

## **CHIKUTA v CHIPATA RURAL COUNCIL (1974) ZR 241 (SC)**

SUPREME COURT (CIVIL JURISDICTION) 15

DOYLE CJ, BARON DCJ AND GARDNER JS

8th OCTOBER 1974

SCZ Judgment No. 38 of 1974

### **Flynote**

**High Court - Commencement of action - When procedure by way of originating summons applies - High Court Rules, Order 6, rule 2.**

**High Court - Commencement of action by way of originating summons when procedure by way of writ applicable - Whether court has jurisdiction to make declarations.** 20

**Legal practitioners - Conducting cases - Swearing affidavits containing hearsay evidence - Effect - Undesirability.** 25

### **Headnote**

The appellant was the secretary of the Chipata Rural Council, and a specified officer as defined in the Local Government Officers Act. On the 28th August, 1972, the appellant was convicted on two counts of forgery and uttering, contrary to ss. 347 and 352 of the Penal Code. He was sentenced to six months' imprisonment with hard labour on each 30 count and the whole of those sentences was suspended. Prior to this he had been suspended from duty by the respondent.

On the 1st September, 1972, the Council met for the purpose of determining whether or not the appellant should be dismissed. The then chairman of the Council gave his view of the appellant's behaviour, 35 which was clearly very favourable to the appellant. A vote was taken and, by 34 votes to 1, the Council resolved to remove the appellant's suspension from duty and to reinstate him in the Council's service. Subsequently, there was correspondence with the Minister and on the 3rd May, 1973, the Council reaffirmed its resolution that the appellant 40 be reinstated. There was further correspondence with the Minister and on the 5th October, the Council, by resolution, reversed its previous resolutions and dismissed the appellant from his employment with effect from the date of his conviction.

1974 ZR p242

DOYLE CJ

The appellant brought this matter before the High Court by means of an originating summons seeking a declaration that he was still employed by the Council. The High Court refused to make the declaration sought by the appellant. 5

*Held:*

- (i) There is no case in the High Court where there is a choice between commencing an action by a writ of summons or by an originating summons. The procedure by way of an originating summons only applies to those matters referred to in Order 6, rule 2, of the 10 High Court Rules and to those matters which may be disposed of in chambers.
- (ii) Where any matter is brought to the High Court by means of an originating summons when it should have been commenced by writ, the court has no jurisdiction to make any declarations.
- (iii) The 15 increasing practice amongst lawyers conducting cases of introducing evidence by filing affidavits containing hearsay evidence is not merely ineffective but highly undesirable, particularly where the matters are contentious.

Legislation referred to:

High Court Rules, Order 6, rule 2, Order 30. 20

*N Kawanambula, Shamwana & Co.*, for the appellant.

*E Dumbutshena, Dumbutshena & Co.*, for the respondent.

### **Judgment**

**Doyle CJ:** This is an appeal against the refusal of the trial judge to make declarations to the effect that the plaintiff/appellant still is an 25 employee of the respondent/defendant council (hereinafter called the council).

The facts, in so far as it is necessary to refer to them in this judgment, are as follows.

The plaintiff was the secretary of the Council and a specified officer 30 as defined in the Local Government Officers Act. On the 28th August, 1972, the plaintiff was convicted on two counts of forgery and uttering, contrary to sections 347 and 352 of the Penal Code. He was sentenced to six months' imprisonment with hard labour on each count and the whole of those sentences was suspended. Prior to this he had been suspended 35 from duty by the respondent.

On the 1st September, 1972, the Council met for the purpose of determining whether or not the appellant should be dismissed. The then chairman of the Council gave his view of the appellant's behaviour, which was clearly very favourable to the appellant. He asked for other views, 40 but whether or not these were given is not clear. In any event a vote was taken and by thirty - four votes to one the Council resolved to remove the appellant's suspension from duty and to reinstate him in the Council's service. Subsequently there was correspondence with the Minister and on the 3rd May, 1973, the Council reaffirmed its resolution that the appellant

1974 ZR p243

DOYLE CJ

be reinstated. There was further correspondence with the Minister and on the 5th October, the Council, by resolution, reversed its previous resolutions and dismissed the appellant from his employment with effect from the date of his conviction.

The evidence in the case was entirely contained in affidavits made by 5 the respective advocates on each side. These affidavits were entirely hearsay. I would like to say that I have noticed an increasing practice amongst lawyers in introducing evidence in such a manner. In my view this is not merely ineffective, but is highly undesirable, particularly where the matters are contentious. In the instant case the affidavit made by the 10 advocate on behalf of the defendant made serious allegations against the chairman of the Council, and it was clearly improper for the defendant's advocate personally to make such hearsay allegations. Furthermore, as the deponents of affidavits may be cross - examined thereon, the position can arise in which each of the advocates would be cross - examining the 15 other. I hope that this practice will now cease.

In the result, the learned trial judge held that the earlier resolutions of the Council were made *mala fide*, a fact which was neither admitted nor proved. Accordingly he held that the Council had the power on the 5th of October, 1973, to dismiss the appellant by reason of his conviction. 20 He refused to make the declaration requested.

It is plain that the learned judge, having determined the matter by finding as a fact something which had neither been proved nor admitted, was in error and ordinarily the result would be that the appeal would succeed. However, for procedural reasons the appeal must in fact fail. 25 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 fully 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 30 writ; rule 3, the proceedings which must be begun by originating summons; rule 4, the proceedings which may be begun either by writ or 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, except as otherwise 35 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 commenced 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 40 choice between commencing an action by a writ of summons or by an originating summons. The procedure by way of an originating summons only applies to those matters referred to in Order 6, rule 2, and 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 45 was unable to show us where under the Order this matter could be begun by an originating summons. Paragraph (j) of rule 11 of Order 30 does refer to "such other matters as a Judge may think fit to dispose of in chambers."

1974 ZR p244

DOYLE CJ

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 5 action for a declaration is brought by writ.

It is clear that these proceedings have been misconceived. As the matter was not properly before him the judge had no jurisdiction to make the declarations requested even if he had been so disposed. The appeal must be dismissed. 10

**Judgment**

**Baron DCJ:** I agree.

**Judgment**

**Gardner JS:** I concur.

*Appeal dismissed*

1974 ZR p244