Mwaungulu J.

Requirement to give Notice
See 4 Civ. Procedure
(Suits by and Officers) Act

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO.1267 OF 1993

BETWEEN:

NELSON KAMBA ..... PLAINTIFF

AND

ATTORNEY GENERAL ..... DEFENDANT

CORAM: MWAUNGULU, REGISTRAR
Mwafulirwa, Counsel for the Plaintiff
Limbe, Counsel for the Defendant
Selemani, Court Clerk

ORDER

This is an application by the Attorney General to set aside a judgment in default of notice of intention to defend entered on the 19th of November, 1993. The application is on the sole ground that the judgment was irregular. I heard argument on the 12th of January, 1994. I reserved ruling because, contrary to what I expected, on an issue like this one, counsel should have cited authority rather than rely, as they did, on general assertions that they made. The question raised by the summons is whether the plaintiff here should have given notice of intended suit as is required by section 4 of the Civil Procedure (Suits by and against Government and Public Officers) Act. That section provides as follows:

> "No suit shall be instituted against the Government, or against a public officer in respect of any act done in pursuance, or execution, or intended execution of any Act or other law, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty or authority, until the expiration of two months next after notice in writing has been, in the case of the Government, delivered to or left at the office of the Attorney General, and, in the case of a public officer, delivered to him or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims."

It is contended for the Attorney General that the notice be given in every case where government is sued and, by extension, it should have been given in this case. It is contended on behalf of the plaintiff that it should not. It looks like the practice has been to give such notice in each case until when I, in passing, said the notice need not be given in every case. Although the issue has not been decided on in our courts, it is a rich area of litigation, as we shall see shortly. Before that, it may be important to look at the facts so far.

The plaintiff took out the action on the 19th of November, 1993. It was commenced by what previously was described as a generally endorsed writ. The endorsement is very brief. The plaintiff's claim is for terminal benefits and gratuity under the contract of service with the Malawi Army. The plaintiff was, therefore, employed in our armed forces.

No statement of claim was served because, I think, there was no notice of intention to defend. It can be said, therefore, that the plaintiff is suing the Attorney General in pursuance of a contract of employment.

Judgment in default of notice of intention to defend was entered on the 19th of November, 1993. On the same day the plaintiff obtained an appointment for assessment of damages for the 9th of December, 1993. Assessment of damages has not been done because of this application taken out on the 12th of November, 1993.

The application to set aside is supported by an affidavit of Mr. Limbe, State Advocate. It is deponed that the plaintiff never served the defendant with any notice of intended suit and thereby failed to comply with the specific and clear requirements of section 4 of the Civil Procedure (Suits by or against the Government or Public Officers) Act.

Mr. Limbe, appearing for the Attorney General, submits that there are no suits which are outside section 4. He submits that all acts done by government must be understood and taken to be made in pursuance of public duty. Equally, for all torts and breaches of contracts committed by government or public officers no suit would lie without such notice. He submits that section 4 encompasses all actions to which government or public officers are a party. Mr. Limbe argued that the section was introduced because government is a collossal organisation: it would be very difficult for the Attorney General to liaise with its client departments. This is why the provision was passed. He also argues that the court should in construing the provision avoid absurdity. He cited the case of Nyrho Developments (Private) Limited v. Mudi River Water Board (1961-63) 2 A.L.R. (M) 405.

Mr. Mwafulirwa, appearing for the plaintiff, argued that going by section 4 itself, it is platitudinous that the section was not to apply to every case. The application, he submits is restricted by the words of the section.

Put concisely the application raises two questions: does section 4 cover all cases where the Government or public officers are to be sued and whether, on facts of this particular case, such a notice should have been given. It is important then to consider the statute itself and judicial pronouncements, which are many, that have been made on similar provisions.

The Civil Procedure (Suits by and against the Government or Public Officers) Act was passed in 1946. The preamble is very brief: "An Act Relating to Civil Suits by or against the Government or Public Officers." There is not much assistance from the preamble on the question I have to answer. We must go to the section itself.

On close reading of the section, it is plain from the words used that the section was not intended to cover all acts of Government or Public officers. The notice previous to suing must be given where the suit is in respect of acts "done in pursuance, or execution, or intended execution" of any Act or other law, or of any public duty or authority. If acts are done, even if done by Government or Public Officers, and are not in pursuance of or in execution or intended execution of an Act or any other law, authority or duty, they are not covered by the statute. The question is not whether they were done by a public officer. The question is whether the public officer did what he did in pursuance or execution or intended execution of an Act, other law, public duty or authority.

The precursor to the Civil Procedure (Suits by or against the Government or Public Officers) Act is the Public Authorities Protection Act, 1893, United Kingdom. This was a statute of general application before 1902 and, therefore, in force in Malawi till our Act of 1946. The Public Authorities Protection Act, 1893 only covered public authorities. It was extended to government by the Crown Proceedings Act, 1947, section 30(2). It can be assumed that when our 1946 Act was passed it took account of developments in the United Kingdom for our Act in one Act gave protection to public officers and the government. Judicial interpretation of these provisions by English courts is very persuasive in our courts.

I think I should state very clearly at the outset, in spite of the strong arguments on behalf of the Attorney General, that there should be a restriction to the interpretation of the provisions. This is supported by superior courts in the United Kingdom. In Lyles v. Southend-on-Sea Corporation (1905) 2 KB 1, 13 L.J. Vaughan Williams said:

> "Now, I do not think that it can have been the intention of the Legislature that every act done by the corporation which was intra vires conferred by this Order should be subject to the protection afforded by this Act. In my judgment an act which is done, not only in pursuance or execution, or intended execution, of this Light Railways Order,

> but also in pursuance of all execution, or intended execution, of some obligation incurred by a public authority voluntarily beyond the obligation cast upon them by the Order, is not an act done in pursuance or execution, or intended execution, of the Order."

This was in the Court of Appeal. In the House of Lords, Lord Buckmaster said in Bradford Corporation v. Myers (1916) 1 A.C. 242, 247:

> "Now it must be conceded that the Act applies only to a definite class of persons and to a definite class of actions. If the section stood alone, and were construed without reference to the introductory words of the statute, it would be wide enough to grant protection to any person who was acting in pursuance of an appropriate Act of Parliament, but on more than one occasion the courts have pointed out that this cannot be its true interpretation ..... While the preamble is necessary thus to constrict the meaning of the persons whom the statute is intended to protect, the words of the section themselves limit the class of action, and show that it was not intended to cover every act which a local authority had power to perform."

The operative words in section 4 of the Civil Procedure (Suits by or against Government or Public Officers) require notice previous to issue to be given in respect of "an act done in pursuance, or execution or intended execution of any Act or other law, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such act, duty or authority." These are similar words that have been used in the Public Authorities Protection Act, 1893. It is quite clear from the authorities that quite a number of activities of government and public officers are protected. Not all, however, are protected. Guidance has been provided by two decisions of the House of Lords. The first one is Bradford Corporation v. Myers, which I referred to earlier. and the other is Griffiths v. Smith (1941) A.C. page 170. It is very clear from the opinions of the Lord Justices in Bradford Corporation v. Myers that the Civil Procedure (Suits by and against Government and Public Officers) Act applies and only applies where government or public officers in performing what is complained of are acting in the direct execution or intended direct execution of a statutory legal or public duty or authority. Lord Justice Buckmaster, the Lord Chief Justice, said at page 247:

> "In other words, it is not because the act out of which an action arises is within their power that a public authority enjoys the benefit of the statute. It is because the act is one which is either an act in the direct execution of a statute, or in the discharge of a public duty, or the exercise of a public authority. I regard these latter words as

> meaning a duty owed to all the public alike or an authority exercised impartiality with regard to all the public. It assumes that there are duties and authorities which are not public, and that in the exercise or discharge of such duties or authorities this protection does not apply."

When the matter came again before the House of Lords in 1941 in Griffiths v. Smith, Viscount Maugham said at page 185:

> "..... it has been impossible to doubt (if it was doubtful before) that it is not essential that a public authority seeking to rely on the Act of 1893 must show that the particular act or default in question was done or committed in discharge or attempted discharge of a positive duty imposed on the public authority, it is sufficient to establish that the act was in substance done in the course of exercising for the benefit of the public an authority or a power conferred on the public authority not being a mere incidental power, such as a power to carry on a trade."

And for purposes of the action here, it is advisable to record the observations of Lord Porter at page 208 when he said:

> "I think it is true to say that a private contract even if entered into in pursuance of an Act of Parliament is not thereby protected but an act which is done in performance of a public duty is still done in the execution of a public duty though it is performed through the medium of a contract."

In my opinion, therefore, and this is in derogation to the argument by counsel for the Attorney General, it was not the intention of Parliament to require a notice before issue in all cases against the government or public officers. The section itself limits the circumstances in which it should. There are also very persuasive judicial pronouncements to the effect. Admittedly, government is a colossal establishment. It is important, therefore, that adequate notice should be allowed to it before proceedings are commenced against it. I don't think, however, that there is any absurdity in limiting the situations in which such notice should be given. I see more absurdity in thinking that it should apply in all cases including acts which are incidental to government or public duties. I see more sense in requiring notice where, for example, the acts complained of are in the direct execution of a statutory legal or public duty. It would be preposterous to require, for example, any retailer who has sold two bottles of Fanta or Coke to government or a public officer to be required to give prior notice to government if government or a public officer refuses to honour the contractual obligation.

It is for this reason that the courts have been more ready to require such a notice in tort and have been very reluctant to actions in contract. In matters of tort, there is a plethora of authorities in the United Kingdom on the construction of the particular wording and the questions of construction of the particular wording have not been reduced by the new statute. That is why Viscount Maugham in Griffiths v. Smith observed at page 181 "In other respects the language of section 1 of the Act of 1893 is reproduced so that the difficult questions of construction which constantly arose in the Act continue to arise except so far as have been settled by authority." In relation to torts, therefore, the situation is fluid and open. Not so in contract.

In relation to proceedings for breach of contract, the general considerations expressed in the judicial pronouncements are of particular importance. The starting point is probably the case of Clarke v. Lewisham Borough (1902) 1 LGR 63. This report does not appear in our library. The case is, however, cited in Preston & Newsoms Limitation of Actions, 3rd Edition 1953 page 202. In that case the action, much like here, was for wrongful dismissal. That is to say, the claim against an employer for breach of a service contract. In that case Justice Bingham said that "good sense, as well as authorities, showed that the Act, that is to say, the Public Authorities Protection Act, was not intended to apply to actions for damages for breach of contract at all." So if there is need for direct authority for this particular case, therefore, it is the case that I have just mentioned.

The matter came again before a High Court judge in Sharpington v. Fulham Guardians (1904) 2 Ch. page 449. In that case the guardians of a public school employed the plaintiff to do works for them required of them by their public duties. The action there was for breach of contract. Justice Farwell refused to find the Act applied to private contracts. He observed that in this modern age government and public authorities perform many functions which compel them to enter all sorts of contracts. He, however, slighted counsel's argument that every contract entered into by a public body is within the Act. At page 455 he said:

> "But every contract entered into by a public body is necessarily in a sense entered into in discharge of a public duty or under statutory authority, for otherwise it would be ultra vires. And I think it would necessarily follow, if I decided in the defendants' favour, that every contract entered into by a public authority is an act done in pursuance of a public duty or authority, and therefore is one to which the Act applies. I do not see where to draw the line."

On the facts of the particular case, however, he said:

> "The present case seems to me quite different. The public duty which is here cast upon the guardians is to supply a receiving house for poor children; a breach or negligent performance of that duty would be an injury to the children, or possibly to the public, who might be injured by finding the children on the highway. In order to carry out this duty they have power to build a house or alter a house, and they accordingly entered into a private contract. It is a breach of this private contract that is complained of in this action. It is not a complaint by a number of children or by a member of the public in respect of the public duty. It is a complaint by a private individual in respect of a private injury done to him. The only way in which the public duty comes in at all is, as I have pointed out, that if it were not for the public duty any such contract would be ultra vires. But that would apply to every contract. I cannot find any ground for saying that this particular contract comes within the Act. I think it is clear that what is complained of is a breach of a private duty by the guardians to a private individual. The result is that, so far as this section is concerned, the action will lie."

The matter went up before the Court of Appeal in Lyles v. Southend-on-Sea Corporation. That action was proceeding in contract. The Court of Appeal decided that it was essentially in tort and therefore the Act applied. The Court of Appeal, however, doubted what the situation would have been if there were conditions on the contract. In The Ronald West (1937) P. 212, the plaintiffs, the Ipswich Dock Commission, wanted to plead the Act to a counterclaim. There was power under the stutute to do what they wanted to do but they chose to enter into a special contract to perform it. It was held that the statute did not apply. Buckmill, J. quoted Lord Haldanes in Bradford Corporation v. Myers at page 251-252:

> "My Lords, in the case of such a restriction of ordinary rights I think that the words used must not have more read into them than they express or of necessity imply. And I do not think that they can be properly extended so as to embrace an act which is not done in direct pursuance of the provisions of the statute or in the direct execution of the duty or authority."

Justice Buckmill went on to quote the words of Lord Haldane in Sharpington v. Fulham Guardians at page 449:

> "I think that this is an Act which does restrict the rights of an individual in suing somebody himself who has done him a wrong and one must read the words of the Act strictly. If I find, as I do in this case, that the negligent act

> done by the plaintiffs was not done in direct pursuance of the provisions of the statute or in the direct execution of their duty or authority, but was, in fact done under a contract made between them and someone else, ... I think that the provisions of the Act do not apply."

I would hold, therefore, when applying the Civil Procedure (Suits by or against Government or Public Officers) Act in relation to contracts that the notice before suit is not required in respect of contracts between government and public officers and private citizens except in so far as the acts complained of are in direct (and not incidental) pursuance of the statutory or public duty or authority and the contract is the only way in which such statutory or public duty is fulfilled. In these sentiments I am in agreement with the observations of Lord Justice Porter in Griffiths v. Smith at page 208 which I should re-quote:

> "I think it is true to say that a private contract, even if entered into in pursuance of an Act of Parliament, is not thereby protected but an act which is done under performance of a public duty is still done in the execution of a public duty for its performance through the medium of a contract."

In this particular case, the plaintiff is suing in relation to a service contract. He is suing for terminal benefits and gratuity under a contract of service with the Malawi Army. He is not alleging that the Malawi Army is in breach of any statutory or public duty. He is saying that in the private contract with him, the Army has not paid him terminal benefits and gratuity under the contract of service. He is not complaining together with members of the public generally against the Army. He wants the Army to pay to him what is due to him privately under the contract. I would be very slow to think that the Army's default in this case is default under a statutory or public duty or an Act of Parliament. My opinion, therefore, is that the notice was not necessary and the judgment was not irregular. This being the only ground on which the application is relied, the application is dismissed with costs.

MADE in Chambers this 4th day of February 1994 at Blantyre.

D.F. Mwaungulu
REGISTRAR OF HIGH COURT OF MALAWI