IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

(Civil Cause Number 2118 of 2001)

BETWEEN

R I HAMDANI TRANSPORT PLAINTIFF

AND

NATIONAL FINANCE COMPANY LIMITED DEFENDANT

CORAM D F MWAUNGULU (JUDGE)

Salimu, legal practitioner, for the appellant/defendant
Mhango, legal practitioner, for the respondent/plaintiff
Machila, the official court interpreter

Mwaungulu, J

ORDER

The defendant, National Finance Company Limited, appeals against the Registrar's order of 18th March 2002. The defendant applied by summons for judgement on admission under Order 27, rule 3 of the Rules of the Supreme Court. The Registrar, despite other grounds the plaintiff raised against the application, dismissed the defendant's application because the defendant's affidavit offended Order 41, rule 5 of the Rules of the Supreme Court. The Registrar, having concluded that way, never considered whether the letter the basis of the application for judgement on admission was one where the court would, in its discretion, order a judgement on admission. On this latter aspect, counsel, particularly Mr Mhango, appearing

for the plaintiff, had much to say before the Registrar and on appeal to the judge.

This Court, in my judgement, has to determine two matters in this appeal one of which, because of the approach taken, the Registrar never decided on. The Registrar thought that an application for judgement on admission is final because it results in the final disposal of the matter between the parties. In that case, under Order 41, rule 5 (1) of the Rules of the Supreme Court, hearsay is inadmissible in affidavit evidence. In this appeal, the Court has to decide whether the Registrar was right. The Registrar relied on the English Court of Appeal decision of Rossage v Rossage [1961] 1 W L R 249. Order 41, rule 5 (1) of the Rules of the Supreme Court, and it has not changed much since Rossage v Rossage, reads:

> "Subject to –
> (a) Order 41, rule 2(2) and 4 (2);
> (b) Order 86, rule 2(1);
> (c) Order 113, rule 3;
> (d) Paragraph (2) of this rule, and
> (e) Any Order made under Order 38, rule 3,
> An affidavit may contain only such facts as the deponent is able of his own knowledge to prove."

Order 41, rule 5 (2) of the Rules of the Supreme Court provides:

> "An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof"

In Rossage v Rossage, the father and a clerk to the father's solicitors, on a father's application to suspend a mother's access to a child not in her custody, introduced in the affidavits hearsay evidence. The Court of Appeal allowed the mother's appeal to reject the affidavits in support of the application. Hodson, Ormerod and Willmer, LJJ followed the

remarks of Cotton, L.J., in Gilbert v Endean (1878) 9 Ch D 259, 269. The rule, as Cotton L.J., demonstrates, underscores the nature and quality of evidence necessary for final determination of rights between the parties. The rule only allows evidence on information and belief for interlocutory applications. Lord Justice Cotton said:

> "...for the purpose of this rule those applications only are considered interlocutory which do not decide the rights of parties, but are made for the purpose of keeping things in status quo till the rights can be decided, or for the purpose of obtaining some direction of the court as to how the cause is to be conducted, as to what is to be done in the progress of the cause for the purpose of enabling the court ultimately to decide upon the rights of the parties."

Lord Justice Cotton continued:

> "Now many of the cases which are brought before the court on motions and on petitions, and which are therefore interlocutory in form, are not interlocutory within the meaning of that rule as regards evidence. They are to decide the rights of the parties, and whatever the form may be in which such questions are brought before the court, in my opinion the evidence must be regulated by the ordinary rules, and must be such as would be admissible at the hearing of the cause. In my opinion, therefore, on such applications, if an affidavit on information and belief is made, the other side is not called upon to answer it under the peril of its being said to him, 'You have in fact admitted this by not denying it, and therefore the court may act upon the admission.' But I must add this: where in the court below the evidence not being strictly admissible, not being that upon which the court can properly act, if the person against whom it is read does not object, but treats it as admissible, then, before the Court of appeal, in my judgment,

> he is not at liberty to complain of the order on the ground that the evidence was not admissible. But in such a case the court does not act on the statement as being evidence properly admissible, but because the party has by the course which he adopted waived proof of the facts stated on information and belief. I have said this because I think that the matter is one of very considerable importance, and that the habit of introducing into applications to decide the rights of parties evidence on information and belief has done great injury in many ways in the Chancery Division."

For applications whose purpose is to finally determine rights between parties, proof requires compliance with ordinary rules of evidence. In that regard, Lord Justice Cotton's test is simple and, in my judgment, cannot presage the difficulties in the Court of Appeal Lord Justice Denning mentions in Saulter Rex & Co v Ghosh, [1971] 2 All E R 865, 866:

> "There is a note in the Supreme Court Practice 1979 under RSC Ord 59, r 4, from which it appears that different tests have been stated from time to time as to what is final and what is interlocutory. In Standard Discount Co v La Grange and Salaman v Warner, Lord Esher MR said that the test was the nature of the application to the court and not the nature of the order which the court eventually made. But in Bozson v Altrincham Urban District Council, the court said that the test was the nature of the order as made. Lord Alverstone CJ said that the test is: 'Does the judgment or order, as made, finally dispose of the right of the parties?' Lord Alverstone CJ was right in logic but Lord Esher MR was right in experience. Lord Esher MR's test has always been applied in practice. For instance, an appeal from a judgment under RSC Ord 14 (even apart from the new rule) has always been regarded as interlocutory and notice of

> appeal had to be lodged within 14 days. An appeal from an order striking out an action as being frivolous or vexatious, or as disclosing no reasonable cause of action, or dismissing it for want of prosecution every such order is regarded as interlocutory: see Hunt v Allied Bakeries Ltd. So I would apply Lord Esher MR's test to an order refusing a new trial. I look to the application for a new trial and not to the order made. If the application for a new trial were granted, it would clearly be interlocutory. So equally when it is refused, it is interlocutory. It was so held in an unreported case, Anglo-Auto Finance (Commercial) Ltd v Robert Dick, and we should follow it today."

Lord Cotton's test suggests that interlocutory applications are within main proceedings. They are not the main action, which must follow its course. The true character of interlocutory proceedings is that if successful, and only if successful, they will have the effect of concluding the rights of the parties. They need not have that effect if they are unsuccessful. It is because, if unsuccessful, the main proceedings will continue that makes other proceedings, within the main proceedings, interlocutory. An application whose finality only depends on it being successful cannot be conclusive or final. The proceedings must surely go on if the application is unsuccessful. This test captures amendment, interim relief, withdrawals, etc. Final applications determine rights of parties one way or the other whether the application is accepted or rejected. In this respect Lord Justice Denning's suggestion to look at previous decision is tentative in an area requiring certainty, obscures a proper enquiry into principles underpinning prior decisions and offers unclear solutions to future and novel situations.

Lord Justice Denning suggested summary judgment and judgments on admissions applications are interlocutory. These applications are interlocutory on the principle just explained. Counsel referred the Registrar to the Court of Appeal decision in Technistudy Ltd v Kelland

[1976] 1 WLR 1042, not on this principle though. On this point Technistudy v Kelland is incongruous to the Registrar's conclusion that judgement on admission applications are not interlocutory. An application for judgement on admission is interlocutory.

Problems or injustices arising from accepting hearsay evidence in interlocutory applications are balanced by a rule of disclosure of the source of information and reasons. This allows the court, where there are reasonable objections, to call for such evidence if necessary. The safeguard ensures interlocutory applications are not blown up to hearings where rights are determined without compliance with rules of evidence.

The second matter, not considered by the Registrar, is whether the letter and the surrounding documents constitute an admission entitling the defendant to a judgement on admission. Mr Salimu is right that, notwithstanding the decision on the affidavit evidence, the Registrar should have considered the matter on the merits. This has always been the practice at *nius prius*. A decision at first instances could be reversed on appeal. A court at first instances must in the order or judgement cover all matters raised during the hearing. The Registrar, aware of this possibility, should have decided the other question necessitated by the application: whether there was an admission in the letter. Both counsel addressed the Registrar on this matter at length. Counsel, before the Registrar and this Court, cited many authorities, some persuasive and others binding on this Court on principles around judgements on admissions.

Mr. Mhango referred to Lord Justice Green's statement in Ash v Hutchinson& Co. Publishers [1936] Ch 48, adopted in this Court by Skinner, C.J., in Barclays Bank DCO v Karim [1971-72] 6 A L R (M) 30:

> " A plaintiff who relies for the proof of a substantial part of his case upon admissions, in

> the defence, should show that the matters in question are clearly admitted; he is not entitled to ask the court to read meanings into his pleadings which upon fair construction do not clearly appear in order to fix the defendant with an admission."

Where the party to an action through pleadings or otherwise clearly admits existence of some aspect, it is good law based on sound public policy that the adverse party benefits from such a confession. Rule 27 allows a party to obtain judgment by motion or summons where the other party admits either in the pleadings or otherwise to the existence of a fact. This beneficial and coercive power should be invoked where clearly there is an admission. For this reason Banda J., in Produce Marketing Supplies Ltd and Globe Electrical and Agriculture Company v Packaging Industries (MW) Ltd (1984 – 86) 11 M.L.R. 104 insisted that such admissions should be unequivocal. The party on whose admission the motion for judgment is sought must intend, tacitly, implicitly or explicitly to admit the aspect. The inference of admission depends, in my judgment, on the clarity in the pleadings and the admission itself, written or otherwise, made by the party. To the extent that an application of a judgement on admission truncates the party's right to trial in a normal way, the court may examine the context and circumstances around the admission.

Where, from the pleadings, the context and the circumstances, the admission is clear, it is sound policy, to the parties and administration of justice, unless there is something to undermine the exercise of the discretion, to have the party obtain judgment under this rule. Where that clarity is wanting or the context or circumstances sully the admission, the court would not be doing justice to the parties or administration of justice to allow judgment on this rule without testing the evidence on which the action is based. This court was reluctant in Venetian Blind Specialist Ltd v Bridge Shipping Malawi Ltd (1984 – 86), 11 MLR 233 to accept admissions made in the context and background of persistent denials. Equally, courts are unlikely to give judgement where the admission was in the course of

negotiations or in furtherance of an out of court settlement (Construction & Development Ltd v Munyenyembe (1987) 12 M L R 292. Moreover, a judgement on admission is within the discretion of a judge. The discretion must be exercised judicially. The judge may, for good reasons, refuse to exercise the discretion.

The letter relied on, in content, context and the circumstances of the case, scarcely amounts to an admission warranting the exercise of the discretion for a judgement on admission. At the time of the letter, the defendant seized the car the plaintiff was using on a contract because the plaintiff stalled on some instalments. The plaintiff obtained an injunction from this court. There is a legitimate dispute about monies actually paid. The plaintiff wanted the car back to finish the contract. The offer was to appease the defendant and continue the payments for the car. The letter was in the spirit of these negotiations. The court cannot fairly use this letter to prejudice the plaintiff's action which, from the plaintiff's pleading, is premised more substantially on the effect of the agreement between the parties.

If, as the plaintiff contends, this was a hire purchase agreement, the defendant's right to seize the car depends on the amount actually paid. That amount is in dispute. The defendant's right to seize the vehicle is different if this was, as the defendant contends, a lease an agreement for lease. To these questions, the letters, even if unequivocal, are not the answer, if the answer, not the full answer. These matters cannot properly be disposed of on a motion or summons like this one. I am relying on the remarks of Jessel, M.R., in Mellor v Sidebottom, (1877) 5Ch. D 342, 344:

> "We think that this is a case in which the Judge has a discretion, with which we ought not to interfere. These applications come on upon an ordinary motion day, and it would be very inconvenient if parties were entitled as a matter of right to interfere with the ordinary motion by bringing on in this form questions which might be better decided on demurrer or at the trial: and we

> consider that the judge has a discretion as to whether a case involves questions which cannot conveniently be disposed of on a motion of this kind."

Although, therefore, the Registrar never exercised the discretion, on the evidence and arguments here and before the Registrar, it is the proper exercise of the discretion to refuse the application for judgement on admission. I therefore dismiss the appeal with costs.

Made in Chambers this 2nd Day Of October 2002

D F Mwaungulu

JUDGE