IN THE HIGH COURT FOR ZAMBIA **2016/HPC/0132**

COMMERCIAL COURT DIVISION

HOLDEN AT LUSAKA

(CIVIL JURISDICTION)

BETWEEN:

BELL EQUIPMENT ZAMBIA LIMITED **PLAINTIFF**

AND

FOVEROS MINING LIMITED **DEFENDANT**

Before the Hon Lady Justice Irene Zeko Mbewe in Chambers

For the Plaintiff: *Ms. M. Namwila of Messrs Corpus Legal Practitioners*

For the Defendant: *Mr. Chebeleka of Messrs ECB Legal Practitioners*

RULING

Cases Referred to:

1. *Freshview Cinemas Limited v Manda Hill Limited Appeal No.174/2013*
2. *Zega Limited v Zambia Airlines Limited Diamond Insurance Limited Appeal No. 39 of 2014*
3. *Ellis v Allen [1914] 1 Ch. 904*
4. *Himani Alloy Limited v Tata Steel [2011] 15 SCC 273*
5. *Photo Bank (Z) Limited v Shengo Holdings Limited 108 (2008) ZR Vol. (SC)*

Legislation Referred to:

1. *High Court Rules, Chapter 27 of the Laws of Zambia*
2. *Rules of the Supreme Court of England (White Book) 1999 Edition*
3. *O Hare and Hill: 'Civil Litigation' 10th Edition Sweet and Maxwell*

This is the Plaintiff's application to enter Judgment on admission pursuant to **Order 21 Rule 6 of the High Court Rules, Chapter 27 of the Laws of Zambia** as read with **Order 27 Rule 3 of the Rules of the Supreme Court of England 1999 Edition**.

In the supporting affidavit dated 17th February, 2017, deposed to by Tulinawe Charles Mwakazanga the Workshop Administrator of the Plaintiff Company, it is deposed that on 5th May, 2015 the parties entered into a Rental Agreement (the "Rental Agreement") for a period of 18 months. (Exhibit "TCM 1"). According to the deponent, the Defendant has to date failed to pay any rentals for the use of any or all of the trucks and therefore owes the Plaintiff the amount of USD1,095,626.12 in outstanding rentals, labour and service charges. It is deposed that on 25th February, 2016, the Defendant admitted owing the Plaintiff the sum of USD 817, 226.12 of which an Acknowledgment of Debt was executed to that effect. The deponent stated that the Defendant has failed or neglected to settle the admitted amount despite various requests from the Plaintiff. That due to this failure to settle the outstanding amount, the Plaintiff commenced an action against the Defendant on 29th

March, 2016 and subsequently brought this application for entry of Judgment on the admitted sum.

In its skeleton arguments, the Plaintiff cited **Order 21 Rule 6 of the High Court Rules**, which provides that:

> *"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."*

I was also referred to **Order 27 Rule 3 of the Rules of the Supreme Court (White Book) 1999 Edition that** provides as follows:

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

Based on the foregoing, the Plaintiff submits that this is a proper case for the Court to enter Judgment on admission as the Defendant expressly admits owing the amount of USD 817,226.12 as shown in the Acknowledgement of Debt. In aid of its argument, my attention was drawn to the holding of the Supreme Court in the case of **Freshview Cinemas Limited v Manda Hill Limited Appeal No.174/2013[1],** where Justice Wood stated that:

> *"We therefore agree with Mr. Chisenga that Order 27 Rule 3 of the Rules of the Supreme Court allows a party to apply for Judgment on Admission '...without waiting for the determination of any other question between the parties'. Order 21 (6) of the High Court Rules also allows a party to apply for Judgment on Admission on the basis of a party's '...pleadings or otherwise.'... what is paramount, in our view, is that the express or implied admission must be clear."*

In light of the above, Counsel submits that notwithstanding that the Acknowledgement of Debt was executed before commencement of the action, the same would still be relied upon in accordance with **Order 27 Rule 3/4 Rules of the Supreme Court, 1999 Edition.**

The Plaintiff prays that the application be granted with costs as the admission herein does not fall short of the requirements set out by the Supreme Court in the case of **Freshview Cinemas Limited v Manda Hill**[1].

In opposing the application, the Defendant filed an affidavit into Court dated 16th March, 2017, deposed to by John Stavros Samaras the Director of the Defendant Company. According to the Defendant, it is not in breach of the agreement and does not owe the Plaintiff the sums of money indicated in the affidavit in support. That the Plaintiff's action was in breach of the Rental Agreement as it rendered the Defendant incapable of enjoying the benefits of the agreement due to immobilization of the equipment by the Plaintiff. Further that the Acknowledgement of Debt was signed on the understanding that the Plaintiff would enable the equipment and reactivate the Rental Agreement to resume normally. That the Plaintiff is not entitled to Judgment on admission as there are several triable issues which ought to be heard on the merits.

The Defendant in its skeleton arguments contend that it is not indebted to the Plaintiff as alleged and argues that the Plaintiff

breached the agreement by late delivery of the equipment and by switching off and disabling the equipment. In support of the argument that an admission should be clear, unambiguous and unconditional, Counsel made reference to the case of **ZEGA Limited v Zambia Airlines Limited Diamond Insurance Limited Appeal No. 39 of 2014**[2]. Counsel submits that the alleged admission herein is subject to certain limitations and that there is no indication that the debt relates to the amounts due under the Rental Agreement which is a subject of this dispute. Further that this is not a proper case for entry of Judgment on admission as the Defendant has raised a strong and arguable defence and counter claim. Premised on this it prays that this application be dismissed with costs.

At the hearing of the application on 4th December, 2017, both Counsel for the Plaintiff and Defendant placed reliance on the parties' respective affidavits and skeleton arguments.

I have considered the affidavit evidence and arguments advanced by the parties herein and I am grateful to both Counsel for their submissions.

The Plaintiff's application is anchored on **Order 21 Rule 6 of the High Court Rules, Cap 27 of the Laws of Zambia** which provides that:

> *"A party may apply, on motion or summons, 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."*

Order 27 Rule 3 of the Rules of the Supreme Court (White Book) 1999 Edition provides as follows:

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

From the cited Orders, this Court is empowered to enter Judgment on admission in favour of a party based on admission of fact made

by the other party on its claim either its pleadings or otherwise. The gist of the Plaintiff's application is that prior to commencement of this action, the Defendant in its Acknowledgement of Debt dated 25th February 2016 admitted to being indebted to the Plaintiff in the sum of USD817, 226.12. Based on that admission, the Plaintiff contends that this is a proper case to enter Judgment on admission in accordance with **Order 27 Rule 3/4 of the Rules of the Supreme Court, 1999 Edition**. Conversely, the Defendant argues that it does not admit the debt to the Plaintiff as the said Acknowledgment of Debt does not indicate that the amount allegedly owed relates to the Rental Agreement. Further, that the Supreme Court authorities referred to by Counsel for the Plaintiff clearly state that in order to warrant entry of Judgment on admission, an admission should be clear and unambiguous.

The law on admissions is well settled. For the Plaintiff to be entitled to enter Judgment on admission, the admission should be clear and unequivocal. Instructive is the case of **Ellis v Allen**[3] where the Court held that:

"....the other must make a clear admission on the face of which is impossible for the party making it to succeed".

This position on admissions was further elucidated in the case of **Himani Alloys Limited v Tata Steel Limited [2011] 15 SCC 273** [4] where the Supreme Court of India held that:

"It should be a conscious and deliberate act of the party making it, showing an intention to be bound by it.

It goes without saying 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. This position was reaffirmed in the case of **ZEGA Ltd v Zambezi Airlines Limited, Diamond General Insurance Ltd SCZ/8/006/2014**[2] where the Supreme Court stated as follows:

"We wish to state from the outset that it is true that under both Order 21/6 HCR and Order 27/3 RSC the Court is empowered to enter judgment in favour of a party based on admissions of fact made by the other party on its claim. However, we must also hasten to mention that the position of the law as spelt out

under Order 21/6/2 HCR is that admissions of liability by the party against whom Judgment on admission is sought to be entered may be express or implied and the admission must be clear."

I find the above legal positions directive in this matter and the Court associates itself with the said positions and principles. I am therefore in agreement with Counsel for the Defendant's submission that it is settled law that an admission should be clear and unambiguous and I have taken into consideration the cases cited by the parties herein. The learned authors **O Hare and Hill: 'Civil Litigation' 10th Edition Sweet and Maxwell** at page 311 express it in this way:

"the admission must be sufficiently clear that the answer in question can be closed."

Applying the law to the present facts, does the Acknowledgment of Debt constitute an admission by the Defendant? The relevant part reads as follows:

"We the undersigned Foveros Mining Limited

/21 Kabengele Ave, Opposite Chisokone Market Kitwe Zambia (the Debtor)do hereby acknowledge ourselves to be truly and lawfully indebted unto and in favour of Bell Equipment Company Limited (Creditor) in the capital sum of $817,226.12 being in respect of the balance of Machine Rentals and Service Contract charges delivered by Bell Equipment Company Limited to Foveros Mining Limited.

We hereby agree and undertake to pay the capital sum of $817,226.12 (eight hundred and seventy thousand two hundred and twenty-six thousand dollars and twelve cents in the following manner:"

From a reading of the Acknowledgment of Debt, it is clear that the Defendant expressly acknowledged its indebtedness to the Plaintiff in the sum of US$817,226.12 in respect to machine rentals and service contract charges. A further reading reveals that clause 2 and 3 of the Acknowledgment of Debt provides for the mode of payment and when payment would be effected. The said clauses read as follows:

"2. *These repayments will be made from receivables from a three year mining contract that we have signed and cash in flows expected to start from end of April 2016.*

3. *We are also working on raising funds from the banks secured by this 3 year contract which we have signed and should this facility come earlier, we commit to utilise any free portion of the banking facility towards the settlement of the debt as appropriate.'*

I am of the settled mind that the above cited clauses further indicate that the Defendant admitted liability and made commitment towards settling its indebtedness to the Plaintiff herein. Counsel for the Defendant argues that the acknowledgment is conditioned on the continuation of the rental of the equipment and that the acknowledgment is equivocal, conditional and qualified and cannot therefore form a basis of entering Judgment on admission. Clause 4 states as follows:

"We sincerely apologise for the delay in settling this debt and take this opportunity to register our interest to continue with the

rental of the equipment under the same terms and conditions of the Rental Agreement subject to the following:

(i) Foveros Mining Limited not assuming liability for rentals in respect of the period from December 2015 to date of resumption of the rental of equipment."

I opine that from a reading of the above clause, it is the intention of the Defendant's not to assume liability for rentals in respect of the period from December 2015. It is a mere intention and not a term of any agreement with the Plaintiff. Arising from that, I find the Defendant's argument that the Acknowledgment of Debt is subject to conditions and limitations untenable. In my considered view, it does not negate the Acknowledgment of Debt and payment of US$817,226.12. I have not seen any provision stipulating or implying that payment of the admitted amount will be subject to any pre-conditions as alleged by the Defendant in paragraph 9 of its opposing affidavit. I opine that the Defendant is attempting to depart from the Rental Agreement which forms the genesis of the Acknowledgment of Debt and has failed to bring any proof of any other agreement to support their assertion that the admitted sum is

independent of the Rental Agreement. I opine that the Acknowledgment of Debt emanates from the Rental Agreement and this can be discerned from the charging of machine rentals and service contract charges which in essence forms the basis of the Rental Agreement between the parties herein and signed on 31st May, 2015. Quite frankly I find that the Defendant's argument superfluous.

The Defendant argues that its counterclaim against the Plaintiff will be obliterated should the matter proceed to trial on the balance of the monies stipulated in the Plaintiff's Writ of Summons. I am inclined to agree with Ms. Namwila, Counsel for the Plaintiff that the existence of a counter claim does not operate as a bar to entering Judgment on admission. The Court weighed in on this principle in the case of **Photo Bank (Z) Limited v Shengo Holdings Limited 108 (2008) ZR Vol. (SC)**[5] where the Supreme Court held that:

> *"It is my considered view that the defendant admits the plaintiff's claim. The defence raised a counter claim. A*

counterclaim is claim in its own right which still has to be proved.

... by counter claiming, you are not denying the claim which was a liquidated claim. The counter claim is more of a set-off and this has to be proved."

Being satisfied that the Defendant have unequivocally and expressly admitted their indebtedness to the Plaintiff, I find that this is a proper case to enter Judgment on admission based on the Acknowledgement of Debt.

I accordingly allow the Plaintiff's application, and enter Judgment on admission in favour of the Plaintiff in the sum of USD817, 226.12 being the admitted sum. Interest is awarded at the short term deposit dollar interest rate from date of Writ of Summons to date of Judgment, and thereafter at the United States Dollar commercial lending rate until full payment.

In terms of the counterclaim, this still has to be proved by the Defendant.

A scheduling conference shall be held on the 11th April 2018 at 10.00 hours.

Costs to the Plaintiff to be taxed in default of agreement.

Leave to appeal is granted.

Dated at Lusaka this 20th day of March, 2018.

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HON IRENE ZEKO MBEWE
HIGH COURT JUDGE