IN THE COURT OF APPEAL FOR ZAMBIA **Appeal No. 036/2018**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

REPUBLIC OF ZAMBIA
COURT OF APPEAL
20 JUL 2018
CIVIL REGISTRY 2
P. O. BOX 50067, LUSAKA

B E T W E E N :

DOCKLAND CONSTRUCTION LIMITED **APPELLANT**

AND

MAUREEN MWANAWASA **RESPONDENT**
(Sued in her capacity as Trustee and Chairperson of the Maureen Mwanawasa Community Initiative)

CORAM : Chishimba, Siavwapa and Majula, JJA
22nd May, 2018 and 20th July, 2018

For the Appellant : Mr. S. Bwalya and Mr. M. Desai of Messrs Solly Patel, Hamir and Lawrence

For the Respondent : Mr. M. Mutemwa of Messrs Mutemwa Chambers

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J U D G M E N T

CHISHIMBA, JA, delivered the Judgment of the Court.

CASES REFERRED TO:

1. Minister of Information and Broadcasting Services, The Attorney General vs Fanwell Chembo and PRS (2007) ZR 207
2. Jean Mwamba Mpashi v Avondale Housing Project Limited
3. Himan Alloys Limited v Tata Steel Limited.
4. Zega Ltd v Zambezi Airlines Limited, Diamond General Insurance Ltd SCZ/8/006/2014
5. Cassan v Sachama 1982 KLR 191

LEGISLATION AND OTHER WORKS REFERRED TO:

1. The High Court Act Chapter 27 of the Laws of Zambia

2. Oxford Law Dictionary (2005) Edition
3. Rules of the Commercial List Rules Statutory Instrument number 27 of 2017.
4. Rules of the Supreme Court (White Book) 1999 Edition.

This is an appeal arising from the decision of the High Court declining to enter judgment on admission.

The facts are that the Appellant had commenced an action against the Respondent seeking the payment of the sum of K265,422.02 being the value of unpaid/outstanding amount agreed and due in respect of construction of a skills training centre in Kapiri Mposhi. The statement of claim at pages 41 to 46 of the record averred that the Appellant was awarded a contract, executed on 12th August, 2007 for constructions works valued at K1,103,676.

After the project was handed over, the Respondent issued a report on 30th of March claiming general poor performance of works and highlighting a number of outstanding works. After several meetings, the parties agreed on the sum of K247, 607.49.

According to the Appellant, the Respondent had acknowledged its indebtedness in the sum of K247,607.49 in a number of letters, dated 16th March, 2010, 24th August, 2010, and 29th September, 2010. Though the Respondent subsequently denied liability, the Appellant stated that the chairperson of MMCI had offered to instead

pay the sum of K100,000 in two instalments as full and final settlement. This offer was rejected.

The Respondent settled a defence and counter-claim on 9th June, 2017, denying liability of the sum of K265, 422.02. It was averred that the acknowledgment was made under duress due to threatened legal action. The Respondent alleged incomplete works and counter claimed for the costs of remedial works to complete the works as well as damages. The Appellant denied the counter claim in respect of defects in the works subject of contract.

Upon entry of a defence and counter claim denying liability, the Appellant issued summons for an order of entry of Judgment on Admission pursuant to **Order XXI Rule 2** and **Order III Rule 2 of the High Court Rules**. The basis being that the Respondent had failed to specifically traverse every allegation of facts contained in the statement of claim. The particular paragraphs alleged not to have been specifically traversed being 9 – 14, 16 – 27, 29, 32 and 33 of the statement of claim. We shall revert back in due course to these paragraphs.

The Respondent in its' affidavit in opposition disputed having admitted liability and alleged unfinished works (defects) outstanding

to date. The learned Judge in the court below considered whether this was a proper and fit case to enter Judgment on admission and the relevant principles. After examining both the statement of claim and defence, the learned Judge found that paragraph 4 of the defence did not constitute admissions as envisaged under **Order 21 (6) of the High Court Rules**.

The learned Judge found that paragraphs 17 to 25 of the statement of claim are averments on the numerous meetings held between the parties. Further, that the response by the Respondent that some facts are within the Appellant's knowledge cannot constitute bare denials or a failure to traverse a fact as alleged.

The court found that paragraphs 8 and 9 of the defence did not constitute admissions. The learned Judge held that the alleged admissions by the Respondent are not sufficiently clear and unequivocal to warrant entry of judgment on admission. The court found that triable issues were raised to require further interrogation at trial and refused to enter judgment on admission.

Being dissatisfied with the ruling the Appellant advanced three grounds of appeal as follows;

(1) **The Court below erred in law when it held that the admissions alleged to have been made by the Defendant were not sufficiently clear and**

unequivocal without considering and making its finding on the admissions made by the Defendant contained in the exhibits collectively marked "FS1" .

(2) The Court below erred in law when it omitted to consider and pronounce its finding on the admissions alleged to have been made by the Defendant contained in the exhibits collectively marked "FS1".

(3) The Court below erred in law when it omitted to consider and pronounce its finding on the alleged failure of the Defendant's Defence to specifically traverse the plaintiff's statement of claim contrary to the special rules that govern the practices and procedure in the Commercial Court.

In the heads of argument dated 23rd February, 2018, the Appellant contends in ground one that the court below did not consider or make any findings in its ruling on the admissions made by the Respondent contained in the exhibits marked "FS1". The gist of the argument being that had the court below considered the alleged admissions contained on the correspondences marked "FS1", it would have found that the Respondent had clearly and unequivocally admitted its indebtedness to the Appellant and entered judgment on admission. Therefore, the court below erred in law when it held that the admissions were not clear and unequivocal. Further, that the court had confined its analysis of evidence to the pleadings on record.

In ground two, which is similar to one, the Appellant contends that the omission by the court to consider and pronounce its finding on the admissions contained in the correspondences marked "FS1" goes against the Supreme Court's guidance in respect of content of a

judgment. The case of ***Minister of Information and Broadcasting Services, the Attorney General vs Fanwell Chembo and PRS*** [1] was cited.

Though the ruling subject of appeal shows a review of the affidavits' evidence, there is no finding regarding the admissions made in the correspondences by the Respondent, its reasoning and application of the law.

The Appellant in ground three assails the refusal by the court to enter judgment on admission despite the failure by the Respondent to specifically traverse every allegation of fact as per Order 53 Rule (6) of the High Court Rules. It was submitted that paragraph 5 of the defence constitutes a general or bare denial of the allegation contained in paragraph 14 of the claim. The failure to traverse paragraph 14 of the claim amounts to an admission of the outstanding amount.

The Appellant made reference to its arguments and list of authorities advanced in the court below; the invitation made to the court during proceedings to consider the affidavit evidence and arguments. The Appellant contends that despite the above, the court below did not consider or make findings relating to the failure to traverse every allegation of facts contained in the statement of claim.

At the hearing of the appeal, the Appellant augmented its' argument by submitting that the exhibit marked "FS1" in issue falls within the ambit of **Order 21 (6) of the High Court Rules**. We were invited to consider the rationale of the commercial list and the requirements of **Order 21 (6)**. In the commercial list, bare denial is insufficient. We were urged to uphold the appeal and make an order for Entry of Judgment on Admission.

The Respondent submits in its' arguments of 27th March, 2018 that the court below was on firm ground to hold that the alleged admissions were not clear and unequivocal for it to enter Judgment on Admission. The gist of the argument in response to ground one being the denial of the actual amount owing and the claim of incomplete works.

The Respondent contends that incomplete works arise from a report. Further that though the Appellant in its affidavit in reply to the affidavit in opposition to summons for entry of Judgment of Admission deny knowledge of a company named Enviro-Design Zambia Ltd, this company was responsible for producing the certificate of completion. For that reason, this appeal must be rejected. As authority the case of ***Jean Mwamba Mpashi v Avondale Housing Project Limited*** [2] was cited.

As regards the nature of admissions, the Appellant referred to a Supreme Court decision of India in the case of ***Himan Alloys Limited v Tata Steel Limited.*** (3)

The Respondent contends essentially that it would have been wrong to enter judgment on admission as there are triable issues raised in respect of quantum.

In response to ground two, it is submitted that the issues raised therein are the same as ground one. Further, that the assertions by the Appellant are a lack of respect to the court which considered the case law in supporting the Judgment.

The Respondent contends that the issues raised indicate a counter claim to be considered at trial. As was held in the case of ***Zega Ltd v Zambezi Airlines Limited, Diamond General Insurance Ltd*** (4)

> ***"the discretion of the court should not be exercised to deny the valuable right of a defendant to contest the claim against him"***

In response to the issue of the communications between the parties alleged to be admissions, the Respondent contends that **Order 53 Rule 6 (2) (3) (4)** and **(5) of the High Court Rules** are instructive as to what amounts to an admission. That admissions are only reflected in the parties defence or counter claim which are part of a pleading. Correspondence to that effect are not part of admissions

and cannot by law be admissions. The Respondent went on to make reference to the definition of the word "traverse" contained in the **Oxford Law dictionary (2005)**. It was submitted that this was not a proper case to enter judgment on admission as there were triable issues raised and that the appeal be dismissed.

We have considered the appeal, the ruling in issue, the authorities and arguments advanced by the learned Counsel. It is not in issue that the parties had entered into a contract on 12th August, 2007 for the construction of a Skills Training Centre for women and youths in Kapiri Mposhi.

On the 11th of March, 2009, the project was handed over to the Respondent and a certificate of practical completion issued. Subsequently on the 30th of March, 2009, the Respondent issued a report in which it alleged poor construction works and highlighted the works outstanding.

The Appellant alleged that the Respondent had acknowledged being indebted to it in numerous correspondences exhibited and marked as "FS1" attached to the supporting affidavit of entry of judgment on admission. Further that the Respondent had not

traversed every allegation of fact contained in the statement of claim and that most averments in the defence were bare denials.

The issues to be determined are twofold,

i. **Whether the averments in the defence are bare denials or do not traverse each and every allegation of facts contained in the statement of claim**

ii. **Whether the admissions by the Respondent are clear and unequivocal warranting entry of judgment on admission.**

Order 21 Rule of the High Court Rules empowers a party to apply for judgment on admission of facts made by a party to the cause or matter by his pleadings or otherwise.

It is trite that judgment on admission may be entered where the other party has made a clear, plain and unequivocal admission of fact. Judgment on admission is not a matter of right and is discretionary. It is entered where there is a clear admission of facts in the face of which it is impossible for the party making such admission to succeed. The object is to enable a party obtain a speedy judgment in respect of the relief sought. The key requirement is that the admissions whether express or implied must be clear. Admissions may be by virtue of the rules as where a defendant fails to traverse an

allegation of fact contained in a statement of claim. We refer to **Order 53 Rule (6) the (Commercial List Rules) S.I number 27 of 2017.**

Order 53 (6) stipulates that a party may in an appropriate case enter judgment on admission where a defence fails to meet the requirements of the rule that;

> **(2) The defence shall specifically traverse every allegation of fact made in the Statement of Claim or counter-claim, as the case may be.**
>
> **(3) A general or bare denial of allegations of fact or a general statement of non-admission of the allegations of fact shall not be a traverse thereof.**
>
> **(4) A defence that fails to meet the requirements of this rule shall be deemed to have admitted the allegations not specifically traversed.**

In respect of whether the defence consists of bare denials or does not traverse each and every allegation of facts, we have perused both the statement of claim and defence on record.

The paragraphs of the statement of claim contended not to be traversed are 9 – 14, and 16 to 33. Further that the defence by the Respondent, particularly paragraphs 4, 5, 8 and 9 are bare denials. Paragraphs 9 – 12 of the statement of claim were denied in the defence. The denial is contended to be bare denial.

The issue is simply whether the admission is clear and unequivocal. Paragraph 4, 5 and 6 of the defence denies liability of the sum of K265,422 as claimed on the basis of alleged incomplete

and defective works by the plaintiff. Paragraphs 15 to 25 of the claim are a chronology of correspondences passing between the parties over a period of time. Paragraphs 26 to 28 of the claim are averments in respect of the meetings held between the parties where a counter offer of K100,000 as full and final payment was made and subsequently rejected. The Respondent partially admitted paragraphs 16 – 25 of the statement of claim, namely the correspondences passing between the parties; save that the issue of unfinished works and defects were raised to the plaintiff which are particularised under paragraph 14 of the defence and counter claim.

We are of the view that the Respondent did not fail to specifically traverse every allegation of fact contained in the statement of claim.

Though the Appellant strongly contended that paragraph 5 of the defence was a bare denial of the claim of K265,422.02, the defence shows that the amount is denied due to alleged incomplete works and defects.

Therefore, we cannot fault the learned Judge in the court below in refusing to enter judgment on the basis that the admissions are not clear and unequivocal.

The Appellant in ground one and two assails the alleged failure or omission by the court below to make findings on the admissions made by the Respondent in the exhibits marked "FS1" attached to the supporting affidavit, namely copies of correspondences by the Respondent confirming admission. The relevant exhibit marked "FS1" appears at pages 143 to 148 of the record, are the letters dated 16th March, 2010, 23rd August, 2010 and 29th September, 2010 in respect of the outstanding debt from the Respondent to the Appellant. In the said letters, the Respondent apologizes for the delay in the payment of the outstanding debt due to financial constraints, further that it is aware of the balance and will endeavour to pay once the donors release the money. There was also exhibited a letter by the Appellant declining the offer to settle the matter by payment of the total sum of K100,000.

There is in addition, a letter dated 15th January, 2014 by the Respondents Advocate stating that it is;

> ***"extremely difficult for our client to accept the liability of the sum of K265,422,012.17 being claimed due to the detailed report highlighting that not all works were completed and the outstanding works have remained unfinished".***

It is the admissions made in the above correspondences by the Respondent that the Appellant contends the Court below ignored. It is trite that admissions may be either by pleadings or otherwise. An

admission may be made in a letter before or since action. See **Order 27/3/4** of the **Rules of the Supreme Court (White Book) 1999 Edition**.

The Respondent argued that admissions are only reflected in the parties defence or counter- claim and that correspondences to that effect are not part of admissions at law.

We are of the view that this argument is untenable and not the correct position of the law. Admissions of fact may either be by pleadings or otherwise. Otherwise such as by letter or correspondence exchanged between the parties which speaks for itself.

The issue is whether looking at the matter as a whole, it is manifestly plain, clear and unequivocal that there was clear admission of the claim by the Respondent. On the face of the evidence before the court below, whether the admission is plain and obvious.

We are of the view, having looked at the matter as a whole that on the face of it, from the contents of the defence and correspondence availed, the admission is not discernible, clear and unequivocal. Where a defence has raised objections which go to the root of the cause, it is not appropriate to exercise the discretion under Order 21 Rule 6 to enter judgment on admission. Perusal of the defence shows

that the Respondent raised triable issues i.e defective works in respects of the construction and remedial works. The contested matter of allegation of defects and poor works goes to the root of the claim and is a matter for further interrogation at trial. The Respondent, having denied liability, there can be no admission on disputed facts.

We hold that on the whole, the alleged admissions are not clear and unequivocal on a plain perusal of the admissions and claim as well as the settled defence.

We hold that the learned trial Judge was on firm ground when she refused to enter judgment on admission. The applicable principal on entry of judgment on admission, that the admission must be very clear and unequivocal was not satisfied.

The admissions have to be plain and obvious on the face of it as well as clearly readable. In the Kenyan case of **Cassan v Sachama** [5], it was stated that;

> **"an admission is clear if the answer by a bystander to the question whether there was an admission of facts would be "of course"**

We therefore hold that the Judge properly exercised her discretion by refusing to grant judgment on admission as the

admission of facts are not clear and unequivocal that they amount to an admission of liability entitling the Appellant to judgment.

We accordingly find no merit in all the grounds raised and accordingly dismiss the appeal.

Costs follow the event.

Dated this 20th Day of July, 2018

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F. M Chishimba

COURT OF APPEAL JUDGE

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J.M. Siavwapa

COURT OF APPEAL JUDGE

.....

B. M. Majula

COURT OF APPEAL JUDGE