IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NUMBER 677 OF 1993

BETWEEN:

UNILEC INDUSTRIES
(PTY) LIMITED ..... PLAINTIFF

and

SALIM SHEIKH t/a
FREIGHT HANDLERS ..... DEFENDANT

CORAM: D F MWAUNGULU, REGISTRAR
Nkhono, Counsel for the Plaintiff
Msisha, Counsel for the Defendant
Ndalama (Mrs), Court Clerk

ORDER

Yesterday when I heard the plaintiff's application for judgment on admission, I reserved ruling. I proceed now to give the order of the Court.

The facts, ascertainable from the Statement of claim defence and the affidavit in support of the application, are as follows. The plaintiff, a South African company, I assume, had dealings with the defendant, a Malawian company. The defendant, according to the defence, is a freight handling company and acts only as agent for importers or exporters in procuring transport facilities or moving goods on the instructions of the exporter or importer. The action is for the price of salt the plaintiff sold to the defendant.

The plaintiff took out this action on the 26th of May 1993 claiming the price of the salt. It is averred that the salt was bought by the defendant and delivered by the plaintiff in July 1990. It is further averred that the defendant acknowledged the claim in a letter of 6th August, 1992 and issued a cheque in respect of it on 22nd February 1993 drawn by the Price Worth Wholesalers. The cheque, it is averred, was returned to the defendant only because of lack of a second signature. The action is therefore, for the sum of R100,724.93 and interest at a normal banking rate.

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There is a defence, a very brief defence. The defendant denies buying and receiving delivery of the salt. The gravemen of his defence is that he only deals with importers and exporters helping them in freight, he could not and never bought the salt in question.

The plaintiff, therefore, took out this summons for judgment on admission under Order 27, rule 2 of the Rules of the Supreme Court. The admission is contained in a letter from the plaintiff of 6th August, 1992, in which the defendant wrote the plaintiff's lawyers that he agrees that they owe the sum of R100,724.93 and no more. The defendant further requested the plaintiff that, until business improved, the amount should be paid in 24 equal instalments. Except for the currency in which the money is expressed in the letter, this is a very clear admission on which, as a matter of course, a court would enter judgment on the amount admitted. Mr. Msisha, appearing for the defendant, however, has raised two objections to the letter.

The first objection is that the letter, the basis of the admission was written on a "without prejudice" footing. Mr. Msisha submits that the communication is privileged and cannot be admitted for this application or any purpose but in the excepted cases. Mr. Nkhono, who was not quite ready for this twist to the summons, submits that the privilege would not apply to the sort of admission here. The question then is the letter here privileged.

On the general principle on communications on a "without prejudice" footing, Mr. Msisha is right. Such communications would be privileged. The matter has not been decided on by the Supreme Court of Appeal or the High Court in Malawi. The House of Lords has decided on it in Rush & Tomkins Ltd. V. Greater London Council[1988]3 All E.R. 737. In that case, Lord Justices Bridge, Branden Oliver and Goff Lord Griffiths agreed, approved of the statement of principle by Lord Justice Oliver in Cutts V. Head [1984]1 All E.R. 597, 605 - 606:

> "That the rule rests, at least in part, on public policy is clear from many authorities and the convenient starting point of the inquiry is the nature of the underlying policy. It is that parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their

> prejudice in the course of the proceedings. They should, as it was expressed Clauson J in Scott Paper Works Ltd (1927) 44 RPC 151 at 157, be encouraged freely and frankly to put their cards on the table...The public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the questions on the question of liability."

The rule is very pervasive in terms of the statements between parties which it is intended to crystalise. After citing the above passage, Lord Justice Griffiths continued:

> "The rule applies to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence. A competent solicitor will always head any negotiating correspondence 'without prejudice' to make clear beyond doubt that in the event of the negotiations being unsuccessful they are not to be referred to at the subsequent trial. However, the application of the rule is not dependent on the use of the of the phrase 'without prejudice' and if it is clear from the surrounding circumstances that the parties were seeking to compromise the action, evidence of the content of those negotiations will, as a general rule, not be admissible at the trial and cannot be used to establish an admission or partial admission. I cannot therefore agree with the Court of Appeal that the problem in the present case should be resolved by a linguistic approach to the meaning of the phrase 'without prejudice'. I believe that the question has to be looked at more broadly and resolved by balancing two different public interests namely the public interest in promoting settlements and the public interest in full discovery between parties to litigation."

Generally, then, letters with a "without prejudice" qualification would be and privileged and inadmissible.

Lest, however, it be thought that anything goes, the Court of Appeal has restrained the excess. The matter came before that Court in Buckinghamshire County Council V. Moran [1989]2 All E.R. 225. The question, it seems is, whether the document so marked could properly be regarded as a negotiating document. So much so that if the document is intended to assert a

right or entitlement it will not be excluded simply because it wears the label "without prejudice":

> "In Re Daintrey, ex p Holt [1893]2 QB at 119-120, [1891-4] All ER Rep 209 at 211 Vaughan Williams J, delivering the judgement of the court, stated the conditions for the application of the 'without prejudice' rule as follows:
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> 'In our opinion the rule which excludes documents marked "without prejudice" has no application unless some person is in dispute or negotiation with another, and terms are offered for the settlement of the dispute or negotiation, and it seems to us that the Judge must necessarily be entitled to look at the document in order to determine whether the conditions, under which alone the rule applies, exist. The rule is a rule adopted to enable disputants without prejudice to engage in discussion for the purpose of arriving at terms of peace, and unless there is a dispute or negotiations and an offer the rule has no applications.'

If this statement represented the outer limits of the 'without prejudice' rule, there could be no question of its availing the defendant, since by his letter of 20 January 1976, he was not offering terms for settlement of any dispute or negotition subsisting between him and the council. Later authorities, however, have expressed the principle in rather wider terms. This court in South Shropshire DC v Amos [1987]1 All ER 340, [1986]1 WLR 1271 held that previlege can attach to a document headed 'without prejudice' even if it is merely an 'opening shot' in negotiations. As Parker L J said [1987] All ER 340, [1986]1 WLR 1271 at 1277-1278):

> 'It attaches to all documents which are marked "without prejudice" and form part of negotiations, whether or not they are themselves offers, unless the privilege is defeated on some other grounds as was the case in Re Daintrey, ex p Holt.'

More recently, the House of the Lords in Rush and Tompkins Ltd v Greater London Council 8[1988]3 All ER 737 at 740, [1988]3 WLR 939 at 942 per Lord Griffiths has stated the general principle that the rule applies 'to exclude all negotiations genuinely aimed at the settlement whether oral or in writing from being given in evidence.'

> I think the judge was right to regard the relevant question as being whether or not the letter of 20 January 1976 could properly be regarded as a negotiating document"

I am now looking at the letter, the basis of this application. With all fairness to Mr. Msisha, there is no way in which the letter under consideration can be regarded as having been made in the course or for purposes of negotiations. The letter in both emphasis and purport was to assert that the indebtedness was in Kwachas and probably not in rands. It being made not for purposes of negotiations, it is not privileged under the principle enunciated by Mr. Msisha.

It must be appreciated that at the time of the letter the plaintiff had legal representation. The defendant had not. I would have different considerations if the alleged admission was made by the defendant after legal advice. I think the words of Lord Atkin in Evans V. Bartlam [1937] A.C. 473,479 are pertnent. I do not think that it would be fair to pin the defendant to this admission in view of his defence.

The defendant says that he personally did not import or export anything. He only helped exporters and importers to freight their goods. The suggestion being that the plaintiff dealt with somebody else and only pins the defendant because he handled the freight. It could very well be, as the plaintiff alleges, his defence is a sham. It is the word of the defendant against the plaintiff. I think that is a matter for trial. Even in the face of an admission, if the matter can be resolved by trial, in exercise of its discretion, the Court will not order summary judgment. The Court will look at all the circumstantances of the case (see the remarks of Kekewich J in Re Wright Kirke V. North[1895]2 Ch. 747, 750. In Melloo V. Redbottom [1877]5 Ch.D 342, 344, Lord Justice Jessel, M.R., said:

> "We think that this is a case in which the Judge has a discretion, with the exercise of 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 motions by bringing on in this form questions which might be decided on demurrer or at the trial; and we consider that the Judge has a discretion as to whether a case involves questions which can conveniently be disposed of on a motion of this kind."

In my opinion the question whether the defendant bought and received the goods from the plaintiff is

critical to the action. It is not resolved by the admission alleged. If the defendant is not legally re represented, it is possible and plausible that he thought he was liable to pay for his exporters and importers when in fact he was only liable to the extent of the freight and not to the price of goods. The answer could be that that is a lie. Credibility is better answered at the trial than by affidavits. I would exercise my discretion in favour of the defendant. I dismiss the summons with costs.

Made in Chambers this 5th day of January, 1994.

D F Mwaungulu
REGISTRAR OF THE HIGH COURT