C.J.

IN THE MALAWI SUPREME COURT OF APPEAL

PRINCIPAL REGISTRY

M.S.C.A. CIVIL NO. 29 OF 1987

BETWEEN: CONSTRUCTION AND DEVELOPMENT LIMITED...APPELLANT

- AND -

R.T.C. MUNYENYEMBE ..... RESPONDENT

BEFORE: THE HONOURABLE MR. JUSTICE MTEGHA, JA
THE HONOURABLE MR. JUSTICE KALAILE, JA
THE HONOURABLE MR. JUSTICE TAMBALA, AG. JA

Mbendera, Counsel for the Appellant
Mhango, Counsel for the Respondent
Kadyakale, Law Clerk

JUDGMENT

This is an appeal against a ruling made by the Chief Justice on 2nd October, 1987, in which he set aside the Registrar's ruling made on 21st February, 1986. In that ruling the Registrar entered judgment in favour of the plaintiffs, now the appellants, on admissions under Order 27, Rule 3 of Rules of Supreme Court.

The facts of the case are really not in dispute. The appellants were engaged to build a house for the respondent in Chitipa District. The house was completed in 1977. On 19th December, 1978, the appellants were placed under receivership. The Receiver/Manager went through the books of accounts belonging to the appellants and discovered that according to the records, the respondent's account stood at K35,485.00

On 27th February, 1979, the Receiver/Manager of the appellants wrote to the respondent. In that letter he stated:

"HOUSE - CHITIPA DISTRICT

You may be aware that this Company was placed in Receivership on 19th December, 1978, and that I was on that date appointed Receiver and Manager. Since my appointment, I have

2/.....

examined the Company's books of accounts and find that there is considerable balance due by yourself for the house which Construction and Development Limited built during 1976 and 1977. BALANCE OUTSTANDING K35,485.00

It is my duty as Receiver to sale all possible steps to recover all monies due to the Company. In this regard, I do not consider it an appropriate arrangement for you to repay this amount with monthly repayments of K200.00. The amount of your monthly repayment does not cover the interest on the principle. Therefore I request that you settle this outstanding balance. If this account is not settled within an acceptable time, I shall have no alternative but to add an interest at the rate the Company is being charged by Commercial Bank of Malawi Limited on the total amount outstanding.

I look forward to your early reply stating how you propose to pay this account."

On 15th March, 1979, the Receiver and Manager sent a reminder to the Respondent. On 22nd March, 1979, the Respondent replied to these letters. He stated, in that letter, inter alia that,

"As regards to the contents of the second paragraph of your first letter I do agree that the figures which you have quoted are correct. I would also add that there is indeed a BALANCE OUTSTANDING OF K35,285.00.

It is true that my monthly repayments of K200.00 are indeed inadequate, as these do not even cover the interest on the principle amount. However, you will no doubt appreciate the fact that these arrangements were arrived at after taking into consideration my family commitments as well as my financial position. This being the case then it was agreed that I should keep on paying the sum of K200.00 per month and this arrangement has not been defaulted by me.

As my financial position has not yet improved, I still plead with you to let me continue paying you the sum of K200.00 per month until such time that I can afford to increase to a bigger amount.... this debt is not only a source of constant worry to me, but it is, to say the least, more of an embarrassment than anything else."

The Respondent continued to pay the K200.00 per month, but on 8th September, 1983, the Appellant issued a writ of summons claiming K31,685.00 the balance then owing. On 9th November, 1983, the Respondent served a defence, which was amended subsequently in which the Respondent raised a number of defences, two of which are relevant for our purpose. Firstly, the Respondent contended that the contract price of the house was K15,000.00 less K3,997.26 cost of materials which the Respondent himself supplied, and secondly, that taking into account direct payments which the Respondent paid amounting to K6,620.00 his liability was only to the extent of K4,402.74

The parties then joined issues and on 19th January, 1984, the Court gave the usual directions for trial. Meanwhile, on 21st February, 1986, the Registrar entered judgment on admissions in favour of the Appellant on a Notice of Motion taken out by the Appellants. The Respondent appealed to a Judge in Chambers, and on 2nd October, 1987, the Chief Justice set aside the Registrar's Order and ordered that the case should go for trial - hence the appeal to this Court.

Meanwhile, pending the hearing of the appeal, the parties exchanged further correspondence. The first letter was written by the Respondent's lawyers to the Appellants' lawyers dated 8th November, 1986. In that letter the Respondent's lawyers querried a number of invoices and asked for explanations. On 14th November, the Appellants' lawyers replied to the effect that their clients were prepared to make concessions and requested for a meeting.

It appears that the meeting took place and on 29th January, 1987, the Respondent's lawyers wrote to the Appellants' lawyers. In that letter they said:

> "We refer to our letter of 17th December, 1986, and advise that our client has accepted your client's proposal that the claim be reduced by K6,248.76. This means therefore that there is a balance of K25,436.24 which our client proposes to pay in instalments of K5,000.00 per year payable every 31st October for five years. The first of such instalments to be paid on 31st October, 1987.
>
> Our Client is unable to offer more than K5,000.00 as his sources of income are rather limited. Furthermore, he can only make a yearly offer as his income is from the sale of tobacco which is grown once a year. Please let us know if our client's offer is acceptable to your client as soon as possible."

On 19th February, 1987, the Appellants' lawyers answered this letter. They stated:

> "We are obtaining instructions from our clients with regard to your client's proposal.
>
> Pending such instructions, we would like to advise that it appears to us that there is no procedure allowing for amendment of judgment unless for technical errors. Please refer to O.20/11 of the Rules of Supreme Court. It appears further to us that the option is to appeal against judgment or to set it aside. Both these procedures seem to us to be unduly cumbersome and costly in the long run. We suggest that rather than amending the judgment, we exchange letters of understanding that when it comes to enforcement of judgment only K25,436.24 would be executed for. That is not to suggest that we are proceeding with execution. As a matter of fact the instructions that we have received from our clients are that they would want to have the matter resolved as far as reasonably possibly without undue embarrassment on either side.
>
> Could you please advise whether the suggestion made by us to issue a warrant for K25,436.24 instead of K31,685.00 is acceptable to you. We can then deal with the proposals for instalments thereafter."

Then there came another letter from the Respondent's lawyers dated 30th April, 1987. The material part thereof reads as follows:-

> "Our client has instructed us to make it part of the consent judgment that the judgment debt be paid by instalments of K5,000.00 per annum. We feel that the offer is reasonable considering that the defendant is not in receipt of regular income. Kindly advise us acceptance of the offer so that the consent judgment could be amended to provide for stay of execution and payment of judgment debt by instalments.
>
> Perhaps you could be good enough to advise us your estimated costs herein so that we may seek our client's views on the question. In the meantime we enclose herewith our client's cheque value K436.24 to bring the balance to a round figure as stated in our letter of 27th ultimo."

It must be noted that all this correspondence was exchanged while the parties were awaiting the hearing of an appeal to a judge in chambers, and, as stated earlier on, the Chief Justice delivered his judgment on 2nd October, 1987, setting aside the Registrar's Order. In his judgment the Honourable the Chief Justice cited the cases of Neville v. Mathewman (1894) 3 ch.345 and the case of Technistudy v. Kelland (1976) 1 WLR, 1042.

It would be prudent if we set out the Order under which these proceedings arise. Order 27 rule 3 of the Rules of Supreme Court states:-

> "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.
>
> An application for an order under this rule may be made by motions or summons."

It is settled law that for the Court to enter judgment on admissions the admissions, which may be express or implied, must be clear and unequivocal. The admissions may be in the pleadings; but can also be made in any other way such as letters, and they can be made at any time after an action has been instituted.

It is not disputed that by his letter of 22nd March, 1979, the Respondent admitted that the balance outstanding was K35,285. In his judgment the learned Chief Justice had this to say:-

> "Although this seems to be an unequivocal admission the defendant subsequently disputed the figure in his defence. In effect he says that the figure was not agreed upon and thus imposed on him. That is why he refused to sign the summary statement of account. He further states that the price verbally agreed upon was K15,000.00 less value of his, i.e., defendant's materials."

6/.....

After citing the above cases, he went on:-

> "In the instant case, the defendant denied by not signing his liability of the final statement. He did this even before the alleged letter of admission. He also denied liability in his defence. The affidavit in answer to the motion for Admission of judgment clearly, in my view, provide circumstances in which the admission was written. In so far as preparation of the case is concerned, it is observed that summons for directions were already done - a very advanced state indeed."

It has been submitted by Mr. Mbendera that the lower court erred in law and in fact in placing undue weight on the alleged refusal by the Respondent to sign the certificate even before his letter containing admissions because there is no indication that the figure on the certificate was disputed or anywhere else, even in his affidavit. Moreover, at that time the Respondent held high political appointments, and he could easily have disputed the figures on the certificate, and silence itself was an admission. It has also been argued that even if this was not the position, whatever reservations that there were, those that existed at the date of the final certificate, must be regarded as abandoned by the time he wrote the letter containing admissions, after a period of two years. He cited to us the case of Ellis v. Allen (1914) 1 ch. 904.

On the other hand Mr. Mhango for the Respondent has submitted that the learned Chief Justice did not err in law or in fact. In fact, Mr. Mhango submits, the learned Chief Justice directed himself to the admissions, and clearly stated that the admission was not unequivocal, and further the mere fact that the final statement was not signed clearly indicates that there was a dispute, and therefore the case should go for trial. Let us pause here and consider the letter of 22nd March, 1979, in which among others the Respondent said:

> "As regards the contents of the second paragraph of your first letter, I do agree that the figures which you have quoted are correct. I would also add that there is indeed a balance outstanding of K35,285.00".

We are of the view that this is a clear, express, admission as envisaged in the Ellis v. Allen case (supra). It is unequivocal. This unequivocality can only be vitiated by taking into account some other circumstances.

7/.....

On this point it was Mr. Mhango's submission that this unequivocal admission was vitiated by two factors. The first is that the Respondent refused to sign the final statement which was sent to him, and secondly, when the Respondent wrote the admission letter his mind was unbalanced because he had just lost his political appointments, and it is these factors that the learned Chief Justice took into account. We are not in agreement with this submission. There is no evidence to show that the certificate was not signed because the Respondent did not agree with the figures thereon. At that time the Respondent had not lost his political appointments. He merely kept quiet. Silence itself can be construed to be an admission, and a prudent man as he was then at the helm of political office should have objected to the figures. We are also of the view that the letter of admission was not written because he had lost his political appointments. Theletter was written two years after he lost his office. We do not think therefore that his mind was unbalanced when he wrote the letter of admission.

The case of Neville v. Mathewman (1894) 3 ch. 345 is slightly different from the present one. In that case Lord Herschell held that the letters written by the defendant admitting that he had £1,000 on behalf of the plaintiff from their fathers estate were not unequivocal because the evidence by the defendant's affidavit clearly showed that their father's estate was not sufficient to pay any annuity on £1,000.00. Furthermore, in the case of Technistudy v. Kellard (1976) 1 WLR 1042, there were no admissions but there were clear challenges.

It is Mr. Mbendera's further submission that the court should have considered another subsequent admission made in a letter dated 29th January, 1987. As we have pointed out earlier in this judgment, this was a letter admitting that after taking into account the sum of K6,248.76 the balance accepted by the Respondent was K25,436.24 which the Respondent proposed to pay by instalments of K5,000.00 per year payable by 31st October each year for 5 years. It was Mr. Mbendera's submission that this letter clearly is an admission, especially if the court could have taken into account that K436.24 was paid leaving a round balance figure of K25,000.00. , the amount claimed. Mr. Mhango, however, argues that the letter was written in the course of negotiations although it was not headed "without prejudice" and therefore the learned Chief Justice was entitled to ignore it, he cited to us the case of Oliver v. Nautilus Steam Shipping Co. Ltd. (1903) 2 KB 639; Nokes: An Introduction to Evidence, 4th Edition at p. 199 and Phipson on Evidence, 13th Edition, paragraph 19.

We agree generally with what the learned jurists, namely Nokes and Phipson have said in their works cited above - that to encourage the settlements of disputes,

the courts will not generally permit the negotiations to be disclosed to the court whether the correspondence pertaining to those are headed "without prejudice" or not. This was clearly stated in the Oliver case. Prima facie therefore the letter cannot be construed as an admission.

However, this is not the end of the matter. Independent facts admitted during negotiations for a settlement are receivable; similarly, offers without prejudice, if the offer has been accepted, are also receivable. 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.

In the case of Walker v. Wilsher, 23 QBD 335 at 337 Lindley, L.J., had this to say:

> "What is the meaning of the words "without prejudice"?. 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 proposed in the letter 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."

Let us now look at the correspondence which went through between the solicitors. It is clear that there were a lot of negotiations going on between the parties, and eventually the appellants accepted the proposals that the balance of debt was K25,436.24 and K436.24 was paid leaving a round figure of K25,000.00.

On the above authorities, it cannot now be said by the Respondent that he did not agree to this arrangement. In fact, the appellants had gone all the way to accede to the Respondent's offers.

It has also been submitted that since the proceedings had advanced very far reaching the stage of summons for directions, it was not proper for the Appellant to ask for judgment on admissions at such a late stage. It is trite law that this type of application, unlike the application under Order 14 for Summary Judgments, can be made before a defence is served or after; or before or after summons for directions or before or after discovery. For these reasons we allow the appeal and enter judgment for K25,000.00 for the appellants with costs.

9/.....

DELIVERED at Blantyre this 12th day of May, 1989.

(Signed) _____

MTEGHA, J.A.

(Signed) _____

KALAILE, J.A.

(Signed) _____

TAMBALA, AG. J.A.