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IN THE HIGH COURT FOR ZAMBIA

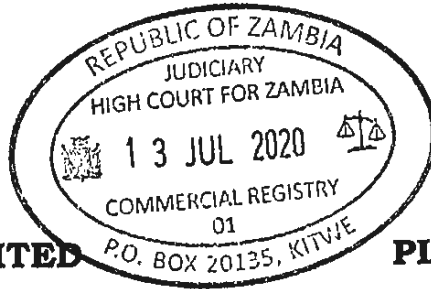
2019/HKC/0048

AT THE COMMERCIAL REGISTRY

HOLDEN AT KITWE

(Civil Jurisdiction)

BETWEEN:



CARMINE MINING LIMITED

PLAINTIFF

AND

CHIMWENDA INVESTMENTS LIMITED

DEFENDANT

Before: Justice Abha N. Patel, SC.

For the Plaintiff : Mr. Nathan Chaleka of Messrs ECB LP.

For the Defendant : Mr. S Twumasi of Messrs Kitwe Chambers

JUDGMENT ON ADMISSION

Rules of Court and Statutes

- (i) *Order 27 Rule 3 of the rules of the supreme Court of England 1965, contained in the White Book, 1999 Edition.*
- (ii) *Order 21 rule 6 of the High Court Rules Cap 27 of the Laws of Zambia.*
- (iii) *Order LIII of the High Court (Amendment) Rules S.I No.27 of 2012*
- (iv) *Order III rule 2 of the High Court Rules Cap 27.*
- (v) *Rule 2 of the Practice Directions governing Commercial Matters.*

Case Law

- (i) *China Henan International Economic Trade Cooperation vs Mwangwe Contractors Limited (SCZ Judgment No. 7 of 2002).*
- (ii) *Chazyia Silwamba vs Lamba Simpito (2010) vol 1 Z.R at 475 .*
- (iii) *Zambia Export and Import Bank Limited Vs Mkuyu Farms Limited and Elias Andrew Spyron and Mary Ann Langley Spyron (1993/1994) Z.R 36 (S.C).*
- (iv) *John Paul Mwila Kasengele and others vs Zambia National Commercial Bank Limited SCZ Judgment No. 11 Of 2000.*
- (v) *Freshview Cinemas Limited vs Manda Hill limited Appeal No. 174/2013.*
- (vi) *National Drug Company Limited and Zambia Privatisation Agency vs Mary Katongo.*
- (vii) *Foveros Mining limited vs Bell Equipment Zambia Limited CAZ No. 115/2018 Appeal No. 79 of 2001.*

Other Works

- (i) *Matibini, on Zambian Civil Procedure: Commentary and Cases.*
- (ii) *Chitty on Contracts 29th Edition General Principles Volume 1 London: Sweet and Maxwell (2004).*

1. Introduction

1.1. In an action filed on 16th October 2019, the Plaintiff seeks the following:

- i. payment of the sum of USD 406,067.24 or the Kwacha equivalent being in respect of payment due to the Plaintiff for the agreement of sale of equipment which sums of money the Defendant has failed and/ or neglected to pay the Plaintiff;

- ii. Interest on the total amount of the outstanding debt levied at the rate of 4% per annum above Standard Chartered Bank Plc lending rate from time to time. And that interest shall accrue on a daily basis from the due date until actual payment of the overdue amount, whether before or after judgment;
- iii. Damages for breach of contract;
- iv. Any other order of the Court may deem fit;
- v. Costs

1.2. The Defendant filed a Memorandum of Appearance and Defence on 7th November 2019, prompting the Plaintiff to file its Reply dated 26th November 2019.

1.3. The Plaintiff subsequently filed an application on 14th February 2020, by Summons for entry of Judgment on Admission, in the sum of USD 406,067.24 the subject of this ruling, supported by an Affidavit in Support and Skeleton Arguments and List of Authorities.

1.4. The Defendant in opposing this application, has filed its Affidavit in Opposition, Skeleton Arguments in Opposition and List of Authorities on 16th March 2020.

2. **The Hearing**

2.1 Due to the Coronavirus pandemic and in accordance with the Judiciary (Coronavirus) May 2020 Guidelines, the Court

did issue Special Order for Directions and did determine the application on documents alone.

2.2 The Court has taken note of all documents filed in support of their respective positions, all of which are on record, and which I have painstakingly considered.

3.0 Application for Judgment on Admission

3.1 The facts and the Law

According to the affidavit in support of this application, the deponent, one Titus Samona, avers that the Plaintiff and the Defendant entered into a Sale of Equipment Agreement for sale of various equipment valued at USD586,647.79. Exhibited and marked '**TS1**' is a copy of the Sale Equipment Agreement. The deponent further avers in paragraph 5 that some payments were made by the defendant and has exhibited a letter from the Plaintiff dated 10th May 2018, and marked '**TS2**'.

3.2 There is also produced and marked '**TS3**' being a copy of the *Variation of Sale Agreement* between the Plaintiff and the Defendant and dated 28th November 2017, the effect of which was to vary the principal sale agreement. The deponent also referred to exhibits marked '**TS3**' and '**TS4**' being the amended amortisation schedule and a letter of demand dated 16th May 2019.

- 3.3 It is the Plaintiffs application that the defendant admitted owing the Plaintiff the sum claimed and refers to the defence filed on 7th November 2019.
- 3.4 The defendant has however opposed the application and has placed reliance on its Affidavit in Opposition sworn by one Charles Chikwelete filed on 16th March 2020, and on its Skeleton arguments in opposition. The deponent has confirmed that the parties did enter into an agreement for the purchase of various equipment and has also exhibited a copy of the agreement marked 'CC1'. The deponent in response to paragraph 5 of the Affidavit in Support, avers that apart from the payments the Plaintiff confirms having received, the defendant has identified two further payments made in the sum of USD25,000 on 11th June 2018 and ZMW45,000 on 12 June 2018, and has referred to exhibits 'CC2' as proof of those further payments made to the Plaintiff.
- 3.5 The Defendant admits the Variation Agreement but contends that the same should be read with the principal Agreement of 28th March 2017. They have submitted that the Plaintiff is misguided in its application and has wrongly assumed the Defendants admission to the Plaintiffs claim. They refer to the contents of paragraph 5 of the Defence and maintain that the Plaintiff is entitled to recover the equipment and treat all moneys paid as rentals in accordance with the terms of the Sale Agreement.

3.6 The defendant has submitted that paragraph 3 of its defence was not an admission that the defendant owes money to the Plaintiff, but only that it did not make payment.

3.7 its defence lies in the pleading that the terms of the transaction are governed by **clauses 6.1, 6.2** as read with **clauses 10.1 and 10.2** of the Sale of Equipment Agreement marked as exhibit '**CC1**' and '**TS1**' to their respective Affidavits.

4. **The Issue**

for determination by this Court is whether this is a proper case for the Court to enter Judgment on Admission.

5. **The Law**

5.1 In terms of legal arguments, the Plaintiff cited **Order XXI., Rule 6 of the High Court Rules, Chapter 27 of the Laws of Zambia** which reads 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"

The Plaintiff also sought refuge in **Order 27, Rule 3 of the Supreme Court Rules, 1965, Supreme Court Practice, 1999 edition**, which gives the Court power to enter judgment upon any admission of fact or of part of a case made by a party to a cause either by his pleadings or

otherwise, without waiting for the determination of any other question between the parties.

The object of **Order XXI of the High Court Rules** and **Order 27 rule 3 of the Rules of The Supreme Court**, is to enable a party to obtain speedy judgement where the other party has made a plain admission entitling the former to succeed. It is important to note that the function of an admission is to ensure that the Courts time at trial is not wasted and delay is avoided. A defence must not be evasive, nor must it be superficial. This was the effect of the decision of the Supreme Court in the case of **Chazya Silwamba vs Lamba Simpito**.

- 5.2 The gist of the plaintiffs' argument is that the defendant by its pleadings, specifically the defence, has admitted the plaintiffs' claim. Additionally, they refer to **paragraph 3** of the Defence which is in response to **paragraph 7** of the statement of Claim both of which reads as follows respectively:

"7. The Defendant has failed to honour its obligation under the Variation Agreement and has only made payments as stated in paragraph 5 above. Consequently the Defendant currently owes the Plaintiff an outstanding balance of USD 496,067.24 of which the Defendant has failed and or/otherwise refused to pay in spite of numerous reminders by the Plaintiff and the Plaintiff's Advocates."

"3. As regards paragraph 7, the Defendant will aver that they have not failed as payments were not made due to non-payment by their main contractor a fact the plaintiff was well aware of."

5.3 The Plaintiff has also relied on the decision of the Supreme Court in the case of **China Henan** where the Court stated as follows:

“The new dispensation in commercial matters is that Parties must place their cards on the table early in the litigation to assist in narrowing issues of contention and for the real issues in the dispute to surface. It is not prudent for a party to wait for trial before exposing their side of the story...In keeping with the Practice Directions, where a defence in a commercial matter does not satisfy the requirements of rule 2, the court is entitled to enter Judgment on Admission in an appropriate case.”

The Court has also been referred to **paragraph 12 in Chitty on Contracts General Principles Vol 1, 20 edition** which states:

“In any agreement or contract words should be given their natural meaning and that the intentions of parties may be gleaned from the surrounding circumstances.”

6. The Defendant has opposed this application and its opposition rests as narrated in *paragraphs 3.4 to 3.7* above.

The Defendant’s understanding of Order 27 rule 3 of the RSC rests on the basis that an admission may be express or implied but must be clear.

7. Analysis of the Law and Findings on the Facts

7.1 I have meticulously perused the affidavit evidence and note the exhibits marked ‘**TS2**’, to ‘**TS4**’ being letters and revised schedules demanding payment from the Defendant for the balance then outstanding.

7.2 I have scrutinised the Sale of Equipment Agreement (**TS1**) and note **clause 4 on Price and Payment** and **Clause 10 on Termination**. I have also noted the Variation of Sale Agreement in a letter dated 28 November 2017, exhibited as '**TS3**' which varied the amortisation schedule and which sought to vary clause 4.5 under the sub head '**Price and Payment**'.

7.3 I note and it is the Defendants submission that the admission must be unequivocal. It must be clear and without doubt. The Defendants have attempted to submit that they accept that they did not make payment to the Plaintiff, but not that they owe the sum claimed by the Plaintiff. Their argument lies in the fact that the Plaintiff should treat all payments made as rental towards the equipment and take recovery of the equipment.

7.4 They have also countered that some payments made by them have not been reflected by the Plaintiff and details of these are contained in **paragraph 5** of the Defendants Affidavit in Opposition.

7.5. Having examined the admission as contained in *paragraph 3* of the Defence, I am satisfied that the defendant herein clearly admits non payment to the Plaintiff but tenders the explanation due to non-payment to it (the defendant) by their main contractor. This, in my considered opinion, does not negate the liability to the Plaintiff. Further and in my considered view, the remedies of the Plaintiff under clause 4 and 10 are separate and distinct. It is the understanding of

the Court that the Plaintiff may chose to proceed to claim for non-payment as per clause 4 (as varied), or to terminate as provided by clause 10.

7.6 The Defendant has countered that should the Plaintiff accept the equipment without payment of the alleged balance, that would conclude the matter, and has posited that a claim for the balance of the purchase price and interest and a return of the equipment would be unjust enrichment on the part of the Plaintiff.

7.7 The Court has also had occasion to consider the recent Judgment by the Court of Appeal, upholding the Judgment on Admission entered by the Court below, in the case of **Foveros Mining Limited vs Bell Equipment Zambia Limited**, whose facts are similar to the case *in casu*. The Court of Appeal noted that there was nothing on record to suggest that the Appellant (*in that case*), was coerced into executing the Acknowledgment of Debt. The Court relied on the authority of **National Drug Company Limited and Zambia Privatisation Agency vs Mary Katongoin** support of the principle that Parties shall be held to the terms of documents they execute. In the course of its Judgment, the Court of Appeal found that the trial court was on firm ground in rejecting the appellants submission that it had raised a defence on the merits.

7.8 I therefore arrive at the finding that the defendant has unequivocally and expressly admitted its indebtedness to the Plaintiff and this is a proper case to enter Judgment on

Admission. I have referred to the exhibits in paragraph 7.1 above and note that all these have been signed and acknowledged by Charles Chikwelete on behalf of the Defendant. I have not seen any provision stating or implying that payment of the amounts outstanding were subjected to any other conditions as now being raised by the Defendant. I am further of the considered opinion that the Defendant is attempting to depart from the terms of the Sale of Equipment Agreement (**TS1**), as varied by the Variation Agreement (**TS3**).

7.9 In response to the Defendants issue of undue enrichment, the Court has anxiously considered the statement of claim and finds no justification in the argument advanced by the Defendant. **Paragraph 1.1** above, has laid out the claims of the Plaintiff.

7.10 I am fortified in this finding ably guided by the pronouncement of the Supreme Court as set out in the case of **Freshview Cinema's Limited vs Manda Hill Limited** when it had occasion to consider a similar application under Order 21 of the HCR and Order 27 rule 3 of the RSC, and held that

"...what is paramount, in our view is that the express or implied admission is clear"

7.11 Further and on the reason advanced for non-payment, the Supreme Court in the case of **John Paul Mwila**

Kasengele vs Zambia National Commercial Bank Limited
stated that:

"The Respondent cannot be said to argue financial constraints or difficulties as the basis for non-payment of rentals. It is my view that inability to pay has never been and is never a defence to a claim"

7.12 The argument presented by the Defendant, of return of the equipment without any entitlement by the Plaintiff of the amounts outstanding is a self-defeating argument, in the face of written admissions and acknowledgments, and at best, an attempt at creative engineering on the part of Counsel.

To me, it comes as *too little, too late*, on the part of the Defendant.

I therefore consider since the admission sits in the defence, a pleading, that this is a proper case for me to exercise my jurisdiction to enter judgment on admission pursuant to **Order 27., Rule 3 of the Rules of the Supreme Court.**

8. Conclusion

In light of my being satisfied that the defendant has admitted indebtedness in his pleadings, Judgment on admission is entered against the defendant in the sum to be determined by the learned District Registrar, being moneys due for equipment sold and delivered to the Defendant, and which were duly acknowledged and received.

The debt shall attract interest on the total amount of the outstanding debt levied at the rate of 4% per annum above

Standard Chartered Bank Plc lending rate from time to time on a daily basis from the due date until the date of this Judgment.

The Judgment debt shall attract interest at the average of the short-term deposit-rate per annum prevailing from the date of commencement of this action to date of Judgment and thereafter at the Bank of Zambia short term lending rate until date of full and final settlement.

Costs are awarded to the Plaintiff, to be taxed in the event of default of agreement.

Leave to appeal is granted.

Dated at Kitwe this 13th day of July, 2020.

to be paid

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Lady Justice Abha N. Patel, SC
Judge of the High Court

