 20th April, 2020.
3. That the parties shall file a bundle of pleadings and bundles of documents by 4th May, 2020.
4. That there shall be liberty to apply by either party.
5. That the matter shall come up on 29th May, 2020 @ 08:45 hours for a status conference.
6. That the matter shall come up for trial on 30th July @ 14:00 hours.

Costs shall be in the cause and leave to appeal is granted.

DATED AT LUSAKA THIS 16th DAY OF MARCH, 2020

S. Kaunda

S. KAUNDA NEWA
HIGH COURT JUDGE