

MAXWELL MUMBI v ZAMBIA NATIONAL COMMERCIAL BANK (1980) Z.R.
154 (H.C.)

HIGH COURT
MUWO, J.
25TH JULY, 1980
1980/HP/470

Flynote

Civil Procedure - Wrongful dismissal - Application by originating summons under High Court Rules, O. 6, r. 2, for declaration that plaintiff still in employment of defendant - Whether procedure proper.

Headnote

This was an application by the plaintiff seeking a declaration that he was still in the employment of the defendant, the Zambia National Commercial Bank. The application was made by way of an originating summons in terms of O. 6, r. 2 of the High Court Rules, Cap. 50. Counsel for the defendant argued that the procedure taken was wrong. He argued that O. 6, r. 2, did not apply in view of the fact that the plaintiff had already commenced action against the defendant for wrongful dismissal.

Held:

The procedure taken is proper as this is a sort of action which can be decided in chambers to determine whether the matter is properly commenced by an originating summons for a declaration, which can be made on the evidence or submissions of counsel for both sides, to make a declaratory order in favour of the party seeking it.

Case cited:

(1) Chikuta v Chipata Rural Council (1974) Z.R. 141.

Legislation referred to:

High Court Rules, Cap. 50: O. 6, r. 2, O. 30, r. 11

Supreme Court Practice, O. 5, r. 4/2.

For the plaintiff: Mrs Katundu of Chigaga and Company.

For the defendant: Mr C.K. Banda of Lisulo and Company.

Judgment

MUWO, J.: This matter came before this court by way of an originating summons in terms of O. 6, r. 2, of the High Court Rules Cap. 50. It is an application by the plaintiff seeking a declaration that he is still in

the employment of the defendant, Zambia National Commercial Bank. Mr C. K. Banda, counsel for the defendant raised a preliminary issue in the matter which was that the matter should not have come before this court by originating summons but by writ of summons for wrongful dismissal claiming damages. Mr Banda argued that O. 6, r. 2, does not apply in this case in view of the fact that the plaintiff had already commenced action against the defendant for wrongful dismissal. He referred the court to O. 5, r. 4/2 of the English Supreme Court Practice 1979, which sets out proceedings which may be begun by writ of originating summons. It is not my intention to tie myself to the "White" book. Rather I will confine myself to the provisions of O. 6, r. 2 of the High Court Rules, Cap. 50, which reads:

"2. Any matter which under any written law or these Rules may be disposed of in Chambers shall be commenced by an originating summons."

Mr Mbaluku, counsel for the plaintiff, submitted that this matter properly came before this court by originating summons because all that was being sought was a declaratory order and not a claim for damages for wrongful dismissal. He said the question for the decision of this court was one of pure law and not one of fact. Order 5, r. 4/1 of the Supreme Court Practice, which Mr Banda quoted is headed:

"Proceedings which may be begun by writ or originating summons."

Rule 4/1 reads:

"Except in the case of proceedings which by these rules or by or under any Act are required to be begun by writ or originating summons or are required or authorised to be begun by originating motion or petition, proceedings may be begun either by writ or by originating summons as the plaintiff considers appropriate."

Sub-rule 2 reads as follows:

"(2) Proceedings -

- (a) in which the sole or principal question at issue is, or is likely to be, one of 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) in which there is unlikely to be any substantial dispute of fact,
are appropriate to be begun by originating summons unless the plaintiff intends in those proceedings to apply for judgment under O. 14 or O. 86 or for any other reason considers the proceedings more appropriate to be begun by writ."

The issue to decide is whether, the matter having been commenced by originating summons, is properly before this court or not. The undisputed facts are that the plaintiff was employed by the defendant as a Branch Manager at Mufulira's Zambia National Commercial Bank; by a letter dated 6th January, 1976 (MAM 1) he was requested by his employer (defendant) to go on compulsory leave because a Mr Kachusha

was to take over duties from him immediately. On or about 9th June, 1976, it became apparent, from the letter marked "MAM 2" that he was technically on leave; by a letter "MAM 3" dated 30th May, 1977, he was informed that his services had been terminated without giving him any reason or explanation for his dismissal. (Letter "MAM 4" refers.) In consequence he received letter "MAM 5" from the managing director saying "It is not true to say that I or the board have sacked you." Because of this ambiguous statement, the plaintiff considered himself not dismissed and it is for this reason he now seeks a declaration by this court as to whether he is still employed by the defendant company or not.

The facts of this case are in many respects similar to the case of *Chikuta v Chipata Rural Council* (1). This case came before the Supreme Court as an appeal against the refusal of the trial judge to make a declaration to the effect that the plaintiff/appellant was still an employee of the respondent/defendant Council. In the judgment delivered by Doyle, C.J., the court said, at pp. 243 to 244:

"The matter was brought before the court by means of an originating summons. The practice and procedure in the High Court is laid down in the High Court Rules, and where they are silent or not duly comprehensive, by the English White Book. Under Order 5 of the English Rules of the Supreme Court, Rule 2 lays down what proceedings must be begun by originating summons; and rule 5 proceedings that may be begun by motion or petition. The Zambian Rules are much more rigid. Under Order 6, rule 1, every action in the court must be commenced by writ., or except as otherwise provided by any written law or the High Court Rules. Order 6, rule 2, states that any matter which under any written law or the Rules may be disposed of in chambers shall be commencing by an originating summons. Rule 3 provides for matters which may be commenced by an originating notice of motion. It is clear, therefore, that there is no case where there is a choice between commencing an action by a writ of summons or by originating summons. The procedure by way of an originating summons only applies to those matters which may be disposed of in chambers. Chamber matters are set out in Order 30 of the High Court Rules. Counsel for the appellant was unable to show us where under the Order this matter could be begun by an originating summons. Paragraph (J) or rule 1 1 1 or Order 30 does refer to "Such other matters as a Judge may think fit to dispose of in chambers." That clearly is not so wide as to allow a judge, carte blanche, to hear any sort of action in chambers and clearly does not apply to an action for a declaration which depends on evidence being called on both sides. Even if the English practice could be prayed in aid, it would not help, as there an action for a declaration is brought by writ."

Although the Supreme Court in the passage quoted above held that the procedure by way of originating summons only applies to those matters which may be disposed of in chambers, the present case is not one

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which is caught by the provisions of O. 30, r.11 of Cap. 50. In my view this is a sort of action which

can be decided in chambers to determine whether the matter is properly commenced by an originating summons for a declaration, which can be made on the evidence or submissions of counsel for both sides, to make a declaratory order in favour of the party seeking it. I do not think the English practice can be adhered to rigidly because under that practice an action for a declaration is only entertained by a writ. I consider that the issues in the Chikuta case were decided on different premises.

I therefore make a declaratory order that the plaintiff be informed as to who purportedly dismissed him, and the defendant must therefore disclose authority for that purported dismissal; and further for the defendant to disclose that the said authority had power to dismiss him other than the managing director or the board of directors. Failure to do this by the defendant, the plaintiff will continue to be considered as still in the employment of the company. The costs of this action will be borne by the defendant in any event.

Declaratory Order made

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