

REPUBLIC OF MALAWI  
IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY  
CIVIL DIVISION  
JUDICIAL REVIEW CAUSE NO.23 OF 2020

BETWEEN:

THE STATE

AND

MALAWI COMMUNICATIONS REGULATORY AUTHORITY.....THE RESPONDENT

EX-PARTE

TIMES TELEVISION LIMITED.....1<sup>ST</sup> APPLICANT

TIMES RADIO LIMITED.....2<sup>ND</sup> APPLICANT

**CORAM**

**Mrs T. Soko: Assistant Registrar**

Mr Chakhala : Counsel for the applicants

Mr Chiwoni: Counsel for the defendant

N. Munthali : Court Clerk

**ORDER ON ASSESSMENT OF COSTS**

The matter came on the 22<sup>nd</sup> day of April 2021 for hearing of taxation of costs. The respondent in this case is the paying party and the applicants are the receiving party. However, before the hearing, Counsel for the respondent filed an objection and stated that Counsel for the applicants herein is the in house Counsel and therefore not entitled to party and party costs. Counsel cited a case of the **State vs Malawi Regulatory Authority Ex Parte the Registered Trustees of Media Institute, of Southern Africa, Times Radio Station Limited, Zodiak Broadcasting Station Limited and Capital Radio (Malawi) Ltd Constitutional Reference Number 3 of 2019** where it was held that in house Counsel are not entitled to party and party

costs. Counsel for the applicant argued that the decision in the above case does not bind to this Court since it was made by the Assistant Registrar as it is that a Judge's decision is not binding on another Judge. Counsel stated that under Order 31 of the CPR, Counsel who is instructing himself is entitled to costs so it should be the same case where the one representing the party is the in house legal counsel. Counsel for the respondent in reply urged the Court to follow the decision in the case of **State vs Malawi Regulatory Authority Ex Parte the Registered Trustees of Media Institute, of Southern Africa, Times Radio Station Limited, Zodiak Broadcasting Station Limited and Capital Radio (Malawi) Ltd Constitutional Reference Number 3 of 2019.** Both Counsel cited authorities that have helped this Court to arrive at a proper decision.

## ISSUES

The issue before this Court is whether it is Counsel for the applicant who is entitled to costs or the party

The costs to be awarded.

## THE LAW

Costs have been defined in the black's law dictionary 6<sup>th</sup> edition p. 359 as a pecuniary allowance, made to the successful party (and recoverable from the losing party), for his expenses in prosecuting or defending an action or a distinct proceeding within an action. Party and party costs have been defined as costs between party and party and that are necessary to enable the adverse party to conduct the litigation and no more. **See Commissioner for Taxes vs A. Limited (1973) 7 MLR 211.** The General rule on costs is provided under O.31 r. (2) of the Courts (High Court) (Civil Procedure) rules where it is provided that a party to a proceeding shall not be entitled to recover costs of the proceeding from any other party to the proceeding except under an order of the Court. The rule envisages that after the litigation no party recovers costs from another unless the Court orders so. **In the case of Mkandawire and another vs Attorney General (1999) MLR 192 at 205** the Court stated the following:

*The general principle regarding costs is that no party to any proceedings is entitled to costs of the proceedings except under the order of the Court. The award of costs is in the discretion of the Court. If therefore a Court in the exercise of its discretion sees fit to make an order as to the costs of any proceedings, the Court shall order the costs to follow the event unless it appears to the court that in the circumstances of that particular case some other order should be made as to the whole or any part of the costs....*

In **Ismail Ebrahim Sabadia vs National Bank of Malawi Ltd and Hilda Mpanga Civil Cause No. 938 of**

**2010** the Court underlined the general principle of costs. The Court stated the following:

*The general principle is that a successful litigant is entitled to his costs unless there is some good reason why he should be deprived of his costs.*

From what I have stated above, it is clear that the costs that the Court orders at the end of the litigation are party and party costs. It is also clear from the general principle that a successful **party** is entitled to the costs unless otherwise. My emphasis is on the party. O.6 r. (1) of the Civil (High Court) (Civil Procedure) Rules defines a party to a proceeding as the person who is named as a claimant or a defendant.

#### **DETERMINATION**

In the present matter, Honourable Justice Chirwa in the judgment dated 13<sup>th</sup> November 2020 awarded the costs to the applicants herein for successfully prosecuting the matter. The applicants herein are Times Television Limited and Times Radio Limited. In my view, the costs which were awarded by the Court were not for the in-house Counsel herein but for the applicants as the party to the proceedings. As I already mentioned earlier, Party and party costs belong to the claimant or the defendant(party) and not the Legal Practitioner. The Legal Practitioner is entitled to Solicitor and Own client costs which are also recovered by the Legal Practitioner after presenting a bill of costs to the client and when three months' elapses without recovering such costs after presenting a bill to the client, then the Legal Practitioner can take an action against the client. **See Section 41 of the Legal Education and Legal Practitioners Act.** I therefore conclude that the costs which were awarded by the Court in this matter belong to the applicants in this matter and not Counsel Chakhala as an individual.

Counsel Chakhala made an argument that Counsel who is instructing himself is entitled to costs and why should an in-house legal counsel be denied costs. My understanding of Order 31 r. 15(2) is that where a legal practitioner is a party to the proceedings and has succeeded and awarded costs, the costs will be taxed based on the scale charges as if the Legal Practitioner had received instructions to represent a person. What should be underlined or emphasized is that the Legal Practitioner in the context of O,31(15) (2) is the party to the proceedings and costs have been awarded to the Legal Practitioner as a party to the proceedings. It is not the same with a Legal Practitioner who is representing an entity which he works for. I find the argument for Counsel for the applicant unfounded.

I will now come to the issue of the public notice on restriction to the practice of Law in Malawi Law Society issued on 22<sup>nd</sup> June 2020 in relation to Section 31 of the of the Legal Education and Legal Practitioners Act. The Notice states as follows:

### ***RESTRICTIONS ON PRACTICE OF LAW***

*1. A person who is not a licenced Legal Practitioner commits a crime under section 31 (L) of the Act if such person does any of the following acts:*

*a) commences, carries on' or defends any action, suit or other proceedings in the name of another person or does any act required to be done by a licenced Legal Practitioner;*

*b) draws or prepares any instruments or any proceeding in law or draws relating to land registration; relating to real or personal property or prepares any document or caveat*

*2.0 i) does any of the works from time to time listed under the Legal*

*Practitioners (scale and Minimum charges) Rules such as but not limited to; i) probate and administration of deceased persons estate including all work done in order to obtain and obtaining issue of grants including completion of assessment of gross value and obtaining final discharge from Estate Duty commissioners, ii)*

*formation and incorporation companies iii) application for naturalisation; iv) registration of business under the Business Names Act; v) conveyance of assignment by deed of any property by way of gift; vi) debt collection, drawing or preparation of all form's mortgages including debentures and further charges; vii)*

*release of mortgages and reconveyance; viii) agreements; ix) attending to stamping and registration of any document at the Registrar General and other legal work from time to time listed in the Legal Practitioners (scale and Minimum charges) Rules.*

### ***EXCEPTIONS TO THE RESTRICTIONS***

*There are only 4 exceptions to the prohibitions outlined in part 1.0 above.*

*These exceptions are set out in sections 3L(21, (3), (4) and (5) of the Act. The exceptions are as follows:*

*a) if the person is appearing on his or her own behalf before any court in proceedings to which he or she or it is a party;*

*b) if the person is a public officer drawing or preparing instruments in the course of duty;*

- c) if the person is an employee merely engrossing any instrument or proceeding;*
- d) if the person is doing any of the following acts: drawing up a letter or power of attorney under seal, transferring stock containing no trust or limitation, writing a demand letter for purposes of collection of monies, conducting an undefended trademark or patent application or processing a passport application.*

*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(1Xb) and all work to which the Scale Charges applies (section 31-(LXc) cannot be handled by any corporation or any of their employees as such even if that employee is a person entitled to practice law.*

There is a case of State vs Malawi Regulatory Authority Ex Parte the Registered Trustees of Media Institute, of Southern Africa, Times Radio Station Limited, Zodiac Broadcasting Station Limited and Capital Radio (Malawi) Ltd Constitutional Reference Number 3 of 2019. My learned colleague stated that the Legal Practitioners employed as in-house Counsel are restricted to the duties assigned to them by their corporation for which remuneration is provided for unless if they run a private law firm independent of their employer. My colleague also stated that in-house Counsel may appear in person on behalf of the corporation under which they are employed. Further to what my learned colleague stated, Section 31 of the Legal Education and Legal Practitioners Act prohibits persons who are not entitled to practice law to appear before the Court or carry out any work which should have been carried out by the Legal Practitioner. This means a natural person or a legal person cannot appear in Court in the capacity as a Legal Practitioner. The public notice is to the effect that in-house lawyers are not independent of their employer. My understanding of this is that in-house lawyers cannot come to the Court and claim that they are appearing to the Court independent of their employer and

later claim solicitor and own client costs from their employer. If they are coming to the Court as employees of the corporation, it means they are coming to the Court on behalf of the corporation or I should say as representatives of the corporation itself not as Legal practitioners given instructions to represent the corporation unless if they own a legal firm independent of their employer. This also means in-house lawyers cannot claim solicitor and own client costs since they receive remuneration from their employer. An exception is provided under Section 31(5) where it is stated that any person may appear on his own behalf before any Court in proceedings to which he is a party. Counsel Chakhala in the present case appeared in Court in the capacity as provided under Section 31(5) of the Legal Education and Legal Practitioners Act. This means Counsel cannot claim solicitor and own client costs. This also means party and party costs which were awarded to the applicant should be assessed in accordance with order 31 r.15(1) which states that a party acting in person is entitled to recover disbursements if he succeeds in the proceeding and costs at a sum not exceeding two-thirds of the sum which in the opinion of the Court would have been allowed in respect of each item if the party was represented by a Legal Practitioner.

I will proceed to tax costs. Counsel adopted the bill of costs and proposed a sum of K28,523,125.00 as party and party costs.

#### **FEE EARNER**

According to Legal Practitioners (Hourly expense rates for the purposes of taxing party and party costs) rules 2018, the hourly rate of Counsel of more than 10 years standing is K40,000.00. Therefore, Counsel for the applicants with 10 years' experience is entitled to K40,000.00 as hourly rate.

#### **PREPARATION**

Under this head, Counsel proposed 36 hours for getting instructions from the applicants, analyzing facts and law, interviewing the client to get the sworn statements. Counsel for the respondent objected and stated that 36 hours is unreasonable, excessive and unsubstantiated. I agree with Counsel for the respondent that Counsel has not substantiated the time that he claims spending on the preparation. He did not attach the time sheet for the Court to appreciate the time that he spent. However, I take cognizance of the fact that Counsel had to do the groundwork before taking the matter to the Court. In my view 3 hours is reasonable. I therefore award K120,000.00.

## **DOCUMENTS PREPARED**

On documents prepared, Counsel proposed a total of 74 hours for preparing summons, notices, sworn statements and skeletal arguments. On the other hand, Counsel objected on the ground that the number of hours that Counsel spent is unreasonable, excessive and unsubstantiated. I have taken a look at the documents that Counsel prepared and in my view 74 hours is excessive and not reasonable. In my view 11 hours 30 minutes is reasonable. I therefore award K460,000.00.

## **RESEARCH AND READING**

Counsel claims 213 hours for the authorities read. In total there are 34 authorities that he read including the case of Dr SK Chilima and Another vs Arthur Mutharika and another Const. Reference No.1 of 2019 and Mutharika and another vs Chilima and another MSCA Const. Appeal No.1 of 2020. Counsel claims 96 hours for reading the former and 48 hours for reading the latter. The question I have is whether it was necessary to read the whole judgment. The answer is in negative. What Counsel could have done was to choose the relevant part of the judgment to save time. In my view, 40 hours is reasonable. I award K1,600,000.00 for research and reading.

## **COURT ATTENDANCE**

On court attendance, Counsel proposed 5 hours for attending Court on ex-parte application for Judicial review injunction and hearing of substantive matter. I award K200,000.00

## **TRAVELING AND WAITING**

On traveling and waiting 3 hours claimed by Counsel for the applicants is reasonable. I award K120,000.00

## **DISBURSEMENTS**

Counsel proposes K90,000.00 which is reasonable.

## **TAXATION**

Counsel proposed a total of 7 hours 30 minutes for preparing the bill of costs, notice of assessment and attending taxation proceeding including traveling and waiting. In my view 7 hours and 30 minutes is reasonable. I award K300,000.00

On general care and conduct Counsel proposed 75%. I have considered all the factors of this matter and in my view 60% on general care and conduct is reasonable.

1% Levy. It is clear that levy does not apply on party and party costs.

## SUMMARY

- a. Preparatory work K120,000.00
- b. Documents prepared K460,000.00
- c. Research and reading K1,600,000.00
- d. Court attendance K200,000.00
- e. Travelling and waiting K120,0000.00

**Total =K2,500,000.00**

- f. General care and conduct 60% of a,b,c,c,d,e =K1,500,000.00
- g. Taxation K300,000.00
- h. General care and conduct 60% =K180,000.00
- i. Disbursements K90,000.00

The total amount is K4,480,000.000. As I have alluded earlier, Counsel appeared in Court to represent his employer. It entails that the corporation came in person unlike if the corporation had engaged an external lawyer. I therefore find that the receiving party is entitled to the disbursements and costs not exceeding two thirds if the receiving party was represented by a Legal Practitioner. See order 31(15) (1) of the Courts (High Court) (Civil Procedure) Rules.

Therefore, the receiving party will be entitled to the following:

- a. Preparatory work  $K120,000.00 \times \frac{2}{3} = K80,000.00$
- b. Documents prepared  $K460,000.00 \times \frac{2}{3} = K307,000.00$
- c. Research and reading  $K1,600,000.00 \times \frac{2}{3} = 1,066,667.00$
- d. Court attendance  $K200,000.00 \times \frac{2}{3} = K133,000.00$
- e. Travelling and waiting  $K120,0000.00 \times \frac{2}{3} = K80,000.00$

**Total =K1,666,667.00**

- f. General care and conduct 60% of a,b,c,c,d,e =K1,000,000.2
- g. Taxation  $K300,000.00 \times \frac{2}{3} = K200,000.00$
- h. General care and conduct 60% =K120,000.00

**Total =K2, 986,667.00**

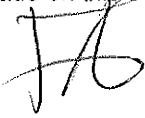
**V.A.T =K492,800.00**



i. Disbursements K90,000.00

I therefore award K2,986,667.00 as professional fees, K492,800.00 as V.A.T. and K90,000.00 for disbursements. In total I award the applicants a total sum of K3,569,467.00.

Made on this 9<sup>th</sup> day of November 2021.



**T.Soko**

**Assistant Registrar**

