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IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 290 OF 1988

BETWEEN:

VICTORIA GONDWE (MRS)...............................PLAINTIFF

- and -

THE ATTORNEY GENERAL...............................DEFENDANT

CORAM: **MWAUNGULU, REGISTRAR**

For the Plaintiff, T C Nyirenda
For the Defendant, Mbendera

RULING

When I taxed the plaintiff's bill, the item on brief fee, together with other two items on the bill which were subsequently agreed between the parties, were reserved. The defendant wants the brief fee to be disallowed altogether. The plaintiff wants them allowed, chiefly on two grounds. First, because, he contends, the case had reached a stage where Counsel's advice could be sought on the evidence. Secondly, because, he contends, this is a situation where the Court has to decide whether there was a premature delivery of brief. It is argued on this basis that, on the totality of the case, brief fee should be ordered. The decision for this Court is really whether brief fee should be paid. I have read the decisions relied on by the plaintiff and those relied on by the defendant. Counsel for the defendant, suspicious of the decision of the Supreme Court of appeal in **Pillane v. Commercial Union Assurance Co. Ltd., MSCA Civil Appeal No. 13 of 1986**, thinks that the brief fee should not be paid. From the practice of the courts from as far back as 1860, brief fee in this matter should be disallowed. I proceed to give reasons.

On the 27th of May 1988 the plaintiff, claiming under Part I of the Statute Laws (Miscellaneous Provisions) Act, issued a writ for loss of dependency for herself, and on behalf of four children and parents of her husband who died tragically on the 28th of November 1987 when a driver of the Ministry of Health run into him at Mzimba Boma. On the 20th of May 1988 the defendant filed a notice of intention to defend. On 13th June 1988 defence was served. On 22nd July 1988 the plaintiff wanted the defence dismissed and an interlocutory judgment entered on the ground that the defence did not disclose a reasonable defence or was frivolous, vexatious and an abuse of the process of the

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Court. The application was dismissed by Mr Deputy Registrar Chipeta, on the 30th of May 1990. The matter did not proceed further, in that the plaintiff did not take out a summons for directions. There was a reason. The parties commenced negotiations which culminated into a settlement as evidenced by an order for approval of settlement in which K130,000.00 was ordered. A bill of costs taken includes a claim for brief fee, which is assailed by the defendant.

The resolution of the problem in this case turns out on what brief fee is paid for. The situation in this country is compounded by the fact that the functions of a solicitor and a barrister, as is vogue in the UK, are fused here. Consequently, a legal practioner is entitled to all costs that would be given to a solicitor and all fees that would be given to Counsel in the UK. This dichotomy does not create any problems as to costs in our country, just as it doesn't in the UK, as long as it is appreciated at what stage these costs should be made. Precisely, brief fee is paid to Counsel. What I understand from the authorities and practice in the UK is that brief fee is remuneration for Counsel for preparation for trial and the first day of the trial. The subsequent time in court is catered for by refreshers. Briefly then, brief fee is paid for the work in the preparation and appearance at the date of trial. This can be seen from the judgment of Millett, J., in **CBS Songs Ltd. and Others v. Amstrad Consumer Electronic PLC and Another, No. 2 (1988) 1 WLR 364, 368:**

> "In considering the amount of the brief fee it is of great importance that too much attention should not be paid by the taxing master to the length of the hearing. The brief fee is payment not only for the first day of the hearing, but also for the time and work of counsel in preparing for the hearing. But part of that time is occupied by reducing the argument to note form and preparing the skeleton argument. In my judgment, once it is accepted that that is part of what the brief fee is paid for, it follows not only that it should not be charged for separately, but also that on taxation of the brief fee, consideration must be given to the time and work involved in preparing a skeleton argument and too much attention must not be paid to the actual length of the hearing."

If brief fee is paid out for preparation of the trial and first apperance at the trial, it follows a fortiori that brief fee would not be paid in this case. Mr Nyirenda, however, thinks otherwise.

The first point taken by Mr Nyirenda is that brief fee would be payable in this case, in that, albeit the matter did not proceed to summons for directions, the matter reached a stage where a solicitor could have sought

Counsel's advice on the evidence. Admittedly, as soon as the pleadings were closed, the plaintiff, much like in the UK, could procure counsel's advice on evidence generally. **Lows v. Comyns (1902), Times, February 14.** In principle, counsel would be entitled to a fee for such work. But this is not brief fee. It could be charged for separately. This advice on evidence is not necessarily preparation for trial. In any event, it appears to me that it must be shown that there was such a request. In the UK it is easy to see that happening. In Malawi that can only be notional, because the solicitor will have to appear as counsel. So counsel advises himself generally on the evidence. In **Heiffernan v. Vaughan (1884), 1 LT.38**, it was held that advice on evidence could be obtained through a conference between counsel and the solicitor or the witnesses, but the normal and better method was to obtain a written opinion. I would think in our country it may be difficult to require that there should be such a written opinion, but I would think that, for purposes of clarity, where counsel is going to ask for fees on advice on evidence, he must satisfy the court that a written opinion or such a conference occurred between the witnesses and counsel. No doubt, a fee would be paid for such work but, in my view, it is not brief fee. This leads me to Mr Nyirenda's second argument.

Mr Nyirenda relied on the decision in **Harrison v. Leutner (1881), 16 Ch.D**, where the taxing master to an inquiry by the court replied as follows, and the court adopted that as a practice:

> "We have always acted on the principle that the costs of all work in preparating briefing or otherwise relating to affidavits or pleadings, reasonably and totally and not prematurely done, down to the time of any notice which stops the work, are allowable, and that the taxing master, having regard to the circumstances of each case, must decide whether the work was reasonable and proper and that the time for doing it had arrived."

I think that this bill proceeded on the principles as laid down, for the legal practitioner has been awarded for all the work done prior to the settlement. The award has been on the basis that all the work of preparing the affidavit, the pleadings, etc. by the plaintiff have been included. These remunerations, however, are not brief fee.

Brief fee is paid in anticipation of the actual trial. It will be seen generally that as long as counsel prepares for the actual trial, he will be entitled to brief fee even if the suit is not contested at the hearing. **Pelster v. Pelster and Samuel (1936), 3 All E.R. 783.** Moreover, once a date of trial has been fixed, and prior to hearing there is a settlement, counsel is, nevetheless, entitled to brief fee albeit less than that agreed between solicitor and counsel. **Gazzaniga v. Society of Graphical**

and Allied Trades (1973), UK (unreported). Both of these cases turn out on the fact that a date for trial was set. In my opinion, counsel cannot start preparing for trial unless a notice of trial has been given. Once a notice of trial has been given and counsel has started preparing for the trial, he is entitled to brief fee, whatever happens thereafter. The problem with this conclusion is the interpretation of the decision of the Supreme Court in **Pillane v. Commercial Union Assurance Co. Ltd.** At page 3 of that decision, Banda, J.A., as he then was, in delivering the majority opinion, said:

> "It is our considered view that under rule 3(4), Government Notice No. 86 of 1962, an instruction fee is payale to a legal practitioner where he acts agent and that means, in our judgment, the amount of preparatory work which a solicitor in England would be doing before a case is ready for trial. Simiarly, it is also our view that a legal practitioner, under rule 3(4), will only be entitled to a brief fee where he appears as counsel and that means when a legal practitioner is appearing after a case is ready for trial."

Mr Mbendera argued that this has been interpreted to mean, generally, that a stage when a bundle of pleadings has been lodged with the court. This would only be the case if judicial statements were to be subjected to the same rigorous and tenacious rules of interpretation ascribed to statutes. For, in practice, under the Rules of the Supreme Court, the expression "ready for trial" denotes the stage when the case is being set down for trial, namely, when the bundle of pleadings is lodged with the court. That, however, is just a stage in the time-table of events which, much like a certificate of readiness in the District Registry or Registrar's certificate under the Matrimonial Cause (Rules) denotes that all the pleadings or documents are through and the parties are ready for trial should a date be appointed. Judicial statements, however, cannot be interpreted that rigorously. In my opinion the statement of the Court of Appeal can only mean whatthe practice has always been. The practice has always been that fees for preparation for trial are not payable until there has been a notice of trial by the court. The rule, as we shall see, entails some hardhsip, but courts have taken a policy stand in order to create uniformity. The starting point is the case of **Cooper v. Boles (1860), 5 H & N 188.** Baron Martin said:

> "The present case falls within the authority of **Doe D Postlethwaite v. Neale (2 M & W 732)** and **Revis v. Hatton (8 DOwl 164).** The rule there laid down, in the great majority of cases, effects substantial justice. Here, no doubt, it caused some hardship; but we cannot depart from a rule which has a salutary operation in the great majority of cases because in a particular case it causes hardship. It was argued

> that there is a distinction between the costs of a draft brief and copies, and instructions for brief. The instructions for brief are preparations for trial, and the rule applies to all costs of preparing for trial. No such costs are allowed if no notice of trial has been given."

This decision was followed in **Freeman v. Springham, 14 C.B. (N.S.) 197.** At page 201, Erle, C.J. said:

> "There has been a known rule of practice for a number of years that neither party has a right to prepare for trial, so as to charge the expense of such preparation upon his opponent until issue has been joined and notice of trial given."

If a party prepares for trial without such a notice of trial, he may be entitled to his costs. These will be charged against his client. He cannot claim them from the opposing party. At page 202 Justice Willes said:

> "I have always understood the rule to be that, if the plaintiff chooses to go on preparing for trial before issue joined and notice of trial given, he may do so, but he does it at the risk of the costs not being allowed if it should turn out that there is no issue. Where this is **bona fide** done, and necessary, the attorney will have a very good claim against his client but not against his opponent. Experience shews that justice is best done in the great majority of cases by not allowing the costs of preparing for trial until after the notice of trial has actually been given. If it were allowed, it would encourage parties to incur, in many cases, what might turn out to be unnecessary expenditure."

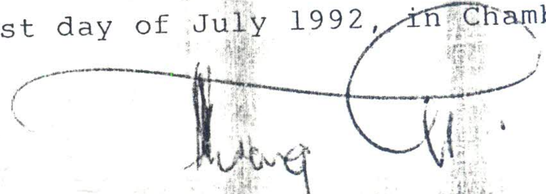
This was underlined my Willes, J., again in **Curtis v. Platt, 16 C.B. (N.S. 465, 468, 469):**

> "I take it as a general rule that no principle can be more clear than that that a defeated litigant ought to bear the expense which the opposite party has been put to. It is necessary, however, that that rule should be guarded by reasonable limitations for the purposes of preventing the successful party from imposing exaggerated expenses upon his adversary. Consequently, the courts have from time to time been called upon to lay down the limits beyond which these expenses shall not be allowed for the purpose of preventing extravagance, and extortion and to discourage suitors from indulging in the luxury of expenses which are not really necessary, but are only incurred with a view to allay the party's anxiety and purely for his own personal security and satisfaction. Take an extreme case:- A cause at the assizes involves interests of large amount, or

questions of great importance. A learned counsel of pre-eminently distinguished talent is taken down "special" by one of the litigants, to whom is given by way of honorarium, a much larger sum than would have been paid to one practising on the particular circuit, but which may, in one sense, be said not to be an unreasonable sum. There are cases which would justify such a course: But the universal practice is to disallow such a fee. It is an expense incurred by the party for his own satisfaction and for his own purposes; and he must bear it himself. So with respect to costs of preparing for trial before notice of trial has been given. The vast majority of actions which are commenced in the superior courts never come to trial at all. Of 10,000 commenced, probably about 250 are set down for trial, of which even some are never tried. This being the undoubted fact, it is obvious that if the parties were, in the majority of cases, allowed to incur the expense of preparing for trial when there is little or no probability of the cause coming to trial, a great deal of useless expense would be incurred, and much injustice and oppression would be perpetrated. In order to avoid that, it became necessary for the courts to lay down some general rule as to the time when it might be considered reasonable that the expense of preparing for trial should be incurred. It would obviously be impossible to fix a period which would suit every case. But the practice which we find laid down, viz. that no costs of preparing for trial shall in any case be allowed before notice of trial has been given seems to mete out the true measure of justice in the great majority of cases."

In my opinion, the decision of the Supreme Court can only mean the established practice of considerable antiquity: that cost for preparation for trial, brief fee, are only payable if a date of hearing has been set down and the parties notified. Only then would counsel in the UK be entitled to brief fee. In this particular case, the matter did not even go for summons for directions. There was still more to be done even before the case would actually be set down: discovery and inspection. Even after the case had been set down, a request for the date of hearing had to be made. The Registrar would then set down a case for trial. It would have been premature for counsel, even of the most enthusiastic kind, to start preparing for trial at this stage. I, therefore, disallow brief fee in this case.

MADE this 1st day of July 1992, in Chambers.



D F Mwaungulu
REGISTRAR