



IN THE HIGH COURT OF MALAWI  
LILONGWE DISTRICT REGISTRY  
CIVIL DIVISION  
JUDICIAL REVIEW CASE NO. 33 OF 2020

BETWEEN:

BETWEEN:

THE STATE (on the application of

THE HUMAN RIGHTS DEFENDERS COALITION LIMITED)

1<sup>st</sup> APPLICANT

ASSOCIATION OF MAGISTRATES IN MALAWI

2<sup>nd</sup> APPLICANT

MALAWI LAW SOCIETY

3<sup>rd</sup> APPLICANT

-and-

PRESIDENT OF THE REPUBLIC OF MALAWI

[PROFESSOR ARTHUR MUTHARIKA]

1<sup>st</sup> RESPONDENT

SECRETARY TO THE CABINET

[JUSTICE LLOYD MUHARA]

2<sup>nd</sup> RESPONDENT

CORAM: CHILUNGA-CHIRWA (ASSISTANT REGISTRAR)

Soko and Theu, for the 1<sup>st</sup> and 2<sup>nd</sup> Applicants

Mpaka and Mwafulirwa, for the 3<sup>rd</sup> Applicant

Banda, for the 1<sup>st</sup> Respondent

Mhango, for the 2<sup>nd</sup> Respondent

## ORDER ON ASSESSMENT OF COSTS

### Brief background

1. On 27<sup>th</sup> of August 2020, the Honourable Justice MCC Mkandawire (as he then was) delivered a judgment in favour of the Applicants in judicial review proceedings which the Applicants had commenced against the Respondents herein. In that Judgment, the Applicants were also awarded costs of the action. However, a prayer was made by the Applicants that costs be borne by the Respondents in their personal capacities. So, on 20<sup>th</sup> November, 2020, the Honourable Judge ordered that the Respondents herein pay the costs of the action personally and further directed that this Court should to assess the said costs.
2. After disposing of some preliminary issues in the intervening period, this court finally heard counsel from both sides on assessment of costs on the 16<sup>th</sup> of February, 2021. This is, therefore, this Court's Order on assessment of costs.

### The Bills submitted by Counsel for the Applicants

3. Both Applicants submitted, through counsel, bills in respect of proceedings that went on before the Honourable Judge. They also filed supplementary bills in respect of both the preliminary issues on which this court ruled in their favour and the actual assessment proceedings.
4. The total bill proposed by Mr Theu and Mr Soko, both for the 1<sup>st</sup> and 2<sup>nd</sup> Applicants in respect of proceedings before the Honourable Judge is MK68,065,125.00. And, in respect of attending to preliminary issues before this court and the actual assessment proceedings, they propose a total of MK7,138,303.00.
5. Mr Mpaka and Mr Mwafulirwa, on behalf of the 3<sup>rd</sup> Applicant, on the other hand, propose a total of MK69,166,392.00 in respect of the proceedings before the Honourable Judge, and a

total of MK25,392,500.00 for attending to preliminary issues before this court and the actual assessment proceedings.

6. All Applicants' counsel propose an hourly rate of K100,000.00.

#### **Reaction by Counsel for the Respondents**

7. The Respondents filed a response to the bills, specifically reacting to the proposed hourly rate of MK100,000.00 by legal practitioners for the Applicants. They also challenge the instruction fee proposed by the Applicants.
8. While during the actual assessment proceedings counsel for Respondents generally felt that the time allocated to each item on the bill was out of proportion, they came short of specifying which items they were not comfortable with. But, the main thrust of their objection to the proposed bills seems to have been against the proposed hourly rate.

#### **Issues for Determination by this court**

9. The main issue before this court is, of course, 'what amount of costs should be awarded to the Applicants?' But, for this ultimate question to be determined, the court must also determine the following attending questions, which were argued by counsel: (i) whether the proposed hourly rate of K100,000.00 should be allowed, (ii) whether the proposed instruction fees by the Applicants should be allowed, and (iii) whether care and conduct should be allowed as proposed.

#### **The Law on Assessment of Costs**

10. Order 25 rule 1(o) of the Courts (High Court) (Civil Procedure) Rules of 2017 provides for the function of this court to assess costs.
11. It is trite that a successful party to a litigation should be allowed costs reasonably incurred in prosecuting or defending the action.

12. It is really a matter of the assessing court striking a balance between, on the 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.
13. 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.
14. And 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.*
15. I think it is also important to mention the case of **Gundry v Salisbury [1910] 1 KB 99**, where the court held to the effect that the purpose for an inter-partes assessment of costs as in the present case is to ascertain the amount payable to the party paying the costs and not to decide on the remuneration of lawyers.
16. Order 31(5)(3) of the Courts (High Court) (Civil Procedure) Rules 2017 (hereinafter CPR 2017) it is provided that when awarding costs, a Court should also have regard to, 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.

21. Counsel for the Applicants advanced a legal argument in favour of departing from the rates in the Hourly Rates Rules, 2018 or at least treating them as a mere minimum. They argued at length submitting, among other things, that these rules should be disregarded as they are inconsistent with the provisions of Section 30 of the Courts Act which is to the effect that the costs of, and incidental to, all proceedings in the High Court shall be in the discretion of the High Court and that the discretion shall be exercised in accordance with the practice and procedure provided in the rules of procedure made by the Chief Justice Under Section 67 of the Act. The rules being referred to in the provision are the present CPR, 2017.
22. It was counsel's argument that Section 30 of the Court's Act is self-explanatory and that it provides for discretion, and that any subsidiary legislation that contravenes Section 30 was inconsistent with it to the extent that it interferes with that discretion. They cited the case of **Barrow Investments v. MPICO Malls Limited Com. Cause No. 6 of 2013** (Mtambo, J) in support of this argument, where the Honourable Judge held to the effect that the statutory discretion given by Section 30 of the Courts Act cannot be fettered by ministerial rules.
23. Counsel further argued that a higher hourly rate is appropriate in the circumstances having regard to the nature of the matter, the sensitivity and public interest involved and that the Respondents deserve to be ordered to pay costs which will reflect abhorrently against the defiant conduct they indulged themselves by purporting to force the Honourable the Chief Justice out of office *ultra vires* their constitutional limits. In other words, they advocated for a rate that would reflect harshly on the paying party.
24. Responding to the submissions by the Applicants, Counsel for the Respondents, on the other hand, argued that it was not the realm of this court to embark on interpreting the law as it were in order to make a declaration on the inconsistency of the Hourly Rates Rules, 2018. Counsel argued that this should be the realm of the Honourable Judge.
25. I had time to consider all the legal principles cited by both counsel and have carefully considered the case referred to. I appreciate the industry of counsel on both sides in bringing before me a litany of important authorities and provisions for my consideration.

26. In my analysis, I find that, while the observations by Counsel for the Applicants may be correct, that is that the Hourly Rates Rules, 2018 might as well be inconsistent with the spirit of discretion as provided for in Section 30, it is not my role, nor is it within my powers to declare such inconsistency. As a Registrar, my powers and functions are as clearly defined under Order 25 of the CPR, 2017 where I am simply enjoined to assess costs.
27. I must agree with what Counsel Mhango said, that I would be treading on dangerous grounds if I embarked on making declarations on the applicability of the Hourly Rates Rules, 2018. And contrary to what Mr Soko said, I am of the humble view that this was not threat mongering on the part of Mr Mhango; rather it was a sincere warning. My function as a registrar is but limited and clearly spelt out under Order 25. What counsel were asking of me is strictly the realm of the Honourable Judge. We may debate the point in this here all we can, but it will still only be moot, and thus nugatory unless the Honourable Judge made a judicial pronouncement on it.
28. But to move on, apart from that legal argument, counsel also seemed to have relied on the fact that the Respondents had been ordered to pay the costs personally as a ground for scaling up the hourly rate. Counsel Mpaka vehemently argued the point citing the South African decision of the **Public Protector v South African Reserve Bank, CCT 107/2018**, where the court held that the Public Protector should personally bear the costs of the action for she had acted in bad faith. However, with all respect, a decision akin to that in **Public Protector** was already made by the Honourable Judge in the instant case on the 20<sup>th</sup> November, 2020. He ordered the Respondents to pay costs personally. If it is punishment that Counsel would advance, I think, it is exactly what the Honourable Judge meted out on the 20<sup>th</sup> November, 2020. The realm of my court is now simply to assess costs as directed, just like I would do in any case where a party had been slapped with costs. I may not weigh in and begin to make further punitive orders. I would then be acting *ultra vires* my powers.
29. In my view, registrars when assessing costs do not have to wield any rod of chastisement. That is not within our prescribed mandate. We are simply to apply the prescribed principles for determining the amount of costs as provided under Order 31 of the CPR,

2017 and, indeed, under the Hourly Rates Rules, 2018. Anything beyond that would be treading on unsure and prohibited grounds.

30. Counsel Mpaka even went on to argue that this court must award costs that should attract people to the profession of law. However, it would be reducing the court into a mere marketing tool if we should fall for such arguments when assessing costs. I do not think the business of a court on assessment should be to attract people to the profession. It is not even to decide on the remuneration of lawyers (see **Gundry v Salisbury**). Our business, in a process such as the present one, is to indemnify a successful litigant and, to do so reasonably and proportionately: No more, no less.
31. In the final analysis, I do not think I am really desperate and destitute of which hourly rate to apply in this case. The law has provided us with the Hourly Rates Rules, 2018 which fixed the rates to be applied. Therefore, in the absence of any judicial pronouncement to the contrary, and, indeed, in the absence of any relevant amendment, these are the rates which the registrars in this jurisdiction, including myself, shall continue to employ when assessing costs.
32. Having said that, I have considered that all counsel for the Applicant, who appeared in this matter are of at least 10 years' standing at the Malawian Bar. But none of them is Senior Counsel. According to the Hourly Rates Rules, 2018 the hourly rate for their category is K40,000.00. This court shall, therefore, adopt that rate as the hourly rate for purposes of assessing costs in this matter.

b) On Instruction Fees

33. 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. In the instant matter, the 1<sup>st</sup> and 2<sup>nd</sup> Applicants submitted an instruction fee of K30,000,000.00 while the 3<sup>rd</sup> Applicant submitted K6,800,000.00. I have considered both proposals and I am of the view that the proposed fee by the 1<sup>st</sup> and 2<sup>nd</sup> Applicants is way on the higher side. I think a reasonable fee, in the circumstances is K10,000,000.00. I will therefore award them

K10,000,000.00. The fee by the 3<sup>rd</sup> Applicant is, in my opinion, reasonable and shall remain intact.

c) On Care and Conduct

34. On care and conduct, the 1<sup>st</sup> and 2<sup>nd</sup> Applicants submitted 85% while the 3<sup>rd</sup> Applicant submitted 75%. Counsel for the Applicants argued that this was on the higher side and proposed 40%. I have, however, considered the circumstances of the case, and I am of the view that the nature and importance of this case, justifies anything above 70% as appropriate care and conduct. I will, therefore, not tamper with the proposed percentages.

35. Apart from these three salient issues, viz: hourly rate, instruction fee and care and conduct, I find that counsel had no serious problems with any other items on the bills. Below are, therefore, summaries of the bills as assessed by this court on the basis of the foregoing determinations.

**ASSESSMENT SUMMARIES**

36. The following tables represent the summarized assessment process and the totals for each of the Applicant's Bills. They are condensed together with the supplementary bills filed after the 16<sup>th</sup> of February, 2021.

1<sup>st</sup> and 2<sup>nd</sup> Applicant's Bill (after assessment)

<b><u>DETAILS</u></b>	<b><u>TAXED AMOUNT (MWK)</u></b>
<b>Court Attendances</b>	<b>684,000.00</b>
<b>Instruction Fees</b>	<b>10,000,000.00</b>
<b>Part I</b>	
<b>a) The Client (meetings to obtain instructions and updates)</b>	<b>480,000.00</b>
<b>b) Documents perused</b>	<b>810,000.00</b>
<b>c) Documents Prepared</b>	<b>1,580,000.00</b>
<b>d) Cases/legislation perused</b>	<b>2,480,000.00</b>



Subtotal for Part I	5,350,000.00
Part II	
General Care and Conduct (85% of Part I)	4,547,500.00
Part III	
Court and oath fees travelling expenses and waiting time	240,000.00
Preparing Bill of Costs (3 hrs) plus Care and Conduct therein at 85%	222,000.00
Total disbursements	217,000.00
SUMMARY	
Court attendance	684,000.00
Instruction Fees	10,000,000.00
Part I	5,350,000.00
Part II	4,547,500.00
Part III	462,000.00
Total professional fees	21,043,500.00
Government VAT (16.5%)	3,472,177.50
1% MLS Levy	210,435.00
Disbursements	217,000.00
TOTAL ON THE MAIN BILL	<u>24,943,112.50</u>
(Plus Total for Supplementary Bill-i.e for attending preliminary objections and assessment proceedings)	<u>1,535,670.00</u>
GRAND TOTAL PAYABLE TO 1 <sup>ST</sup> AND 2 <sup>ND</sup> APPLICANT	<u>MK 26,478,782.50</u>

3<sup>rd</sup> Applicant's Bill (after assessment)

<u>DETAILS</u>	<u>TAXED AMOUNT (MWK)</u>
<b>PART A (Preparation)</b>	
<b>Documents Prepared and considered</b>	10,324,000.00
<b>Subtotal Part A</b>	<b>10,324,000.00</b>
<b>PART B</b>	
<b>i) Care and Conduct (75% of Part A)</b>	7,743,000.00
<b>ii) Instruction fee</b>	6,800,000.00
<b>Subtotal Part B</b>	<b>14, 543,000.00</b>
<b>PART C</b>	
<b>Disbursements</b>	<b>3, 292, 954. 50</b>
<b>SUMMARY</b>	
<b>Professional fees (Part A + Part B)</b>	<b>24, 867,000.00</b>
<b>Disbursements</b>	<b>3, 292,954.50</b>
<b>16.5% Surtax on Professional fees</b>	<b>4, 103, 055.00</b>
<b>1% MLS Levy on Professional Fees</b>	<b>248, 670.00</b>
<b>TOTAL</b>	<b><u>32,511, 679.50</u></b>
<b>(Plus Total for Supplementary Bill-i.e for attending preliminary objections and assessment proceedings</b>	<b><u>10, 517,000.00</u></b>
<b>GRAND TOTAL PAYABLE TO 3<sup>RD</sup> APPLICANT</b>	<b><u>MK43,028, 679.50</u></b>

Disposal

37. In sum therefore, the total costs payable by the Respondents to the Applicants are in the global sum of **MK69,507,461.00 (Sixty Nine Million Five Hundred and Seven Thousand Four Hundred and Sixty One Kwacha)**. The payments are to be made within 14 days.

Any party not satisfied with this assessment is at liberty to file a review process under Order 31 rule 17 (1) of the CPR, 2017.

Made in Chambers at Lilongwe this 12<sup>th</sup> day of March, 2021



Patrick Chilunga-Chirwa

**ASSISTANT REGISTRAR**