JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
PERSONAL CAUSE NO. 1083 OF 2013

BETWEEN:

HACKSON GOLASI ..... PLAINTIFF

-AND-

G4S (MALAWI) LIMITED ..... DEFENDANT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA

Mr. Sauti, of Counsel, for the Plaintiff
Mr. Makwinja, of Counsel, for the Defendant
Ms. A. Mpasu, Court Clerk

JUDGMENT

Kenyatta Nyirenda, J

This is an appeal by the Defendant [hereinafter called the "Appellant"] against the order made by learned Assistant Registrar on 26th February 2015 entering judgment on admission against the Appellant pursuant to Order 27 rule 3 of the Rules of the Supreme Court (RSC).

The Plaintiff [hereinafter called the "Respondent"] commenced an action against the Appellant claiming damages for (a) pain and suffering, (b) loss of amenities of life (c) disfigurement and (d) costs of the action. The Appellant filed a defence wherein it denied liability. The case progressed to mediation.

The Respondent and Appellant entered into discussions for a possible settlement of the claim. The Respondent wrote a letter dated 22nd September 2014 proposing to have the claim settled in the sum of K4, 500, 000.00, with

K4,100,000.00 being damages and K400, 000.00 being party and party costs. By its letter dated 22nd

September 2014, the Appellant responded by stating that the proposed quantum was on the higher side and then proceeded to put forward figures that were acceptable to it. A copy of the letter is exhibited to the Respondent's affidavit and is marked BYM2. BYM2, in so far as is relevant to this matter, reads:

> *"...All in all we are of the view that an award of Kl ,500,000.00 will be sufficient for the settlement of the injuries suffered herein.*
>
> *As far as costs are concerned, we are of the view that K400,000 is too high/or a case ... Nonetheless, we are of the view that costs of Kl 50,000.00 would be adequate and reasonable .*
>
> *Looking forward to your favourable response"* – Emphasis by underlining supplied

By his letter dated 8th December 2014 and marked BYM3, the Respondent accepted the quantum suggested by the Appellant in BYM2. The substantive part of BYM3 is as follows:

> *"Your letter dated 22nd September 2014 in connection with the above matter refers.*
>
> *Our client accepts to have the matter herein settled at Kl ,500, 000 damages and Kl 50,000.00 party and party costs*
>
> *Kindly let us have your client's cheque in the sum of Kl ,650,000.00 in full and final settlement of the claim herein.* "

Despite the Respondent writing a reminder letter dated 19th January 2015, the Appellant did not respond to BYM 3 until 27th January 2015 when it wrote the following letter (Marked BYM4):

> *"Your letter dated I 9th January, 2015 refers.*
>
> *Be advised that our client 's express instructions are toproceed and defend the matter. You may proceed to set down the matter for trial.*
>
> *We trust the foregoing is in order.* "

Based on above-mentioned correspondence, the Respondent filed an application for judgment on admissions and the learned Assistant Registrar, having made a finding that the claim was made out, entered judgment on admission in the sum of K l , 650,000.

The Appellant is dissatisfied with the order of the learned Assistant Registrar and he filed the following five grounds of appeal:

"I . The learned Assistant Registrar erred in law in holding that the matter wasproperly brought before him when mediation had not been terminated [Hereinafter referred to as Ground of Appeal No. I}

2. *The Learned Assistant Registrar erred in law and fact in holding that the correspondences on which the application was based were admissible as evidence. [Hereinafter referred to as Ground of Appeal No. 2}*

3. *The Learned Assistant Registrar erred in law and fact in holding that there was unequivocal admission despite of evidence to the contrary. [Hereinafter referred to as Ground of Appeal No. 3}*

4. *The Learned Assistant Registrar erred in law and fact in holding that there was an admission of liability which led to the correspondences in question. [Hereinafter referred to as Ground of Appeal No. 4}*

5. *The Learned Assistant Registrar erred in law and fact in awarding the Plaintiff the sum of MKI , 500. 000.00 as damages and MKI 50, 000.00 as costs." [Hereinafter referred to as Ground of Appeal No. 5}*

Ground of Appeal No. 1 was not pursued by the Appellant. Neither the Appellant's Skeleton Arguments nor the oral submissions by Counsel Sauti covered this ground. This does not come as a surprise in view of BYM4. The statement therein that *"You may proceed to set down the matter for trial"* is not consistent with the contention by the Appellant that mediation had not been terminated. In the premises, this ground of appeal is dismissed.

With respect to Ground of Appeal No. 2, Counsel Sauti submitted that mediation discussion is not admissible evidence. He placed reliance on rule 15(2) (c) (iii) of the Court (Mandatory Mediation) Rules which prohibits a party to a mediation from relying on any information obtained during the mediation, as evidence in court proceedings or any other subsequent settlement initiative, except in relation to proceedings brought (a) by either party to vitiate the settlement agreement on the grounds of fraud or (b) against a mediator relating to his or her conduct of the mediation in terms of rule 9 (5).

He further argued that even if the correspondence between the parties was held to be outside the mediation, the Appellant would contend that the correspondence was part of settlement negotiations. He thus argued that the Respondent was precluded from relying on any of the correspondence relating to mediation and settlement negotiations.

Counsel Makwinja response was brief and concise. He submitted that mediation is not a life-time activity. He referred the Court to rule 7(5) of the Court (Mandatory) Rules which requires mediation to be done within 90 days. On the authority of this rule, Counsel Makwinja submitted that the settlement negotiations did not take place within the realm of mediation.

I have considered the submissions by both counsel and in my view the determination of this ground rests upon rule 15(c) (iii) of the Court (Mandatory) Rules. This provision was the subject of consideration in the case of **Flora Chagoma v. Charter Insurance, HC/PR Civil Cause** No. **831 of 2007 (unreported)** wherein Mbvundula, J made the following observations thereon, at page 3:

> *"Jn terms of sub-rule (1) it is only those communications made at the mediation session plus the notes and records of the mediator, and under paragraph iii of sub-rule 2(c), it is any information obtained during the mediation which are confidential. In my understanding of that provision, itfollows that communications not made at the mediation, and information not obtained during the mediation, are not privileged, even though they may relate to the case. It is also my understanding that by 'mediation' is meant 'mediation session' . The communications in question here were neither made at a mediation nor can be described as information obtained during the mediation. They are communications made other than at the mediation, or outside the mediation, because they were made when the mediation session had been adjourned. It has not also been shown that they were made with the knowledge or sanction of the mediator, or that the mediator was involved in any manner when the parties made the exchanges which culminated in the agreement, such that they may rightly be said to have been part of the mediation. They are therefore not privileged from disclosure during court proceedings relating to the dispute in issue. "*

I cannot agree more with the apt observations by Mbvundula, J. It is only communication that is made with a view to reaching a settlement in the context of mediation proceedings that should be treated as privileged. None of the letters that were exchanged between the parties suggest being made in the context of mediation. To my mind, the letters were actually made independent of the mediation. Such communication is not excluded from disclosure at the trial. By reason of the foregoing, Ground of Appeal No.2 has to fall by the wayside.

Coming to Ground of Appeal No.3, it is the case of the Appellant under this ground of appeal that the correspondence exchanged between the parties does not reveal clear and unequivocal admission as required by Order 27, rule 3 of RSC. Order 27, r.ule 3 of RSC reads:

> *"Where admissions of fact or 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 ".*

Counsel Sauti also cited the cases of **Ellis v. Allen [1914] CL 904, Produce MKTC Suppliers Ltd v. Packing Industries Mw Ltd (1984-86) II MLR 104) and NBS v. Malawi Housing Corporation, HC/PR Civil Cause No. 1132 of 2002 (unreported)** in support of his proposition that judgment on admission will only be granted in those cases where the admission was clear and unequivocal.

Counsel Sauti submitted that BYM2 does not contain a specific offer but only suggests the quantum and level of costs that would be acceptable to the Appellant. He also contended that BYM3 constituted a second offer by the Respondent but the said offer was never accepted by the Appellant. It was further submitted that, in so far as the settlement or agreement on quantum did not stipulate the mode of payment and the dates of payment, there was no clear and unequivocal admission by the Appellant. In the premises, it was argued that the learned Assistant Registrar erred in holding that he was entitled to assume that there was such an agreement.

Counsel Makwinja submitted that the present case falls squarely within the purview of 0.27, r 3 of RSC. It may not be out of place to reproduce the oral submissions by Counsel Makwinja:

> *"The letters exhibited were on negotiations on how much the Appellant was willing to pay to settle the claim. The Respondent accepted the sum. In that case, it cannot be said that the amount expressed by the Appellant was not. It was a given amount of Kl ,500, 000 damages and costs of Kl 50,000.00. The Respondent was free to accept amount and he accepted it."*

It is clear from a perusal of 0.27, r 3 of RSC and case authorities thereon that the admissions relied on by a party seeking judgment need not only be in express terms or be only contained in pleadings. The admissions could be implied and set out in documents other than pleadings. Further, admissions may be contained in letters authored either before or after the commencement of the proceedings: see **Hampden v. Wallis (1884) 27 Ch D 257.** The important point being that such admissions must be clear and unequivocal.

In the present case, the Respondent has placed reliance on BYM l , BYM2, BYM3 and BYM4. In BYM2, the Appellant states that an award of K l ,500,000.00 for damages and K150,000.00 for costs would be adequate and reasonable. The statement is very clear and without any qualification at all. It is also not uninteresting to note that BYM2 concludes by stating that *"Lookingforward to your favourable response "*. To my mind, BYM2 demonstrates that the Appellant made a clear and

unequivocal offer which was duly accepted by the Respondent in BYM3. I thus find this ground of appeal to be without merit and it is, accordingly, dismissed.

Turning to Grounds of Appeal No 4. And 5, Counsel Sauti submitted that once it is clear that correspondence exchanged by parties formed part of a genuine attempt to resolve the dispute, such correspondence enjoys the *"Without Prejudice"* privilege notwithstanding the fact that those two magical words are not used in the correspondence.

He contended that BYM l , BYM2 , BYM3 and BYM4 were written for purposes of negotiations between the parties which were genuinely aimed at a settlement. It was thus argued that all these four letters be excluded from consideration in this case as the same are privileged. To buttress his submission, Counsel Sauti cited a host of cases, namely, Lin Liar Hang Construction PTC Ltd v. Singapore Telecom munications Ltd [2007] 2 SLRCR 433, Jean Marie v. National University of Singapore [2014] SG HC 217, Truth Slongshire District Council v Amos [1987] I All ER 340 and Chocolate Fabriken Ltd v. Nestle [1978] RPC 287. Counsel Sauti laid much emphasis on the last mentioned case and gave it special attention in the Appellant Skeletal Arguments:

> *"Jn Chocolate Fabriken Ltd vs- Nestle [1978] RPC 287 the High Court held that the telex messages through without the words "Without Prejudice " were not admissible. This was because it was perfectly plan that the telexes related to a propo sed settlement of the dispute between the Parties.*
>
> *Sir Robert Megary said:-*
>
> > *"The mere failure to use the expression "Without Prejudic e" does not include the matter. The question was whether there was an attempt to compromise actual or impending litigation, and*
> >
> > *whether from the circumstances the court can infer that attempt was in fact to be covered by the "Without Prejudice".*
>
> *It is submitted that the present case falls on all fours with the aforecited case.* "

Counsel Sauti concluded by submitting that once the Court agrees that correspondence sought to be relied upon is non-admissible, it means that there is no evidence of clear and unequivocal admission of liability by the Appellant let alone a contract of settlement.

The words *"without prejudice"* , as used by parties in the course of attempting to settle a matter, have been the subject of consideration by the Supreme Court of Appeal in a number of cases but it will suffice to refer to one case only. In **Construction and Development Ltd v. Munyenyembe 12 MLR 292,** the Supreme Court of Appeal made the following important observation:

> *"The words 'without prejudice ' serve to protect the position of the writer if what he proposes is not accepted and if what he proposes has been accepted, an independent admission is established.* " - emphasis by underlining supplied

In the course of its judgment in **Construction and Development Ltd v. Munyenyembe,** supra, the Supreme Court of Appeal cited with approval the following dicta by Lindley LJ in **Walker v Wilsher [1889] 2 QBD 335,** at page 337:

> *"What is the meaning of the words 'withoutprejudice '? I think they mean without prejudice to the position of the writer of the letter if the terms he proposes are not accepted. If the terms are accepted a complete contract is established, and the letter, although written*
> *without prejudice, operates to alter the old state of things and to establish a new one.* "

In the present case, as already held herein, the offer made by the Appellant to settle the Respondent's claim at K l,650,000.00 was duly accepted by the Respondent. In the premises and going on the basis of the principle established in the case of **Construction and Development Ltd v. Munyenyembe,** supra, the Appellant plainly admitted liability in the sum set out in BYM2.

All in all, I find no principle on which to interfere with the order of the learned Assistant Registrar. The appeal is, accordingly, dismissed with costs.

Pronounced in Court this 7th day of October 2016 at Blantyre in the Republic of Malawi.

Kenyatta Nyirenda
JUDGE