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IN THE HIGH COURT OF ZAMBIA **2019/HP/1818**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

MARY CHITIMBA MULENGA **PLAINTIFF**
(T/A MC Mulenga and Company, a law firm)

AND

SCIROCCO ENTERPRISES LIMITED **DEFENDANT**

BEFORE HON MRS JUSTICE S. KAUNDA NEWA IN CHAMBERS THIS 14th DAY OF OCTOBER, 2020

For the Plaintiff : *MC. Mulenga and Company*

For the Defendant : *Messrs Sondashi & Co Advocates*

R U L I N G

CASES REFERRED TO:

1. ***Dombey & Son v Playfair Bros 1897 1 QB 368, CA***
2. ***Evans v Bartlam 1937 2 ALL ER 646 at 650***
3. ***Fidelitas Shipping v V/O Exportchleb 1965 2 ALL ER 4, 1966 1 QB 630***
4. ***Carl-Zeiss-Stiftung v Rayner and Keeler Ltd No 3 1969 3 ALL ER 897, 1970 Ch 506***
5. ***Alpine Bulk Transport Co Inc v Saudi Eagle Shipping Co Inc, The Saudi Eagle 1986 2 Lloyd's Rep 221 CA 223***
6. ***Bank of Zambia V Jonas Tembo and others SCZ No 24 of 2002***
7. ***R.K. Markan v Rajiv Kumar Markan (2003/AIHC/632) [633]***
8. ***Smt Sudesh Madhok v Paam Antibiotics Ltd and another MANU/DE/3082/2010***
9. ***Cavell v Transport for London [2015] EWCA 2283 (QB)***
10. ***Sylvia Masebo v Davies Chama (Sued in his capacity as Secretary General of the Patriotic Front) (2015/HP/20) [2016]***

ZMHC 110

11. ***African Banking Corporation Zambia v Mubende Country Lodge Appeal No 116/2016***
12. ***Bank of Zambia v Lamasat International Appeal No 175/2017 [2018] ZMCA 15***

LEGISLATION REFERRED TO:

1. ***The High Court Rules, Chapter 27 of the Laws of Zambia***
2. ***The Rules of the Supreme Court of England, 1999 Edition***

OTHER WORKS REFERRED TO:

1. ***Black's Law Dictionary, 10th Edition by Bryan A. Garner, 2009***
2. ***Halsbury's Laws of England, Vol 16, 4th Edition***

This is a ruling on two applications, the first being on an application to enter judgment on admission, which was filed on 5th June, 2020, and was made pursuant to Order 21 Rule 6 of the High Court Rules, Chapter 27 of the Laws of Zambia, as read together with Order 27 Rule 3 of the Rules of the Supreme Court of England, 1999 edition.

The second ruling is on an application to raise preliminary issues to the first application, which application was made pursuant to Order 14A and Order 33 Rule 3 of the Rules of the Supreme Court of England, 1999 edition. It was filed on 9th July, 2020.

On 9th July, 2020, I directed service of the first application on the defendant, who was to file an affidavit in opposition by 30th July, 2020 and the plaintiff was to file an affidavit in reply by 7th August, 2020. I would thereafter deliver my ruling. No affidavit in opposition to the first application, being the application to enter judgment on admission was filed. An affidavit in opposition to the second application was filed on 11th August, 2020.

On 4th September, 2020, I directed the defendant to file an affidavit in opposition and skeleton arguments to the application to enter judgment on admission by 18th September, 2020. The plaintiff was to file an affidavit in reply by 25th September, 2020, and I would thereafter deliver a composite ruling.

In the affidavit in support of the application to enter judgment on admission, which is deposed to by Mary Chitimba Mulenga, the managing partner of the plaintiff, she avers that by retainer agreements between the defendant and herself commencing the year 2014, the defendant retained her as its legal advocate for certain contentious and non-contentious business.

Pursuant to those agreements, the defendant would request for legal services from the plaintiff, and the fees would be settled later, resulting in the account maintained by the defendant being cumulative. It is the plaintiff's averment that during the course of the retainer agreement, the plaintiff duly provided legal services to the defendant, whose debt cumulatively accrued as follows;

Period 2014- early 2016	K192, 805.30
Period 2014-late 2016	K325, 762.30
Period 2014-2018	K942, 735.12

Exhibited as 'MCM1a c' to the affidavit is the defendant's statement of account of the legal fees that accrued. It is also deposed that the plaintiff sent demand letters for the payment of the accrued legal fees to the defendant during the course of the retainer agreements, which are exhibited as 'MCM2a-c'. The plaintiff states that by way of letter of

demand dated 20th August, 2019, and which was delivered to the defendant, the firm withdrew from acting for the defendant as its lawyers, and demanded payment of the outstanding legal fees in the amount of K942, 725.12, and the letter is exhibited as 'MCM3a-b'.

In response, the defendant requested for the invoices in support of the earlier delivered bills, in the letter exhibited as 'MCM4a-b', which were promptly delivered for purposes of reconciliation. The averment is that by way of e-mail dated 16th October, 2019, the defendant's accountant by the name of David Chisheta notified the plaintiff of the conclusion of the process of reconciliation, wherein K773, 463.27 and K91, 502.10 for uncollected materials was acknowledged, as shown on exhibit 'MCM5'.

That attached to the e-mail were two statements of account proving the K773, 463.27 and K91, 502.10 for uncollected materials, which are exhibited as 'MCM6' and 'MCM7'. However, the plaintiff's accountant, Beatrice Sikombe, by an email exhibited as 'MCM8' dated 16th October, 2019, disputed the acknowledged amount, and enquired how the defendant had arrived at the amount of K776, 463.27.

It is deposed that Beatrice Sikombe noted some anomalies in the recording of sums on voucher number 143419, and requested verification of the same, as shown on the letter exhibited as 'MCM9' dated 29th October, 2019. The defendant revised the firms statement of account, and through an email from the defendant's accountant, David Chisheta, dated 6th November, 2019, which is exhibit 'MCM10', he expressly, clearly, and unequivocally admitted the outstanding

balance on the AP account as K776, 463.27 and K91, 502.10 worth of materials that were to be collected.

Thereafter in the email dated 27th November, 2019, exhibited as 'MCM11', the defendant once more acknowledged the debt owing, and proposed an instalment payment plan. Still in her averments, the plaintiff states that the written emails by the defendant, contain express admissions of the legal fees that had accrued, which admissions were made by the defendant's accountant David Chisheta, whom the plaintiff believes had personal, qualified, accurate and long standing knowledge of the legal fees that had accrued.

Further, the emails where David Chiseta admitted that the legal fees were owing to the plaintiff were copied to Ahmed Saadi, Taher Saleem, Maybin Chibamba, M.Saadi and the Sales Department. That a proposal to liquidate the amounts owing in instalments was made. The plaintiff contends that none of the persons that were copied the emails who were either directors or managers of the defendant, expressed discontent with the admitted sum or alleged payment of the debt either in cash or in kind, and therefore, jointly and severally, they acknowledged the admitted amounts.

The averment is that it is shocking that after these proceedings were commenced, the defendant changed its earlier position with regard to having earlier made express admissions of the debt, stating that they were made wrongly and erroneously. However, the plaintiff believes that the assertion that the admissions were made wrongly or erroneously are not true, as they were authored by the defendant's

accountant who is qualified, and he had no incentive to misrepresent the facts in the exercise of his professional duty to the defendant.

Exhibit 'MCM12' is a copy of the accountant's statement that all the bills were accordingly processed on the account. Further, the plaintiff's statement of account as prepared by David Chishcta, contained information relating to the retainer period, in which all the accounting information was recorded simultaneously, with the annual accumulation of the debt, and exhibit 'MCM13' is the email dated 23rd February, 2018, containing the statement of account.

The plaintiff also states that the defendant's revised statement of the plaintiff's account, revising the debt to K776, 463.27, and the plaintiff's own statement of account are largely similar, and do not indicate any gross disparities in terms of the figures related to the bills that were issued, settled amounts and the balances.

However, on the action being commenced, the defendant has changed its earlier position, stating that the express admission of the debt, was made in the absence of legal guidance or advice. The plaintiff deposes that there is no evidence to support the defendant's assertion that the admission was made in the absence of legal guidance, by reason of the fact that the claim against the defendant is not de jure or legal in nature, but it is based on facts by way of reconciliation of figures, which show that the defendant owes K776, 463.27 in legal fees and K91, 502.10 for uncollected materials.

Continuing with her averments, the plaintiff states that after the commencement of the action, the defendant has changed its earlier

position stating that contrary to their earlier admission, the debt of K776, 463.27 for legal fees and K91, 502.10 for uncollected materials was paid in cash or in kind, and exhibited as 'MCM14a-g' are the invoices produced by the defendant to that effect.

It is contended that the claim by the defendant that the amount of K776, 463.27 in legal fees and K91, 502.10 worth of uncollected materials was settled in full, is not true, on account of the fact that after delivery of the bill in the amount of K942, 739.12, the defendant did not allege that the same had been settled either in cash or in kind, but instead, the defendant revised the account, and admitted the amount of K776, 463.27 in legal fees, and K91, 502.10 as uncollected materials.

Further, the exhibited tax invoices do not amount as new evidence which would invalidate the earlier admissions that were made by the defendant, as at the time of the admissions, these documents were in the safe custody and possession of the defendant, as they bear the dates 21st and 28th August, 2017, 13th September, 2017, 28th November, 2017, 31st December, 2017, 19th April, 2018 and 14th October, 2019.

The plaintiff also avers that AR account debt of K91, 502.00 for uncollected materials contemporaneously accounted for the tax invoices, and thus do not constitute new evidence of payment in kind, and the AR account on exhibit 'MCM7', and the total debt of K91, 502.10 account for the seven (7) tax invoices, and the subject transactions are underlined in red. The plaintiff states that the tax invoices do not amount to full payment of the outstanding debt either

in cash or in kind, as there is no proof of actual delivery of the goods as payment in kind.

That the basis of the application is the clear admissions that were made by the defendant, and the consequent proposal for payment in instalments, and it is prejudicial for the defendant to abandon the admissions in the absence of any error, mistake or new evidence. Relying on the principle of res judicata of the dispute between the parties, the plaintiff states that judgment on admission should be granted.

In the skeleton arguments and list of authorities, the plaintiff argues that as shown on exhibits 'MCM5' and 'MCM10' to the affidavit in support of the application, the defendant expressly admitted owing the plaintiff the amount of K776, 463.27 as legal fees, and K91, 502.10 as uncollected materials. Further, as shown on exhibit 'MCM11', the defendant proposed to pay the amount outstanding in instalments. This prompted the plaintiff to take out the application for the entry of judgment on admission.

Reliance is placed on the case of ***Bank of Zambia v Lamasat International*** [12], and it is argued that the Court of Appeal in that matter stated that;

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

The argument is that on the strength of this case, and as evidenced by exhibits 'MCM5' and 'MCM10' dated 16th October, 2019 and 6th November, 2019, which show that the defendant admits owing the amount of K776, 463.27 in legal fees and K91, 502.10 in uncollected materials, judgment on admission should be entered.

It is also argued that in the case of ***Smt Sudesh Madhok v Paam Antibiotics Ltd and another*** [8], the Supreme Court of India noted that where a claim is admitted, the court has jurisdiction to enter judgment for the plaintiff, and to pass a decree on the admitted claim. That the object of the rule is to enable a party to obtain speedy judgment at least to the extent of the relief to which, according to the admission, the plaintiff is entitled. The other authority relied on in this regard is ***R.K. Markan v Rajiv Kumar Markan*** [7].

In relation to the withdrawal of the admissions that were made by the defendant, the case of ***Cavell v Transport for London*** [9] is relied on, and it is stated that in that matter, it was noted as follows;

> ***"It cannot be in those interests to permit the withdrawal of an admission made after mature reflection of a claim by highly competent advisors when there is not a scintilla of evidence to suggest that the admission was not properly made. Were it to be otherwise, civil litigation on any sensible basis would be impossible".***

On the basis of this case, the plaintiff argues that the admissions by the defendant were made by David Chisheta a qualified accountant, and the admissions were copied to top management and the

administration of the defendant. Therefore, there was acquiescence to the admissions by the defendant. Further, there is no scintilla of evidence to show that the admissions were made in error or mistake, and all the invoices adduced by the defendant were accounted for in the AR account, which indicates a balance of K91, 502.10. Thus, judgment on admission should be entered.

No affidavit in opposition was filed.

As regards the notice of intention to raise preliminary issues, the affidavit in support of the said notice which is dated 9th July, 2020, is deposed to by Kalaluka Mututwa, an advocate in the employ of the defendant. He avers that the plaintiff commenced this action seeking a myriad of reliefs, and obtained a judgment in default of appearance and defence. On 9th December, 2019, the defendant applied to set aside the default judgment, as shown in the affidavit filed in support of the application, which is exhibited as 'KM1'.

The plaintiff however claimed that the defendant had no defence on the merits to the claim, as evidenced by the affidavit in opposition exhibited as 'KM2'. The Deputy Registrar on ruling on the application, declined to entertain the claim that the defendant had earlier admitted the amounts claimed, stating that there were issues in controversy between the parties, which could only be determined at trial.

In opposing the preliminary issues raised, the plaintiff on 11th August, 2020, filed an affidavit in opposition. The gist of that affidavit is that in order for the doctrine of res judicata to apply, there must be in existence an earlier decision on the subject matter by a court of

competent jurisdiction. That the affidavit filed by the defendant fails to establish so.

It is deposed that the decision to set aside the default judgment does not preclude the plaintiff from making an application for the entry of judgment on admission, as the earlier decision did not distinctly determine the issue pertaining to the express admissions by the defendant.

Counsel further avers that the plaintiff's contention in opposition to the application to set aside the judgment in default was that the defendant had no defence on the merits, yet in the application for entry of judgment on admission, the plaintiff contends that while the defendant has a defence, it fails in light of the admissions that it made. Further, that the decision to set aside the default judgment was made on the basis that there was a triable defence, and not that the defence was successful, so as to extinguish any litigation on the admissions made by the defendant.

Still in averment, it is stated that apart from the issues relating to the setting aside of the default judgment, the application for the entry of judgment on admission relates to the court delving into the merits and actual success of the defendant's defence, in light of the admissions of the plaintiff's claims. Further, that another essential element which must be satisfied before the doctrine of res judicata can be invoked is the existence of a final judgment on the matter.

In this regard, Counsel deposes that a perusal of the affidavit in support of the notice reveals that the defendant has not established

the existence of a judgment on the merits, in so far as it relates to the alleged express and clear admissions of the plaintiff's claims by the defendant.

That setting aside of the default judgment does not amount to a final determination of the issues relating to the express and clear admissions made by the defendant, so as to limit the jurisdiction of the court or infer the existence of a prima facie defence thereby precluding the court from delving into the merits of the case.

The plaintiff goes on to depose that the Deputy Registrar in setting aside the default judgment gleaned at the defendant's documents and acknowledged the existence of a prima facie defence of payment in cash or in kind, but that does not suffice as a final determination based on substance and rationale, but remedied a procedural default on the part of the defendant.

It is conceded that in arguing that the defendant did not have a defence on the merits, the plaintiff had referred to the admissions that had been made by the defendant, but the court in setting aside the default judgment, did not refer to the said admissions.

In the list of authorities and skeleton arguments, the case of ***Sylvia Masebo v Davies Chama (Sued in his capacity as Secretary General of the Patriotic Front)*** [10] is relied on. The argument is that in that case, it was stated in relation to the doctrine of res judicata that;

> ***"That there is an earlier decision on the issue by a court of competent jurisdiction".***

Counsel argues that the setting aside of the default judgment was not conclusive on the claim to enter judgment on admission. The submission is that the two applications and their net effect are dissimilar, as the decision to set aside the default judgment did not distinctly determine the issue of the express and clear admissions made by the defendant. It is reiterated that the said decision was that the defendant had raised triable issues, and not that the said issues raised were successful.

That with regard to the application to enter judgment on admission, the court has to delve into the actual merits, demerits and success of the defendant's defence. The argument is that the defence raised by the defendant fails in light of the admissions that the defendant made. As authority, the case of ***Fidelitas Shipping v V/O Exportchleb*** [3] is relied on, arguing that it was stated in that case that;

> ***"But within one cause of action, there may be several issues raised which are necessary for the determination of the whole case. The rule then is that once an issue has been raised and distinctly determined between the parties, then, as a general rule, neither party can be allowed to fight that issue all over again. The same issue cannot be raised by either of them again in the same or subsequent proceedings, except in exceptional circumstances".***

On the setting aside of a default judgment being premised on the existence of a prima facie defence, the case of ***Evans v Bartlam*** [2] is relied on. The argument is that Lord Atkins in that matter guided as follows;

> ***"One is that , where the judgment was obtained regularly, there must be an affidavit of merits, meaning that the applicant must produce to the court evidence that he has a prima facie defence....The principle obviously is that, unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of coercive power, where that has been obtained only by a failure to follow any of the rules of procedure".***

It is the plaintiff's argument that the court's power to set aside a default judgment is to enable the pronouncement of a judgment on the merits, and that by implication, this does not entail the determination of the contentious issues. Further, setting aside a default judgment does not curtail a plaintiff from taking further action invoking the jurisdiction of the court to decide the case in finality, based on the defendant's clear and express admissions.

That this position is buttressed by the case of ***Alpine Bulk Transport Co Inc v Saudi Eagle Shipping Co Inc, The Saudi Eagle*** [5], and in that matter, it was observed that;

> ***"In a case like the present, there is a judgment, which though by default, is a regular judgment, and the applicant must show grounds why the discretion to set aside should be exercised in his favour. The primary consideration is whether he has merits to which the court should pay heed; if merits are shown, the court will not prima facie desire to***

let a judgment pass on which there has been no proper adjudication on".

That based on the above, it is grossly flawed for the defendant to assume that the court's finding of an arguable case represents a final determination of the admissions made by the defendant, as in the above case, Lord Wright stated that finality occurs following proper adjudication of the matter on the merits.

The plaintiff further argues that the reliance by the defendant on an interlocutory decision offends the principle of res judicata, in that a final judgment of this court has not been obtained. In this regard, ***Halsbury's Laws of England, Vol 16, 4th Edition*** in paragraph 1563 at page 1055 is relied on as authority. It states that;

"It has already been stated that in order to give rise to an estoppel, the record must be that of a judgment which is final in substance and not in form, namely it is not merely interlocutory".

The plaintiff argues that this position was adopted in the case of ***Carl-Zeiss-Stiftung v Rayner and Keeler Ltd No 3*** [4], where it was stated that;

"No finding or decision would occasion an estoppel unless it were final, but it may be said that no finding or decision on an interlocutory application, apart from the actual relief granted (which may or may not be of a final nature) is final, in the relevant sense unless in consequence of the

> ***doctrine of res judicata, it is a bar to further litigation of that issue"***.

Relying on the case of ***Dombey & Son v Playfair Bros*** [1], the plaintiff argues that the setting aside of the default judgment does not amount to a final determination, as the substance and rationale of doing so was not based on the merits of the case. That in the ***Dombey*** case, the court stated that;

> ***"This principle applies where in the previous battle, the substantive issue between the parties has been decided, and not where on account of some remediable procedural error or omission, the substantive issue has had to be left undecided"***.

No affidavit in reply has been filed.

I have considered the notice to raise preliminary issues, as well as the application to enter judgment on admission. I will start with the preliminary issues raised. The notice was raised pursuant to Order 14A and 33 Rule 3 of the Rules of the Supreme Court of England, 1999 edition. The notice seeks determination of the following questions;

1. ***Whether the plaintiff is correct at law to reopen a matter that this court has once heard and considered, and has settled after a hearing; and***
2. ***Whether this application is correctly before the court.***

Order 14A of the Rules of the Supreme Court of England, 1999 Edition provides that;

> ***"(1) The Court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that***
>
> ***(a) such question is suitable for determination without a full trial of the action, and***
>
> ***(b) such determination will finally determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein.***
>
> ***(2) Upon such determination the Court may dismiss the cause or matter or make such order or judgment as it thinks just".***

On the other hand, Order 33 Rule 3 of the said Rules of the Supreme Court of England, provides and I quote;

> ***"The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated".***

In the case of ***African Banking Corporation Zambia v Mubende Country Lodge*** [11], the Supreme Court gave guidance on when applications can be made under Order 14A of the Rules of the Supreme Court of England. In giving the guidance, reference was made to the requirements under Order 14A/2/3 of the said Rules of the Supreme Court. These are as follows;

> ***"The requirements for employing the procedure under this Order are the following:***
>
> ***(a) the defendant must have given notice of intention to defend;***
>
> ***(b) the question of law or construction is suitable for determination without a full trial of the action;***
>
> ***(c) such determination will be final as to the entire cause or matter or any claim or issue therein; and***
>
> **(d)** ***the parties had an opportunity of being heard on the question of law or have consented to an order or judgment being made on such determination".***

The Supreme Court noted that under that provision, the giving of notice of intention to defend is a requirement, and that in that matter, the defendant had not filed a defence, but had only filed a conditional memorandum of appearance. The court went on to ask the question whether a conditional appearance amounts to the giving of notice of intention to defend. It was observed that in answering that question, there was need to reconcile the provisions of the Rules of the Supreme Court of England with our High Court Rules.

The Supreme Court observed that notice of intention to defend is defined in Order 1 Rule 4 of the Rules of the Supreme Court as;

> ***"means an acknowledgment of service containing a statement to the effect that the person by whom or on whose behalf it is signed intends to contest the proceedings to which the acknowledgment relates;"***

The court further observed that notice of intention to defend does not appear in our High Court Rules, but that however, Order 11 Rule 1 of the High Court rules provides for the mode of entering appearance to a writ of summons. That going by that provision, what constitutes a notice of intention to defend is the filing of a memorandum of appearance, which is accompanied by a defence.

Thus, it follows that the filing of a memorandum of appearance with a defence is a pre-requisite to launching an application under Order 14A of the Rules of the Supreme Court. As to the appellant's argument that it had filed a notice of intention to defend by way of the conditional appearance, the Supreme Court stated that the filing of a conditional appearance without a defence is only applicable in circumstances where a defendant wishes to contest the validity of the proceedings with a view to applying to set aside the writ, in line with Order 11 Rule 1 (4) of the High Court Rules, which provides that;

> ***"(4) Any person served with a writ under Order VI of these rules may enter conditional appearance and apply by Summons to the Court to set aside the writ on grounds that the writ is irregular or that the Court has no jurisdiction".***

That other than what is provided in the said Order, a conditional appearance can never be extended or over stretched to constitute a notice of intention to defend, in the context of an application under Order 14A of the Rules of the Supreme Court, which is intended to fully determine a matter without a full trial of the action.

In this matter, after the default judgment was set aside on 10th March, 2020, the defendant filed a defence and counterclaim on 23rd March, 2020. Thus, the giving of notice of intention to defendant has been satisfied by the defendant. The questions raised in the notice to raise preliminary issues relate to whether the setting aside of the default judgment amounts to a decision that can be said to be res judicata in relation to the application to enter judgment on admission which has been filed by the plaintiff?

In opposing the notice, the plaintiff has argued that the setting aside of the default judgment did not determine the matter with regard to the admissions made by the defendant on amounts owed to the plaintiff, such that matter can be said to be res judicata. The plaintiff has cited various authorities, whose rationale is that in order for a matter to be res judicata, it must relate to a final determination of a matter on its merits, and not in relation to an interlocutory application, as in this case.

Further, that the application to set aside the default judgment is dissimilar to an application to enter judgment on admission, as in an application to set aside a default judgment, an applicant merely needs to demonstrate that there is prima facie a defence on the merits, and

not that it is successful, thereby determining a matter with finality, while in an application to enter judgment on admission, the merits or otherwise of a defence are looked at, and the determination is final.

A defence on the merits, is an arguable case, and it is only after the matter is heard on the merits that a determination can be made on whether it is successful or not. Entry of judgment on admission on the other hand entails that a defendant has made clear and unequivocal admissions of the claims, which entitles an applicant to the entry of judgment on admission, which determines a matter with finality.

In this matter, the plaintiff obtained judgment in default of appearance and defence, which the defendant applied to have set aside before the Deputy Registrar. In so applying, the defendant argued that it had a defence on the merits to the claim, as the amounts claimed by the plaintiff, as owing in legal fees were paid either in cash or in kind, as shown on the invoices and delivery notes exhibited as 'ST1' to the affidavit in support of that application.

In opposing the application, the plaintiff contended that the defendant through its accountant had admitted the claim. In a ruling dated 10th March, 2020, the Deputy Registrar stated that a perusal of the defence showed that it raised triable issues, and that while the defendant admitted owing the plaintiff, and had proposed to pay in instalments, it had stated that the amounts owed were paid either in cash or in kind. On that basis, the default judgment was set aside.

It can be seen that the basis of setting aside the default judgment was that there was a claim that the amounts claimed by the plaintiff as

owing were settled either in cash or in kind. Whether this is in fact the position, is something that needs to be determined, and it does not entail that the matter is res judicata, and an application for entry of judgment on admission cannot be made.

The case of ***Bank of Zambia v Jonas Tembo and others*** [6] set out the requirements that need to be satisfied in order for a plea of res judicata to succeed. These were named as;

1. *It must be shown that the cause of action was not only the same, but also that the Plaintiff had an opportunity of recovering but for his own fault might have recovered in the first action that which he seeks to recover in the second action.*

2. *A plea of res judicata must show either an actual merger or that the same point had been decided between the parties.*

Black's Law Dictionary, 10th Edition by Bryan A. Garner, 2009 defines res judicata as;

> ***"A thing adjudicated. 1. An issue that has definitely been settled by judicial decision. 2. An affirmative defence barring the same parties from litigating a lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions that could have been but was not raised in the first suit. The three essential elements are (1) an earlier decision on the issue (2) a final judgment on the merits and (3) the involvement of the same parties, or parties in privity with the original parties"***

Privity is defined in the same ***Black's Law Dictionary*** as;

> ***"The connection or relationship between two parties, each having a legally recognized interest in the same subject matter (such as a transaction, proceeding or piece of property); mutuality of interest".***

Therefore, there being no final determination on the defence raised by the defendant, the preliminary issues fail.

As regards, whether judgment on admission should be entered, Order 21 Rule 6 of the High Court Rules, pursuant to which the application was made provides as follows;

> ***"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".***

Also relied on in making the application is Order 27 Rule 3 of the Rules of the Supreme Court of England, which states that;

> ***"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".***

The plaintiff relies on the admissions made by the defendant in the letter and email exhibited as 'MCM5' and MCM10' to the affidavit in support of the application, as well as exhibit 'MCM9a' the reconciliation done by the defendant on the amounts due. Also relied on is exhibit 'MCM11' the proposal to pay the admitted sum in instalments.

It has been seen that the defendant contends, as seen from the exhibits to the affidavit in support of the notice to raise preliminary issues, being invoices raised, that the amounts claimed were paid either in cash or in kind. Those invoices are also exhibited as 'MCM14a-g' to the affidavit in support of summons to enter judgment on admission.

These seven (7) invoices amount to ZMW118, 686.00, and the plaintiff contends that they were in the custody of the defendant when its' accountant David Chisheta admitted owing ZMW776, 463.27 in legal fees and ZMW91, 502.10 in uncollected materials. Further, that the amount of ZMW91, 502.10 contemporaneously accounted for the tax invoices, as evidenced by exhibit 'MCM7' to the affidavit in support of the application, as part of the materials yet to be collected, and thus, the said tax invoices, do not suffice as evidence of payment in kind.

The plaintiff also contends that there are no delivery notes to show that the materials were actually delivered to the plaintiff. There is no affidavit in opposition to the application to enter judgment on admission, and the defendant has thus not countered the argument that the seven tax invoices have been accounted for on exhibit 'MCM7'

to the affidavit in support of the summons for entry of judgment on admission, or provided proof of delivery in the form of delivery notes. It can therefore be seen that while the defendant contends that the amounts claimed by the plaintiff were either paid for in cash or in kind, there is no evidence to support that assertion.

It will also be noted that the invoices do not add up to the amount claimed by the plaintiff as owing, and which the defendant admitted. The fact that there is no proof of delivery of the materials, entails that it has not been established that the amount on the invoices can be offset from the amount claimed.

As such, there being admission of the plaintiff's claims, I enter judgment on admission in favour of the plaintiff for the amount of K776, 643.27 as legal fees and ZMW91, 502.00 for uncollected materials. The said amount shall carry interest at the average short term deposit rate from the date of issue of the writ until judgment and thereafter, at the Bank of Zambia lending rate until payment. The plaintiff is also awarded costs of and incidental to the application, to be taxed in default of agreement.

I note that the defendant filed a counterclaim to the action. A counterclaim being an independent action, I issue the following orders for directions;

1. That the plaintiff files a defence to the counterclaim by 28th October, 2020.

2. That the defendant files a reply to the defence to the counterclaim by 6th November, 2020.

3. That there shall be discovery of documents by 20th November, 2020.

4. That there shall be inspection of documents by 4th December, 2020.

5. That the parties shall file a bundle of pleadings and bundles of documents by 18th December, 2020.

6. That there shall be liberty to apply by either party.

7. That the matter shall come up on for a status conference on 27th January, 2021 at 08.30 hours.

Leave to appeal is granted.

DATED AT LUSAKA THIS 14th DAY OF OCTOBER, 2020

REPUBLIC OF ZAMBIA
HIGH COURT OF ZAMBIA
14 OCT 2020
S. NEWA, J
P.O. BOX 50067, LUSAKA

S. KAUNDA NEWA
HIGH COURT JUDGE