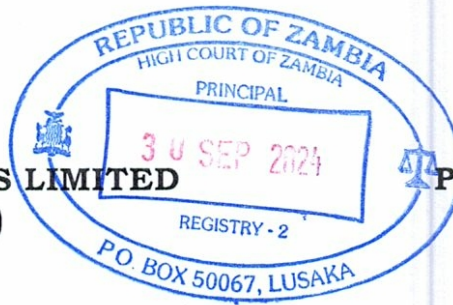


IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2021/HP/0626

BETWEEN:

**NAPEN INVESTMENTS LIMITED
(T/A OCEAN BASKET)**



PLAINTIFF

AND

MANDA HILL CENTRE LIMITED

1st DEFENDANT

VIJAYA BABULAL LIMITED

2ND DEFENDANT

BEFORE THE HONOURABLE JUSTICE M.C KOMBE

For the Plaintiff:

Mr. A. Samabi – Messrs. Ferd Jere & Co

For the 1st Defendant:

Mr. S. Muzimu – Messrs. Corpus Legal Practitioners

For the 2nd Defendant:

No-appearance

J U D G M E N T

Cases referred to:

- 1. Freshview Cinemas Limited v. Manda Hill Limited (Appeal No. 174/2013).**
- 2. Finance Bank Plc. v. Lamasat International Limited (Appeal No. 27 of 2018).**
- 3. Zega Limited v. Zambezi Airlines and Diamond General Insurance Ltd (Appeal No.39/2014) 2016 ZMSC 45.**
- 4. Common wealth Development Corporation v. Central African Power Corporation (1968) ZR 90.**

5. **Chief Mwanatete v. Lushato and Another (2014/HP/1043).**
6. **Chazya Silwimba v. Lamba Simpito (2010)1 Z.R 475.**
7. **Moschi v. Lep Sir Services Limited (1973) A.C 336.**
8. **Selly Yoat Asset Management Limited v. Remotesite Solutions Zambia Limited (2010) 2 Z.R 35.**
9. **Samson Lee Chisulo SC v. C and J Harvey Farms Limited. Appeal No. 219/2023.**
10. **Ellis v. Allen (1911-1913) All ER 906.**
11. **Hughes v. London, Edinburgh and Glasgow Assurance (1891) 8 TLR 81 (CA).**
12. **Thorp v. Holdsworth (1876) 3 Ch.D.637.**
13. **Himani Alloys Limited v. Tata Steel Limited (2011) 3 Civil Cases 721.**
14. **Colgate Palmolive (Z) Inc. v. Able Shemu and 110 Others Appeal No 181 of 2005**

Legislation and other material referred to:

1. **The High Court Rules, Chapter 27 of the Laws of Zambia.**
2. **The Rules of the Supreme Court, (RSC) 1999 Edition (White Book).**
3. **Matibini P. (Dr.) *Zambian Civil Procedure: Commentary and Cases* (Pinetown Printers) South Africa,2017.**
4. **Halsbury's Laws of England, Volume 37, Fourth Edition, Butterworths, London- 1982.**

1. INTRODUCTION

1.1 The Plaintiff herein commenced this action on the 2nd June, 2021, by way of a Writ of Summons accompanied by a Statement of Claim. In turn, the 1st Defendant on the 27th September, 2021 filed their Defence and Counter Claim.

1.2 Subsequently, on 21st June, 2023, the 1st Defendant filed summons for leave to enter judgment on admission pursuant to Order 21 rules 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 (1965) 1999 Edition.

2. DEFENDANT'S AFFIDAVIT EVIDENCE

2.1 The application is supported by an affidavit deposed to by **FRAZER MULENGA**, the General Manager in the 1st Defendant Company.

2.2 He deposed that by a lease executed sometime in 2017, the 1st Defendant demised to the Plaintiff, Shop BU3 whose outside seating measured 250 square meters plus 100 square metres outside for 4 years 11 months. A copy of the lease agreement was exhibited and marked "**FM1.**"

2.3 In breach of the lease agreement, the Plaintiff defaulted on paying rentals and consequently owed the 1st Defendant rental arrears in the sum of USD 129.617 as at July, 2021. The 2nd Defendant, the Director of the Plaintiff pledged

himself as a surety and thereby agreed to be personally liable for the timeous payment and performance by the Plaintiff of all its obligations to the 1st Defendant arising under the lease agreement. A copy of the said suretyship was exhibited and marked **"FM4."**

- 2.4 The deponent asserted that the Plaintiff had admitted owing the 1st Defendant rental arrears and utilities. That according to paragraph 5 of the Plaintiff's Statement of Claim the Plaintiff admitted that due to Covid-19 and other unforeseen, intervening factors, it had since accumulated arrears in the sum of USD 113,235.41.
- 2.5 That at paragraph 8 of the Plaintiff's statement of claim the Plaintiff stated that the business had drastically improved and it undertook to adhere to practical and realistic payment plan of the arrears in instalment of USD 1,000.00 and make the rentals current while a third-party arrangement was being explored with a view of settling the arrears in lump sum.
- 2.6 Further that by claim (iii) of the writ of summons on record dated 2nd June 2021, the Plaintiff sought "an order to liquidate the rental arrears of USD 113,235.41.00."
- 2.7 It was also asserted that discussions were conducted, and the Plaintiff admitted the sum of USD 121,358.15 as at 31st

May, 2021 and it undertook to pay 50% of the admitted amount by 7th June 2021 and the balance thereon to be paid by 7th July, 2021. Despite that commitment to settle the admitted amount, the Plaintiff had neglected to make payments. A copy of the correspondence where the Plaintiff admitted the amount owed and requested for a payment plan was exhibited and marked **“FM6.”**

2.8 That it was clear that the Plaintiff had admitted that the said sum of USD 113, 235.41 due to the 1st Defendant, that since the 2nd Defendant pledged himself as surety and agreed to be personally liable for the Plaintiff under the lease agreement, he was equally liable for the admitted amount. According to Clause 10 of the Schedule to the lease agreement, the Plaintiff and 2nd Defendant were liable for 2% interest above the prime rate on outstanding amounts.

2.9 The deponent added that it was desirable that this Court enters judgment on admission against the Plaintiff and the 2nd Defendant in the sum of USD 113,235.41 including the judgment on admission on the interest of 2% above the prime rate.

3. PLAINTIFF’S AFFIDAVIT IN OPPOSITION

3.1 The affidavit in opposition was deposed to by **VIJAYA BABULAL SHARMA**, the Director in the Plaintiff Company.

- 3.2 He disputed paragraph 6 of the 1st Defendant's affidavit in support in the sense that it referred to the month of July, 2021, when the actual narration in "FM2" indicated that the Plaintiff was owing the 1st Defendant the sum of USD 129,617.69 stretching over a period of 01/06/19 to 10/07/21. This cast a lot of doubt on the 1st Defendant's claim.
- 3.3 It was asserted that if the 2nd Defendant had pledged to be personally liable as alleged, then that liability should not extend to the Plaintiff as they were not one and the same. That much as the Plaintiff had admitted in paragraph 5 of the statement of claim owing the 1st Defendant the sum of USD 113,235,41, the main issue to be resolved was whether the Plaintiff could be allowed to pay the sum due in instalments among other things.
- 3.4 It was deposed that the 1st Defendant's affidavit in support was contradictory in so far as the amount the Plaintiff owed as it referred to three different amounts namely: USD 129,617.69, USD 113,235.41 and USD 121,358.15 and it was unknown which amount the Plaintiff unequivocally admitted.

- 3.5 That the Plaintiff still maintained that the issue to be resolved was the payment of accumulated rental arrears in instalments among other issues.
- 3.6 The deponent added that when the 1st Defendant took possession of the premises in June 2021, they did not take inventory of the chattels seized in the execution of the warrant of distress; that an auction sale was conducted and the bailiffs had not rendered an account of the proceeds of such sale; that the 1st Defendant deliberately omitted to mention a deposit of USD 17,000.00 made towards rentals and that by reason thereof, there were contentious issues that were to be resolved at the main trial and this application should not be entertained.
- 3.7 That the issue pertaining to interest and other issues ought to be resolved at the main trial if need be.

4. 1ST DEFENDANT'S AFFIDAVIT IN REPLY

- 4.1 The 1st Defendant filed an affidavit in reply deposed to by **WINSTON MWEEMBA**, the Senior Accountant who deposed that the affidavit in support did not refer to rentals for the month of July but all rental arrears owed by the Plaintiff until the month of July, 2021.

- 4.2 Both the Plaintiff and 2nd Defendant were equally liable for the admitted amount in their separate capacities as principal debtor, and surety, respectively.
- 4.3 That the Plaintiff and 2nd Defendant admitted in paragraph 12 of the affidavit in opposition to being indebted to the 1st Defendant in the sum of USD 113,235.41. The Plaintiff expressly admitted owing USD 121, 358.51 as at 31st May, 2021 and that the 1st Defendant denied receiving the USD 17,000.00 towards rental as alleged by the Plaintiff.
- 4.4 It was asserted that there were no contentious issues in this matter as the Plaintiff unequivocally admitted being indebted to the 1st Defendant.

5. HEARING

- 5.1 At the hearing of the application, learned Counsel for the 1st Defendant, Mr. Muzimu relied on the affidavits and the skeleton arguments filed in support of the application.
- 5.2 In the skeleton arguments, Counsel referred the Court to Order 21 rule 6 of the High Court Rules and Order 27 rule 3 of the Rules of the Supreme Court of England.
- 5.3 Counsel submitted that the affidavit in support exhibited "FM6" a letter in which the Plaintiff admitted its indebtedness to the 1st Defendant in the sum of USD

121,358.15 as at May, 2021 even though in the pleadings it attempted to admit a lesser amount.

- 5.4 Furthermore, it was submitted that in paragraph 5, 8 and claim (iii) of the statement of claim, it was evident that the Plaintiff was owing the 1st Defendant and the exhibit FM6 amounted to a clear and unequivocal admission on which judgment on admission could be entered by the Court.
- 5.5 Counsel also submitted that the Plaintiff was liable to pay interest on the overdue amounts in accordance with clause 10 of the Schedule to the lease agreement which stated that the Plaintiff and 2nd Defendant were liable for 2% interest above the prime rate on outstanding amounts.
- 5.6 In addition, it was argued that by virtue of the Deed of Suretyship, the 2nd Defendant was liable to pay the admitted amount and interest thereon and costs of recovery of that amount.
- 5.7 Counsel referred to the case of **Freshview Cinemas Limited v. Manda Hill Limited** ⁽¹⁾ where the Supreme Court in granting an application to enter judgment on admission held that:

“What is paramount in our view, is that 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 US118,043.60, as a term and condition for leasing the cinemas. This was in itself, consideration which created a binding legal relationship between the parties.”

- 5.8 Learned Counsel referred to a number of cases on judgment on admission including the case of Finance Bank Plc. v. Lamasat International Limited Appeal ⁽²⁾ and Zega Limited v. Zambezi Airlines and Diamond General Insurance Limited ⁽³⁾.
- 5.9 It was thus submitted that the Plaintiff in this case made express and clear and unequivocal admissions which warranted a judgment on admission and bound the 2nd Defendant.
- 5.10 In his verbal submissions, counsel reiterated what was contained in the skeleton arguments.
- 5.11 On behalf of the Plaintiff, learned counsel Mr. Samabi submitted that the 1st Defendant filed an affidavit in reply without leave of Court and such failure left the Court with no jurisdiction to entertain the affidavit in reply. Reliance was placed on the cases of Common Wealth Development Corporation v. Central African Power Corporation ⁽⁴⁾ and

Chief Mwanatete v. Lushato and Another ⁽⁵⁾ for this proposition.

5.12 It was further argued that the said affidavit in reply contained a prayer in paragraph 26, therefore offending the provisions of Order 5 rule 15 of the High Court Rules.

5.13 In his oral submissions, learned Counsel for the Plaintiff reiterated his arguments

5.14 In the arguments in reply, Counsel reiterated that the Plaintiff and the 2nd Defendant had not justified why the amount of USD113,235.41 which had been admitted to in the Plaintiff's pleadings should be accepted as opposed to the clear and unequivocal admission of USD121,358.15 contained in exhibit FM6.

5.15 On the question of whether a claim to liquidate in instalments had a bearing on an application for judgment on admission, it was submitted that the Plaintiff's opposition to this application was centred on the fact that they sought to pay rental arrears in instalments. That this did not amount to a claim that warranted trial as by the aforesaid relief, the Plaintiff was confirming owing the 1st Defendant but merely sought to liquidate in instalments.

5.16 It was further argued that the Plaintiff's claim that there were other issues to be resolved at trial that prevented the court

from granting judgment on admission in relation to the warrant of distress issued was misplaced. That on the strength of the case of **Chazy Silwimba v. Lamba Simpito** (6) a judgment on admission could be entered notwithstanding that there were other questions outstanding between the parties.

5.17 On the issue of interest, it was Counsel's argument that the parties agreed to interest payable on the outstanding amounts under the lease agreement and the Court should therefore enforce this term by finding that Plaintiff and its surety were bound to jointly pay the admitted sum.

5.18 Furthermore, on the question of whether the 2nd Defendant was liable to the 1st Defendant for the admitted amount as surety, it was submitted that the Deed suretyship signed by the 2nd Defendant was a continuing security that bound him as long as the Plaintiff had outstanding liability towards the 1st Defendant. Counsel placed reliance on the cases of **Moschi v. Lep Sir Services Limited** (7) and **Selly Yoat Asset Management Limited v. Remotesite Solutions Zambia Limited** (8).

6. DECISION BY THE COURT

6.1 I have considered the affidavit evidence, the skeleton arguments and the submissions by both Counsel.

- 6.2 By this application, I have to determine whether or not the 1st Defendant is entitled to judgment on admission.
- 6.3 I find it imperative to first deal with the 2nd Defendant's objection that the 1st Defendant filed an affidavit in reply without leave of Court and such failure left the Court with no jurisdiction to entertain the affidavit in reply.
- 6.4 The Court of Appeal recently clarified in the case of **Samson Lee Chisulo SC v. C and J Harvey Farms Limited** ⁽⁹⁾ that there is no requirement to obtain leave to file an affidavit in reply.
- 6.5 I therefore find that the affidavit in reply is properly before the Court and I shall consider it.
- 6.6 The application is anchored on **Order 21 rule 6 of the High Court Rules, Chapter 27 of the Laws of Zambia** which provides that:

“a party may apply, on motion or summon, for 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.”

- 6.7 Paragraph 314 of the **Halsbury's Laws of England Volume 37, Fourth Edition** also provides that:

“Where admissions of fact or part of a case are made by the party to a cause or matter either by

his pleadings or otherwise, any other party may apply to the court by motion or summons 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.”

6.8 Order 27 rule 3 of the White Book is couched in similar terms. These provisions clothe this Court with the power to enter judgment on admission where the admission of facts or part of a case are made without waiting for the determination of any other questions between the parties. The admission may be express or implied but it must be clear.

6.9 Matibini J, (as he then was), the learned author of **Zambian Civil Procedure: Commentary and Cases** at page 623 stated that the object of Order 21 and 27 of the High Court Rules and the White Book respectively was to enable a party to obtain speedy judgment where the other party has made a plain admission entitling the former to succeed.

6.10 In the case of **Ellis v. Allen** ⁽¹⁰⁾, judgment on admission was entered against the Defendant by Sargant J. In doing so, he made the following observation:

“I cannot conceive any circumstances which the Defendant Allen could rely on as a defence to the action having regard to the admissions by the letter.”

6.11 What is clear from the above case is that if there is no defence conceivable on which a party can rely on to the action having regard to the alleged admission, then the court can enter judgment on admission.

6.12 Furthermore, in the case of **Hughes v. London, Edinburgh and Glasgow Assurance** ⁽¹¹⁾, it was held that:

“The court will not allow final judgment to be signed upon admissions in a pleading or affidavit unless the admissions are clear and unequivocal.”

6.13 On the facts of that case, the court found that judgment on admission could not be entered as there were no clear admissions and it would have amounted to not less than a scandal if judgment was entered.

6.14 Furthermore, it was pointed out by Jessel M.R in **Thorp v. Holdsworth** ⁽¹²⁾ that the main object of the rule on admissions is to bring the parties by their pleadings to an issue, and indeed to narrow them down to definite issues, and so diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing.

- 6.15 It is worth noting that the object of entering judgment on admission is to ensure that the Court's time at trial is not wasted and save on the expenses that would be incurred by the parties involved if the matter was to proceed.
- 6.16 The 1st Defendant in this case has applied to enter judgment on admission against the Plaintiff and 2nd Defendant in light of their admissions contained paragraph 5 of the statement of claim, claim (iii) of the statement of claim. Further, that the Plaintiff admitted owing the sum of USD121,358.15 as at 31st May, 2022 and undertook to pay 50% of the amount by 7th June, 2021 as shown by the correspondence in exhibit "FM6."
- 6.17 It is argued that based on the aforementioned admissions, the Plaintiff had made express, clear and unequivocal admissions warranting the Court to enter judgement on admission.
- 6.18 The gist of the Plaintiff's argument on the other hand is that in as much as paragraph 5 of the statement of claim admits owing the 1st Defendant the sum of USD113,235.41, the main issue to be resolved was whether to allow the Plaintiff to pay the sum due in instalments among other things.
- 6.19 Further that the 1st Defendant had referred to three different amounts of USD129,617.69, USD113,235.41 and

USD121,358.15 and it was not known which of the amounts the Plaintiff unequivocally admitted.

6.20 In considering this application, I have had regard to the pleadings in which the Plaintiff averred in paragraph 5 of the statement of claim that due to covid-19 and other unforeseen intervening factors, it had since accumulated arrears in the sum of USD 113,235.41.

6.21 In claim (iii) of the statement of claim, the Plaintiff seeks an order to liquidate the rental arrears of USD113,235.4.

6.22 Further in exhibit "FM6", a memorandum of commitment, the Plaintiff admits that total rent due as at 31st May, 2021 was USD121,358.15 and committed to paying 50% of the rent due on 7th June, 2021 and the balance in six equal instalments beginning of July, 2021.

6.23 In this vein, I am fortified by the provision of **Order 27/3/4 of the RSC** which provides as follows:

"an admission may be in a letter before or since the action was brought."

6.24 I have carefully considered the evidence and arguments proffered by the parties and I am satisfied that the Plaintiff has admitted being indebted to the 1st Defendant. More so, that in the affidavit in opposition, the 2nd Defendant deposed that in as much as paragraph 5 of the statement of claim

admits owing the 1st Defendant the sum of USD113,235.41, the main issue to be resolved was whether to allow the Plaintiff to pay the sum due in instalments among other things. This, in itself entails that the Plaintiff admits owing the 1st Defendant.

6.25 I am guided by the case of ***Zega Limited v Zambezi Airlines Limited and Diamond General Insurance Limited***, already referred to by the Plaintiff in which it was stated that:

“The power of the Court to enter judgment on admission is discretionary and that in order to exercise its discretion to enter judgment on admission, the admission relied upon must not be limited by any conditions and that it must be clear.”

6.26 It is clear that the Court’s power to enter judgment on admission is discretionary and to be exercised in cases where the admission relied upon is not limited by any conditions and clear.

6.27 Further, in the case of **Himani Alloys Limited v. Tata Steel Limited** ⁽¹³⁾ which was also cited with approval in the ***Zega case***, the Supreme Court of India made it clear that:

“... the admission must be a conscious and deliberate act of the party making it and showing an intention to be bound by it and that unless the

admission is 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.”

6.28 It is therefore my considered view from the evidence that the Plaintiff's admission is clear, unambiguous and unconditional. What seems to be in contention however is the amount alleged to be owed to the 1st Defendant.

6.29 The Plaintiff commenced this action on 2nd June, 2021, by way of writ of summons in which it endorsed that it sought an order to liquidate the rental arrears of USD113 235.41 in exhibit “FM6”, the Plaintiff admits that as at 31st May, 2021, the rental amount due was USD121,358.15. There is no evidence on record to show why the rent due had reduced from USD121,358.15 to USD113 235.41. Without any evidence to this effect, I find that the admitted amount is USD121,358.15.

6.30 On the issue of whether the 2nd Defendant is liable to the 1st Defendant for the admitted amount as surety, I have had regard to the case of *Moschi v Lep Air Services* already referred to by the 1st Defendant which states that the obligation of a guarantor at common law was to see to it that the debtor performs the obligations subject of the guarantee.

A breach by the debtor entails a breach on the part of the guarantor or surety.

6.31 It is therefore clear that a guarantor's liability is for all intents and purposes secondary as opposed to primary. By this I mean that the surety or guarantor's liability is to be pursued where there is clear breach or default on the person guaranteed.

6.32 The 1st Defendant is in this matter seeking an order to enter judgment on admission. According to the Deed of Surety which is Annexure F of the Lease Agreement, the 2nd Defendant bound himself to the Landlord as surety for and co-principal debtor to the Plaintiff for the due, proper and timeous performance of the Tenant (Plaintiff) of all its obligations.

6.33 Furthermore, clause 11 reads as follows:

“All the Landlord's rights without exception applicable against the Tenant will be applicable against the surety and the surety shall be liable jointly and severally with the Tenant in favour of the Landlord.”

6.34 It is clear from the foregoing that the 2nd Defendant agreed to be jointly liable with the Plaintiff in favour of the 1st Defendant. Thus, he cannot have the benefit of becoming liable only after the principle debtor (Plaintiff) fails to pay.

6.35 I have made a finding that the Plaintiff admits owing USD 121,358.15 but has neglected to make any payments, I find that the 2nd Defendant is equally liable to pay the admitted amount.

6.36 Regarding the issue of the interest payable, it is a well settled principle of law espoused in a plethora of cases including the case of **Colgate Palmolive (Z) Inc. v. Able Shemu and 110 Others**⁽¹⁴⁾ where it was held that parties shall have the utmost liberty in contracting and when the contracts are entered into freely and voluntarily shall be enforced by the courts of justice.

6.37 I therefore find that the terms and conditions of the lease agreement entered into between the Plaintiff and the 1st Defendant particularly the terms on interest are binding on both parties. When it comes to interest which the parties have readily acquiesced or consented to, the Court will only interfere where the same is unusual or unconscionable.

6.38 Having settled that, it is clear that the Plaintiff made a clear and unequivocal admission of its indebtedness to the 1st Defendant. I am therefore satisfied that on the facts of this case there is no defence conceivable in relation to the

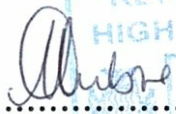
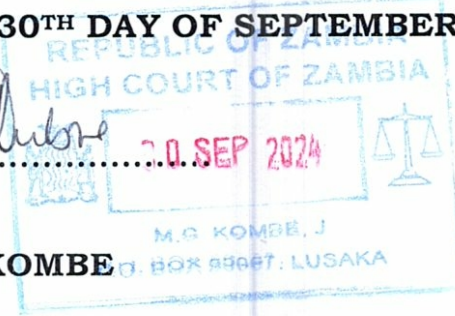
Plaintiff's liability on the contractual obligations under the lease agreement that a total sum of USD121,358.15 with 2% interest is owed to the 1st Defendant. In the same vein, the 2nd Defendant by virtue of clause 2 of the Deed of Surety agreed that the amount recoverable from him would be unlimited and would include further sums for interest.

I therefore Order that:

- i) The 1st Defendant is entitled to judgment on admission. Accordingly, I enter judgment on admission against the Plaintiff and 2nd Defendant in the amount USD 121,358.15 with 2% interest above the prime rate on outstanding amount and this shall apply to up to the date of filing the counterclaim.
- ii) Thereafter, interest shall accrue at short term deposit rate for dollar denominated account from the date of counterclaim to date of judgment and thereafter at the commercial lending rate for dollar denominated account until full satisfaction of the debt.

- iii) Costs are awarded to the 1st Defendant to be taxed in default of agreement.
- iv) Leave to appeal is granted.

DELIVERED AT LUSAKA THIS 30TH DAY OF SEPTEMBER, 2024


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M.C. KOMBE

JUDGE