



REPUBLIC OF MALAWI  
IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 39 OF 2019

**BETWEEN:**

BEN NYOZENI.....CLAIMANT

**AND**

EASY PACK LIMITED.....DEFENDANT

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

Mr. Chidothe- of Counsel for the Claimant

Ms. Chida- Court Clerk and Official Interpreter

**ORDER ON TAXATION OF COSTS**

**INTRODUCTION**

This is an order on assessment of costs. The Claimant commenced the action on 16<sup>th</sup> August, 2019 claiming damages for pain and suffering, loss of amenities of life, special damages and costs of this action. Apparently, the action arose from an accident that occurred on 11<sup>th</sup> October, 2018 while the Claimant was under the defendant's employment working on a machine. The issue of liability was settled during the Mediation Session on 6<sup>th</sup> February, 2020 when the Defendants' defence was struck out and a Judgement on liability entered against the Defendants on account of the Defendant's failure to attend Mediation Session. On 22<sup>nd</sup> October, 2020 a hearing of assessment of damages took place and an order of assessment of damages was delivered by the Court on 28<sup>th</sup> October, 2020.

Subsequently, the matter came for hearing on assessment of costs. The defendants did not avail themselves for the hearing. There being evidence that they had been served with a notice for the assessment of costs, the court continued to hear the claimant on assessment of costs. There is on the record a bill of costs which Counsel Chidothe representing the claimant (hereinafter referred to as the receiving party) adopted in court. In his bill of costs, the receiving party is claiming K9,723,500.00 as costs of this action. Even though there was nothing in opposition, the court felt obliged to still go through the bill to satisfy itself on the reasonability of the proposed costs in accordance with the law and guiding principles.

## **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**

#### **A. 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 Chidothe of 15 years standing at the bar. Considering the Legal Practitioners Hourly Expense Rate for Purposes of Taxing Party and Party Costs 2018 gazetted on the 16<sup>th</sup> of November 2018 and that this matter was commenced in the year 2019, the court takes no issue with the proposed K40,000.00 per hour.

## B. ATTENDANCES AT TRIAL

The receiving party proposes a ¼ an hour for attending mediation and 10 minutes for attending hearing on assessment of damages. I went through the file and I am of the view that the 35 minutes claimed on this part is reasonable. I will allow the **35 minutes** for this part.

## C. TRAVELLING AND WAITING

The receiving party also claims ½ an hour for travelling to court to attend mediation, ¼ of an hour waiting to attend mediation, ½ an hour for travelling to court to attend assessment of damages and a ¼ of an hour waiting to attend hearing on assessment of damages. In total, the receiving party claims 1½ hours for attendances at trial which this court has no issues. The court allows **1½ hours**.

## D. PREPARATION (CLIENT AND OTHER PARTIES)

The receiving party is claiming a total of 2 hours for preparatory work which involved taking instructions from client to advise possible legal remedies, 1 hour for having conference with the claimant in preparation of mediation, 1 hour having conference with claimant in preparation of hearing of assessment of damages, ½ an hour having conference with claimant to discuss order on assessment of damages and way forward. Further to that, the receiving party claims 2 hours for corresponding with other parties including the court and the defendants' legal practitioners. In total, the receiving party is claiming 6½ hours for this part. This court has no issues with the proposed time even though there was no time sheet to verify. I believe the time is reasonable and I allow the **6½ hours** claimed.

## E. DOCUMENTS PREPARED

On this part, the receiving party claims 12 hours 10 minutes for documents prepared and considered. I went through the record to appreciate their length and complexity. I am of the view that the 3 hours claimed for preparing the specially endorsed summons and other accompanying documents be reduced 2 hours and the 4 hours claimed for claimant's skeletal arguments be reduced to 3 hours. In essence, the court allows **10 hours 10 minutes** for this part.

## F. PERUSING FILE

The receiving party is claiming ½ of an hour for perusing file in preparation of mediation session and 1 hour for perusing the file in preparation of hearing of assessment of damages. Having seen the file and the documents therein and having considered their complexity and importance to the matter, this court allows the **1½ hours** proposed.

## G. RESEARCH

Under this head, the receiving party is claiming 9 hours for researching on the law which among other things they claim to have read the Occupational Safety, Health and Welfare Act, the Courts (High Court) (Civil Procedure) Rules, 2017 and 7 case authorities. They propose one hour for each. It is not clear as to what was being read however, I find the **9 hours** reasonable and I allow it.

## H. INSTRUCTION FEES

The receiving party is claiming K3,500,000.00 as instruction fees. Order 31 rule 10 of the CPR 2017 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. My perusal of the court file led to the conclusion that Chidothe, Chidothe and Company were seised with the matter from commencement of proceedings. All in all, I hold the view that the claim for instruction fees is justified however the amount claimed is on the higher side. I shall allow the **K1,500,000.00** as instruction fees.

## I. GENERAL CARE AND CONDUCT

The receiving party proposes 80% of Part A as General Care and Conduct. It is submitted that the case required to be handled with utmost care and it needed sufficient preparations on all occasions and that Counsel employed exceptional skills to ensure that the case is well prepared for presentation and pleadings were prepared to ensure recovery of damages for the Claimant. Be that as it may, there is no doubt that the matter herein was a straight forward case which can best be described as one of the run on the mill cases. Observably, the matter did not raise complex issues and it did not involve lengthy and difficult hearings. Neither did the matter require a display of high level skills on the part of the legal teams involved. I am of the view that **60%** would be reasonable.

## J. DISBURSEMENTS

The receiving party is claiming K191,000.00 for disbursements as follows: K34,000.00 for filing fees, K45,000.00 for stationery, K20,000.00 for telephone, K86,000 for photocopying and printing. They further claim K6,000.00 for 2 trips taken by Counsel to the High Court.

The only issue I have with the disbursements is that there are no supporting documents for the same. The figures given are merely speculative. There were no receipts produced or at least a breakdown on how they arrived at the same. All the same, the figure claimed is reasonable and this court allows **K191,000.00** for disbursements.

## K. TAXATION

The receiving party proposes 1 hour for perusing the file preparing for the taxation, 10 hours for preparation of the bill of costs, 2 hours attending assessment of costs and 10 minutes for the certificate of costs. They also claim 80% of the foregoing proposals as care and conduct. This court however has issues with the 10 hours for preparing the bill of costs. Mindful that preparing a bill is a tedious task, I believe 10 hours is on the higher side. I will allow 6 hours. On attending assessment proceedings, the defendants did not avail themselves. Basically, Counsel adopted his bill of costs and the matter was adjourned for ruling. I will allow 30 minutes. The receiving party is also granted 50% Care and Conduct for Taxation. I further allow 1½ hours for travelling and waiting. In total, the court allows **K360,000.00** for taxation of costs.

## SUMMARY

I therefore tax the bill as follows:

PART	AMOUNT
Attendances at trial	K23,333.00
Travelling and waiting	K60,000.00
Attendances on client & other parties	K260,000.00
Documents prepared	K248,000.00
Documents perused	K60,000.00
Research	K360,000.00
Instruction fees	K1,500,000.00
Total of Part A	K2,511,333.00
General Care and Conduct (Part A)	K1,506,800.00
Taxation	K360,000.00
Total Professional Fees	K4,378,133.00
16.5 % Surtax	K722,392.00
Add disbursements	K191,000.00
TOTAL	K5,291,524.00

The costs are taxed at **K5,291,524.00**.

MADE IN CHAMBERS THIS 6<sup>th</sup> OF JANUARY, 2021

WYSON CHAMBOIMBA NKHATA

ASSISTANT REGISTRAR