4 June 1991

4-OC-91

ATB

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 62 OF 1990

BETWEEN:

J. A. SIYANI t/a NAMATUNU ESTATES.....APPELLANT

- and -

SABOT HAULIERS (PVT) LIMITED.....RESPONDENT

Check & file Registrars Ruling

CORAM: BANDA, J.
Mhango of Counsel for the Appellant
Fachi of Counsel for the Respondent
Kholowa, Court Clerk

R U L I N G

This is an appeal from the Ruling of the learned Registrar which he made on the 5th December 1990. The plaintiffs are applying for judgment on admissions in the sum of K33,480.14. The application is made under Order 27 and Rule 3 of the Rules of the Supreme Court. It is submitted by Mr Mhango, for the plaintiffs, that the defendants have made admissions of fact and that upon those admissions the plaintiffs are entitled to judgment under the Order.

The appeal comes to this Court by way of rehearing. The admissions on which Mr Mhango relies are contained in three letters. The first letter is marked "PIA" and is dated 16th October 1989. This letter enclosed a cheque for the sum of K10,000.00 which was made payable to the plaintiffs but was sent through Messrs Pearl Assurance Public Limited Company. The second letter is marked "MIP" and is dated 8th May 1990. The third letter is marked "MIP2" and is dated 1st June 1990.

It is clear, and this is not disputed, that the two letters "MIP" and "MIP2" were written to Messrs Bazuka and Company after Mr Mhango had held discussions with the writer of those letters. The writ in this action was filed on 23rd January 1990, while the defence was filed on 26th March 1990. The letter "PIA" was written four months before the writ was issued. In addition to these three letters, Mr Mhango has also contended that because the defendants did not lodge an insurance claim, it was an admission that they were liable. Order 27, Rule 3 provides as follows:

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> "Where admissions of facts 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."

There can be no doubt that the admissions under the Order must be made by the parties to the cause or matter and those admissions must be clear.

Mr Fachi, for the defendants, has contended that the admissions relied upon are not clear and that had they been so clear as contended for by Mr Mhango, those admissions would have been referred to in the statement of claim. Mr Fachi submitted that the admissions must not be forced upon a party and he suggested that the alleged admissions were solicited for by Mr Mhango and he wondered why it was necessary for Mr Mhango to have engaged in discussions with a potential witness for the defendants in a matter which was already before the Court. Mr Mhango countered that suggestion by submitting that there is no law which prevents a party from soliciting admissions.

I have carefully considered the three letters on which Mr Mhango has relied upon and, to be fair to Mr Mhango, he did concede that the admissions are only implicit and not express from those documents. Mr Mhango further submitted that those admissions were made by the defendants' agents and that those admissions are binding on the defendants. Order 27, Rule 3 makes it very plain that the admissions relied on must be made by the parties to the action and that the admissions themselves must be clear. It is not disputed that the alleged admissions were made by a third party. There is no evidence to show that the alleged admissions were made on instructions or authority of the defendants nor is there any action taken by the defendants which could be construed as ratification.

As I have already indicated earlier in this judgment, this appeal comes to this Court by way of rehearing. I must, of course, consider the views of the Registrar and the findings he made, although I am not bound by his findings. It is interesting to note that in arguing the appeal before this Court, Mr Mhango did not attack in any way the findings of the learned Registrar. He did not show to this Court where the Registrar erred either in law or in fact. Although I accept the position that the appeal before this Court is by way of rehearing, and that I must treat it as if it comes before me for the first time, it would have been helpful to the Court for Mr Mhango to show what it was that he did not agree with in the learned Registrar's Ruling.

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I have read all the cases which are cited in the Registrar's Ruling and in particular the case of Mulphy vs. Culhane (1976) 3 AER 533. Some of those cases dealt with admissions which were made in the pleadings and are not very relevant to the present case. I have considered the statement of claim and the particulars of negligence alleged. I have also considered the defence filed. It is clear from the pleadings that the accident happened during the time when the plaintiffs' vehicle was overtaking the defendants' vehicle. The defendants allege that the overtaking took place on an area where overtaking is prohibited. The issues which are raised on the pleadings might well raise a possible full or part defence on liability. It is important, in those circumstances, that those issues which, in my judgment, are wide open, should be fully investigated at a trial. I am satisfied that this is clearly a case where the facts of the accident should be fully investigated at a trial when both parties' claims can be tested in a full trial.

I would therefore dismiss this appeal with costs.

MADE in Chambers this 4th day of June 1991, at Blantyre.

R. A. Banda
JUDGE