

Civil Procedure - mode of commencing an action;  
cases where an action cannot be commenced  
by way of originating summons if the  
issues raised does cannot be resolved  
on affidavit evidence available  
⇒ Or 5 r 4 of the RSC stipulates actions  
which may be commenced by way  
of originating summons

IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY  
CIVIL CAUSE NO. 925 OF 1995

BETWEEN:-

L W J KAMLETE ..... PLAINTIFF

- and -

ATTORNEY GENERAL ..... DEFENDANT

CORAM: Msosa, J  
Ng'ombe, Counsel for the Plaintiff  
Unrepresented, Counsel for the Defendant  
Kadyakale, Official Interpreter

ORIGINATING SUMMONS

The plaintiff by this originating summons prays for the following:-

- (a) A declaration that the interdiction or termination of the employment of the plaintiff from the public service was unjustified, unlawful and an infringement to the plaintiff's human rights.
- (b) A declaration that the removal of the plaintiff from the public service aforesaid was a breach of conditions of service under the Public Service Act in so far as no reasons were given to the plaintiff for such removal and no opportunity was given to the plaintiff to be heard as is required by Section 43 of the constitution of the Republic of Malawi.
- (c) A declaration that the information passed on or caused to be passed on to the media in particular the Independent Newspaper was false and malicious and only intended to damage the good name, reputation and character of the plaintiff.

The plaintiff also seeks the following orders:

- (a) That he be re-instated into his post as Chief Assistant Controller (P6) unconditionally and that if any payments on

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account of salaries and other allowances had been withdrawn or withheld by reason of the interdiction be paid over to the plaintiff forthwith.

- (b) That the defendant do publish or cause to be published in the local newspapers and in the Government Gazettes an apology and a reversal of the story that has appeared in the media concerning the plaintiff.
- (c) That he be paid a fair compensation for injury and damage suffered through the conduct of the defendant.
- (d) That in the alternative or/and in addition to the foregoing, the defendant having reached a point of retirement be accordingly retired with his full benefits under the public service scheme of retirement.

The plaintiff swore an affidavit in support of his application which discloses the facts he relies on. The plaintiff was employed by the Civil Service Commission as Chief Assistant Controller (P6). The Secretary to the Treasury, by his letter dated 14th August, 1995 interdicted him from exercising the functions and duties as Chief Assistant Controller. It was stated in the letter that this was done in order to facilitate the investigations that were taking place at the material time as he was implicated in certain acts of misconduct. He was interdicted on half pay. The alleged acts of misconduct were not specified.

The applicant states that he was aware of certain allegations that had earlier to his interdiction, appeared in the newspaper called "The Independent" dated March 29, 1996 which published an article under the heading "Customs: Serious Fraud". The paper made all sorts of accusations of corruption and bribery against him. And according to the article the information came from inside the Department of Customs and Excise.

Meanwhile, he responded to the letter of interdiction. He advised the Secretary to the Treasury that he welcomed the investigations as the move would clear his name. He further advised him that he had instructed a firm of legal practitioners to act for him, to ensure that his rights were protected. The plaintiff's legal practitioner wrote the Secretary to the Treasury confirming that they were indeed acting for the plaintiff. There was no response to any of the two letters.

Later the plaintiff wrote to the Officer-In-Charge of Police seeking clearance after he had learnt that the Police had completed investigating the case and had found no fault in him. The Officer-in-Charge responded to his letter and advised him that the Senior State Advocate who had perused the Police docket concerning his case found no sufficient evidence to warrant his prosecution. He recommended closure of the case and that the



order of interdiction against him should be rescinded. The plaintiff was advised to get clearance from his controlling officer, the Secretary to the Treasury. On 1st April, 1996 the plaintiff wrote to the Secretary to the Treasury seeking such clearance but up to the date of hearing of his application there was no response.

The defendant was properly served with the notice of the originating summons but have not entered an appearance and was absent during its hearing.

I remind myself of the fact that this is an originating summons. Order 5 rule 3 of the Rules of the Supreme Court provides that proceedings by which an application is to be made to the High Court under any statute must, in the absence of any provision to the contrary, be commenced by originating summons. Rule 4(2) of the same order, provides that there are two categories of cases appropriate to begin by originating summons rather than by writ, namely:-

- (a) Where the sole or principal question at issue is the construction of an Act or of any instrument made under an Act or of any deed, will, contract or other document or some other question of law or
- (b) Cases in which there is unlikely to be any substantial dispute as to the fact.

The present application has been made under Section 27(1)(a) of the Public Service Act which provide that except where a public officer has absconded from his duties, no public officer appointed to an established post in the public service on permanent and pensionable terms shall be dismissed or otherwise have his services terminated at the instance of the Government unless he is proved to have committed a prescribed act of misconduct.

The plaintiff's affidavit shows that he is under interdiction and that although the Police investigations have revealed that he will not be prosecuted as there is lack of sufficient evidence, the Government has remained mute as to his fate. He, therefore, continues to be on interdiction and on half pay.

The plaintiff applies for several declarations or orders of this Court. The question which has exercised my mind is whether this is a proper case where the proceedings should have begun by originating summons and whether on the affidavit evidence of the plaintiff I can make the declarations and grant the orders sought.

My understanding of the provisions of Section 27(1)(a) of the Public Service Act is that it gives one of the instances under which the Government can dismiss or terminate the services of a public officer appointed on permanent and pensionable terms. On

the evidence before me the plaintiff seems to have been employed on permanent and pensionable terms and that the provisions of Section 27 of the Act would apply in the event of termination of his services or dismissal. Further it is clear that he is under interdiction and that his services have not yet been terminated nor has he been dismissed.

I am of the view that there are a lot of issues to be decided in this matter. The Court will have to decide whether he has been unlawfully dismissed or his services have been unlawfully terminated by the Government. The Court will also have to decide whether the Government is responsible for the publication in the newspaper titled "The Independent" and if so whether the words therein are defamatory as alleged. Then there will be the question of damages to be assessed in the event that the Government is found liable. It will also be necessary to consider the terms of the contract of employment.

In view of all these issues, this matter is beyond the scope of the provisions of Order 5 rule 4 of the rules of the Supreme Court which determines the type of proceedings which can begin by an originating summons as opposed to a writ.

The principal questions at issue in this matter are not just in respect of the construction of an Act or the contract of employment or any other document. And this matter can not justly be decided on the affidavit evidence which is available now. This is a proper case that should have begun by writ. I consequently order that the case proceed as if it had begun by writ. The plaintiff should serve a statement of claim on the defendant.

MADE in Chambers this 19th day of July, 1996, at Blantyre.

  
Mrs A S E Msosa  
JUDGE