



**REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY**
Constitutional Reference Number 3 of 2019

**THE STATE
VERSUS**

**MALAWI COMMUNICATION REGULATORY AUTHORITY.....DEFENDANT
AND**

THE REGISTERED TRUSTEES OF MEDIA INSTITUTE

OF SOUTHERN AFRICA.....1ST APPLICANT

TIMES RADIO STATION LIMITED.....2ND APPLICANT

ZODIAK BROADCASTING STATION LIMITED.....3RD APPLICANT

CAPITAL RADIO (MALAWI) LIMITED.....4TH APPLICANT

CORAM: C MANDALA:

ASSISTANT REGISTRAR

J Suzi-Banda & C Makoko:

Counsel for Applicants of Messrs JB Suzi & Company

M Mmeta & Kadam'manja:

Counsel for the Defendants of M&M Global Law Consultants

C Zude:

Court Clerk

ASSESSMENT OF COSTS

C MANDALA, AR:

INTRODUCTION AND BACKGROUND

This is an order for assessment of costs pursuant to a Judgment made by the Honorable Judges on 29th May 2020. The Applicants filed a Bill of Costs on 12th August 2020 proposing a total sum of K169,414,840.00 to be awarded as costs. Counsel for the Defendant filed objections to the Bill of Taxation and laid out numerous heads upon which they were objecting. The hearing on assessment of costs was conducted on 8th October 2020 and this ruling stems from that hearing.

THE LAW

One of the powers and functions of registrars is to assess costs. Order 25 rule 1(o) of the *Courts (High Court) (Civil Procedure) Rules* of 2017. Costs are to be assessed on a standard or indemnity basis and the court will not allow costs that are unreasonably in their incurrence or amount. Order 31 rule 4 of the *Courts (High Court) (Civil Procedure) Rules* of 2017. In assessing costs, according to Order 31 rule of *the Courts (High Court) (Civil Procedure) Rules* of 2017, the Court will consider the following circumstances in assessing costs:

- 5.—(1) *The Court shall have regard to all the circumstances in deciding whether costs were*
- (a) *if it is assessing costs on the standard basis—*
 - (i) *proportionately and reasonably incurred; or*
 - (ii) *were proportionate and reasonable in amount, or*
 - (b) *if it is assessing costs on the indemnity basis—*
 - (i) *unreasonably incurred; or*
 - (ii) *unreasonable in amount.*

Additionally,

- (3) *The Court shall also have regard to__*
- (a) *the conduct of all the parties, including in particular__*
 - (i) *conduct before, as well as during, the proceedings; and*
 - (ii) *the efforts made, if any, before and during the proceedings in order to try to resolve the dispute;*
 - (b) *the amount or value of any money or property involved;*
 - (c) *the importance of the matter to all the parties;*
 - (d) *the particular complexity of the matter or the difficulty or novelty of the questions raised;*
 - (e) *the skill, effort, specialized knowledge and responsibility involved;*
 - (f) *the time spent on the case; and*
 - (g) *the place where and the circumstances in which work or any part of it was done.*

ISSUES

The issues raised for the Court's Determination are:

1. The Number of Legal Practitioners to be Awarded Costs
2. Whether in-house Counsel ought to be awarded Party and Party Costs
3. Whether the Bill ought to include the proceedings on Judicial Review

DISCUSSION

1. Number of Legal Practitioners

Counsel for the Defendant argued that there was no appearance by Counsel Chakhala and a very minimal appearance by Counsel Malera. Counsel submitted that only one lawyer be awarded costs. In response Counsel for the Applicants stated that Mr Chakhala attended all the hearings apart from the day of the hearing of the Constitutional Challenge. He also prepared sworn statement from himself and Mr Leonard Chikadya. Additionally, Mr Malera was present at the scheduling conference and he prepared sworn statements for the former CEO of Zodiak Mr Kazako. Counsel Mmeta responded by pointing out that Mr Chakhala might not be entitled to indemnity for party and party costs because he is in-house Counsel for Times Group. The Malawi Law Society issued directions that in-house Counsel are not entitled to receive party and party costs.

The Registrar has the discretion to determine the number of Counsel to claim costs. The Registrar, in ***Dr Saulos Klaus Chilima & Dr Lazarus McCarthy Chakwera v Professor Arthur Peter Mutharika & Electoral Commission*** Constitutional Reference Number 1 of 2019, limited the number of Counsel representing each party to 5. In making her determination, she considered 'the complexity of the matter, the importance of the case to the nation and factors raised by Counsel'. Some other issues raised by Counsel were that, 'it was one of the most important cases in the history of Malawi, and a good number of lawyers was needed to scrutinise the volume of documents in the case.' Although all this was true, the Registrar noted that the receiving party should not incur unnecessary expenses under the guise of national importance and the historic nature of the case.

There are four applicants in this matter, and each one of them is entitled to legal representation. Having three lawyers acting under one legal house was fair in the circumstances. The number of lawyers will be maintained as proposed.

2. Whether in-house Counsel ought to be awarded Costs

Counsel for the Defendant argued that Counsel MacMillan Chakhala is in-house Counsel for the 2nd Applicant – Times Radio Limited and that receiving party and party costs as in-house Counsel is illegal. Counsel Mmeta cited a Public Notice issued by the Malawi Law Society on 22nd June 2020. The Public

Notice is titled ‘Restrictions to the Practice of Law in Malawi.’ The relevant part of the Notice is paragraph 4.3 that provides restrictions for in-house counsel.

4.3 MEMBERS of the legal profession employed in corporations are not independent of their employing corporations unless the member operates a private law practice independent of the employer which is subject to the regulation by the Malawi Law Society. The scope of in-house legal work within any corporations is therefore to be limited only to such work as falls within the exceptions such as appearing in person on behalf of the corporation (section 31(5), engrossing of instruments (section 31(3)(b), drawing up letters or powers of attorney, transfer of stock and demand letters and processing passport applications or undefended trademark and patents application (section 31(4). All other work including drawing up any instrument relating to real or personal property (section 31(1)(b)) and all work to which the Scale Charges applies (section 31(1)(c)) cannot be handled by any corporation or any of their employees as such even if that employee is a person entitled to practice law.

The Malawi Law Society (the Society) is a statutorily established body corporate that has six objects (section 63 and 64 of the *Legal Education and Legal Practitioners Act*, namely:

- (a) Promote the highest professional standards among legal practitioners in legal practice;
- (b) Enhance credibility in the delivery of legal services;
- (c) Promote integrity, competence and transparency of professional services in legal practice;
- (d) Protect matters of public interest touching, ancillary or incidental to the law;
- (e) Promote research towards the development of the law;
- (f) Regulate the setting up, management and dissolution of legal practice; and
- (g) Do all other things that are incidental or conducive to the attainment of the foregoing objects or any of them.

These objects also allow the Society to make rules ‘prescribing anything...and generally for the better carrying out of the purposes of this part and the objects for which the Society is established.’ – Section 73 of the *Legal Education and Legal Practitioners Act*. Based on these prescriptions, the Society issued the Public Notice of 22nd June 2020 pursuant to section 31 of the *Legal Education and Legal Practitioners Act* that provides for restrictions on practice.

My understanding of paragraph 4.3 of the Public Notice is as follows:

- 1) That legal practitioners employed as in-house Counsel are restricted to the duties assigned to them by their corporation for which remuneration is provided by the said corporation. The pertinent part of the paragraph reads - ‘
MEMBERS of the legal profession employed in corporations are not independent of their employing corporations unless the member operates a private law practice independent of the employer which is subject to the regulation by the Malawi Law Society.’

The only exception to this provision is where the legal practitioner runs a private law practice separate from the employer. In the present matter, Counsel MacMillan Chakhala, though employed by Times Radio Station Limited (Times), was representing Times under the private law practice of JB Suzi & Company. In which case, he ought to be indemnified for party and party costs since that is the exception stated in the public notice.

- 2) That in-house Counsel may appear in person on behalf of the corporation under which they are employed. Counsel MacMillan Chakhala is employed by Times as in-house Counsel and was on the legal team in this capacity. Counsel Banda for the receiving party argued that despite the fact that the different applicants sourced their own Counsel to represent them, for example, Counsel Malera received instructions from Zodiak Broadcasting Station Limited, they all came together and worked as a team towards the conclusion of the matter.

The scope of in-house legal work within any corporations is therefore to be limited only to such work as falls within the exceptions such as appearing in person on behalf of the corporation (section 31(5), engrossing of instruments (section 31(3)(b), drawing up letters or powers of attorney, transfer of stock and demand letters and processing passport applications or undefended trademark and patents application (section 31(4). (emphasis provided by Court)

The distinction in this matter is that Counsel Banda and Counsel Malera both operate private law practices and were sourced as external Counsel while Counsel Chakhala as in-house Counsel was representing Times in that capacity. Should he then be indemnified with party and party costs for duties he is required to carry out as in-house Counsel, or does the fact that he was working under the private law practice of JB Suzi and Company allow him to be indemnified with party and party costs?

It should be noted, however, that the Public Notice refers to section 31(5) of the ***Legal Education and Legal Practitioners Act*** which actually speaks of legal practitioners appearing on their own behalf. It states:

(5) Nothing in this section shall be deemed to limit the right of any person to appear on his own behalf before any court in proceedings to which he is a party.’

My understanding of this is that in-house Counsel can therefore not represent persons/entities other than their corporation or themselves. The idea is therefore that in-house cannot represent other person/entities if they do not run a private legal practice.

3) In relation to 2), the Society gives directions as follows:

All other work including drawing up any instrument relating to real or personal property (section 31(1)(b)) and all work to which the Scale Charges applies (section 31(1)(c)) cannot be handled by any corporation or any of their employees as such even if that employee is a person entitled to practice law. (emphasis provided by Court).

The position of the Society seems to be that in-house Counsel ought not to engage in work where the Scale charges could apply. Scale Charges are payable to individual legal practitioners and not to legal houses, therefore, any work that attracts Scale Charges cannot be engaged in by ‘a corporation or any of their employees as such even if that employee is a person entitled to practice law.’ In as much as in-house Counsel may appear in person on behalf of the corporation, they may not engage in work that attracts the Scale Charges. It appears the Society was encouraging the outsourcing of legal services for the purpose of litigation so as to not conflate the roles of in-house Counsel and Counsel operating a/ employed in private law practice.

The Society therefore allows in-house Counsel to appear in person in three instances: 1) where Counsel operates a private law practice independent of the employer, 2) on behalf of the corporation by which he is employed, and 3) on his own behalf where he is a party to the proceedings. With these considerations, this Court finds that Counsel Chakhala in his capacity as in-house Counsel for the Times Radio Station Limited is not entitled to party and party costs. Counsel Chakhala will therefore be awarded zero costs for his role in these proceedings.

3. *Whether the Bill ought to include the proceedings on Judicial Review*

Order 19 of the ***Courts (High Court) (Civil Procedure) Rules*** of 2017 deals with Matters Under the Constitution and prescribes that matters under the constitution be commenced by certification of the Honorable the Chief Justice, by summons under Order 5, by a referral by the President and by referral by any other court.

In this case, the Applicants wrote to the Honourable the Chief Justice to certify the Judicial Review Matter as a constitutional matter pursuant to the section 9 (3) of the Courts Act.

Section 9(2) and (3) of the *Courts Act* states:

(2) Every proceeding in the High Court and all business arising thereout, if it expressly and substantively relates to, or concerns the interpretation or application of the provisions of the Constitution, shall be heard and disposed of by or before not less than three judges.

(3) A certification by the Chief Justice that a proceeding is one which comes within the ambit of subsection (2) shall be conclusive evidence of that fact.

The Chief Justice certified the matter as Constitutional Matter by returning Form 19 as prescribed by Order 19 rule 2.

This matter was commenced as a Judicial Review application as prescribed by Order 19, Part III of the *Courts (High Court) (Civil Procedure) Rules* of 2017. Counsel for the Paying Party argued that there was no order before the court that condemned the Paying Party to pay costs for the Judicial Review Matter. In response, Counsel for the Receiving Party argued that the panel of judges sitting on the Constitutional Referral dealt with everything that was before the single judge as a Judicial Review matter. There were no additional documents filed as the panel of judges used the sworn statements and skeleton arguments that were before the single judge on Judicial Review. Counsel explained that when the Judicial Review matter was commenced, they were not aware that rules had been promulgated by the Minister that affected the exercise of fundamental rights by their Clients. The application for certification as a constitutional matter to the Chief Justice came about after the matter had already been commenced.

Looking at these matters, this Court holds the view that the award for costs encompassed indemnity of costs for the Judicial Review Proceedings. The Panel of Judges did not remit the matter to the original court for a final decision. The final decision was made by the panel of three judges which suggests that all issues that arose in the Judicial Review were aptly dealt with and there was no need for the reversion. This court will therefore proceed to assess costs for both the Judicial Review Proceedings and the Constitutional Referral.

BILL OF COSTS AS TAXED

Two Legal Practitioners allowed: Mr Ian Malera and Mr John Suzi-Banda. Both are legal practitioners of more than 10 years standing at the bar, whose approved hourly rate is MWK40, 000.00.

SUMMARY OF BILL¹

<u>DETAILS</u>	<u>TAXED AMOUNT (MWK)</u>
Part A	
• Documents Read	946,666.65
• Court Documents Read	1,906,665.00
• Court Documents Prepared	3,519,999.99
• Books Read (1 hour per book)	1,520,000.00
• Cases Read (50 allowed at 1 hour per case)	4,000,000.00

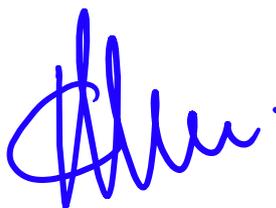
¹ Full Bill as taxed attached.

• Statutes Read (1 hour per statute)	1,920,000.00
• Conferences (11 allowed, 3 hours per conference)	2,640,000.00
• Court Attendances	4,200,000.00
Total Part A	20,653,331.60
Part B - Care and Conduct at 100%	20,653,331.60
Instruction Fee – K10,000,00.00 per lawyers	20,000,000.00
Disbursements	1,000,000.00
Preparation	480,000.00
Professional Fees	61,786,663.30
Value Added Tax (16.5%)	10,194,799.40.40
MLS Levy (1%)	617,866.63
Add Disbursements	1,000,000.00
TOTAL PAYABLE	73,599,329.30

DISPOSAL

The Bill of Costs is hereby taxed at **MWK73,599,329.30 (seventy-three million, five hundred ninety-nine thousand, three hundred- and twenty-nine-kwacha, thirty tambala.**

Ordered in Chambers on the 26th day of November 2020 at the High Court, Lilongwe.



CM Mandala

ASSISTANT REGISTRAR

FULL BILL OF COSTS AS TAXED BY COURT ON 26TH NOVEMBER 2020

Details	Taxed Amount (MWK)
PART A	
Preparation	
Documents read	
(i) Letter from NAMISA to the Defendant dated 7 th June, 2019 (10 minutes)	K13, 333. 33
(ii) Letter from NAMISA to the Defendant dated 24 th June, 2019 (10 minutes)	K 13,333. 33
(iii) Private national broadcasting licence for Times Radio Station (2 hours)	K160,000.00
(iv) Communications (Broadcasting) Regulations 2019 (6 hrs)	K480,000.00
(v) Letter from the Defendant to Times dated 25 th July, 2019 (10 minutes)	K13,333.33
(vi) Letter from Times to the Defendant dated 1 st August, 2019 (10 minutes)	K13,333.33
(vii) Report on the analysis of phone-in programmes issued by the Defendant (1hr)	K80,000.00
(viii) Comments and proposals on broadcasting regulations (2hrs)	K160,000.00
(ix) Defendant's ban dated 7 th June, 2019 (10 minutes)	K13,333.33
SUB-TOTAL	K946,666.65
Court Documents Read	
(i) Dan Chiwoni's Sworn Statement in Opposition to Judicial Review (1hr)	K80,000.00
(ii) Notice of Appointment of Legal Practitioners filed by M & M Global (10 minutes)	K13,333.33
(iii) Respondent's Skeleton Arguments in Opposition to Application for Leave for Judicial Review (2hrs)	K160,000.00
(iv) Notice of Scheduling Conference 27 th November, 2019 (10 minutes)	K13,333.33
(v) Notice of Direction 31 st October, 2019 (10 minutes)	K13,333.33
(vi) Respondent's Skeleton Arguments in Opposition to Application for Interlocutory Injunction (2hrs) (vii) Justice Chinangwa's Ruling granting Interim Injunction dated 25 th September, 2019 (1hr)	K160,000.00
(viii) The Constitutional Court's Judgement of 29 th May, 2020 (4hrs)	K80,000.00 K320,000.00
(ix) The Defendant's Defence dated (1hr)	K80,000.00
(x)Defendant's Skeleton Arguments Opposing the Constitutional challenge (6hrs)	K480,000.00
(xi) Defendant's final submissions (6hrs)	K480,000.00
(xii) Innocent Kadammanja's Sworn Statement verifying facts pleaded in Defence (10 minutes)	K13,333.33 K13,333.33
(xiii) Scheduling Conference Order (10 minutes)	
SUB-TOTAL	K1,906,665
Court Documents Prepared	
(i)Notice of Inter-parte Application for Interlocutory Injunction (1hr)	K80,000.00
(ii) Sworn Statement of Tereza Ndanga in Support of Application for Leave for Judicial Review and	K480,000.00

Consequential Order for Injunction dated 30 th August, 2019 (6 hrs)	K160,000.00
(iii) Sworn Statement of of Gospel Kazako in Support of Application for Leave for Judicial Review and Consequential Order for Injunction dated 29 th August, 2019 (2 hrs)	K320,000.00
(iv) Sworn Statement of Leonard Chikadya in Support of Application for Leave for Judicial Review and Consequential Order for Injunction dated 28 th August, 2019 (4 hrs)	K320,000.00
(v) Form 86A (4hrs)	K40,000.00
(vi) Letter to the Chief Justice dated 11 th October, 2019 (1/2hrs)	480,000
(vii) Statement of Case (6hrs)	13,333.33
(viii) Certificate of Urgency (10 minutes)	K1,600,000.00
(ix) Skeleton Arguments in Support of Constitutional Challenge (20hrs)	K480,000.00
(x) Final Submissions in Support of Constitutional Challenge (6hrs)	K13,333.33
(xi) Notice of reliance of sworn statements (10 minutes)	K13,333.33
(xii) Notice to cross-examine (10 minutes)	
SUB-TOTAL	K3,519,999.99
Books Read (1 hour each)	
i) Bullen & Leake & Jacob's Precedents of Pleadings (12 th ed.) (1hrs)	K80,000.00
ii) Chitty & Jacobs Queen's Bench Forms (21 st ed.) (1hrs)	K80,000.00
(iii) Jacob's Pleading and Practice (1hrs)	
(iv) Odger's Principles of Pleading and Practice in Actions in the High Court of Justice (22 nd ed) (1hrs)	K80,000.00
(v) Fordam, M, Judicial Review Handbook, 5 th edn, Hart (1hrs)	K80,000.00
(vi) Bibby, P, Effective Use of Judicial Review, Tolley (1hrs)	K80,000.00
(vii) Benion Statutory Interpretation 3rd Edition (1hrs)	K80,000.00
(viii) Phipson on Evidence (16th Edition) (1hrs)	K80,000.00
(ix) Wade and Forsyth's Administrative Law 7 Edition (1hrs)	K80,000.00
(x) Chirwa, D, Human Rights Under the Malawian Constitution, Juta Law (1hrs)	K80,000.00
(xi) Alexandre Kiss, Commentary by the Rapporteur on the Limitation Provisions' (1985) 7(1) Human Rights Quarterly 15 (1hrs)	K80,000.00
(xii) de Smith, Woolf and Jowell, Judicial Review of Administrative Action, 5 th Edn., Sweet & Maxwell (1hrs)	K80,000.00
(xiii) James Madison, <u>The Federalist</u> , ed. Benjamin F. Wright, no. 47 (1hrs)	K80,000.00
(xiv) Ian Currie and Johan De Waal (2013), The Bill of Rights Handbook (Juta & Co, Cape Town), 6 th ed. (1hrs)	K80,000.00
(xv) Nunziato, DC, How Not to Censor: Procedural First Amendment Values and Internet Censorship Worldwide, GW Scholarly Commons, 2011 (1hrs)	K80,000.00
	K80,000.00

(xvi) Tambini, D et al, ‘The Privatisation of Censorship: Self-regulation and Freedom of Expression’, LSE 2011, (1hrs)	K80,000.00
(xvii) Silver DA, ‘National Security and the Press: the Government’s Ability to Prosecute Journalists for the Possession or Publication of National Security Information’, Taylor & Francis Group, 2008 (1hrs)	K80,000.00
(xviii) Centre for Law and Democracy, ‘Freedom of Expression and the Regulation of Television to Protect Children: Comparative Study of Brazil and Other Countries’ (1hrs)	K80,000.00
(xix) Supreme Court Practice Volume 1 1999 edition (1hrs)	K1,520,000.00
<u>SUB-TOTAL</u>	
Case Authorities Read – 50 allowed at 1 hour each	K4,000,000.00
Statutes Read	
(i) Constitution of the Republic of Malawi (1hrs)	K80,000.00
(ii) Communications Act 2018 (1hrs)	K80,000.00
(iii) Communications Act 1998 (1hrs)	K80,000.00
(iv) 2 nd Schedule to the Communications Act – Regulation of Content Services (1hrs)	K80,000.00
(v) International Covenant on Civil and Political Rights (1hrs)	K80,000.00
(vi) European Court of Human Rights (1hrs)	K80,000.00
(vii) Constitution of the Republic of South Africa (1hrs)	K80,000.00
(viii) Constitution of the United States of America (1hrs)	K80,000.00
(ix) Corrupt Practices Act (1hr)	K80,000.00
(x) Standing Orders of Parliament 2013 (1hrs)	K80,000.00
(xi) Courts (High Court) Civil Procedure Rules 2017 (1hrs)	K80,000.00
(xii) Supreme Court Rules 1999 (1hrs)	
<u>SUB-TOTAL</u>	K1,920,000.00
Conferences (11 allowed at 3 hours per conference)	K2,640,000.00
Court Attendances	

Interlocutory Attendances	
(i) Attending Court on 2 nd September, 2019 for hearing of ex-parte application for interim injunction Hearing time (1.5hrs)	K120,000.00 K640,000.00 K80,000.00
(a) Traveling time (8hrs)	
(b) Waiting time (1hrs)	
(ii) Attending Court on 16 th September, 2019 for hearing of inter-parte application for interim injunction and leave for judicial review	K120,000.00 K640,000.00 K80,000.00
(a) Hearing time (1.5hrs)	
(b) Travelling times (8hrs)	
(c) Waiting time (1hrs)	
(iii) Attending Court on 31 st October, 2019 for Directions	K120,000.00 K640,000.00 K80,000.00
(a) Hearing time (1.5 hrs)	
(b) Traveling time (8 hrs)	
(c) Waiting time (1hrs)	
(iv) Attending Court on 27 th November, 2019 for Scheduling Conference	
(a) Hearing time (1.5hrs)	K120,000.00
(b) Traveling time (8hrs)	K640,000.00
(c) Waiting time (1hrs)	K80,000.00
(v) Attending Court on 8 th January, 2020 hearing/trial	
(a) Hearing time (1.5hrs)	K120,000.00
(b) Traveling time (8hrs)	K640,000.00
(c) Waiting time (1hrs)	K80,000.00
SUB-TOTAL	4,200,000.00
TOTAL PART A	20,653,331.60
PART B	
General Care and Conduct – 100%	20,653,331.60
PART C: INSTRUCTIONS FEE	
K10,000,000.00 per lawyer	K20,000,000.00
Disbursements	K1,000,000
Preparation	
Preparing party and party bill of costs (6hrs)	K480,000.00
Professional fees	61,786,663.30
Value Added Tax (16.5%)	10,194,799.40.40
MLS Levy (1%)	617,866.63
Add: Disbursements	1,000,000.00
TOTAL PAYABLE	73,599,329.30