REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 728 OF 2018

BETWEEN:

SEVETION NACHIBWE.....1ST CLAIMANT

GARSON MAKONI.....2ND CLAIMANT

AND

JAMES LEONARD.....1ST DEFENDANT

PRIME INSURANCE COMPANY LIMITED.....2ND DEFENDANT

CORAM: **WYSON CHAMDIMBA NKHATA (AR)**

Mr. Kanyika- of Counsel for the Claimant

Mr. Kalua-of Counsel for the Defendant

Ms. Chida- Court Clerk and Official Interpreter

ORDER ON TAXATION OF COSTS

INTRODUCTION

The case was commenced by the Claimant on 30th November, 2018 claiming damages for pain and suffering, loss of amenities of life and disfigurement and costs of this action. The action arose from an accident that occurred on 4th September, 2018 at Nthundu Junction. During mediation, the 2nd defendant pleaded that the policy limit was exhausted. It was adjudged that the 2nd defendant should furnish the claimants with proof of

policy being exhausted and costs were awarded to the claimants. This is the court's order on assessment of costs.

The parties appeared before this court for assessment of costs on the 10th of December 2020. The claimants (hereinafter referred to as the receiving party) through Counsel filed a notice of appointment to assess costs and a bill of costs which Counsel Kanyika representing the receiving party adopted in court. In the said bill of costs, the receiving party is claiming K15,879,187.50 as costs of this action. The Defendants (hereinafter referred to as the paying party) did not file points of dispute on the bill of costs. However, they opted to make oral submissions to the items listed on the bill of costs which I shall consider as and when necessary.

THE LAW AND PRINCIPLES ON ASSESSMENT ON COSTS

Basically, the principle upon which costs should be taxed is that the successful party should be allowed costs reasonably incurred in prosecuting or defending the action. The taxing master must hold a balance: On one hand, the successful litigant, who has been awarded the costs so that he is made whole by being able to recover costs necessarily incurred and on another the unsuccessful party so that he does not pay an excessive amount of money. In the case of **Harold Smith** [1860] 5H & N 381, Bramwell B stated that Costs as between party and party are given by the law as an indemnity to the person entitled to them; they are not imposed as a punishment on the party who pays them, or given as a bonus to the party who receives them. In the case of **Smith v Buller** [1875] LR 19 Eq 473, Sir Richard Malins V.C. stated that:

> It is of great importance to litigants who are unsuccessful that they should not be oppressed into having to pay an excessive amount of costs … the costs chargeable under a taxation as between party and party are all that are necessary to enable the adverse party to conduct litigation and no more. Any charges merely for conducting mitigation more conveniently may be called luxuries and must be paid by the party incurring them.

Order 31(5)(3) of the Courts (High Court) (Civil Procedure) Rules 2017 hereinafter CPR 2017 provides that in awarding costs the Court shall also have regard among others things the amount or value of any money or property involved; the importance of the matter to all the parties; the particular complexity of the matter or the difficulty or novelty of the questions raised; the skill, effort, specialized knowledge and responsibility involved and the time spent on the case.

Order 31 rule 5 of the CPR provides that the court should have regard to whether the costs were proportionate and reasonable in amount. It is clear that the law regulating assessment of costs abhors costs disproportionate to the amount recovered that was the subject matter of the proceedings. I believe the proportionality of costs to the value of the result is central to the just and efficient conduct of civil proceedings. The test of what is a proportionate amount of costs to incur therefore involves considerations of the amount recovered.

Order 31(4)(1) provides that where the Court is to assess the amount of costs, whether by summary or detailed assessment, those costs shall be assessed on the standard basis or the indemnity basis, but the Court will not in either case allow costs which have been unreasonably incurred or are unreasonable in amount.

Order 31(4)(2) provides that where the amount of costs is to be assessed on the standard basis, the Court shall (a) only allow costs which are proportionate to the matters in issue and (b) resolve any doubt which it may have as to whether costs were reasonably incurred or reasonable and proportionate in amount in favour of the paying party.

THE BASIS FOR THE ASSESSMENT

Order 31(4)(4) of the CPR provides that where the Court makes an order about costs without indicating the basis on which the costs are to be assessed or the Court makes an order for costs to be assessed on a basis other than the standard basis or the indemnity basis, the costs will be assessed on the standard basis. In this case, the order on costs as stipulated in the Judgment does not indicate the basis upon which the costs ought to be assessed. It follows therefore that this court ought to assess the costs on standard basis which according to Order 31(4)(2) of the CPR the court ought to allow only those costs which are proportionate to the matters in issue and resolve any doubt which it may have as to whether costs were reasonably incurred or reasonable and proportionate in amount in favour of the paying party.

CONSIDERATION OF THE ITEMS OF THE BILL

THE HOURLY RATE

The receiving party is of the view that the items on the bill be taxed at K40,000.00 per hour. It is indicated that the matter was handled by Counsel Felix Ebinet Mipande of 10 years standing at the bar. The paying party however moves the court to consider that Counsel Mipande was not in the jurisdiction and did not attend mediation. Counsel Kanyika contends that the matter was commenced in the year 2018 and Counsel Mipande was within the jurisdiction that he was the primary legal representative for the claimants while the other

lawyers were under his instruction. He adds that it was in 2019 when Counsel Mipande was intermittently in the jurisdiction. Having perused the file, the court took note that the first mediation session was attended to by Counsel Jere and the other by Counsel Kamoto. Essentially, there is no basis for this court to hold that Counsel Mipande was seised with the matter as argued by Counsel Kanyika. I have no choice but to tax the costs at K30,000.00 per hour which is presumably the hourly rate for the lawyers that appeared before the court in this matter according to the Legal Practitioners Hourly Expense Rate for Purposes of Taxing Party and Party Costs 2018 gazetted on the 16th of November 2018.

PREPARATORY WORK

A. RECEIVING INSTRUCTIONS

The receiving party is proposing 8 hours for attending upon the claimant to receive instructions, reviewing all evidence, including Police and Death Reports and all relevant documentation and recording statements from the claimant and other witnesses. The paying party is of the view that the matter herein was straight forward and could not demand 8 hours just to take instructions. They express doubt on recording witness statements since the matter went as far as mediation only. They propose 1 hour.

I agree that 8 hours is on the higher side for Counsel to take instructions and review the evidence in a personal injury case. I also have in mind that the lawyers that dealt with this matter have been doing this for a considerable period. I shall allow **2 hours**.

B. DOCUMENTS PERUSED

The receiving party indicated 1 hour for perusal of the defence, 1hour for the defendant's list of documents, 1½ hours for the Defendant's statement of issues and 15 minutes for the notice of change of legal practitioners. The paying party was of the opinion that all the documents were brief and proposed 15 minutes for the defence, 5 minutes for the defendant's list of documents, 15 minutes for the Defendant's statement of issues and 5 minutes for the notice of change of legal practitioners.

This court went through the record to satisfy itself on the length of the documents said to have been perused. I take note that for the defence the perusal is coupled with consideration of the import the contents have on the claimant's case likewise the statement of issues however the notice of change of legal practitioners is just for taking note. I believe it is reasonable to allow 45 minutes for the perusal of the defence, 15 minutes for the defendant's list of documents, 30 minutes for the Defendant's statement of issues and 5 minutes for the notice of change of legal practitioners. Thus, **1 hour 35 minutes** is allowed for the documents perused.

C. DOCUMENTS PREPARED

The receiving party claims 6 hours for the documents prepared. They propose 3 hours for the preparation of the statement of claim, 2 hours for the statement of issues, 15 minutes for the notice of mediation, 15 minutes for the notice of adjournment and 30 minutes for the Order. The paying party is of the view that the time proposed by the receiving party is exaggerated. They counter-propose 45 minutes for the preparation of the statement of claim, 10 minutes for the statement of issues, 5 minutes for the notice of mediation, 5 minutes for the notice of adjournment and 10 minutes for the Order.

Having looked at the proposals made by the parties and having considered the length and complexity of the documents listed, this court allows 1 ½ hours for the statement of claim, 1 hour for the statement of issues, 15 minutes for the notice of mediation, 15 minutes for the notice of adjournment and 15 minutes for the order. Thus, **3 ¼ hours** is allowed for the documents prepared.

D. BOOKS AND STATUTES READ

On this part, the receiving party proposes a total of 34 hours for the 8 books and statutes purported to have been read. The paying party however contends that the matter ended at mediation stage as such there is no justification for having read the books and statutes listed. They are of the view that the court should tax off the listed items. The receiving party argues that it was only proper for them to read the listed books and statutes as it is encouraged to be well versed with issues whenever it comes for hearing. Counsel further argued that Rules state that one has to be prepared to settle the matter as such one needs to be knowledgeable about the quantum.

This court agrees with the receiving party in that reading the said books and statutes was not unnecessary industry even at mediation stage. Ideally, parties ought to have taken time to prepare for the mediation with anticipation of even settling the matter. What I considered to be an issue is that some of the authorities cited are the very same that Counsel has engaged in cases like the one herein. I say this mindful that Counsel Kanyika has appeared before this court several times in a similar exercise. If at all the reading was done, it was for refreshing purposes and would not demand the proposed time. In any case, I exercise the doubt in favour of the paying party and shall allow 1 hour for each making a total of **8 hours** for the books and statutes read.

E. CASE AUTHORITIES PERUSED

The receiving party has indicated 4 hours against each of the 5 case authorities claimed to have been perused making a total of 20 hours. The paying party, on the other hand, is of the view that the court should not make

an award for case authorities perused. It is argued that there was no reason for the receiving party to read the said cases considering that the matter was at mediation stage and there was no order on assessment of damages.

As indicated above, the parties ought to have attended the mediation fully versed with issues up to determination of the quantum considering that at mediation there is an anticipation that the matter can be settled. That notwithstanding, I was of the view that two hours for each would be more reasonable. I shall allow **10 hours** for this part.

F. CONFERENCES

The receiving party proposes 2 hours for attending to the client to discuss the defence on the 29th of January 2019 and 3 hours for attending upon the clients in conference on 15th May 2020 for a pre-mediation conference. The paying party questions the need for the conference to discuss the defence. They argue that the defence simply denies occurrence of the accident as such there was no need for a conference. Further to that, the paying party is of the view that the 3 hours for the pre-mediation conference is exaggerated and suggests 20 minutes.

This court is of the view that the need to have pre-conferences with the client cannot be ruled out however 2 hours for each is exaggerated. The court allows 1 hour for each making a total of **2 hours**.

G. TRAVELLING AND WAITING

The receiving party is proposing 3 hours for travelling to the locus in quo and 10 hours for travelling to the High Court Library and Law Society Library to conduct research. The paying party however challenges the necessity for the fee earner having visited the locus in quo. They argue that that costs should be reasonably incurred and that in a matter like the one herein it was not necessary for Counsel to visit the locus in quo. I was of the opinion that making a finding that it was not necessary for Counsel to visit the locus in quo would be tantamount to detecting how Counsel should conduct his case. This would essentially be going beyond the discretion that the court is supposed to exercise in such proceedings. I shall allow this item. I believe 3 hours is reasonable.

On the visit to the High Court library, the paying party argues that there is no legal opinion exhibited as such there is no evidence of what was being read. They therefore counter-propose 1 hour for the same. I shall allow 3 hours.

The paying party proposes 4 hours each for the two attendances to mediation thus on the 20th of May 2019 and on 21st May 2019 inclusive travelling and waiting. The paying party counter-proposes 1 hour for each. Having seen the record, I agree that 1 hour each is reasonable including the travelling and waiting.

The receiving party is also claiming K1,500,000.00 refresher fees. They state that the matter was called on two occasions and Counsel had to refresh on issues which related to pleadings and meeting with the witness. The paying party argues that the refresher fees do not apply in this case considering that the matter never made it to trial stage. I wish to agree with Counsel representing the paying party. The fee applies when a case on trial is adjourned from one term or sitting to another, or when a term extends over more than one day. I disallow the refresher fees in this case.

The receiving party is claiming K1,000,000.00 on the instruction fees. They state that Counsel acted for the claimant generally and performed the rate of barrister and solicitor duties to ensure the claim is properly presented. The paying party is of the view that the K200,000.00 is reasonable in this matter. Order 31 rule 10(1)(a) of the CPR provides that a legal practitioner or his law firm shall be entitled to an instruction fee and not a brief fee where he or his firm have had instructions to act for a party from the commencement of a proceeding to trial. This matter was resolved at mediation stage. I agree that K200,000.00 is reasonable as instruction fees in circumstances.

Essentially, the court allows a total of 7 hours plus K200,000.00 for this part which gives **K410,000.00.**

H. GENERAL CARE AND CONDUCT

The receiving party proposes 75% of Part A as General Care and Conduct. They argue that the case was very important to the client and as a matter of principle it is necessary that the claimant should receive appropriate compensation for the loss suffered. It is further averred that Counsel worked hard and displayed remarkable skill in presenting the facts and the law. However, the paying party is of the view that the matter was a straight forward case which can best be described as one of the run on the mill cases. I agree that this was a straight forward case much as it was important to the claimants, the matter did not raise complex issues and it was resolved as mediation which means it did not involve lengthy and difficult hearings. Neither did the matter require a display of high level skill on the part of the legal teams involved. I am of the view that **50%** would be reasonable.

I. DISBURSEMENTS

The receiving party claims K1,506,000.00 for disbursements. The paying party contends that the same ought to have been proved by production of receipts. It is also contended that the figures are exaggerated and they

drew the attention of the court to items like the Stationery, Phones, messengers and Photocopying. They further indicated that it is difficulty to counter-propose as Counsel should have produced receipts. They therefore suggest that the same be reduced. It is true that the outlays are not supported by any receipts. However, I still believe that some expenses incurred. I think it is only proper that this court only makes deductions on some items that are evidently exaggerated.

	PROPOSAL BY RECEIVING PARTY	PROPOSAL BY PAYING PARTY	AMOUNT ALLOWED BY THE COURT
Stationery	K200,000.00	K75,000.00	K75,000.00
Court fees	K56,000.00	K11,000.00	K20,000.00
Phones	K100,000.00	K1,000.00	K20,000.00
Messengers	K200,000.00	K5,000.00	K50,000.00
Photocopying	K200,000.00	-	K50,000.00
Secretarial	K500,000.00	K50,000.00	K100,000.00
Fuel	K250,000.00	K50,000.00	K60,000.00
TOTAL			**K375,000.00**

J. TAXATION

The receiving party proposes 12 hours for preparation of the bill of taxation. However, the paying party is of the view that the same is exaggerated and that the receiving party wasted a lot of time including things that ought not to have been included in the bill. I had occasion to go through the bill that was presented before this court and I hold the view that 4 hours is reasonable. On the issue of attending taxation proceedings, the receiving party proposes 4 hours and the paying party is of the view that the actual time taken should be used by the court. The record indicates that the hearing on taxation took about 50 minutes. I believe 1 hour is reasonable. I take not that the receiving party also claims 75% Care and Conduct for Taxation however for reasons already given above, the court allows 50% of this Part. In summary, this part is taxed at 5 hours plus 50% which is **K225,000.00**.

SUMMARY

I therefore tax the bill as follows:

ITEM	COSTS
PART A: Receiving instructions	K60,000.00
Documents perused	K48,000.00
Documents perused	K97,500.00
Books and Statutes	K240,000.00
Case authorities	K300,000.00
Conferences	K60,000.00
Travelling and waiting	K410,000.00
	K1,215,500.00
PART B: General Care and Conduct 50% of Part A	K607,750.00
Taxation	K225,000.00
Total Professional Fees	K2,048,250.00
VAT	K412,211.25
Disbursements	K337,961.25
TOTAL	**K2,798,422.50**

The costs are taxed at **K2,798,422.50.**

MADE IN CHAMBERS THIS 4th OF JANUARY, 2021 AT PRINCIPAL REGISTRY

WYSON CHAMIMBA NKHATA

ASSISTANT REGISTRAR