

IN THE COURT OF APPEAL OF ZAMBIA **Appeal No. 227/2023**
HOLDEN AT LUSAKA
(Civil Jurisdiction)



BETWEEN:

NKANA MINING & MINERAL PROCESSING APPELLANT
LIMITED

AND

YAFEI VENTURES LIMITED RESPONDENT

CORAM : Siavwapa JP, Chishimba, and Patel JJA

On 26th March, 2024 and 12th April 2024

For the Appellant : Mr. R. Malipenga of Messrs. Robson of
Malipenga & Co.

For the Respondents : Mr. V.N. Michelo of Messrs. V. N. Michelo
& Partners

Mr. A. Mukanda of Messrs. H.H Ndhovu &
Co.

J U D G M E N T

CHISHIMBA JA, delivered the judgment of the Court.

CASES REFERRED TO:

- 1) Foveros Mining Limited v Bell Equipment Zambia Limited CAZ Appeal No. 135 of 2018
- 2) Himani Alloys Limited v Tata Steel Limited (2011) 3 Civil Cases 721
- 3) Ellia v. Allen (1911- 13) ALL ER 1027
- 4) Jones vs Mbna International Bank Ltd (2000) EWCA CIV 314
- 5) Finance Bank (Z) PLC v Lamasat International Limited CAZ Appeal No. 27 of 2018



- 6) Zega Limited v Zambezi Airlines Limited and Diamond Insurance Limited SCZ Appeal No. 134/2017
- 7) Airtel Networks Zambia PLC and James Kumwenda CAZ Appeal 19 of 2020
- 8) Northworld Investment Limited v Diamond General Insurance Limited CAZ Appel No. 135 of 2018

LEGISLATION CITED:

- 1) The High Court Rules Chapter 27 of the Laws of Zambia
- 2) The Rules of the Supreme Court of England, 1999
- 3) Law of contract by P. Richard 7th Edition. Pearson & Longman (2006)

1.0 INTRODUCTION

1.1 This appeal is against the ruling of Justice E. Pengele dated 17th May, 2023 in which he entered judgment on admission in the sum of US\$654,255.88 in favour of the respondent.

2.0 BACKGROUND

2.1 The appellant engaged the respondent to provide various construction and engineering services which included the construction of a tailings dam. It was customary for the appellant to pay the respondent upon presentation of an invoice for services provided. The total balance of the value of unpaid invoices due to the respondent by the appellant stood at US\$654,255.88. The appellant, while admitting its indebtedness, stated that it could not pay the respondent,

because the tailing dam had developed cracks and collapse of the soil.

- 2.2 The appeal raises the issue of whether a counter – claim can prevent the entry of judgment on admission in respect of an admitted claim.

3.0 CLAIM IN COURT BELOW

- 3.1 On 28th March, 2023, the respondent commenced an action against the appellant by writ of summons and statement of claim seeking an order for the payment of \$654,255.88 being the balance of the value of unpaid invoices due to the respondent, which amount the appellant had undertaken to pay; an order for the payment of interest on all sums found to be due and costs.
- 3.2 On 18th April, 2023, the appellant filed a defence and counterclaim, seeking refund of all the money paid on the tailing dam due to the poor workmanship, which resulted in weak compaction and collapse of the dam's soil in the two seasons of rain; set off on the amount to be demanded by the new company to redo the dam's work; damages, interest; and costs.

- 3.3 On 17th April, 2023, the respondent issued summons for entry of judgment on admission pursuant to **Order 21 rule 2** and **Order 3 rule 2 of the High Court Rules (HCR) Chapter 27 of the Laws of Zambia**. The basis being that the appellant had admitted its indebtedness to the respondent and at one point, had made a written undertaking to pay.
- 3.4 The appellant, on the other hand, stated that the respondent was engaged to build the tailing dam and offer transportation services. A balance of \$654,255.88 remained to be paid to the respondent. As the dam developed cracks and soil collapsed, the respondent undertook repair works.
- 3.5 Though the appellant accepted the claimed amount of \$654,255.88 and proposed to settle it in three monthly instalments in February, March and April 2022, the dam again collapsed. This compelled the appellant to seek quotations for repair works from other contractors. That the appellant's commitment to settle the \$654,255.88 has been overtaken by events due to the collapse of the dam.

4.0 DECISION OF THE COURT BELOW

- 4.1 In his ruling, the Learned Judge held that the appellant had admitted its indebtedness to the respondent in the sum of \$654,255.88 as per the letter undertaking to pay in three

monthly instalments. The court below found that the appellant in paragraph 6 of the affidavit in opposition, had admitted that under the contract with the respondent, there was an outstanding balance of \$654,255.88. Under paragraph 12 of the said affidavit, the appellant accepted the claimed amount and offered to settle the sum in three instalments in February, March and April 2022.

4.2 In addition, the court also found that paragraph 4 of the defence, by the appellant acknowledges unpaid invoices due to the respondent in to the sum of \$654,255.88.

4.3 The Learned Judge considered the provisions of **Order 21 Rule 5 of the HCR** on entry of judgment on admission. The court held that the appellant did not dispute the fact that it made a clear, unambiguous and unconditional admission. That at the time of the admission in issue, the appellant had not raised any of the issues that constitute its counterclaim. The said issues were only raised after it had committed itself to paying the admitted sum in three monthly instalments commencing in February 2022.

4.4 The court further found that the issues raised in the counterclaim were all generated after the respondent commenced the action on 28th March, 2023. Therefore, the

admission in issue was made long before the appellant started raising the issues that constitute its counterclaim. Guided by our decision in **Feveros Mining Limited v Bell Equipment Zambia Limited** ⁽¹⁾ that a counterclaim being a distinct action, cannot be used as a basis to set aside a judgment on admission, the court entered judgment on admission in the sum of \$654,255.88 in favour of the respondent with interest and costs.

5.0 GROUNDS OF APPEAL

5.1 Being dissatisfied with the ruling of the court below, the appellant appealed advancing six grounds as follows:

- 1) *The lower court misdirected itself in fact and law when it entered judgment on admission purely based on a document dated 11th December, 2021, when the appellant demonstrated in their defence and counterclaim that the said admission was equivocal, ambiguous and conditional;*
- 2) *The lower court erred in fact and law when it entered judgment on admission premised on a letter dated 11th December, 2021, without primarily considering that the respondent breached or did not fulfil its contractual obligation under the contract, that is to construct a dam that is useful, as the said dam collapsed after being constructed, in order to warrant any payment by the appellant;*
- 3) *The lower court erred in fact and law when it entered judgment on admission premised on a letter dated 11th December, 2021, when the said letter of commitment was*

conditional to acceptance and settlement by the parties, which acceptance and settlement has not been shown;

- 4) *The lower court erred in fact and law when it entered judgment on admission premised on a letter dated 11th December, 2021, which letter does not relate to the respondent's claims in the writ and statement of claim, as the amounts in the letter of commitment clearly exceed those being claimed by the respondent, thereby being ambiguous and unclear position.*
- 5) *The lower court erred in fact and law when it entered judgment on admission premised on a letter dated 11th December, 2021, which letter was written in a foreign language without giving interpretation to the content of the letter; and*
- 6) *The lower court erred in fact and law when it entered judgment on admission premised on a letter dated 11th December, 2021, without considering the merits of the defence, that is, the breach of the contract by the respondent's.*

6.0 APPELLANT'S HEADS OF ARGUMENT

- 6.1 The appellant filed heads of argument dated 18th July, 2023, in which the six grounds of appeal were argued as one.
- 6.2 Learned Counsel submitted that **Order 21 rule 6 of the HCR** as read with **Order 27 rule 3 of the Rules of the Supreme Court of England, 1999 (the RSC)**, gives the court the jurisdiction to enter judgment where the other party had admitted facts either in their pleadings or in any other documents without waiting for the determination of any other

question between the parties. Further that **Order 27 rule 3(4) of the RSC** requires that the court is satisfied that the party has made an admission of fact or an admission of part of the claimant's case in the pleadings or otherwise.

- 6.3 It was submitted that the court below entered judgment on admission based on a letter of repayment commitment made between the appellant and respondent on 11th December, 2021 on account of a contractual relationship that existed between the parties for the construction of a tailings dam. That the letter, was a commitment by the appellant, to settling the debt, on the condition that the respondent constructs a dam fit for the appellant's use and is accepted by the appellant.
- 6.4 However, after its construction, the dam collapsed twice and that the respondent had to redo the work. The dam has since been declared unfit for use by the Mines Safety Department in the letter dated 11th April, 2021.
- 6.5 It was contended though that court can enter judgment on admission where the admission is unconditional, in this case, the letter of commitment relied upon by the court below, had a condition stipulated for repayment. The condition for repayment was that inspection of the tailing dam had to be

done and accepted by the appellants. Reference was made to paragraphs 3 and 4 of the respondent's reply to the defence and counterclaim. Further, that inspection could not be done because the respondent moved to Zimbabwe.

6.6 Counsel, in the second instance, argued that the letter of commitment dated 11th December, 2021 is written in Chinese. The court below did not interpret the document in its ruling to state what the document meant. The court can only enter judgment on admission where the admissions from the face of the document are clear and plain. A perusal of the said letter shows that the amounts appearing thereon far exceed the amounts being claimed by the respondent. Further, that other contractual projects and amounts are stated apart from those claimed by the respondent.

6.7 In this regard, the appellant contends that from the face of the letter in issue, there is a high level of ambiguity and lack of clarity between the amounts stated on the document and the claims in the respondent's pleadings. Therefore, the court below should not have entered judgment on admission without first ascertaining the contents of the letter alluded to bearing in mind that there was a binding contract existing between the parties.

6.8 It was further contended that the respondent did not discharge its contractual obligation to construct a dam fit for the appellant's use under the contract to enable it claim the amount that gave rise to the action. Reference was made to the pictures exhibited at pages 43, 46 and 47 of the record of appeal as proof of the non-discharge of the contract.

6.9 The appellant conceded that the documents at page 46 and 47 of the record of appeal were obtained after the matter commenced, but that this was done to show the court that the respondent breached the contract by constructing a dam that was not fit for long usage by the appellant. Therefore, the respondent was in breach of contract which entitled it to damages and the right to repudiate the contract. Discharging the contract will bring all future obligations under the contract to an end. Reference was made to the learned author **P. Richard's Law of Contracts. 7th edition.**

6.10 Though the appellant had made prior payments to the respondent for the works done, due to the development of the cracks on the dam and the subsequent collapse in 2021 and 2023, the respondent breached the implied quality of construction. Therefore, the appellant cannot reasonably be

expected to pay the remaining balance as it will incur further costs in repairing the dam.

6.11 We were referred to the case of **Himani Alloys Limited v Tata Steel Limited** ⁽²⁾ that an admission:

“... should be a conscious and deliberate act of the party making it, showing an intention to be bound by it. The court, on examination of the facts and circumstances, has to exercise its judicial discretion, keeping in mind that judgment on admission is a judgment without trial, which permanently denies any remedy to the defendant by way of appeal on merits. Therefore, unless the admission 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 when there is a clear admission which can be acted upon.”

6.12 On the basis of the highlighted breaches of contract by the respondent, the issues between the parties can only be determined at trial. Coupled with the lack of clarity in the admission, ambiguity and conditions in the letter of commitment, it is contended, that the court below misdirected itself by entering judgment on admission against the appellant.

7.0 ARGUMENTS BY THE RESPONDENT

7.1 The respondent, with leave of court, filed heads of argument dated 26th March, 2024 in which it submits that the appellant, in a letter dated 11th December, 2021, made unequivocal, unambiguous and clear unconditional admission of liability to settle the sum of US\$ 654, 225.88 in three instalments.

Counsel for the respondent referred to the provisions of **Order 21 Rules 1, 5 & 6 of the HCR** and **Order 27 Rule 3 of the Rules of the Supreme Court of England**. We were referred to the cases of **Ellia v. Allen** ⁽³⁾ and **Himani Alloys Limited (Supra)** on the object of entry of Judgment On Admission being the obtaining of speedy judgment and judicial discretion involved in the exercise.

7.2 The respondent contends that the court below was on *terra firma* when it entered judgment on admission based on the letter of commitment dated 11th December, 2021, and upon other admissions contained in the affidavit in opposition and defence. That the issues being raised were not raised in the court below. That the counter claim was not raised at the time the application for entry of judgment on admission was made.

- 7.3 In any event, a counter claim is a distinct matter and cannot arrest entry of judgment on admission. In respect of the argument by appellant that the amount in the letter exceeds those claimed by the respondent, Counsel stated that the Writ of Summons was endorsed with the claim for US\$ 654,225.88 which was acknowledged in the defence and opposition on record.
- 7.4 As regards the contention that the letter dated 11th December, 2021, was in a foreign language, and ought to have been interpreted, the respondent submits that the issue was not raised in the court below and cannot be raised on appeal. The case of **Jones vs Mbna International Bank Ltd** ⁽⁴⁾ at page 52 was cited as authority.
- 7.5 Further, that in any event, the parties both being Chinese, understood the contents of the said letter without need for interpretation. On the issue of alleged breach of duty, the respondent submits that the issue arose after the admissions to pay the amount claimed.
- 7.6 In conclusion that the admissions contained in the documents were unambiguous, clear and free from uncertainty. We were urged dismiss the appeal with costs.

8.0 ANALYSIS AND DECISION

- 8.1 We have considered the appeal, the authorities cited and the arguments advanced by the Learned Counsel for the parties. From the evidence on record, it is common cause that sometime in 2021, the appellant engaged the respondent to build a tailings dam and offer transportation services. Construction of the dam commenced at the end of July 2021 and the dam was put to use in early December, 2021.
- 8.2 During the rainy season between December, 2021, and January 2022, part of the dam collapsed. As a result, in June 2022, the respondent carried out a unified overall repair by flattening the uneven position and excavating and compacting the sunken positions.
- 8.3 It is not in dispute that a balance of \$654,255.88 remained, outstanding to be paid to the respondent. In its affidavit in opposition, the appellant confirmed that there was a balance of \$654,255.88 as per the letter of commitment dated 11th December, 2021.
- 8.4 In the letter dated 11th December, 2021, the appellant proposed to settle the claimed sum in three monthly instalments in February, March and April 2022. Upon the collapse of the dam, the appellant obtained quotations for

repair works from other contractors. The appellant's position being that its commitment to settle the \$654,255.88 has been overtaken by events due to the collapse of the dam.

8.5 The issues for determination from the six grounds of appeal are as follows:

(1) Whether the admission by the appellant is clear, unequivocal, unambiguous and unconditional.

8.6 It is trite that the court has judicial discretion to enter judgment on admission. **Order 21 of the HCR** provides for entry of judgment on admission. The admissions of fact may be made either in the pleadings or otherwise. The power to enter judgment admission is exercised in plain cases where the admission is clear and unequivocal. We refer to the case of **Finance Bank (Z) PLC v Lamasat International Limited** ⁽⁵⁾ where the court stated that:

“an admission has be plain and obvious on the face of it without requiring a magnifying glass to ascertain its meaning.”

8.7 We further refer to the Supreme Court decision in the case of **Zega Limited v Zambezi Airlines Limited and Diamond Insurance Limited** ⁽⁶⁾ where it was stated that:

“... both order 21 rule 6 of HCR and Order 27 Rule 3 of RSC empower the court to enter judgment in favour of a party on its claims and that the admission must be clear.”

8.8 A judgment on admission essentially denies the defendant his/her right to contest the claim. Therefore, the discretion of the court should be exercised only where there is a clear, categorical and unequivocal admission which can be acted upon. In our decision, in the case of **Airtel Networks Zambia PLC and James Kumwenda** ⁽⁷⁾ we held that the admission was a clear and unambiguous admission on the part of the respondent.

8.9 The appellant challenges the entry of judgment on admission based on the letter of commitment dated 11th December, 2021, on six fronts on the basis that:

- i) The admission was equivocal, ambiguous and conditional;
- ii) The respondent breached its contractual obligations by building a dam that collapsed and is for that reason not entitled to any payment;
- iii) The letter of commitment was conditional to acceptance and settlement by the parties, which acceptance and settlement has not been shown;

- iv) The letter does not relate to the respondent's claims in the writ and statement of claim, as the amounts in the letter of commitment clearly exceed those being claimed by the respondent, thereby being ambiguous and unclear position;
- v) The letter was written in a foreign language without giving interpretation to the contents of the letter; and
- vi) The court did not consider the merits of the defence, that is, the breach of the contract by the respondent.

8.10 The question is whether the appellant clearly, unambiguously and unconditionally admitted the claim by the respondent to warrant entry of judgment on admission.

8.11 The pleadings on record reveal that the respondent sought an order of payment of the sum of \$ 654,255.88 in respect of a contract between the parties for construction and engineering services. These related to the Transportation Project and Tailings Dam.

8.12 **Order 21 Rule 5 and 6 of the HCR** provides for the entry of judgment on admission as follows:

5. If any defendant shall sign a statement admitting the amount claimed in the summons or any part of such amount, the Court or a Judge, on being satisfied as to the genuineness of the signature of the person before whom

such statement was signed, and unless it or he sees good reason to the contrary, shall, in case the whole amount is admitted, or in case the plaintiff consents to a judgment for the part admitted, enter judgment for the plaintiff for the whole amount or the part admitted, as the case may be, and, in case the plaintiff shall not consent to judgment for the part admitted, shall receive such statement in evidence as an admission without further proof.

6. 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.

8.13 In the case of **Finance Bank Zambia PLC v Lamasat International Limited** ⁽⁵⁾, we held that:

“It is trite that the court has discretionary power to enter judgment on admission under Order 21 Rule of the High Court Rules. This power is exercised in only plain cases where the admission is clear and unequivocal. There is a plethora of decisions on the admissions and entry of judgment. 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 by pleadings or otherwise. The crux of the first part of this appeal is whether in the circumstances the learned judge erred by refusing to enter judgment on admission. The requirements to be satisfied before the court can pronounce or enter a judgment on admission are that the admissions have been made in either the pleadings or otherwise, and must be clear and unequivocal.”

The appellant raised issue with the letter of commitment being relied upon by the court to enter judgment on admission.

8.14 It is accepted that the letter of commitment is written in the Chinese language and that it was not translated to the court. However, we note that in paragraph 6 of the affidavit in opposition, the appellant admitted that under the contract with the respondent, *“there remained balance of \$654,255.88 to be paid to the respondent.”* Further, in paragraph 12 of the same affidavit, the appellant deposed that it accepted the claimed amount and proposed to pay in three instalments in February, March and April 2023. In paragraph 4 of the defence, the appellant averred that *“it admits that the unpaid invoices amount to \$654,255.88 but could not be paid because of the cracks of the tailing dam and collapsing of the soil.”*

8.15 The appellant contends that it only accepted settlement amount after it engaged the respondent to repair the dam in June 2022. Hence its contention that the admission was conditional. Further they went at length to submit on breach of contract and other irrelevant contentions.

8.16 We are of the view that the letter of commitment is not the only document on admission of the balance outstanding.

Though the letter of commitment was not translated to the court, there is no dispute both parties concede that in the said document, the appellant admitted being indebted to the respondent in the sum of \$654,255.88. The appellant argued that the letter of commitment does not relate to the respondent's claims in the writ and statement of claim, as the amounts in the letter of commitment clearly exceed those being claimed by the respondent. In our view, this does not take away the fact that the appellant admitted its indebtedness in the sum claimed and the proposals made to liquidate the debt.

- 8.17 The admissions are contained in paragraph 4 of the defence admitting to unpaid invoices of \$654,255.88 and the affidavit in opposition where the appellant accepted the claimed amount and proposed to pay in three instalments.
- 8.18 The appellant does not dispute the claim for the said sum but contends that it has a counter-claim. Arguing that therefore, judgment on admission ought not to have been entered against it by the court below.
- 8.19 Can a counter claim prevent entry of judgment on admission in the main claim? It is trite that a counter claim is a separate action, distinct and separate from the main claim. It can be

determined on its own. In the case of **Foveros Mining Limited** (Supra) we held that:

“The law that a counter claim is a distinct action is well established. The mere fact that the appellant is challenging the acknowledgment of a debt in its counter claim cannot be used as a basis for setting aside the judgment on admission granted to the respondent.”

8.20 In the case of **Northwold Investment Limited v Diamond General Insurance Limited** ⁽⁸⁾ we held that *“... counter claims are proceedings in their own right ...”*

8.21 We are of the view that a counter claim cannot prevent entry of judgment on admission as long as the admissions are clear, and unequivocal. The entry of judgment on admission does not affect the right to counter claim on the new set of facts. The averments that the respondent did not construct a dam fit for use, alleged breach and the costs in repairing the dam as claimed, being an action in its own right, cannot defeat the entry of judgment on admission.

8.22 Therefore, having clearly admitted the sum claimed, the appellant cannot be heard to argue or raise a counter claim that the respondent breached its contractual obligations by building a dam that collapsed or that the letter of commitment was conditional to acceptance and settlement by

the parties, which acceptance and settlement has not been shown, or that the court below did not consider the merits of the defence, that is, the breach of the contract by the respondent. The counter claim can be pursued and determined separately.

9.0 CONCLUSION

9.1 We hold that the court below did not misdirect itself when it entered judgment on admission in the sum of \$654,255.88 in favour of the respondent with interest and costs. We uphold the decision of the court below. The judgment sum to be paid upon determination of the counter claim and to be set off against the amount, if any, that will be awarded by the court below. Costs follow the event, to be taxed in default of agreement.



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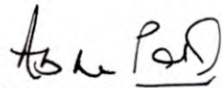
M. J. Siavwapa

JUDGE PRESIDENT



F. M. Chishimba

COURT OF APPEAL JUDGE



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A. N. Patel

COURT OF APPEAL JUDGE