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REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
PERSONAL INJURY CAUSE NO. 325 OF 2016

BETWEEN:

CATHERINE SAITI.....CLAIMANT

AND

GREY SCOTT.....1ST DEFENDANT

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

CORAM: WYSON CHAMDIMBA NKHATA (AR)

Mr. G. Phiri- of Counsel for the Claimant

Mr. K. Tembo-of Counsel for the Defendant

Ms. Chida- Court Clerk and Official Interpreter

ORDER ON TAXATION OF COSTS

INTRODUCTION

On 26th April, 2016, the claimant commenced these proceedings by writ of summons claiming damages for pain and suffering, loss of amenities of life, disfigurement and costs of this action. The claim arises out of an accident that occurred on 25th July, 2015 at or near Rafadrum in Zomba District in which the 1st defendant who was driving motor vehicle registration number BN1052 Nissan UD Lorry hit a pedal cyclist who was carrying a pillion passenger, the claimant herein. The 1st defendant was sued as the driver of the said motor vehicle and the 2nd defendant was sued by virtue of being the insurer of the said motor vehicle. The issue of liability was settled in favour of the claimant through a consent judgment executed by the parties on 22nd March, 2019. Subsequently, the matter proceeded for hearing on assessment of damages and the claimant was

awarded a total sum of MK3,513,500.00 in all heads of damages claimed and proved on 27th April, 2020. This is the court's order on assessment of costs.

The parties appeared before this court for assessment of costs on 16th July, 2021. The claimant (hereinafter referred to as the receiving party) through Counsel filed a notice of appointment to assess costs and a bill of costs which Counsel Given Phiri representing the receiving party adopted in court. In the said bill of costs, the receiving party is claiming K20,947,212.50 as costs of this action. The Defendants (hereinafter referred to as the paying party) filed and adopted their objections to the claimants' Party and Party Bill of Costs. I have carefully and anxiously considered the rival submissions by both learned counsel to the parties in this reference. I now feel duty bound to say that their able arguments were not only illuminating but refreshing and that I am grateful to both of them.

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. Further to that 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.

PROPORTIONALITY OF COSTS

Order 31 rule 5 of the CPR 2017 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. In this case, the receiving party moves the court to tax the costs herein at the sum of K20,947,212.50 against the MK4,515,500.00 that was recovered.

The paying party through Counsel submit that the court should consider the case of **Yusuf Mtengerenji v Kamanga & United General Insurance Company, Civil Cause No. 537 of 2013** in which damages of MK 2,000,000.00 were awarded but the claimed sought costs to the sum of MK 50,000,000.00, and the court approved what was stated in **Lin Jian Wei v Lim Eng Hock Peter [2011] SCGA 29**, that there must be a sensible correlation between costs and the value of the case. Counsel further points out that the court found that costs that are plainly disproportionate on the value of the claim cannot be said to be reasonably incurred. Clearly, this defies the test of proportionality that this court ought to apply. In view of this, this court shall proceed mindful of the need to adhere to o.31 r. 5 of the CPR 2017.

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 Consent 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 Felix E. Mipande of over 10 years standing at the bar. However, the record indicates that the matter was actively handled by Counsel Mipande up to judgment on liability and this was before the Legal Practitioners Hourly Expense Rate for Purposes of Taxing Party and Party Costs 2018 was gazetted on the 16th of November 2018. During this period, the hourly rate was largely dependent on the court's discretion and mostly K15,000.00 was applied for lawyers of reasonably comparable skills and experience rendering a similar service. Nonetheless, with the passage of time, I believe K30,000.00 would be reasonable even for the work done then.

The record shows that thereafter the case was handled by Counsel Hawa Kamoto for assessment of damages in the year 2020 and then by Counsel Given Phiri for assessment of costs in the year 2021. I have reason to believe that going by the Legal Practitioners Hourly Expense Rate for Purposes of Taxing Party and Party Costs 2018 the expense rate for Counsel Phiri and Counsel Kamoto is K30,000.00. In the circumstances, I shall allow an hourly rate of K30,000.00.

PREPARATORY WORK

A. ATTENDANCES UPON THE CLIENT

The receiving party is proposing 8 hours for attending upon the Claimants to receive instructions, reviewing all the evidence, including police and medical reports and all relevant documentation and recording statements from the Claimants and other witnesses. The paying party submits that 8 hours is exaggerated. They counter-

propose 2 hours for this part. This court agrees with the paying party in that 8 hours is on the higher side for Counsel to take instructions and record 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 **4 hours** for this part.

B. DOCUMENTS PERUSED

The receiving party prays for 5 hours for perusal of documents in this matter. The paying party is of the view that the time proposed by the receiving party is exaggerated. They have counter-proposed 2 hrs. Having considered the proposals by the parties, the length and complexity of the documents listed documents, this court summed up this part as follows:

DOCUMENTS	TIME PROPOSED BY THE RECEIVING PARTY	TIME ALLOWED BY THE COURT
Notice of appointment of legal practitioners	15mins	15mins
Defence	2hrs	30mins
Defendant's list of documents	30mins	15mins
Notice of change of legal practitioners	15mins	15mins
Order on Assessment of Damages	2hrs	30mins
TOTAL		1hr 45mins

C. DOCUMENTS PREPARED

The receiving party prays for 30¼ hours for preparation of documents in this matter. The paying party is of the view that the time proposed by the receiving party is exaggerated. They argue that the proposed time spent preparing the documents is manifestly unreasonable, repetitive and a tactic to inflate costs. They propose 4 hours for this part. Having considered the submissions by the parties and having considered the length and complexity of the documents listed documents, this court summed up this part as follows:

DOCUMENTS PREPARED	TIME PROPOSED BY THE RECEIVING PARTY	TIME ALLOWED BY THE COURT
Writ of summons and statement of claim	6hrs	2hrs
Affidavit of service by post	30mins	15mins
Summons for directions	30mins	30mins
Claimant's list of documents	1hr	30mins

Order for directions	30mins	15mins
Claimant's list of documents	1hr	30mins
Bundle of pleadings	3hrs	1hr
Consent Judgment	1hr	30mins
Notice of appointment to assess damages	15mins	15mins
Ex-parte summons on application for correction of judgment	3hrs	1hr
Order	15mins	15mins
Amended consent judgment	1hr	15mins
Notice of adjournment of assessment	15mins	15mins
Assessment bundle	8hrs	2hrs
Claimant's submissions on assessment of damages	5hrs	2hrs
TOTAL		10.5hrs

D. BOOKS AND STATUTES READ

The receiving party has listed 8 books and statutes on this part and they claim 34 hours in total. The paying party proposes that they be awarded K100,000.00 for the books, statutes and case authorities. Much as I agree that the time is exaggerated in some of the books and statutes, I am of the view that the time proposed in total by the paying party is overtly unreasonable. I will allow **4 hours** for this part.

E. CASE AUTHORITIES PERUSED

The receiving party has listed 10 cases on this part and they claim a total of 40 hours. The paying party contends that most of cases indicated were not used during the proceedings. Further to that, the paying party contends that the listed cases were not attached to the Assessment Bundle. They point out that Order 31, Rule 12(3) of the CPR provides that a bill of costs shall be accompanied by an assessment bundle which shall contain all documents, excluding those on the Court's file, that a party shall rely on at the assessment hearing. He cites the case of **Madanitsa vs New Building Society (1992) 15 MLR 205**, in which the Court stated that this meant any documents that a party claiming costs would need to support any of the costs being claimed should be provided.

Indeed, order 31 rule 12(3) of the CPR 2017 stipulates that a bill of costs shall be accompanied by an assessment bundle which shall contain all documents, excluding those on the Court file, that a party shall rely

on at the assessment hearing. Clearly, the doubt thereof must be exercised in favour of the paying party by trimming the cases. I shall allow 6 cases with an average of 1 hour each giving a total of **6 hours**.

F. CONFERENCES

The receiving party proposes 2 hours for attending to the client to discuss the defence on the 6th June 2016 and 4 hours for attending upon the client in conference on 17th February, 2020 for assessment of damages. The paying party contends that the number of hours alleged to have been spent on conferences are exaggerated. They propose K100,000.00 under this head. I shall allow one hour for each making 2 hours for this part.

G. TRAVELLING AND WAITING AND COURT ATTENDANCES

The receiving party is proposing 8 hours for travelling to the locus in quo and 12 hours for travelling to the High Court Library and Law Society Library to conduct research. Further to that, the paying party proposes 4 hours each for the two court attendances thus 4 hours for attending court on the 24th June 2019 for assessment of damages and attending court on 12th May 2020 for delivery of order on assessment of damages. They indicate that the time is inclusive of travelling and waiting. The paying party contends that the time provided by the Claimant as time spent in attending court on several occasions is exaggerated and unsupported by time sheets. Counsel also points out that the offices for the Claimant's Legal Practitioners are a few kilometers away from the High Court, Principal Registry and as such some of the expenses included on the Claimant's Bill are baseless. He cites the case of **Council for UNIMA vs Flywell Banda and Others, Civil Cause No. 616 of 2013** in which the court stated that party to party costs do not include all the costs that a litigant may have incurred, but only those costs, charges and expenses that appear to have been necessary or proper for the attainment of justice. They propose that they be awarded 3 hours for all attendances to the court.

Having seen the record, I will allow 2 hours for travelling to the locus in quo and 4 hours for travelling to the High Court Library and Law Society Library to conduct research. I agree with the paying party that there was no attendance to court warranting 4 hours. I shall allow 1 hour each to cover the travelling and waiting giving a total of 2 hours. In total, the court allows 8 hours for this part.

H. REFRESHER FEES AND INSTRUCTION FEES

The receiving party is also claiming K1,000,000.00 refresher fees and K1,500,000.00 as instruction fees. They submit that the matter was called for on 2 occasions and Counsel had to refresh on the issues which related the pleadings, and meeting the witnesses and that Counsel acted for the Claimants general and performed the rate of a barrister and solicitor duties to ensure the claim is properly presented. The paying party argues that the instruction fees claimed by the Claimants is manifestly excessive and has no justification whatsoever. They

propose that it be taxed downwards to MK 400,000.00. They further submit that the refresher fee being claimed is not provided under any law and the same should not be awarded. I was of the view that 800,000.00 for instruction fees is reasonable in this matter. However, there is no cause to claim refresher fees. The matter never had occasion of spilling over any sitting. I shall tax off the refresher fees.

I. 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 there is no basis in law for this head and pray that it should be struck off. Alternatively, they submit that there was nothing novel or new in the case, it being a personal injury matter. They are of the view that 75% of Part A of the Claimant's Bill, being for care and conduct, is excessive. They further point out that the case was concluded without trial and a consent judgment on liability was entered. They propose that a reasonable rate in the circumstance is 20%. In my opinion, this is a personal injury matter. It falls squarely under ordinary cases. In the case of **Kavwenje v Chilambe** 1996 MLR 113 it was stated that for ordinary cases Care and Conduct should be between 50% and 60%. In this case, I am of the opinion that 50% of Part A is reasonable.

J. DISBURSEMENTS

The receiving party claims K2,075,000.00 for disbursements. The paying party contends that the costs of disbursements are largely not supported by any documents and are unrealistic. They submit that the amount being claimed has no basis and should be taxed-off. They point out that the Claimant's Legal Practitioners' offices are a few kilometers away from the Court and that it cannot cost them MK1,000,000.00 on travelling alone. They propose that expenses under disbursements should be reduced to MK80,000.00. I have no doubt that the receiving party did anticipate an indemnification of costs in this case but they omitted to obtain receipts to support the costs they had incurred. I am of the view that the doubt raised should be exercised in favour of the paying party as follows:

ITEM	AMOUNT PROPOSED BY THE RECEIVING PARTY	AMOUNT ALLOWED BY THE COURT
Stationery	K150,000.00	K100,000.00
Filing fees	K25,000.00	K25,000.00
Phones	K50,000.00	K20,000.00
Messengers	K200,000.00	K100,000.00

Photocopying	K150,000.00	K20,000.00
Secretarial	K500,000.00	K100,000.00
Fuel	K1,000,000.00	K100,000.00
TOTAL		K465,000.00

K. TAXATION

The receiving party proposes 12 hours for preparation of the bill of taxation, 6 hours for attending taxation proceedings and 75% of this item as Care and Conduct. The paying party proposes 2 hours for preparation of the bill of taxation. I had occasion to go through the bill before and I hold the view that 4 hours is reasonable. On attending taxation proceedings, the record indicates that the hearing took less than 30 minutes. I believe 30 minutes is reasonable just to include waiting. Lastly, this court is of the view that 50% of this item as Care and Conduct for Taxation is reasonable. All in all, this part is taxed at is **K202,500.00**.

SUMMARY

I therefore tax the bill as follows:

ITEM	COSTS
PART A: Attendances upon client	K120,000.00
Documents perused	K52,500.00
Documents prepared	K315,000.00
Books and Statutes	K120,000.00
Case authorities	K180,000.00
Conferences	K60,000.00
Travelling and waiting	K240,000.00
Instruction fees	K800,000.00
Total for Part A	K1,887,500.00
General Care and Conduct 50% of Part A	K943,750.00
Taxation	K202,500.00
Total Professional Fees	K3,031,250.00
VAT	K500,156.25
Disbursements	K465,000.00
TOTAL	K3,996,406.25

The costs are taxed at K3,996,406.25.

MADE IN CHAMBERS THIS 22ND OF JULY, 2021

WYSON CHAMBIMBA NKHATA

ASSISTANT REGISTRAR