IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 1385 OF 2002

BETWEEN:

LEVER BROTHERS ……PLAINTIFF

AND

VINCENT DUNCAN CHIDZANKUFA

T/A V & C DISTRIBUTORS……. DEFENDANT

CORAM: POTANI, REGISTRAR

Mwankhwawa, Counsel for the Plaintiff

Masumbu, Counsel for the Defendant

RULING

On April 30, 2002, the Plaintiff, Lever Brothers Malawi Limited, commenced this action against the defendant, Vincent Duncan Chidzankufa t/a V and C Distributors, claiming the sum of K14,948,817.29 being money owed by the defendant to the plaintiff and/or in the alternative for an account plus interest including costs of this action. Upon being served with the originating process, the defendant gave notice of intention to defend. Subsquently, the plaintiff took out this application for judgement on admissions under order 27 rule 3 of the Rules of the Supreme Court. In support of the application, there is the affidavit of John J Mhone, Commercial Director for the plaintiff. There is also the affidavit of Vincent Duncan Chidzankufa, the defendant and Managing Director of V and C Distributors in opposition to the application. There is a further affidavit of John J Mhone in reply to the affidavit in opposition. Order 27 rule 3, under which the present application, falls 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.

The above provision has been amply interpreted by the courts and in the celebrated case of Ellis v. Allen (1914) 1 Ch 904 it was held that for a party to be entitled to judgment on admissions

under order 27 rule 3, the admissions of fact relied on may be express or implied, but they must be clear and unequivocal.

The brief facts of the case are that the plaintiff and the defendant entered into an agreement which entitled the defendant to stock and sell the plaintiff's products. The agreement has been exhibited to the affidavit in support as 'JJMI' and contains various terms and conditions governing the parties relationship. Pursuant to clause 5(b) of the agreement, the plaintiff, in September 2001, conducted a stock taking of the stocks being held by the defendant. The results of that exercise were that the defendant could not account for stocks to the tune of K11,462,247.02. A written advice to that effect was made to the defendant and is exhibited to the affidavit in support as 'JMM2' dated October 25, 2001. The letter 'JMM2' had a provision below it requiring the defendant to append his signature as an acknowledgment of receipt of the letter and acceptance of its terms and conditions. That the defendant did on October 26, 2001 and it is the plaintiffs' contention that in so doing, the defendant made an admission of liability.

The cases of Hampden vs. Wallis (1884) 27 Ch D 257 and Porret vs. White (1885) 31 Ch D are authority for the proposition that an admission for purposes of order 27 rule 3 may be made in a letter before or since the commencement of the action. What I need to consider is whether the admissions relied on in this case is clear and unequivocal to warrant judgment to be entered. I has been contended by counsel for the defendant that "JJM2" which contains the alleged admission ought not be looked at in isolation but as part of protracted negotiations between the parties such that it cannot be constructed as amounting to an admission on the part of the defendant. In this regard, counsel drew the courts attention to the fact that 'JJM2' makes reference to a meeting of October 4, 2001 between the parties at which negotiations on the matter took place. It is also the defendant's contention that he could not have made an admission when the plaintiff did not make available to him a definite figure of the amount owing. On this point, reliance is made on documents exhibited as 'VC1' to the affidavit in opposition being letters dated October 25, 2001 (exhibited as 'JJM2' to the affidavit in support) December 2001 and March 21, 2002 which show different figures as being outstanding.

Looking at the evidence before me especially, the exhibited correspondence between the parties, it is very clear that the parties indeed had protracted negotiations on the matter. However, when one looks at the nature of the negotiations between the parties as reflected in the correspondence between them, it comes out clearly that what the parties were negotiating was not whether or not or how much the defendant owed the plaintiff. What they were negotiating was as to how the defendant would pay back what he owed the plaintiff. What the defendant owed the plaintiff was established during the September 2001 stocktaking, that is, the sum of K11,462,247.02. The results of the stock taking were discussed at their meeting of October 4, 2001 following which the plaintiff wrote to the defendant 'JJM2' outlining the results of the stocktaking and what the parties had agreed at that meeting. The defendant signed for that letter acknowledging receipt and agreeing with its contents. The words preceeding that part of the letter which the defendant signed for clearly indicated to the defendant what would be the consequencies of sign for it. The defendant, cannot now turn around and say he did not mean to admit owing the sum stated in the letter by so signing.

Then there is the defendants argument on the different figures advised by the plaintiff as being owing. It should be observed that these different figures were advised at different times. The difference in the figures comes as no surprise at all when one considers that one of the agreements made by the parties as contained in 'JJM2 was that despite the stock shortage, the

plaintiff would still selectively supply some goods to the defendant. That being the case, it is clear that despite the stock shortage, the defendant still continued trading on supplies provided by the plaintiff as such the stock shortage of K11,462,247.02 might have fluctuated either upwards of downwards.

There has also been an attempt by the defendant to suggest that since there is a counterclaim, it would defeat justice to enter judgment as prayed for by the plaintiff. I would hasten to say that it is trite law that a counterclaim is in essence a separate action as such the defendants contention is unattainable. This, in my view, is a proper case to invoke Order 27 rule 3 as such it is ordered that judgment be entered in favour of the plaintiff in the sum of K11,462,247.02 together with statutory collection charges.

On the question of interest, the controversy surrounds the applicable rate of interest. Although the admission letter 'JJM2' makes provision for payment of interest by the defendant, it does not provide for the applicable rate. The plaintiff, in the statement of claim, seeks interest at 45 percent per annum per National Bank's current base lending rate. In dealing with this issue, I have taken recourse to section 11 (a) of the Courts Act which empowers the court to direct payment of interest on debts including judgment debts or sums found due on taking account between parties. This power is discretionary and as was said in Gwembere vs. Malawi Railways Ltd 9 MLR 369 the court would normally order payment of interest where the sum due is as a debt opposed to damages. The sum due in this case is clearly a debt. In exercising the discretionary power whether or not interest should be granted, I also take cognizance of the fact that the debt herein arose out of a commercial transaction. I consequently order that interest be paid at commercial bank lending rate on simple interest basis and such interest to be assessed.

Costs of this application are to be borne by the defendant.

Made in chambers this day of 31, 2002 at BLANTYRE.

H S B Potani

REGISTRAR