IN THE COURT OF APPEAL OF ZAMBIA **APPEAL 038/2021**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

ZDENAKIE LIMITED **APPELLANT**

AND

PROFERT ZAMBIA LIMITED **RESPONDENT**

Coram: Makungu, Sichinga and Banda-Bobo, JJA
On the 17th day of June, 2021 and on the 3rd day of August, 2021

For the Appellant: Mr. J. Mwamba of Simeza Sangwa Associates
For the Respondent: Mr. D. Mushenya of Messrs Wright Chambers

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JUDGMENT

MAKUNGU, JA delivered the Judgment of the Court.

Case referred to:

1. *Zega Limited v. Zambezi Airlines and Diamond General Insurance Limited – SCZ Appeal No. 39 of 2014*
2. *Himani Alloys Limited v. Tata Steel Limited (2011) 15 SCC 27*
3. *Attorney General v. Ndhlovu (1986) Z.R 12*
4. *Bank of Zambia v. Chibote Meat Corporation (1999) Z.R 103*
5. *Finance Bank Zambia PLC v. Lamasat International Limited – CAZ Appeal No.175/2017*
6. *Salomon v. A Salomon and Co Limited (1897) AC 22*
7. *Natural Valley Limited v. Brick and Tile Manufacturers and the Attorney General – SCZ Selected Judgment No.32 188/2015*

Authorities referred to:

1. *Rules of the Supreme Court, 1999 Edition.*

1.0 INTRODUCTION

1.1 This is an appeal against the ruling of Justice I.Z Mbewe of the High Court in which she entered Judgment on admission against the appellant.

2.0 BACKGROUND

2.1 On 27th March, 2020, the plaintiff (now respondent) commenced an action against the appellant as 1st defendant and Zdenakie Commodities Limited as 2nd defendant in the Commercial Division of the High Court, seeking the following reliefs:

1) Judgment on admission for the sum of USD 1,104,269.86 together with the sum of USD 278,536.00, accrued interest as at 31st December, 2019 being part of the outstanding debt payable to the plaintiff by the 1st and 2nd defendants for the supply of fertilizer by the plaintiff to the defendants at the defendants request and instance.

2) Payment of the sum of USD 22,085.39 with accrued interest from 1st January, 2020 to 28th February, 2020.

3) Alternatively, payment of the said sum of USD 1,104,269.86 together with the sum of USD 300,621.39, accrued interest as at 28th February, 2020 as damages for breach of contract.

4) Interest, costs and any other relief the court may deem fit.

3.0 EVIDENCE BEFORE THE LOWER COURT

Respondent's (plaintiff's) evidence

3.1 The respondent's evidence was contained in an affidavit deposed by Rajkumar Gulati-the Managing Director in the respondent's company who stated that, the appellant supplied fertilisers worth USD 1,134,269.86 to the 1st and 2nd defendants between 1st January, 2014 and October 2018. Both defendants admitted owing the amount of USD 1,134,269.86 together with the sum of USD 144,153.27 as accrued interest as at 31st December, 2018 through letters dated 17th and 18th January, 2019. The defendants paid the

sum of USD 30,000.00 towards the debt, leaving a balance of USD 1,104,269.86 and accrued interest of USD 300,621.39 on the reducing balance as at 28th February, 2020. The defendants further admitted to owing the said amount of USD 1,104,269.86 and USD 278,536.00 accrued interest on reducing balance as at 31st December, 2019 through the statements of account and letters dated 20th January, 2016 and 6th February, 2020 respectively.

Appellants (defendants) evidence

3.2 The appellant's evidence was contained in an affidavit sworn by George Liacopolous, a Director in both defendant companies who stated that, the 1st defendant company deals in storage and warehousing whilst the 2nd defendant deals in buying and supplying of agricultural commodities such as fertilisers. The sum of USD 1,134,269.86 claimed by the plaintiff arose from an oral agreement between the plaintiff and 2nd defendant. The 1st defendant was not privy to the said agreement and never admitted the debt. The fertilisers were supplied to the 2nd defendant. There are three separate and distinct companies all bearing the name Zdenakie Limited and

they all use the same letterhead as evidenced by the letter dated 6th February, 2020. The 2nd defendant is not disputing the debt as it was the sole contracting party and the only reason why the 1st defendant is party to the action is because of the usage of the same letter head by all Zdenakie companies.

4.0 DECISION OF THE COURT BELOW

4.1 Upon considering the affidavit evidence and submissions, the trial judge noted that it had the discretion to enter judgment on admission of facts without waiting for the determination of any other question between the parties. That discretionary power can only be exercised if the admission is clear, unambiguous and unconditional. The court observed that, the discretion should not be exercised to deny the valuable right of a defendant to contest the claim against him.

4.2 The court found that the 1st defendant's admissions in the letters dated 10th April, 2018 and 18th January, 2019 were unambiguous and there was no contestation over the material facts. There was also proof of payment of USD 20,000 on 3rd October, 2019 by the 1st defendant to the Plaintiff with a

covering email from Tanya Kieslich, the Finance Director of both defendant companies.

4.3 The court further held that, even if the 1st defendant's letterhead was used by three Zdenakie companies, it would be an internal arrangement among the companies who did so at their own peril and this should not affect the plaintiff who is an outsider.

4.4 In light of the above, the court came to the conclusion that the 1st defendant admitted the debt. The learned judge concluded that, it was misleading for the 1st defendant to state that the documentary evidence requires to be tested at trial and that all payments were made by the 2nd defendant.

4.5 The trial judge further found that, the 2nd defendant admitted the debt through the letters dated 17th, 18th January, 2019 and 20th January, 2020. This position was re-affirmed by the 2nd defendant in their affidavit in opposition.

4.6 The Judge therefore held that the admissions were clear and unambiguous and entered judgment in favour of the plaintiff for the recovery of USD 1,104,269.86 together with the sum of USD 278,536.00 and USD 22,085.39 accrued interest on the

outstanding debt as at 31st December, 2019 and 1st January 2020 respectively.

4.7 Interest on the judgment sum was awarded at the short-term deposit rate from date of writ to date of judgment and thereafter at the commercial lending rate as determined by the Bank of Zambia until full payment.

4.8 The plaintiff's alternative claim of USD 1,104,269.86 together with the sum of USD 300,621.39 accrued interest as at 28th February, 2020 as damages for breach of contract was dismissed. Costs were awarded to the plaintiff.

5.0 GROUNDS OF APPEAL

5.1 The appellant has advanced two grounds of appeal as follows:

1. ***That the lower court erred in law and fact when it entered judgment on admission against the appellant when the appellant was not a party to the oral agreement.***
2. ***The lower court erred in law and fact by giving conflicting rulings on the matter relating to the appellant's application for misjoinder.***

6.0 APPELLANT'S ARGUMENT

6.1 The appellant relied on the heads of argument filed on 4th March, 2021. In support of ground one, counsel for the appellant submitted that the appellant was not privy to the oral agreement that gave rise to the debt and it could therefore not have admitted the debt. He outlined the essential conditions that must be satisfied before a court can pass a Judgment on admission as follows:

a) the admission must have been made either in the pleadings or otherwise;

b) the admission must have been made orally or in writing;

c) the admission must be clear and unequivocal; and

d) the admission must be taken as a whole and it is not permissible to rely on a part of the admission, ignoring the other part.

6.2 Counsel went on to cite the Zambian case of **Zega Limited v. Zambezi Airlines and Diamond General Insurance Limited**[1] and the Indian case of **Himani Alloys Limited v. Tata Steel Limited**[2] which are both to the effect that a court is empowered to enter judgment in favour of a party based on

the admissions of fact made by the other party on its claims. The admission must be clear, unambiguous and unconditional and that, the discretion should not be exercised to deny the valuable right of a defendant to contest the claim.

6.3 Counsel argued that, the circumstances of this case did not warrant the entry of judgment on admission as the appellant denied being a party to the oral contract. Under the principle of privity of contract, a party cannot assume liability under a contract to which he is not a party. Counsel submitted that on this ground alone, the lower court should have declined to enter judgment on admission and held a trial.

6.4 In actual fact, in its ruling on the joinder application the court stated or held that there was need for a trial to determine whether or not the appellant was a party to the oral contract and whether its letterhead was being used by Zdenakie Commodities Limited.

6.5 Counsel contended that, the lower court should have followed its earlier guidance and declined to grant judgment on admission. Counsel submitted that the letters relied upon by the lower court were written by Zdenakie Commodities Limited

on the appellant's letterhead. To justify this, he referred us to the letter dated 6th February, 2020 which categorically states that the letter was written on behalf of Zdenakie Commodities. He quoted the relevant portion of the letter which reads as follows:

> ***"Mr. R. Gulati***
>
> ***Profert Zambia Ltd***
>
> ***Dear Mr.Gulati,***
>
> ***I am writing to update you on the efforts Zdenakie Commodities is making to reduce its indebtedness to profert.***
>
> ***We have scrambled resources to have farmers plant 250 ha of maize and 180ha of soya beans, we should be expecting a harvest for 1,250 mt of maize and 380mt of soya beans between April and May 2020..."***

6.6 The second letter which counsel said the court below ignored, is dated 6th January, 2017 and it is from the respondent to Zdenakie Commodities Limited. The relevant portion reads as follows:

"The Director

Profert Zambia ltd

Lusaka

Zambia

Re: Confirmation of stocks as at 31 December, 2016

I would like to confirm that Zdenakie Commodities ltd is holding the following stocks on behalf of Profert Zambia limited as of 31 December, 2016."

6.7 Counsel contended that had the trial court considered the above documents, it would have come to the conclusion that the debtor was Zdenakie Commodities Limited and not the appellant.

6.8 Counsel went on to submit that, the court should have allowed this matter to go to trial instead of entering judgment on admission because there were two sets of documents, that is, documents clearly showing that the indebted party was Zdenakie Commodities and that the communication was on behalf of Zdenakie Commodities albeit on the appellant's letterhead and letters that were silent on whose behalf the

communication was made. Further, the court ignored the fact that Zdenakie Commodities Limited admitted the debt and not the appellant.

6.9 The gist of the argument in ground two was that the lower court reached two different conclusions on the same documents. This inconsistency has resulted in unfairness which warrants the setting aside of the ruling.

6.10 We were therefore urged to set aside the lower court's ruling and refer the matter back to the High Court for trial between the appellant and the respondent only.

7.0 RESPONDENT'S ARGUMENTS

7.1 In opposing the appeal, counsel for the respondent relied on the heads of argument filed on 17th May, 2021. The two grounds of appeal were argued together as follows:

7.2 The ruling on misjoinder dated 15th July, 2020 was not appealed against, which entails that it was accepted. Counsel therefore argued that this court has no jurisdiction to entertain the submissions relating to the said ruling.

7.3 Counsel went on to submit that the Supreme Court has in a plethora of cases including **Attorney General v. Ndhlovu**[3] held that:

> ***"A finding of fact by a judge sitting alone can only be reversed when it is positively demonstrated that, by reason of some non-direction or misdirection or otherwise, the judge erred in accepting the evidence which he did accept or in assessing and evaluating the evidence, the judge has taken into account some matters which he ought not to have taken into account or failed to take into account matters which he ought to have taken into account."***

7.4 It was submitted that in this case, the appellant has failed to demonstrate that the court below made any wrong finding of fact before entering the judgment on admission.

7.5 The respondent's counsel further submitted that the appellant's contention in ground one is unfounded because the court found that the appellant admitted the debt on its own behalf and even paid part of the debt to the respondent.

7.6 Counsel contended that, the argument by the appellant that it was not a party to the oral agreement was an afterthought in an effort to evade liability. Additionally, the argument that all Zdenakie companies use the same letterhead, is a peculiar arrangement and within the personal knowledge of the appellant. The same should not affect the respondent who is an outsider. He cited the case of **Bank of Zambia v. Chibote Meat Corporation,**[4] where it was held that;

> ***"Matters of internal procedure in the management of a company are not a concern of third parties."***

7.7 Further, the fact that Zdenakie Commodities Limited, the 2nd defendant in the lower court, is not disputing the debt, does not mean that it is the only party which contracted with the respondent herein. The fact remains that both the appellant and Zdenakie Commodities Limited contracted with the respondent and admitted the debt.

7.8 As regards the argument by the appellant that the court reached two different conclusions in the matter, counsel for the respondent submitted that the application for misjoinder was heard before the application for judgment on admission.

The trial judge determined the application for misjoinder based on the evidence that was before it at that time. When it finally heard the application for judgment on admission, it took cognizance of the appellant's unequivocal admissions of the debt as highlighted in the exhibits. He therefore urged us to dismiss the appeal in its entirety.

8.0 APPELLANT'S ARGUMENTS IN REPLY

8.1 In reply, the appellant's counsel contended that the appeal is against the judgment on admission dated 15th September, 2020 and not the ruling on misjoinder and therefore the court has jurisdiction to entertain the appeal.

8.2 As regards the respondent's argument that the appellant has failed to demonstrate that the court below made a wrong finding of fact, counsel argued that the respondent did not address the issue whether the appellant was privy to the oral contract or not.

8.3 The only evidence the respondent adduced in support of its claim were letters drafted on the appellant's letter head. The fact that the appellant and its sister companies communicate on the same letterhead, could be seen in the letter dated 6th

February, 2020 which indicates that Zdenakie Commodities Limited was the indebted party and the letter dated 6th January, 2017 which indicates that Zdenakie Commodities Limited obtained the stock and was indebted to the respondent. Counsel submitted that, although the letter was written on the appellant's letter head, it was stamped by Zdenakie Commodities Limited.

8.4 Additionally, the letter dated 5th March, 2018 written by the respondent to Zdenakie Commodities Limited for audit purposes, confirms that the indebted party is Zdenakie Commodities Limited and not the appellant.

8.5 He contended that had the court analyzed this evidence, it would not have entered judgment on admission against the appellant and this renders its findings perverse and justifies interference by this court.

8.6 Counsel further argued that "the outsider principle" argued by the respondents does not apply to this case as the issue is not about internal procedures of a company but the use of one letterhead by three companies. Moreover, the respondent was

aware at all material times that it was dealing with Zdenakie Commodities Limited and not the appellant.

8.7 The prayer was that the appeal be upheld.

9.0 DECISION OF THIS COURT

9.1 We have considered the record of appeal and arguments by the parties. We shall deal with the grounds of appeal together as they are intertwined.

9.2 It is common place that the court has power to enter judgment on admission of facts without waiting for the determination of any other question between the parties. **Order 27 Rule 3 of the Supreme Court Practice, 1999 Edition** provides that:

> ***"Where admissions of fact or of part of a case are made by a party to a cause or matter either by his pleading 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 sees just."

9.3 Further in the case of **Zega Limited v. Zambezi Airlines Limited Diamond General Insurance Limited**, *supra* the Supreme Court cited with approval the case of **Himani Alloys Limited v. Tata Steel Limited** where it was stated that:

> ***"The court, on examination of the 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 an appeal on merits. Therefore, unless the omission is clear, unambiguous and unconditional, the discretion of the court should not be exercised to deny the valuable right of the defendant to contest the claim. In short, the discretion should be used only where there is clear admission which can be acted upon."***

9.4 Similarly, in the case of **Finance Bank Zambia PLC v. Lamasat International Limited**[5] we stated that:

"The Court has discretionary power to enter judgment on admission under Order 27 of the High Court Rules. This power is exercised in only plain cases where admission is clear and unequivocal.

An admission has to be plain and obvious, on the face of it without requiring a magnifying glass to ascertain its meaning. Admissions may be in pleadings or otherwise. A court cannot refuse to grant judgment on admission in the face of clear admissions."

9.5 The appellant's dispute is that, it was not privy to the oral agreement that gave rise to the debt and therefore, it could not have admitted it. Accordingly, it contends that, the only thing linking it to this case, is the fact that the 2nd defendant company which is not a party to this appeal used the appellant's letterhead to communicate with the respondent.

9.6 For convenience, we shall quote the letters upon which the court below based its finding that the appellant had unequivocally admitted the debt to the respondent. The

relevant parts of letter dated 10th April, 2018 addressed to the respondent on the appellant's letterhead are as follows:

"April 10, 2018

Mr. Raj Gulati

Profert Zambia Limited

Dear Mr. Gulati

Re: Outstanding balance as at 31st March, 2018 $1,142,644.37

We sincerely apologise that payments have been outstanding for some time, as you are aware, the bulk of this balance is made up of farmers to whom we financed their crop, but due to adverse trading conditions in the 2017 marketing season, they were unable to clear the debt on the fertiliser.....

We would be grateful therefore if you could bear with us until our facilities are in place as it will assist us to make some payments towards the outstanding.

Of course, if we receive some payment before this time, we will endeavor to make payment towards your account.

Thank you, for your kind understanding and we assure you of our commitment to making payments at the earliest possible.

All the best.

Tanya Kieslich

Finance Director.

9.7 The relevant parts of the letter dated 18th January, 2019 on the appellant's letter head to the respondent, read as follows:

"18th January, 2019

Mr Raj Gulati

Profert Zambia Limited

Dear Mr. Gulati

Re: Outstanding balance to Profert as at 31st December 2018 USD 1,134,269.86 and accrued interest USD 144,153.27

Following our letter of the 27th August 2018 outlining the proposed repayment of the outstanding amount, I wish to confirm that the recovery from the wheat crop has been smaller than expected.....

Nonetheless, we are still looking for other sources of financing to enable us liquidate this debt as early as possible.

We sincerely regret that this outstanding amount remains unsettled after a considerable period of time and we apologise for the inconvenience caused to your business, but we are committed in having it fully settled.

Yours sincerely,

George Liacopolous

Managing Director

9.8 There was also evidence of "proof of payment" from Barclays Bank Zambia PLC dated 3rd October, 2019 indicating that the appellant paid the sum of USD 20,000 to the respondent. The same is shown on page 68 of the record of appeal. The

covering email from Tanya Kieslich to Mr. Gulati stating that "As discussed, please find attached proof of payment to profert", is on page 67 of the record.

9.9 Our interpretation of the above mentioned documents is that the appellant acknowledged the debt owed to the respondent in no uncertain terms and proceeded to make part payment thereof. Therefore, we cannot fault the court below for entering Judgment on admission against the appellant.

9.10 In the case of **Natural Valley Limited v. Brick and Tile Manufacturing Limited,**[9] it was held inter-alia that, ***"An admission is only binding on the person who makes it."***

9.11 In light of the documentary evidence, we have no doubt that the appellant personally admitted to owing the debt as it cannot admit a debt on behalf of another company.

9.12 As regards the argument relating to the ruling on misjoinder, it is comprehensible that the appeal is against the judgment on admission and not the refusal of the lower court to remove the appellant from the proceedings. There is clearly no appeal against the ruling on misjoinder. We have already addressed the appellant's argument that the matter should have

proceeded to trial by holding that the lower court was on firm ground when it entered the judgment on admission.

9.13 The appellant's protestation is that the lower court delivered two conflicting rulings on the matter, in that in the ruling on misjoinder the court declined to disjoin the appellant on the ground that there was need for a trial to determine whether or not the appellant's letterhead was being used in the communication between the respondent and Zdenakie Commodities Limited, but later Judgment on admission was entered.

9.14 We are fully convinced that, the application by the respondent for entry of Judgment on admission was a totally different application from the one for misjoinder and the court was entitled to consider all the evidence that was available before it at different times. The lower court did not contradict itself in any way by determining both applications as it did.

9.15 It is settled law that an incorporated company is a legal entity. See the case of **Salomon v. A Salomon and Co Limited.**[6] Under the circumstances, we hold that the use of the same letterhead by two companies was an internal arrangement

which has nothing to do with the respondent as an outsider. See the case of **Bank of Zambia v. Chibote Meat Corporation**[4] cited by the respondents.

9.16 For the foregoing reasons, the appeal is bereft of merit and dismissed.

10.0 CONCLUSION

10.1 All being said, we find no merit in this appeal and it is accordingly dismissed with costs which should be agreed upon between the parties or taxed.

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C.K. MAKUNGU
COURT OF APPEAL JUDGE

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D.L.Y. SICHINGA
COURT OF APPEAL JUDGE

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A.M. BANDA-BOBO
COURT OF APPEAL JUDGE