

H Msafi v The Peoples Trading Centre and Attorney General Civil Cause No. 1929 of 1996

Summary

Court:	High Court of Malawi
Registry:	Principal Registry
Bench:	Honourable Justice Chimasula Phiri
Cause Number:	Civil Cause No. 1929 of 1996
Date of Judgment:	February 12, 2002
Bar:	Mr. C. Mhango, Counsel for the Plaintiff Mr. T.C. Nyirenda, Counsel for the Defendants

The Applicant sought an order in the High Court, Principal Registry, to restore a civil action to the cause list following its dismissal for non-attendance. The action had commenced its trial on 10th November 2000, and after an adjournment due to a witness's absence on 12th January 2001, it was called again on 11th February 2002. Neither party nor their counsel attended, and the Court Clerk informed the judge that the parties were aware of the hearing date. The judge proceeded to dismiss the action for non-attendance, noting that it could be restored upon application. The Applicant's counsel returned from the United Kingdom in October 2002 and was informed of the dismissal, leading to the

present application. The First Defendant vehemently opposed the application, arguing that the dismissal should have been set aside under Order 35 Rule 2 of the *Rules of the Supreme Court (RSC)*, not restored under Order 35 Rule 1 *RSC*, and further contended that there was inordinate delay in bringing the application—almost a year—and that the counsel's absence for studies was not good reason.

The principal questions for the Court were whether the original order was a dismissal or a striking out amenable to restoration under Order 35 Rule 1 *RSC*, whether the application was unduly delayed, and whether restoration would prejudice the Defendants. The application was allowed. The Court held that the presiding judge, by indicating the dismissal was subject to an application for restoration, intended to strike out the action under Order 35 Rule 1 *RSC* (which deals with non-appearance of both parties) and not to abate the action, thereby distinguishing restoration from setting aside an order. The Court further found that no fault for non-attendance could be imputed to the Plaintiff or his lawyers, as there was no proof of service of the hearing notice, accepting the argument that the Court Clerk had likely misled the judge. Since the application was made soon after the Plaintiff's counsel became aware of the status of the matter, the Court held there was no inordinate delay. The Court reasoned that both parties came to court to have the dispute resolved on merit, and restoration, which would allow the continuation of the trial, would not prejudice the Defendants. The action was ordered to be restored to the cause list and remitted for continuation of the hearing before a different judge (Justice Kapanda). The Court made no order as to costs.