

Judge
AP 92

IN THE HIGH COURT FOR ZAMBIA

2021/HKC/010

AT THE COMMERCIAL REGISTRY

HOLDEN AT KITWE

(CIVIL JURISDICTION)



BETWEEN:

NUCO INDUSTRIAL SERVICES LIMITED

PLAINTIFF

AND

GROUP FIVE ZAMBIA LIMITED

DEFENDANT

Before Hon. Lady Justice Abha Patel, S.C. on 15th September 2021

For the Plaintiff:

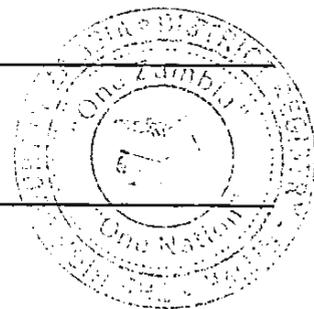
Mr. H. Pasi

Messrs Mando & Pasi Advocates

For the Defendant:

Mr. G. Kalandanya of Messrs G.M. L.P. Agents for
Messrs Malambo & Co

JUDGMENT ON ADMISSION



List of Authorities

- (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 5 and 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.

Other Works

- (i) Matibini, on *Zambian Civil Procedure: Commentary and Cases*
- (ii) *Halsbury's Laws of England 4th Edition*

Case Law

- (i) *China Henan International Economic Trade Cooperation vs Mwange Contractors Limited (SCZ Judgment No. 7 of 2002);*
- (ii) *Chazya Silwamba vs Lamba Simpito (2010) vol 1 Z.R at 475;*
- (iii) *Finance Bank Zambia Plc vs Lamasat International limited Appeal No. 175/2017 and Appeal No. 27/2018;*
- (iv) *China Copper Mines Limited vs Tikumbe Mining Limited Appeal No.17 of 2017;*
- (v) *Himani Alloys Limited vs Tata Steel Limited (2011) 3,Civil Court Cases 721;*
- (vi) *Freshview Cinemas Limited vs Manda Hill limited Appeal No. 174/2013;*
- (vii) *Zega Limited vs Zambezi Airlines Ltd & Diamond Insurance Limited Appeal No. 39/2014;*
- (viii) *Zambezi District Council vs Zolick Kazanda Chanyika III Appeal No. 49 of 2018*
- (ix) *Trans Trust S.P.R.L vs Danubian Trading Company (1952) 1 All ER 970*
- (x) *The Lemoine Company of Alabama, L.L.C vs HLH Constructors INC. 1090847*
- (xi) *Sylvester Musonda Shipolo vs Shadreck Maipambe Appeal No. 1/2016*
- (xii) *A.J. Trading Company Limited v Chilombo (1973) Z.R 55*

1. Introduction

1.1 The Plaintiff on the 25th day of February 2021, caused to be filed a Writ of Summons and Statement of Claim claiming the following reliefs:

- i. Payment of the sum of USD524,994.79 being the aggregate sum owed by the Defendant to the Plaintiff as agreed by the Plaintiff and the Defendant in the final payment agreement as the outstanding payment

for labor hire services provided by the Plaintiff to the Defendant for construction and mechanical works at the New Synclinorium Concentrator Project at Mopani Copper mines in Kitwe;

- ii. Interest accrued on the outstanding instalments at the rate of 1% per month from the due date of the respective invoices as agreed by the Plaintiff and the Defendant in the Final Payment Agreement dated 11 August 2020 which interest stood at USD 45,442.43 as at 22 February 2021 and will continue to accrue as aforesaid until full payment of the debt;
- iii. Interest on each sum adjudged to be payable to the Plaintiff pursuant to section 4 of the Law Reform (Miscellaneous Provisions) Act, Chapter 74 of the Laws of Zambia;
- iv. Interest pursuant to the Judgments Act, Chapter 87 of the Laws of Zambia; and
- v. Costs

1.2 On 22nd July 2021, the defendant filed its Defence prompting the Plaintiff on 11th August 2021, to issue Summons for Entry of Judgment on Admission Pursuant to Order 21 rule 6 and Order 53 Rule 6 (5) of the High Court. This was filed with an Affidavit in Support and Skeleton Arguments of the same date. (hereinafter referred to as "*the application*").

1.3 On the return date of 1st September 2021, Counsel for the Defendant sought an adjournment and applied for leave to file their opposing process, which application the Court granted and issued further directions which have been complied with. It was also ordered that the Court would deliver its Judgment on the application before it.

1.4 The defendant duly filed its opposing Affidavit and Skeleton Arguments on 8th September 2021, (*the opposing arguments*) and the Plaintiff caused to be filed its Affidavit and skeleton arguments in reply on 15th September 2021 (*the arguments in reply*).

1.5 The Court remains grateful to Counsels respectively, for the industry employed in the documents presented, all of which have been considered carefully, alongside the respective submissions, and my decision is as set out below.

2.0 The Application for Judgment on Admission

2.1 *The facts and Law as pleaded by the Plaintiff*

According to the affidavit in support of this application, the deponent, one **Doreen Nketani**, in her capacity as the Finance Director for the Plaintiff company, avers that the Defendant had been contracted by Mopani Copper Mines Plc to carry out construction and mechanical works at the New Synclitorium Concentrator Project at the said Mine in Kitwe, and that the Defendant in turn, sub-contracted the Plaintiff to provide labour hire services for the said project.

- 2.2 It was her averment that the Plaintiff did provide the defendant with such services and invoiced the defendant accordingly. It is also her averment that the defendant certified the services it received and despite it receiving payment from the said Mopani Copper Mines Plc, it has refused, failed and or neglected to pay the Plaintiff for its services as agreed in the contract.
- 2.3 The Plaintiff has averred that following on from the failure of the Defendant to settle the sums due to the Plaintiff, the Parties entered into negotiations, which culminated in a Final Payment Agreement whose terms were agreed between the parties agreeing the principal sum of USD 524,994.93 (after discount), payable by the Defendant, by 25 September 2020, and interest to accrue at 1% per month from the original due date of the various invoices. The Plaintiff has exhibited a copy of the said Final Payment Agreement marked 'DN1'.
- 2.4 To the extent narrated above, this seems to be common cause between the Parties and will be treated as findings of fact. However, it is the Defendants contention as pleaded by its defence that it was only liable to pay the Plaintiff upon receiving payment from Mopani Copper Mines Plc.
- 2.5 The Plaintiff has denied this as it is not supported in the Final Payment Agreement which also agreed the date for settlement of the negotiated amount by 25 September 2020, and has urged the Court to find that payment to the Plaintiff was not conditional on the defendant receiving payment for Mopani Copper Mines Plc. The deponent has also referred

to an exhibit marked 'DN2', being an e-mail from the defendant, in response to the letter of demand, issued by the Plaintiffs Advocates, in support of its submission that the negotiated payment as embodied in the Final Payment Agreement, was not conditional upon the defendant being paid by Mopani Copper Mines Plc.

2.6 The Plaintiff has also submitted that **paragraph 5c and 6** of the Defence is a clear and unequivocal admission that the Plaintiff is entitled to the sums it claims for services rendered. The Plaintiff has maintained that the Final Payment Agreement and the schedule attached to it, is not conditional to the Defendant being paid by Mopani copper Mines Plc.

2.7 The Plaintiff has referred to a Judgment of the Court of Appeal in the case of **Zambezi District Council vs Zolick Kazanda Chanyika III** Appeal No. 49 of 2018 wherein the Court of Appeal upheld the entry of Judgment on Admissions based on earlier correspondence between the Parties, from which it tried to resile.

2.8 The Plaintiff has also invoked the provisions of **Order 53 rule 6** of the HCR on the requirements of a defence for actions instituted in the Commercial Division and has submitted that the defence entered does not meet the requirements of the said Order, and further that the defence makes general and bare denials and has submitted that Judgment on Admission be entered in favour of the Plaintiff.

3. **The Defendant's Opposition**

- 3.1 The defendant has opposed the application through the Affidavit of one **Zander Van Lingen** and has placed reliance on their Skeleton arguments in opposition, both filed on 8th September 2021. They have submitted that the condition upon which the Plaintiff would be paid is upon the Defendant collecting the funds which funds have not been collected by the Defendant.
- 3.2 The deponent further avers that the sum of USD 524,994.93 as embodied in the agreement 'DN1,'relied on by the Plaintiff is payable from funds collected by the Defendant, which funds have not yet been collected and that the collection of the funds forms a condition precedent to the entitlement of the Plaintiff, which has not yet been satisfied.
- 3.3 I have reflected on the skeleton arguments and the authorities relied on by the Defendant in support of its position that the admission if at all, was conditional to the payment to it by Mopani Copper Mines Plc, which payment has not yet been made and hence the liability to the Plaintiff has not accrued.
- 3.4 I have also noted that the defendant has gone to great lengths to substantiate its submissions on the law of condition precedent and to support its argument that a condition precedent is not a bar to prevent a binding contract but to suspend its immediate performance until the fulfilment of the condition. On this Counsel has referred to the words of Lord Denning in the case of **Trans Trust S.P.R.L vs Danubian Trading Company** and the case of **The Lemoine Company of Alabama, L.L.C vs HLH Constructors INC.**

3.5 The defendant has quoted extensively from **Halsbury's Laws of England** 4th Edition on the subject of Conditions Precedent and has quoted heavily from a decision of the Supreme Court in the case of **Sylvester Musonda Shipolo vs Shadreck Maipambe**.

3.6 It is the defendant's submission ultimately that the condition to fulfil the obligation created by the contract with the Plaintiff, not having occurred, this is not a proper case for the Court to sustain the Plaintiff's application for the entry of Judgment on Admission and prays for it to be dismissed with costs.

4. **The Issue for determination**

The issue for my determination is crystal clear and simply put:
has the Defendant admitted the Plaintiffs claim in such clear and unequivocal terms, that mandates this Court to exercise its discretion and enter Judgment on Admission in favour of the Plaintiff? Conversely stated, has the Defendant shown that the Court should not exercise its discretion, to deny the valuable right of the defendant to contest the claim based on the defence of condition precedent?

5. **The Law**

5.1 In terms of legal arguments, the Plaintiff has placed reliance on **Order XXI., rule 5** 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."

- 5.2 The Plaintiff also sought refuge in **Order 27, rule 3 of The Supreme Court Rules** 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.
- 5.3 It is trite that 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. It is also trite that a defence must not be evasive, nor must it be superficial. This was the guidance by Hon Dr. P. Matibini, as he then was, in the case of **Silwamba v Simpito**.
- 5.4 The gist of the Plaintiffs' argument is that it is now a settled position that an admission can either be by a Party's pleading or otherwise and that an admission may be relied upon even if made before the action is commenced. The Plaintiff thus submits that the Final Payment Agreement marked '**DN1**' is an admission of the debt by the Defendant which admission is clear in its terms.

5.5 The Plaintiff has, in its reply to the defendants opposition, maintained that the defendant has in any event not denied liability to the Plaintiff and that Judgment on Admission, is in any event appropriate on the facts of the case before the Court, whether liability for it has arisen or suspended due to what it terms as condition precedent.

6. **Analysis of the Law and Facts**

6.1 I have examined the arguments advanced by both Parties and I am also alive to the fact that the Final Payment Agreement and the Schedule attached to it, does not, on the face of it, have any conditions of the type that the Defendant is trying to import when settling its defence.

6.2 I am equally alive to the pronouncement made by the Supreme Court of Zambia, in the case of **China Henan International Economic Technical Cooperative vs Mwange Contractors Limited** in relation to **rule 2 of the Practice Direction**, which governs commercial matters and is similar to **Order 53 rule 6**. The Supreme Court in the cited case stated as follows:

"The new dispensation in commercial matters is that Parties must place their cards on the table 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."

6.3 I have noted upon scrutiny of the defence, more specifically **paragraph 8** thereof, which in my considered opinion only offers a general and bare averment does not suffice as a traverse to the specific claims made in **paragraph 11** of the statement of claim. I am also of the considered view that **Order 53 rule 6** and the practice direction referred to above, were specifically directed at defences such as the one in *casu*.

6.4 It is also common cause that Parties in the commercial division must lay their cards on the table early in the day. This Court has already delivered two Rulings on two separate interlocutory applications and I also find as a fact that the Final Payment Agreement and the Schedule has already been considered by this Court.

6.5 I have also directed my mind to the case of **China Copper Mines Limited vs Tikumbe Mining Limited** wherein the Court of Appeal cited with approval the holding in the Indian case of **Himani Alloys Limited vs Tata Steel Limited** on the issue of the admissions being a discretionary remedy and the requirement that the admission should be unequivocal, when it stated as follows:

"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 an 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."

6.6 I have also scrutinised the exhibit marked **'DN1'**, at **paragraph 2** of the said letter from the Plaintiff reads as follows:

"...The discounted amount applied is USD 75,000 as agreed, leaving an outstanding balance due to Nuco Industrial Services Limited an amount of USD 524,0994.93 payable from funds collected by Group 5 Zambia.

(emphasis is by the Court) .

I note that the defendant has attempted to convince the Court and has submitted on the definition the word *'payable'*. However, I will not accept the meaning ascribed by the defendant who has gone to all lengths to introduce what I would term as a *"post-script"* meaning to the Agreement entered into by the Parties.

6.7 Further the Final Payment Agreement at **page 2**, of the exhibit marked **'DM1'**, shows the respective Invoice Numbers, the submission date, the certificate approval date, the payment due date, the amount and under status/comments the following:

"due for payment within 2 weeks. Deadline 25.08.2020 if deadline is not met an additional 1% (monthly) interest will be charged from original payment due date.

It is noted that the comment above, is repeated in respect of all the Invoices covered by the Final Payment Agreement. I have also noted that the due date for payment was altered by consent to 25.09.2020

- 6.8 I have also noted from the exhibit marked 'DN2' that the defendant through its Director, *Zander Van Lingen*, had written to the Plaintiff, apparently in response to a letter of demand issued by the Plaintiffs Advocates, wherein the defendant states as follows:

"We understand your position completely, its been nearly a year without payment."

There is no mention of the liability not having crystallised, nor of any condition precedent.

- 6.9 The intention of the Parties being crystal clear, it is the role of the Court to uphold the intention of the Parties. The Court will not be drawn into making any findings or assumption of conditions precedent as they simply do not exist. Having found that the condition precedent did not exist at the time the Final Payment Agreement was concluded between the Parties, I must disagree with Counsels submissions on the issue of condition precedent, as the law and authorities they have relied on, have been misapplied in the circumstances of the facts in *casu*, and are a blatant attempt to massage the legal argument to defeat the course of justice. It is trite that the ends of justice must not be delayed or thwarted by unmeritorious arguments. I am alive to the rationale laid down by the case of **A. J. Trading Company Limited v Chilombo** where the Court held that:

"an admission by the Defendant of an allegation in the Plaintiffs Statement of Claim means there is no issues between the parties on that point and no further evidence is admissible in reference to that".

6.10 Any which way this agreement is read, there is no condition that the defendant now seeks to introduce. To my mind, and as guided by the Court of Appeal in the case of **Zega Limited v Zambezi Airlines Ltd & Diamond Insurance Limited**, I am satisfied that the admission is clear, unambiguous and unconditional. Further and also in the words of the Court of Appeal, in the **Finance Bank Zambia Plc v Lamasat** case, I find that in *casu*, the **"admission is plain and obvious, on the face of it without requiring a magnifying glass to ascertain its meaning."**(the emphasis is by the Court).

6.11 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 XXI** 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."

6.12 To that extent, I am fortified in arriving at the finding that there is adequate clear and unequivocal admission made by the Defendant and that the defence raised by the Defendant, lacks merit and is an attempt at dragging litigation which has no merit, and which on the authority of

the decision in the **China Henan** case, will not be entertained in this division.

6.13 I am satisfied that Judgment on admission may be entered and that this is a proper case for me to exercise my discretion to enter judgment on admission pursuant to **Order XXI of the High Court Act and Order 27 rule 3 of the Rules of the Supreme Court.**

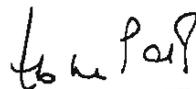
7. Conclusion

7.1 In light of my being satisfied that there is clear admission by the defendant, Judgment on admission is entered for the Plaintiff against the defendant in the sum of United States Dollars Five Hundred and Twenty Four Thousand Nine Hundred and Ninety Four and seventy nine cents (**USD 524,994.79**) being moneys due for services rendered to the Defendant, and interest in the sum of **USD45,442.43** as at 22 February 2021 and thereafter at the rate of 1% per month from the due date of the respective invoices until the date of this Judgment.

Interest on the Judgment sum, thereafter, shall apply at 1% above LIBOR to the date of full settlement. Costs are awarded to the Plaintiff, to be taxed in the event of default.

To prevent further satellite applications, leave to appeal is granted.

Dated at Kitwe this 18th day of January, 2022.



Abha N. Patel, S.C.
Judge of the High Court

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