IN THE HIGH COURT OF MALAWI

LILONGWE DISTRICT REGISTRY

CIVIL CAUSE NO. 09 OF 2006

BETWEEN

JOSEPH D. PATHUNGO ..... 1ST PLAINTIFF

-AND-

WILLY JAMES KACHEMWE ..... 2ND PLAINTIFF

-AND-

THE ATTORNEY GENERAL .....DEFENDANT

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CORAM : **T.R. Ligowe : Assistant Registrar**

Nankhuni : Counsel for the Plaintiffs

Liabunya : Counsel for the Defendant

RULING

The plaintiffs commenced action on 26th January 2006 claiming a total of US$30 000 from the defendant. It is averred in their statement of claim that they were policemen in the Malawi Police Service at the material time and they successfully underwent peace keeping interviews and were selected for the United Nations Mission in Kosovo commencing 3rd September 2007. (sic). There were a total of 17 officers chosen from Malawi Police Service for the said mission. It is further averred that it was a term of the contract of engagement at the said mission that every officer would be eligible to extend his contract for a further six months after completing an initial period of 12 months. That after the 12 months

all the said 17 officers applied for the extension which applications were duly approved by the contingent's contingent commander. But the Inspector General only ordered the plaintiffs to return to Malawi among the 17 officers. That the Inspector general falsely alleged to other police officers that the plaintiffs had been returned by the United Nations as a result of offences which they had committed whilst there. That the plaintiffs were never at any time informed verbally or in writing by their supervisors or the Inspector General of Police as to why they were called back as they were outstanding officers at the mission. The plaintiffs hold the conduct of the defendant unlawful and unconstitutional and therefore claim a total of US$ 30 000 plus costs of the action.

No notice of intention to defendant having been given by the defendant the plaintiffs entered a default judgment on 16th February 2006 against the defendant.

The defendant now applies to set the judgment aside and to dismiss the action for being irregular, in that it ought to have been commenced by way of judicial review and not by writ of summons, thus it is an abuse of the process of the court. There is an affidavit in support sworn by counsel. It deposes that Malawi signed a 12 month contract with the UN Peace Keeping Mission in Kosovo and the plaintiffs were among the 17 officers that went for that mission. That procedurally, at the end of the mission when one wishes to extend his tour of duty an application form is filled and sent to the Director of Administration and Personnel, United Nations Interim Administration in Kosovo who later communicates with the UN Headquarters in New York. Every member of the Malawi contingent applied for extension and the home Government was also requested in writing of the interest to extend the contracts. There are exhibited the covering letter for the applications to the Director of

Administration and Personnel, EX1 and the letter to the Malawi Government, EX2. The Malawi Government responded approving extension of the rest but the plaintiffs. A copy is exhibited EX3. In response the United Nations extended the contingent's mission by six months except for the plaintiffs and Mr. Oliver Soko. Later Mr. Soko was allowed to extend. The letters are exhibited EX4 and EX6.

The defendant argues the plaintiffs are challenging the validity of the decision of the Inspector General of Police in not approving the extension of their services in Kosovo and ordering them to come back to Malawi. That in alleging the plaintiffs were outstanding during their period of service implies irrelevant considerations influenced the decision of the Inspector General. So the issues in this case are of public law in nature requiring a judicial review and not an action by way of writ of summons. That the action was therefore irregularly commenced and the said irregularity amounts to abuse of the process of the court and the claim must be dismissed with costs.

The plaintiffs contend the matter herein does not raise issues of public law but issues of employment and allowances as a result of unfair labour practice by the defendant which are rather private law issues.

As I see it, the application before me is two-fold; to set aside the default judgment and to dismiss the whole action for being an abuse of the process of the court. I will deal with the former and then the latter in this ruling.

On Dismissal of the action

The defendant would like to the whole action dismissed for being an abuse of the process of the court. The issues centre on the argument

that the present proceedings needed to have been commenced by way of Judicial Review under Order 53 of the Rules of the Supreme Court.
The law is that where a person seeks to establish that a decision of a person or body infringes rights which are entitled to protection under public law he must, as a general rule, proceed by way of judicial review and not by way of an ordinary action whether for a declaration or an injunction or otherwise (***O'Reilly v. Mackman*** [1983] 2 A.C. 237; [1982] 3 All E.R. 1124, HL). If a person commences an ordinary action where he should have applied for judicial review, the action will be struck out by summary process (ibid.). "... it would ... as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of O.53 for the protection of such authorities" (ibid., per Lord Diplock at 285/1134).

Therefore, Order 53 does not extend the circumstances in which judicial review is available so as to permit the enforcement of private rights, such as rights of particular employees vis-à-vis their employer. (***R. v. BBC, ex p. Lavelle*** [1983] 1 W.L.R. 23; [1983] 1 All E.R. 241, approved and applied by the Court of Appeal in ***Law v. National Greyhound Racing Club Limited*** [1983] 1 W.L.R. 1302; [1983] 3 All E.R. 300). In the ***BBC case*** it was held that judicial review was not the appropriate procedure to challenge the decision of domestic tribunals, such as the disciplinary tribunals of the BBC; in such cases the appropriate remedy is by an action for a declaration and an injunction.

It is obvious that the Inspector General of Police complained of in this case is a public authority. The question however is whether the present

proceedings seek to establish that his decision on the plaintiffs infringed their rights under public law.

I am mindful that as of 1999 the scope of the rule in ***O'Reilly v. Mackman*** was still a matter of debate. I have not taken the trouble to find out the position as of today. Suffice to say however that, there are two main approaches which have been canvassed. The broad approach is that the rule does not apply to actions brought to vindicate private law rights even though involving a challenge to a public law act or decision. If the broad approach is adopted, the aggrieved person will be forced to proceed by way of judicial review only in a case where private law rights are not at stake. The narrower approach is that the rule in ***O'Reilly v. Mackman*** generally applies to all cases where it is sought to challenge a public law act or decision, subject to some exceptions when private rights are being invoked. In ***Roy v. Kensington and Chelsea and Westminster Family Practitioner Committee*** [1992] 1 A.C. 624; [1992] 1 All E.R. 705, the House of Lords left open the question which of these approaches should be adopted, but indicated a preference for the broad approach.

Whatever approach we may take in this case, I think the effect will be the same. The action must be such that it vindicates the plaintiff's public law rights against the public law act or decision of the Inspector General for it to fall under Order 53 of the RSC. In other words, the action would not fall under Order 53 if it was brought to vindicate private law rights against a public law act or decision of the Inspector General. I am fortified on this view by what Lord Bridge of Harwich said in ***Roy v. Kensington and Chelsea and Westminster Family Practitioner Committee.*** He said:

> "It is appropriate that an issue which depends exclusively on the existence of a purely public law right should be determined in judicial review proceedings and not otherwise. But where a litigant asserts his entitlement to a subsisting right in private law, whether by way of claim or defence, the circumstance that the existence and extent of the private right asserted may incidentally involve the examination of a public law issue cannot prevent the litigant from seeking to establish his right by action commenced by writ or originating summons, any more than it can prevent him from setting up his private law right in proceedings brought against him."

Whether the present proceedings hinge on the plaintiffs' public law or private law rights can be ascertained form the pleadings.

The defendant's view is that the plaintiffs are challenging the validity of the decision of the Inspector General of Police in not approving the extension of their services in Kosovo and ordering them to come back to Malawi. That in alleging the plaintiffs were outstanding during their period of service implies irrelevant considerations influenced the decision of the Inspector General. So the issues in this case are of public law in nature requiring a judicial review and not an action by way of writ of summons.

The plaintiff's view is that the matter herein does not raise issues of public law but issues of employment and allowances as a result of unfair labour practice by the defendant which are rather private law issues. They aver that the Inspector general falsely alleged to other police officers that the plaintiffs had been returned by the United Nations as a result of offences which they had committed whilst there. That they were never at any time informed verbally or in writing by their supervisors or the

Inspector General of Police as to why they were called back as they were outstanding officers at the mission. Thus, they hold the conduct of the defendant unlawful and unconstitutional and therefore claim a total of US$ 30 000 plus costs of the action.

The issue of unfair labour practice comes from section 31 of the Constitution of this country which provides under subsection 1 that every person has the right to fair and safe labour practices and to fair remuneration. That section has often been invoked and examined together with section 43 of the Constitution which provides for the right to:

(a) lawful and procedurally fair administrative action, which is justifiable in relation to reasons given where his or her rights, freedoms, legitimate expectations or interests are affected or threatened; and

(b) be furnished with reasons in writing for administrative action where his or her rights, freedoms legitimate expectations or interests if those interests are known.

See. ***M.M. Kambuwa v. Malawi Institute of Management***, Civil Cause No. 1240 of 1996 (Principal Registry) (Unreported).

It means therefore that it would be an unfair labour practice for one not to be furnished with reasons in writing for an administrative action where his or her rights, freedoms and legitimate expectations and interests are affected.

I would want to take the position of the plaintiffs as regards the substance of their claim before this court. They are the ones who know what they want from the court. The defendants are there only to defend

on the basis of the plaintiffs' claims. They can not suggest to the plaintiffs what to plead to the court. The plaintiffs are saying their action hinges on employment and allowances as a result of unfair labour practice by the defendant. Counsel for the plaintiffs actually told this court in his oral submission that the action is not premised on the right to fair administrative practice but the right to fair labour practices under Section 31 of the Constitution. As long as it is to do with labour practice then it squarely falls within the realm of private law and Judicial review under Order 53 of the Rules of the Supreme Court is out of question. The action can not be dismissed.

On setting aside of the default judgment

Under 0rder 13 rule 19, R.S.C. the court is given the discretion to set aside a default judgment on such terms as it thinks just. Lord Atkin in ***Evans V Bartlam*** [1937] A.C. 473 at 480 clearly stated the principle behind it all. He said,

> *"The principle obviously is that unless and until the court has pronounced judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure."*

Where the default judgment is regular as the situation in the present case it is an almost inflexible rule that there must be an affidavit of merits, i.e. an affidavit stating facts showing a defence on the merits (***Farden v Richter*** (1889) 23 9.B.D. 124). Thus the major consideration is whether the defendant has disclosed a defence on the merits, and this transcends any reasons given by him for the delay in making the application even if the explanation given by him is false. (***Vann V Awford*** (1986) 83 L.S. Gaz 1725; The Times, April 23 1986, C.A.)

Somehow the defendant concentrated so much on wanting to dismiss the action for being an abuse of the process of the court and neglected issues to do with setting aside a default judgment. Therefore there is nothing else advanced apart from the argument that this action needed to have been commenced by judicial review. The affidavit in support does not state any facts showing a defence on the merits. I am mindful that in ***Kachunjulu v. Magaleta*** 6 MLR 403, Skinner CJ held that the rule in ***Farden v Richter*** is not absolute. So if sufficient reason is otherwise shown an application to set aside the judgment may be granted or, at the very least, the applicant should be given an opportunity to file a supplementary affidavit. In that case the defendant in an application to set aside a default judgment only stated in general terms that he ad a defence on the merits and he intended to defend the matter. Going through the defendant's affidavit in support of the present application and every argument advanced in writing and orally, I find no suggestion of a defence of merits to the plaintiffs' claim even in general terms that I may consider giving an opportunity to file a supplementary affidavit.

Therefore the application is dismissed with costs.

Made in chambers this 21st day of April 2008.

T. R. Ligowe
ASSISTANT REGISTRAR