JUDICIARY

IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NUMBER 2159 OF 2007

BETWEEN:

COUNCIL OF UNIVERSITY OF MALAWI……………..APPLICANT

- AND -

CCASU & OTHERS……………………………………..RESPONDENT

CORAM: THE HONOURABLE JUSTICE E. B. TWEA
Mr Kanyenda, of the Counsel for the applicant
Miss Malinda, of the Counsel for the respondent
Miss Y. Phiri – Official Interpreter

R U L I N G

Twea, J

This was an application to restore the summons of the plaintiff to the list after it was struke off for default of attendance. The summons to restore was brought inter – parte; and was so heard.

The applicant filed an affidavit in support the application and skeletal arguments. The defendants did not.

The applicant adopted the affidavit and made submissions.

The defendant when called upon to be heard applied that the application be dismissed with costs. They argued that this court had no inherent power to restore an action to the list after dismissal. Secondly that the strike in issue ended last year therefore this application was academic and a waste of time. Lastly that there was no need to file an affidavit in opposition as the court cannot bar a party from being heard.

I adjourned the case for my ruling.

I must say that I was taken aback by counsel for the defendants arguments. Clearly, the power of the court to proceed in the absence of a party failing to attend is discretionary. This power is now regulated by Order 35/5 of the rules of Supreme Court. Where the absent party comes before the court before the order is perfected, the court has power to re – hear the summons. Lastly, the absent party may apply to have the matter restored to the list. The court, if satisfied that it is just to do so, will allow the case to be restored: Order 32 r 5/4.

This rule is complimented by Order 35/6 – which now regulates the Court power to set aside any order made ex –parte. Such an application can itself be brought ex – parte. The Court will again, be guided by the requirement to do justice. I therefore find no merit in the defendant argument that this court has no jurisdiction to restore a summons.

The second joint was that since the strike was called off this order is superfluous. I examined the record. The originating summons addressed legal issue on when the defendants can strike and the intended or on going strike. Further there is a court order which is self – explanatory. That the

injunction shall bind the parties until the court determines when it would be lawful to strike or if the court orders otherwise. The Court order must be obeyed. Since the order addressed the permanent issue in dispute and the transient issue of the strike, it cannot now be said to be superfluous because the transient issue has ended. It would be legal short – sightedness to ignore the permanent issues that need to be determined. I therefore find no merit in the defendant argument that the extension of the order would be academic.

Lastly, I agree that the court would not ordinarily bar a party from being heard. However, the rules of foreclosure require a party to disclose the issues it wishes to raise so that the other party and the court are aware of what is in dispute. This power, again, is, discretionary and court would be guided by the justice of the matter.

In the final analysis, I find that the objections raised by the defendants are misdirected and I overrule them. I grant the application to restore the summons to the list.

I have considered the question of costs. Ordinarily this application could have been brought ex – parte. Since it was brought inter – parte, it would be fair to allow the defendants cost. However, I noted with dismay that the defendants brought arguments which are totally unjustified thereby causing the case to drag, and requiring the court to make a reasoned ruling. I think the best course is not to penalise any of the party with costs. I order that each party should bear its own costs.

Pronounced in Chambers this 24th day of January, 2008 at Blantyre.

E. B. Twea
JUDGE