IN THE HIGH COURT FOR ZAMBIA **2016/HPC/0124**

IN THE COMMERCIAL DIVISION

HOLDEN AT LUSAKA

(CIVIL JURISDICTION)

BETWEEN

PAN AFRICAN BUILDING SOCIETY **PLAINTIFF**

AND

ASSHIA HAULAGE LIMITED **1ST DEFENDANT**

MICHAEL SPANOU **2ND DEFENDANT**

CORAM: Hon. Madam Justice Dr W. S. Mwenda in Chambers on the 9th day of December, 2016.

For the Plaintiff: Mr. K. Musaila of Chonta Musaila and Pindani Advocates

For the Defendants: Mr. C. Ngaba of Isaacs and Partners

RULING

Cases referred to:

1. *Gale v. Superdrug Stores Plc (1996) 3 ALL E.R. 469*

Legislation referred to:

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

The Plaintiff issued a Writ of Summons from the Commercial Registry on 22nd March, 2016 against the Defendants for payment of the sum US$22,368.18 due as arrears of lease rentals in respect of the 60 MT Crushing Plant; payment of US$6,409.89 due as arrears of lease rentals in respect of the mobile concrete pump; payment of the sum of US$138,724.02 due in respect of the Term Loan; interest; an order of possession of the leased asset; an order of possession, sale and/or foreclosure of the mortgaged property subdivision A of Stand No. 7183, Lusaka; any other relief the Court may deem fit and costs.

On 15th July, 2016 the Plaintiff issued a Summons for Judgment on Admission pursuant to Order 21 rule 6 of the High Court Rules, Chapter 27 of the Laws of Zambia and Order 27 rule 3 of the Rules of the Supreme Court, 1999 Edition (The White Book).

The grounds for the application as extracted from the Affidavit in Support of Summons for Judgment on Admission sworn by one Brenda Muwaika, the Head of Retail and Credit in the Plaintiff Company, are that the Defendants unequivocally admitted their indebtedness to the Plaintiff vide a letter dated 18th May, 2016 produced and exhibited as "BM1" in the Certificate of Exhibits appended to the affidavit.

The Defendants opposed the application and in an affidavit sworn by Michael Spanou, the Managing Director of the 1st Defendant Company and 2nd Defendant in this cause, aver that on 18th March, 2016 the deponent wrote to the Plaintiff acknowledging the debt as outlined in the Statement of Claim. Prior to the commencement of the suit the deponent wrote to the Plaintiff's advocates informing them of the disparities in the figures purportedly owed by the 1st Defendant.

It is the deponent's further testimony that upon being served with a Notice of Hearing when supposedly the matter had been discontinued, the Defendants retained the advocates currently on record to represent them in this suit and upon availing them with all relevant documentation and explaining the circumstances, it was realised that the debt created by the loan account was made out of misrepresentation by the Plaintiff to the Defendant.

The deponent states that the position arose from the Assignment of Receivables executed by the 1st Defendant as outlined in paragraphs 7 to 17 of the Defendant's Defence. He avers that the Defendants have since settled all outstanding amounts to the Plaintiff for the disputed sum which he believes was debited to the 1st Defendant erroneously.

The deponent asserts that the admission by way of the letter exhibited in the Plaintiff's affidavit has since been retracted in the Defendants' Defence which has a counterclaim of US$45,646.00 being funds paid by the 1st Defendant under the loan account created by misrepresentation.

That in the premises, the Defendants have a valid reason for their change in stance from the earlier admission.

The deponent avers that no prejudice has been occasioned to the Plaintiff by the retraction of the admission but that on the contrary, grave prejudice would be occasioned to the Defendants by the grant of the application as the Court would not have the opportunity to hear the Defendants on their Defence and Counterclaim. It is the deponents' belief that there are triable issues which ought to be heard and determined at a full hearing.

The application came up for hearing on 31st August, 2016 and Mr. Musaila, Counsel for the Plaintiff submitted that his client would rely on the Affidavit in Support and Skeleton Arguments filed on 15th July, 2016 as well as the Affidavit in Reply filed on 30th August, 2016. He submitted that this is a proper case to enter judgment on admission and it is their prayer that the application be granted accordingly.

Mr. Ngaba, Counsel for the Defendants submitted that the Defendants oppose the application for judgment on admission and in so doing, will rely on the Affidavit in Opposition and Skeleton Arguments filed on 12th August, 2016. Counsel submitted further to reiterate the point that while the Defendants initially admitted being indebted to the Plaintiff, the same was retracted through the pleadings in the Defence. He contended that the Defendants have a valid reason for the retraction. It would thus be in the interest of justice that they be allowed to plead their defence at trial.

Mr. Ngaba submitted further that the Plaintiff has acknowledged the rescission of the Defendant's admission in both its Affidavit in Reply as well as in the Reply and Defence to counterclaim filed on 29th August, 2016 in particular, paragraph 9. It is thus the Defendant's position that this is not a proper case to enter judgment on admission. It is the Defendants' prayer that the application be dismissed and the matter be allowed to proceed to trial.

In reply, Mr. Musaila referred the Court to paragraphs 3 to 9 of the Affidavit in Reply which according to him, show that this is not a proper case for the Defendants to retract their admission. In the circumstances, he prayed that the Court should not allow the retraction but instead grant the Plaintiff's application.

Paragraphs 3 to 9 in the Affidavit in Reply referred to above contains the following evidence as deposed by Brenda Muwaika, namely, that the Plaintiff and 1st Defendant did, on or about 9th March, 2012, execute an assignment whereby C & B Enterprises Limited's debt to the 1st Defendant was assigned to the Plaintiff as per exhibit "BM1". That by virtue of clause 3 of the assignment, the 1st Defendant was to remain liable and pay the Plaintiff on demand all the monies due and payable to the Plaintiff, notwithstanding the assignment.

That on or about 24th December, 2014 the Plaintiff availed the 1st Defendant a term loan facility in the sum of US$140,000.00 following the 1st Defendant's default on its two earlier facilities and C & B

Enterprises Limited's failure to settle the 1st Defendant's debt as per exhibit "BM2" which is a copy of the facility letter and exhibit "BM3" being a copy of the duly executed Deed of Acknowledgment of Debt by the 1st Defendant dated 24th December, 2014.

That the 1st Defendant's debts were incurred freely and without any misrepresentation whatsoever on the Plaintiff's part. Further, that the Defendant's admission was made after commencement of this action on 18th May, 2016 and more than a month after the Defendant claimed alleged disparities in figures referred to in paragraph 5 of the Defendant's Affidavit in Opposition.

Further, that the 1st Defendant is a limited liability company run by knowledgeable directors and/or shareholders who fully understand the transactions herein and made their admission of liability without any mistake. The explanation for the withdrawal of the admission is therefore untenable. That the Plaintiff will be prejudiced if the Defendants are allowed to resile from the admission as the Plaintiff will be kept out of its money for longer than anticipated when the Plaintiff considered the issue of liability resolved. According to the Plaintiff, the Defendants have now suddenly brought back the issue of liability making the action a fully contested case.

In the Plaintiff's Skeleton Arguments filed on 15th July, 2016 the Plaintiff argued that the 1st and 2nd Defendants expressly admitted their indebtedness to the Plaintiff by letter dated 18th May, 2016 and Order 21 rule 6 of the High Court Rules allows a party on motion or summons to

apply for judgment on admission where admission of facts or part of a case are made by a party to cause or matter either by his pleadings or otherwise. Order 27 rule 3 of the rules of the Supreme Court have similar provisions which the Plaintiff cited.

The Plaintiff submitted that the authorities cited clearly give this Court the power in cases like the one before the Court, to enter judgment on admission. It is therefore, the Plaintiff's prayer that judgment on admission be entered against the Defendants with costs to the Plaintiff.

The Respondents filed Skeleton Arguments on 12th August, 2016 and drew the attention of this Court to the English case of ***Gale v. Superdrug Stores Plc (1)*** where it was held as follows:-

> *"In determining whether to allow a defendant to resile from an admission of liability, it was not sufficient for the court to presume prejudice to the plaintiff; the Court's discretion was a general one in which all the circumstances of the case, including any explanation or excuse for the defendant's change of stance, would be taken into account and a balance struck between the prejudice suffered by each side if the admission were allowed to be withdrawn. In particular, the party resisting the retraction of an admission would have to produce clear and cogent evidence of prejudice before the court could be persuaded to restrain the privilege, which every litigant enjoyed, of freedom to change his mind. In the instant case, the judge had no evidence before him of any specific matter which rendered it more difficult for the Plaintiff to prosecute the claim in liability than it would have been*

if the admission had never been made to weigh against the clear prejudice which the defendants would suffer if they were allowed to resile from their admission. The appeal would accordingly be allowed and the orders striking out the defence would be dismissed".

The Defendants argued that in the case in *casu* as in the Gale case cited above, the Defendants initially admitted liability but subsequently abandoned that position and put up a defence. They argued further that in paragraphs 7 to 12 of the Affidavit in Opposition the Defendants have shown why they resiled their defence. That upon consultation with their advocates the Defendants realised that, based on the Assignment of Receivables executed by the parties, the monies credited to their account ought not to have been and accordingly filed a counterclaim for monies paid in that account. In their view, this constitutes a valid explanation for the Defendant's change of stance. The Defendants submitted that no prejudice having been shown by the Plaintiff, being the party resisting the retraction of the admission, the Defendants ought to be allowed to retract the admission and allow for the defence that forms part of its pleadings to stand. In the premises, the Defendants pray that this Court dismisses the Plaintiff's claim with costs.

I have studied the documentary evidence before this Court and considered the viva voce submissions by Counsel on both sides.

It is not in dispute that the 1st Defendant initially admitted unequivocally owing the debt, but later retracted the admission in the Defence and

Affidavit in Opposition to Summons for Judgment on Admission giving an explanation for the change in stance. The 1st Defendant claimed that the debt created by the loan account was made out of misrepresentation by the Plaintiff to the Defendants and thus have a valid reason for the change in stance. The allegation of misrepresentation is denied by the Plaintiff. The 1st Defendant also submitted that no prejudice has been occasioned to the Defendant by the retraction of the admission but grave prejudice would be occasioned to the Defendants by the grant of the application as the Court would not have the opportunity to hear the Defendants on their Defence and Counter-Claim and further, that there are triable issues that ought to be heard and determined at full trial.

Even though the decision in the case of Gale v Superdrug Stores Plc is not binding on this Court, I find the same persuasive and I am guided by the principles enunciated in the same, namely that in a case such as the one before this Court, the Judge should not presume some prejudice to the Plaintiff but in exercising its discretion it should take into account all the circumstances of the case, including the explanation or excuse for the Defendant's change of stance and strike a balance between the prejudice suffered by each side if the admission were allowed to be withdrawn.

In particular, the party resisting the retraction of an admission would have to produce clear and cogent evidence of prejudice before the Court could be persuaded to restrain the privilege, which every litigant enjoys, of freedom to change his mind.

I am of the view that apart from claiming that the Plaintiff will be prejudiced if the Defendants are allowed to resile from the admission in that it will be kept out of its money for longer than anticipated, the plaintiff has not produced clear and cogent evidence of prejudice before this Court to persuade the Court to restrain the privilege of the Defendants of freedom to change their mind and enter judgment on admission.

I am persuaded by the explanation given for the change in stance and I am of the view that entry of judgment on admission would prejudice the Defendants more than the Plaintiff in that they would not be afforded the opportunity to be heard on their Defence and their Counterclaim.

Consequently, I am inclined to dismiss the application for entry of judgment on admission for being without merit and I dismiss the same accordingly.

Costs of the application are awarded to the Defendants to be agreed or taxed in default of agreement.

Dated at Lusaka the 9th day December, 2016.

W. S. MWENDA (Dr)
JUDGE