

IN THE HIGH COURT FOR ZAMBIA
IN THE COMMERCIAL DIVISION
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2016/HPC/0224



BETWEEN:

CHEN XIANG HUA

PLAINTIFF

AND

RICHARD MWAPELA

DEFENDANT

DAVISON JERE (Paramount Chief Mpezeni)

THIRD PARTY

Before Hon. Madam Justice Dr. W. S. Mwenda in Chambers the 6th day of December, 2016.

For the Plaintiff : Mr. L. Linyama of Eric Silwamba Jalasi
and Linyama Legal Practitioners
For the Defendant : Mr. B. A. Sitali of Butler and Company
Legal Practitioners
For the Third Party : Mr. M. Kanga of Makebi Zulu
Advocates.

RULING

Cases referred to:

- 1. Cavmont Merchant Bank v. Amaka Holdings, SCZ Judgment No. 12 of 2001.*
- 2. A. J. Trading Company Limited v. Chilombo (1973) Z.R. 55.*
- 3. China Henan International Economic Technical Cooperation v. Mwanje Contractors Limited, SCZ Judgment No. 7 of 2002.*

Legislation referred to:

- 1. Order 21 rule 6 of the High Court Rules, Chapter 27 of the Laws of Zambia.***
- 2. Order 53 rule 6 of the High Court Rules, Chapter 27 of the Laws of Zambia***
- 3. Order 27 rule 3 of the Rules of the Supreme Court 1999 Edition (The White Book)***

This is a ruling in an application by the Plaintiff for an order that judgment on admission be entered pursuant to Order 21 rule 6 of the High Court Rules as read together with Order 53 rule 6 of the High Court (Amendment) Rules 2012 and Order 27 rule 3 of the Rules of the Supreme Court, 1999 Edition (The White Book). The reason advanced for the application is that the Defence filed in the matter is characterised by express admissions to the Plaintiff's claim. Additional grounds for the application are provided in the Affidavit in Support filed on 4th August, 2016 sworn by one Lubinda Linyama, the Advocate having conduct of the matter on behalf of the Plaintiff.

The deponent avers in the affidavit that on 12th May, 2016, the Plaintiff issued a Writ of Summons and Statement of Claim for an action in the realm of money had and received. The Defendant settled his Defence on 2nd June, 2016 in which he does not dispute having collected the funds in issue from the Plaintiff as claimed but states that the recipient of the said funds was Paramount Chief Mpezeni, who has refused or neglected to perform his portion of the bargain. According to the deponent, in further admission to having had and received the funds, the Defendant has taken out a

Third Party Notice wherein he enjoins the Third Party to the claim herein and seeks to be indemnified by the Third Party against the entire claim.

It is the deponent's further averment that conversely, the Third Party has filed his Defence stating that he partially collected funds from the Defendant. A perusal of the Defences filed by both the Defendant and the Third Party reveal that there is no complete traverse to the Plaintiff's claim as liability is being apportioned by the Defendant and the Third Party on their own admissions. The deponent avers that the Defendant's Defence is a bare denial of the Plaintiff's claim. It is his belief that for the reasons set out above, the Plaintiff is entitled to judgment on admission.

In opposing the application, the Defendant filed an Affidavit in Opposition to Summons for Judgment on Admission on 26th August, 2016 sworn by Richard Mwapela the Defendant herein, wherein he deposed that he stated in his Defence that the money demanded or claimed by the Plaintiff herein was paid to and collected by His Royal Highness Davison Jere, the current Paramount Chief Mpezeni, who is the Third Party herein. He also averred that the fact that he was merely acting for and as an agent for Paramount Chief Mpezeni who was to supply the mukula timber was disclosed in the contract dated 25th July, 2015 which he exhibited as "RM" in the annexure to the affidavit.

Richard Mwapela averred further that Clause 2 of the Agreement provided that the timber was to be supplied by the Third Party and

under Clause 6 payment to Paramount Chief Mpezeni was to be made through him and the payments were made accordingly through him and received by the Third Party who in his Defence admitted receiving ZMW320,000.00 from him.

It was the deponent's further averment that issuance of a Third Party Notice does not amount to an admission on his part but merely shows that the recipient of the funds in issue is the Third Party whose identity he had also disclosed in the Agreement between the Plaintiff and himself. Further, that he had been advised and verily believed it to be true that orders for Third Party directions are yet to be issued in this matter, following which he would have an opportunity to respond by way of Reply to the Third Party's Defence. That since the Third Party Orders for Directions have not been issued yet, it is premature for the Plaintiff to state that his Defence amounts to an admission.

The deponent stated that he had been advised and verily believes that in view of the aforesaid, the matter is not one where judgment may be entered without determination of all the issues between the three parties at trial.

The application came up for hearing on 29th August, 2016 at which all parties were represented.

Mr. Linyama, learned Counsel for the Plaintiff submitted that the Plaintiff was relying on the affidavit in support of the application and Skeleton Arguments filed on 4th August, 2016. Counsel pointed

out the fact that in his Defence the Defendant admitted receiving the funds but averred that he took the said funds to the Third Party.

According to Counsel, in terms of the rules of this Court, that Defence is frowned upon as it is a bare denial. As regards the Defendant's affidavit in opposition to the application, Counsel submitted that the reasons advanced therein seem to suggest an element of agency which, however, was not specifically pleaded in the Defence. Counsel urged the Court to limit its scope of enquiry in the application before it to one issue, namely, whether the Defence is in line with the Rules of the Commercial Court. He also prayed that the Court grants the application.

In response Mr. Sitali, learned Counsel for the Defendant submitted that the Defendant was relying on the Affidavit in Opposition and Skeleton Arguments filed on 26th August, 2016. To augment the case, Counsel submitted that there is no admission whatsoever of the claim by the Defendant and that what the Defendant stated in his Defence was that the money being claimed by the Plaintiff was paid to the Third Party in line with Clause 6 of the Agreement which was entered into between the Plaintiff and the Defendant. According to Counsel, that is the crux of the matter. Having stated that payment had been made to the Third Party, the Defendant had in essence addressed the Claim made by the Plaintiff.

Mr. Sitali submitted further that the Defendant has issued a Third Party Notice to demonstrate that the money in issue was indeed paid to the Third Party and in view of the ensuing Third Party

Proceedings which have not been concluded, it would be incorrect to suggest that the Defendant has admitted liability. According to Counsel, it is equally wrong to suggest that the Defence filed by the Defendant is a bare denial when the said Defence points at the person who has been paid the money and which payment is in accord with Clause 6 of the Agreement being relied upon by the Plaintiff.

Further, that this being a case where a Third Party Notice has been issued there is a requirement for Third Party Orders for Directions to be issued which will give the Defendant an opportunity to respond to the Defence filed by the Third Party who has admitted receiving part of the money.

Mr. Sitali submitted in addition that under Clause 3 of the Agreement the Plaintiff does recognise that the Defendant was acting on behalf of the Third Party. Counsel submitted that in keeping with the decision in *Cavmount Merchant Bank v. Amaka Holdings (1)* the Defendant cannot be said to be liable.

According to Counsel the authorities cited by the Plaintiff in support of this application are distinguishable from the present case because of the Third Party Proceedings which did not feature in the cited cases.

It was Counsel's submission that owing to the Third Party Proceedings in this case, the Defendant's Defence cannot be said to be a bare denial. According to Counsel, had there been no Third

Party Proceedings and admission by the Third Party about receiving some money, the Defendant would have conceded that judgment be entered but as it is, this is not a proper case for judgment to be entered as prayed by the Plaintiff and that this is a matter which the Court needs to determine on the merits.

Mr. Kanga, learned Counsel for the Third Party submitted that he was unable to respond to this particular application because he had not received any instructions from the Third Party.

In reply to the Defendant's submissions, Mr. Linyama submitted that the averments and submissions by the Defendant and his Counsel, respectively, are not a defence. According to Mr. Linyama, the submission by Mr. Sitali that there was an agency relationship is a legal position that must be specifically pleaded as agency is not only a matter of fact but also a matter of law. Counsel reiterated that the rules of this Court proscribe the making of bare denials which had been done by the Defendant.

Mr. Linyama submitted that the focus of this Court in these proceedings at this point should be to review the Defence filed on behalf of the Defendant. He reiterated that matters pleaded in the Affidavit in Opposition to the application are not contained in the Defence and the Court cannot consider them to be part of the Defence.

It was Counsel's contention that his colleague had gone to great lengths to talk about Third Party Proceedings. However, since the

Third Party had admitted liability, at least partly, what the Defendant should be pleading is to be granted leave to enter a Third Party Judgment on Admission. Counsel questioned the submission by the Defendant that the matter should proceed to trial on the merits and wondered what the Court would be investigating at trial since the claim for money had and received is not denied by the Defendant.

Counsel submitted that the claim in this case is for a liquidated sum which is specifically pleaded. It was Counsel's contention that the Defendant does not dispute in his Defence that he received the money. Additionally, the Third Party admits receiving a portion of that money. According to Counsel, this is a clear case where the pleadings themselves show that there is no need for a trial. He reiterated his prayer that this is a fit and proper case for judgment to be entered on admission.

I have examined the Statement of Claim and Defence filed by the Plaintiff and Defendant, respectively. I have also perused the Third Party Notice and Third Party Defence and in addition, have also scrutinised the Affidavit in Support of Application for Entry of Judgment on Admission and Affidavit in Opposition to Summons for Judgment on Admission.

Both the Plaintiff and Defendant filed Skeleton Arguments in Support of their respective cases. I have taken the same into consideration in my ruling.

As Mr. Linyama, learned Counsel for the Plaintiff correctly submitted, for purposes of the application before this Court, the scope of my inquiry is limited to a review of the Defence filed on behalf of the Defendant on 2nd June, 2016 with a view to determining whether the same specifically traverses every allegation of fact made in the Statement of Claim as required by Order 53 rule 6 of the High Court Rules.

Order 53 rule 6 referred to above reads as follows:

“(2)The defence shall specifically traverse every allegation of fact made in the statement of claim or counterclaim as the case may be;

(3) A general or bare denial of such allegation or a general statement of non-admission of them 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;

(5) Where a defence fails under sub-rule (4) the plaintiff or defendant or the court on its own motion, may in an appropriate case, enter judgment on admission.”

A perusal of the Defendant's Defence reveals that the Defendant does not deny receiving the money claimed to have been paid by the Plaintiff to him for the supply of mukula logs. His Defence is that the seller of the mukula logs and recipient of the consideration is Paramount Chief Mpezeni who has refused or neglected to perform

his portion of the bargain. The Defence does not traverse specifically or otherwise, the allegations of fact contained in paragraphs 7, 8, 9, and 10 of the Plaintiff's Statement of Claim. By failing to do so, the Defendant is deemed to have admitted the claims.

I concur with Mr. Linyama in his submission that the reasons for opposing the application for judgment on admission that have been advanced in the Affidavit in Opposition are suggestive of an aspect of agency. It is also correct that agency is not only a matter of fact, but also a matter of law and must be pleaded in the Defence. It is clear from the Defence that the Defendant did not specifically plead that aspect in his defence. Indeed as Mr. Linyama submitted, the averments that were made by the Defendant in his Affidavit in Opposition were not specifically pleaded in his Defence. Therefore, this Court cannot consider them at this stage to be part of the Defence.

The Plaintiff cited two cases in support of his application for entry of judgment on admission. The first one is the case of *A. J. Trading Company Limited v. Chilombo (2)* where the High Court held that an admission by the Defendant of an allegation in the Plaintiff's Statement of Claim means that there is no issue between the parties on that point and no further evidence is admissible in reference to that point. I am persuaded by the reasoning in that case.

The second case cited was the case of *China Henan International Economic Technical Cooperation v. Mwange Contractors Limited* (3) where the Supreme Court stated that:-

“Judgment on admission can, in appropriate cases, be entered at the scheduling conference because this is the time when the Court considers the pleadings and the direction the matter should take”.

Mr. Sitali submitted that these two cases are distinguishable from the present case because in both those cases there were no Third Party Proceedings involved. It was his argument that both those cases did not involve Third Party Proceedings and it was therefore, correct and appropriate for the court to consider the defence filed by the defendant in each case, for the admissions made therein.

I do not agree with the submissions by learned Counsel for the Defendant because filing of a Third Party Notice or commencement of Third Party Proceedings is not a defence to a claim of money had and received. By not specifically traversing the claims in paragraphs 7, 8, 9 and 10 of the Plaintiff's Statement of Claim, the Defendant is deemed to have admitted them. There is therefore, no issue to be determined by this Court on the claims in paragraphs 7, 8, 9 and 10 of the Statement of Claim.

Consequently, I find that the Defendant's Defence does not meet the requirements of Order 53 rule 6 of the High Court Rules. In my

view this is an appropriate case for judgment on admission to be entered.


Therefore, Judgment on admission is entered for the Plaintiff for the sum of United States Dollars 46,250 and ZMW101,833.00, respectively, on account of money had and received by the Defendant.

The other claims by the Plaintiff for damages for fraudulent misrepresentations, damages for loss of use of funds and interest on sums payable at the current Bank of Zambia lending rate shall be determined at the trial.

Costs for this application are awarded to the Plaintiff which costs shall be agreed and in default thereof, taxed.

Leave to appeal is granted.

Dated at Lusaka the 6th day of December, 2016


.....
Hon. W. S. Mwenda (Dr)
JUDGE