

IN THE COURT OF APPEAL OF ZAMBIA

CAZ APPEAL NO. 115/2018

HOLDEN AT KABWE

(Civil Jurisdiction)

BETWEEN:

FOVEROS MINING LIMITED

AND

BELL EQUIPMENT ZAMBIA LIMITED

APPELLANT

RESPONDENT



CORAM: CHISANGA JP, MAKUNGU AND KONDOLO SC, JJA

On 16th October, 2018 and, 2020

For the Appellant : Mr. T. Chibeleka of Messrs ECB Legal Practitioners

For the Respondent : Mr. S. Chisenga of Corpus Legal Practitioners

J U D G M E N T

KONDOLO SC, JA delivered the Judgment of the Court.

CASES REFERRED TO:

1. **Zega Limited v Zambezi Airlines Ltd & Diamond Insurance Limited – Appeal No. 39/2014 at page 20**
2. **Three Rivers District Council v Bank of England (No. 3) [2001] UKHL 16. [2003] 2 AC 1.**
3. **Stanley Mwambazi v Morester Farms Limited (1977) ZR 108.**
4. **Lord Woolf MR in Swain v Hillman [2001] 1 ALL ER 91**
5. **Freshview Cinema's Limited v Manda Hill Limited – Appeal No. 174/2013**
6. **Friday Mwamba v Sylvester Nthenge and Others SCZ/5/2013**
7. **A.J. Trading Company Limited v Chilombo (1973) ZR 74**
8. **Photo Bank (Z) Limited v Shengo Holdings Limited (2008) 108 Vol. 1**
9. **Kansanshi Mine Plc v Maini Joseph Mudimina & Others, Appeal No. 149 of 2010**
10. **National Drug Company Limited and Zambia Privatization Agency v. Mary Katongo Appeal No. 79 of 2001**

LEGISLATION REFERRED TO:

- 1. The High Court Rules, Chapter 27, Laws of Zambia**
- 2. The Rules of the Supreme Court of England 1999 Edition (the Whitebook)**

TEXT REFERRED TO:

- 1. Chitty on Contracts 29th Edition. General Principles, Volume 1. London: Sweet and Maxwell (2004)**

This is an appeal against the Ruling of the learned Justice I.Z. Mbewe dated 20th March 2018 in which she granted the Respondent judgment on admission.

The background is that the Appellant rented some trucks from the Respondent and fell into rental arrears. The Respondent (the Plaintiff in the Court below) sued for recovery of the said rental arrears in the sum of US\$1,095,626. After the action was commenced the Respondent applied for Judgment on Admission on the basis of an Acknowledgement of Debt executed by the Appellant in which a debt amounting to US\$817, 226.12 was acknowledged.

The Appellant argued before the High Court that prior to executing the acknowledgement of debt, the Respondent had disabled the trucks and the acknowledgement was executed on the

understanding that the trucks would be made available to the Appellant as the revenue to discharge the debt would be generated by the same trucks when executing the mining contract stated in paragraph 2 of the acknowledgment. It was also argued that the Appellant had a counter claim in the sum of US\$300,000 against the Respondent for late delivery of the said trucks at the commencement of the rental agreement.

The trial Court held that when all was said and done, the debt had been admitted and not denied. In so doing, she noted that the Acknowledgement of Debt document executed on 25th February, 2016 was a clear and unambiguous admission which even provided for the mode of payment as well as when the payment would be effected. The trial Judge further found that the counterclaim should not affect the admission.

The Appellant has filed 3 grounds of appeal as follows;

- 1. That the learned Trial Judge erred in law and fact when she held that the Appellant admitted liability and made commitments towards settling its indebtedness to the Respondent herein.**

2. The learned Trial judge erred in law and fact when she held that the Appellant had unequivocally and expressly admitted its indebtedness to the Respondent and that this was a proper case to enter Judgement in Admission.

3. The learned Trial Judge erred in law and fact when she held that the existence of a counter claim does not operate as a bar to entering judgement on admission.

Both parties filed written submissions.

Under ground 1, the Appellant essentially argued that the Acknowledgement was conditional and that the trial Judge did not consider the defence raised in the Appellant's Affidavit which explained that the acknowledgement was conditional on the fact that the contract would be performed in full and contingent upon performance of another contract from which funds to pay the debt would be obtained. It was emphasized that the Appellant's Affidavit had raised triable issues on the Acknowledgement of Debt which should have allowed the Appellant to later adduce evidence on it before the Pleadings closed.

The case of **Zega Limited v Zambezi Airlines Ltd & Diamond Insurance Limited**⁽¹⁾ was cited where it was stated that the admission must be 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 against him. It was opined that at the stage of summary judgment or judgment on admission even default judgment, the showing of a defence on merit is sufficient to offset entry by the Court.

The Respondent submitted that the Appellant's argument with regard to the Acknowledgement of Debt being conditional was not raised in the Affidavit in opposition but in the Appellant's Skeleton Arguments as shown at page 240 of the Record of Appeal. It was further submitted that the alleged condition was an intention in itself and independent from the acknowledgement of indebtedness and that the learned trial Judge was on firm ground when she said as follows; *"I have not seen any provision stipulating or implying that payment of the admitted amount will be subject to any pre-conditions as alleged by the Defendant in paragraph 9 of its opposing affidavit."*

It was pointed out that paragraph 4 of the Acknowledgement of Debt clearly indicated that the continuation of the rental

[agreement was not a condition for payment of the admitted amount. It was opined that paragraphs 2 and 3 of the Acknowledgment of Debt provided for the mode of payment and when payment would be made and did not thereby create a condition that the debt would only be paid if the Appellant's source of that income materializes. According to the Respondent, the Acknowledgement of Debt was clear, unambiguous and unconditional.

The Respondent submitted that an alleged defence does not negate the clear admission made by the Appellant and mere depositions were insufficient to bar entry of judgment on admission. The Appellant failed to support its deposition in its affidavit in opposition with evidence and the trial Judge was thus on firm ground when she held that; *"I opine that the Defendant is attempting to depart from the Rental Agreement which forms the genesis of the Acknowledgement of Debt and has failed to bring any proof of any other agreement to support their assertion that the admitted sum is independent of the Rental Agreement"*. The Respondent summed up on this point by submitting that **Order 21 High Court Rules (HCR) and Order 27 Rule 3 Rules of the Supreme Court (the "Whitebook")** do not provide any exceptions

to the entering of judgment on admission such as an alleged defence or counterclaim.

Under ground 2 the Appellants posed the question as to whether this case was a proper case for the entry of Judgment on Admission. Solace was sought in English law which, according to the Appellant, postulates that an application for summary judgment is decided by applying the test of whether the Respondent has a case with a real prospect of success, which is considered having regard to the overriding objective of dealing with the case justly. It was further stated that this was in tandem with the need for a fair trial as provided by **Article 6 (1) of the European Convention of Human Rights** and referred to the English case of **Three Rivers District Council v Bank of England**⁽²⁾

The Appellant submitted that the test to be applied with regard to the real prospect of success was the same as that applied in applications to set aside default judgments. That the trial Judge ought to have considered that the deposition in the Appellant's Affidavit had raised triable issues which ought to go to trial so that further evidence is led on them. The Appellant further cited the cases of **Stanley Mwambazi v Morester Farms Limited** ⁽³⁾

The cited the case of **Lord Woolf MR in Swain v Hillman** ⁽⁴⁾ was cited in which it was held that a trial court should not hold a “mini trial” when deciding whether or not to strike out an action as the idea was not at that stage to examine carefully, matters which should properly be investigated only at trial. It was submitted that *“The net effect of entry of Judgment on Admission on the sum claimed is that the total contract sum which has not been performed would be disposed of and the entire trial will become that based solely on the counterclaim”* and that the courts frown upon the concept of unjust enrichment.

The Appellant submitted that granting Judgment on Admission would create a commercial absurdity because the Appellant would be paying for a benefit it had not received. This was because the Appellant had alleged that the Respondent had sold the equipment despite the rationale of the Rental Purchase Agreement being that payments would go towards liquidating the purchase price. The Appellant posited that even assuming that the purported agreement was not conditional, the scenario begs the question, *“For what is the Respondent paying?”*

The Respondent replied by reiterating that the Respondent’s admission of its indebtedness was express, clear, unambiguous

and unconditional thus meeting the requirements set out by the Supreme Court in **Freshview Cinema's Limited v Manda Hill Limited** ⁽⁵⁾ when it considered a similar application under **Order 21 HCR and Order 27 Rule 3 of the Whitebook** and held that; “.... *What is paramount, in our view is that the express or implied admission must be clear*”.

The Respondent pointed to the Acknowledgement of Debt at page 115 of the Record of Appeal and submitted that the Appellant had clearly and unequivocally admitted owing the Respondent the sum of USD 817,226.12.

The Respondent further submitted that the English authorities cited by the Appellant under this ground were not in relation to the entry of judgment on admission but in relation to the civil procedure rules of England *vis-à-vis* when a case should be dismissed for not having real prospects of success. That in any event the English civil procedure rules cited in those cases are not applicable to Zambia. It was further submitted that even the Zambian case cited, i.e. **Stanley Mwambazi v Morester Farms Limited** ⁽³⁾ was cited out of context as it explained instances when judgment in default of appearance could be set aside.

The Respondent pointed out that the judgment on admission had not determined the whole matter and the Appellant still had an opportunity to defend itself on the sums which were not admitted as well as to prove its counterclaim.

The Respondent opined that no commercial absurdity had occurred because the Appellant admitted the amount owed for accrued rentals of the machines and they are estopped from resiling from the acknowledgement of debt which was executed freely and voluntarily. **Chitty on Contracts** was cited in relation to freedom of contract where the learned authors opined that; *“Freedom of contract entails that parties are the best judges of their own interests, and if they freely and voluntarily entered into a contract, the only function of the law was to enforce it”* The case of **Friday Mwamba v Sylvester Nthenge and Others** ⁽⁶⁾ was also cited in support of this argument.

In ground 3 the Appellant argued that the counterclaim it had raised showed that the contract was not performed as agreed, bearing in mind that the acknowledgement of debt was an indication of the full contract period and hence conditional, judgement on admission should not have been entered. The Appellant cited the case of **A.J. Trading Company Limited v**

Chilombo⁽⁷⁾ as well as **Stanley Mwambazi v Morester Farms Limited** and submitted that where facts pleaded by the parties are disputed or contested, proceedings for a summary judgment cannot take the place of a trial.

The Respondent submitted that a counterclaim is a distinct action and does not operate as a bar to entering Judgment on admission and cited the cases of **Photo Bank (Z) Limited v Shengo Holdings Limited⁽⁸⁾** and **Kansanshi Mine Plc v Maini Joseph Mudimina & Others⁽⁹⁾**. It was further submitted that the **A.J. Trading Company Limited Case⁽⁷⁾** cited by the Appellant as a Supreme Court case was in fact a High Court Case.

At the hearing, learned Counsel for the Appellant reiterated that the genesis of this matter resided in a Rental Agreement with an option to purchase but some issues arose leading to the signing of the now contentious Acknowledgement of Debt shown at page 224 of the Record of Appeal. He repeated the argument that paragraph 4 of the Acknowledgement showed that it was conditional on resumption of the Rental Agreement which could not be resumed because the Respondent had sold the rental equipment. He added that the Acknowledgement was not clear as to which period or which debt it was referring to.

∴ Counsel reemphasized that the issue of selling the rental equipment was the basis of the counter-claim and entry of judgment on admission curtailed this right. That no prejudice would visit the Respondent if the appeal was dismissed. He summed up by submitting that the acknowledgement is in relation to the issues raised in the Defence and Counter-claim.

Learned Counsel for the Respondent repeated the arguments in the filed submissions that a counter-claim could not stop judgment on admission being entered and once again referred to the **Freshview Cinema's Case (supra)**. He further added that the Appellant's argument that the acknowledgement of debt was conditional was not raised in the Appellant's Affidavit in opposition found at pages 227-229 of the Record of Appeal but was only referred to at page 240 of the Record of Appeal in the Appellant's Skeleton Arguments before the lower Court. That the acknowledgement was clear and unequivocal.

Counsel for the Respondent rejoined by distinguishing the **Freshview Cinema's Case (supra)**. He submitted that judgment was entered in that case because no particulars were given to support the plea of undue influence meaning that nothing stops

the Court from looking at the pleadings when deciding the issue in *casu*.

It was submitted that the acknowledgement of debt was not clear and unequivocal but was conditional as set out in paragraphs 11 to 15 of the Appellants Affidavit in opposition.

We have considered the record of appeal and thank the parties for their well-argued submissions. We shall address grounds 1 and 2 together and ground 3 on its own.

Judgment on admission was granted to the Respondent following an application under **Order 21 Rule 6 HCR** which is actually quite brief and concise and under **Order 27 Rule 3 of the Whitebook**.

Order 21 Rule 6 HCR;

“A party may apply, on motion or summons, for cancelled 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”

Order 27 Rule 3 of the Whitebook

“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.”

This entire appeal rests on the interpretation of whether or not the acknowledgement of debt executed by the Appellant was conditional upon the occurrence of certain events. The Acknowledgement of Debt is found at pages 115 to 117 of the record of appeal. It is a brief document and we shall therefore reproduce it in full;

ACKNOWLEDGEMENT OF DEBT

We, the undersigned, Foveros Mining Limited, 21 Kabengele Ave, Opposite Chisokone Market, Kitwe, Zambia (“the Debtor”)....

Do hereby acknowledge ourselves to be truly and lawfully indebted unto and in favour of Bell Equipment Company Zambia Limited ("the Creditor")

In the capital sum of \$817,226.12 (eight hundred seventeen thousand two hundred and twenty six dollars and twelve cents) being in respect of the balance of Machine Rentals and Service Contract charges delivered by Bell Equipment Company Limited to Foveros Mining LTD.

We hereby agree and undertake to pay the capital sum of \$817,226.12 (eight hundred seventeen thousand two hundred and twenty six thousand dollars and twelve cents) in the following manner:

- 1. By way of monthly installments of \$163,445.22 (one hundred and sixty three thousand four hundred and forty five US dollars and twenty two cents) per month commencing on the 30th of May, 2016 and payable thereafter on or before the last day of each and succeeding month.*
- 2. These repayments will be made from receivables from a three year mining contract that we have signed and cash inflows expected to start from end of April, 2016.*
- 3. We are also working on raising funds from the banks secured by this 3 year contract which we have signed and should this facility come earlier, we commit to*

utilize any free portion of the banking facility towards the settlement of the debt as appropriate.

4. We sincerely apologize for the delay in settling this debt and take this opportunity to register our interest to continue with the rental of the equipment under the same terms and conditions of the Rental Agreement subject to the following:

- i. Foveros Mining Limited not assuming liability for rentals in respect of the period from December, 2015 to date of resumption of the rental of the equipment.*
- ii. In the event that there is Force Majeure event or a fundamental business development which result in Foveros Mining having no use of the rented equipment Foveros and Bell Equipment Limited agree to a suspension of the rental obligations of the period of such non utilisation of the said equipment. Once the period of suspension comes to an end, the parties agree that the rental agreement in respect of the specified equipment shall resume on the same terms and conditions serve for the condition that there shall be no rental obligations for Foveros for the period of suspension of the Agreement.*

The Appellant does not deny executing the Acknowledgement of Debt but argues that the document emanated from a Rental Agreement which the Appellant had breached and that the

document was not clear and unequivocal because it provided conditions upon which the debt would be accepted.

We observe that the Acknowledgement of Debt can be dissected into four distinct segments;

1. The preamble which states that Foveros Mining (the Appellant) acknowledges that it is truly and lawfully indebted to Bell Equipment Company Zambia Limited (the Respondent) in the capital sum of \$817,226.12.
2. The undertaking that the money would be settled by way of monthly instalments of \$163,445.22. commencing on the 30th of May 2016
3. Possible sources of money from which the debt would be settled;
 - a. From receivables from a three-year mining contract from which payments were expected to start from the end of April.
 - b. A bank facility secured on account of the three-year mining contract.
4. Apology for the delay in settling the debt and expressing a desire to continue with the rental of the equipment under the

same terms and conditions of the Rental Agreement, subject to the conditions set out in paragraph 4.

We note that the preamble provides a clear and unequivocal statement that the Appellant is indebted to the Respondent in the sum of \$817,226.12. This is followed by an undertaking of how the debt would be settled and thereafter information as to where the funds for settling the debt would be obtained. In our view the preamble sums up the admission of debt and the undertaking to settle it by way of monthly instalments and disclosing the source of money for settling it were mere proposals which the Respondent was not even obliged to accept. The admission of debt is summed up in paragraph 4 where the Appellant apologizes for the delay in settling the debt.

There is nothing on Record that suggests that the Appellant was coerced into executing the Acknowledgement of Debt. The case of **National Drug Company Limited and Zambia Privatization Agency v. Mary Katongo** ⁽¹⁰⁾ states that parties shall be held to the terms of documents that they execute.

The Appellant has suggested that the document makes no commercial sense and the net result of allowing judgment on

admission will result in unjust enrichment of the Respondent who has sold the trucks which are the subject matter of the rental agreement from which the acknowledgement of debt emanates. Whatever the argument in this regard, the fact remains that the Appellant was indebted to the Respondent in the admitted sum and the Appellant shall be in a position to defend the rest of the Respondent's claims as well as prosecute its counter-claim.

The trial Judge properly analyzed the evidence before her including considering the depositions in the Appellant's Affidavit in opposition which she rejected on the finding that they were not supported by any evidence. We note that, in addition to the Acknowledgement of Debt, the Respondent in its Affidavit in reply exhibited a letter from the Appellant to the Respondent dated 1st October, 2015 which in effect acknowledged the Appellant's indebtedness on the Rental of Machines and Service Agreement. The letter stated that the Appellant had experienced delay in payments from its clients and proposed a payment schedule on how it intended to discharge its debt. The letter further advised the Respondent as follows' *"In the event that this delay persists, please take this proposal as our notice to suspend the rental and service*

agreements and /or will resume on the renewal of our contract or works assigned.”

The parties and the trial Judge cited several authorities including the case of **Freshview Cinema’s Limited v Manda Hill Limited** ⁽⁵⁾. In the cited case, the parties entered into a lease agreement for rental space at the Respondent’s shopping mall. One of the terms of the lease agreement was that the Appellant would pay the rentals owed by the previous tenant Silverbird Cinema’s and the Appellant wrote a letter to the Respondent stating as follows;

“For the sake of progressing the opening of the cinema’s at Manda Hill Shopping Center, Fresh View Cinema’s Limited, in good faith agreed to inherit the previous tenants historical outstanding liabilities. These outstanding liabilities amount to US\$118,043.60 including interest.”

The Appellant later refused to pay the said sum and commenced an action seeking an Order that it could not be forced to assume a debt incurred by a separate entity and claimed that it had written the letter under *“duress in the form of undue influence”*.

The Respondent then applied for judgment on admission on the basis of the letter in which the Appellant had agreed to assume the debt. The trial Court dismissed the Appellant's averment of duress and undue influence on the ground that no particulars of the alleged duress had been provided. Judgement on admission was granted on the basis that the Appellant had made an unequivocal admission on its indebtedness to the Respondent. The Appellant appealed and the Supreme Court held as follows;

“The mere plea of undue influence does not in itself act as a bar to an application for judgment on admission ... The Appellant did not give particulars of the undue influence in its statement of claim ... Both Order 27 Rule 3 of the Rules of the Supreme Court and Order 21 Rule 6 of the High Court Rules, do not make any distinction relating to a plea of undue influence as one that must be first addressed by a court regardless of whether or not there is a meritorious application for judgment on admission. What is paramount, in our view, is that the express or implied admission must be clear. In this case, the appellant had expressly and in no uncertain terms

stated that it would be responsible for the liability of Silverbird Cinemas in the sum of US\$118,043.60, as a term and condition for leasing the cinemas. This was in itself, consideration which created a binding legal relationship between the parties.” (emphasis ours)

As we see it, the trial Court, in *casu*, was on firm ground when she rejected, for lack of supporting evidence, the Appellant’s submission that it had raised a defence on the merits and that its counter-claim disclosed triable issues. As indicated earlier, we have dissected the Acknowledgement of Debt and no matter which way you look at it, there was a clear and unequivocal admission of the debt on the part of the Appellant which was not conditional at all. As we earlier stated, the Appellant is still at liberty to defend itself against the Respondent’s other claims as well as to pursue its counter-claim. Grounds 1 and 2 consequently fail.

The third ground of appeal has been somewhat addressed by our holding that the Respondent is still at liberty to prosecute its counter claim. We would however, categorically state that the law that a counter-claim is a distinct action is well established and the trial Judge correctly cited the case of **Photo Bank (Z) Limited v**

Shengo Holdings Limited⁽⁸⁾. In the cited case, judgment in default of appearance and defence was granted and the Supreme Court held that a counter claim could not be used as a basis for setting it aside. Likewise, in *casu*, the mere fact that the Appellant is challenging the Acknowledgement of Debt in its counter-claim cannot be used as a basis for setting aside the judgment on admission granted to the Respondent. The Appellant's arguments under this ground are therefore untenable and Counsel for the Appellant is admonished for citing the case of **A.J. Trading Company Limited v Chilombo (1973) ZR 55** as a Supreme Court matter when it is in fact a High Court judgement.

In the premises, all three 3 grounds of appeal are dismissed and costs of this Appeal are awarded to the Respondent, to be taxed in default of agreement.



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F.M. CHISANGA
JUDGE PRESIDENT



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C.K. MAKUNGU
COURT OF APPEAL JUDGE



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KONDOLO SC
COURT OF APPEAL JUDGE