



REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
PERSONAL INJURY CAUSE NO. 282 OF 2017

BETWEEN:

JAMES TANAPOSI.....1ST CLAIMANT

MARTIN MWAMADI (Suing on his own behalf and
on behalf of TIPASENI MWAMADI, a minor).....2ND CLAIMANT

AND

YASIN DAUD.....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 2nd May 2017, the claimants 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 action arose from an accident that occurred on the 10th day of March 2017 at or near Jokala Trading Centre in Zomba district in which the 1st defendant who was driving motor vehicle registration number BT906 hit motor vehicle registration number BK8483 in which the claimants were passengers. The 1st defendant is sued as the driver of motor vehicle registration number BT906 and the 2nd defendant is 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 the 24th of April, 2019. Subsequently, the matter proceeded for hearing on assessment of damages and the claimants were awarded a total sum of MK8,109,000.00 in all heads of damages claimed and proved on 20th April 2020. This is the court's order on assessment of costs.

The parties appeared before this court for assessment of costs on the 9th of July, 2021. 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 Given Phiri representing the receiving party adopted in court. In the said bill of costs, the receiving party is claiming K19,018,862.50 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 shall consider both as and when necessary.

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.

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 K19,018,862.50 against the MK8,109,000.00 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 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 E. Mipande of over 10 years standing at the bar. The paying party prays that the hourly rate be split considering that the matter was handled by several lawyers of varying experience at different stages. The record indicates that the matter was actively handled by Counsel Mipande up to judgment on liability and after that it was handled by Counsel Hawa Kamoto for assessment of damages and then by Counsel Given Phiri for assessment of costs. I have reason to believe that going by the Legal Practitioners Hourly Expense Rate for Purposes of Taxing Party and Party Costs 2018 was gazetted on the 16th of November 2018 the expense rate for Counsel Mipande is K40,000.00 per hour while for Counsel Phiri and Counsel Kamoto is K30,000.00. I see no reason why the hourly rate should not be accordingly apportioned where possible.

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 1 hour 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** at the rate of K40,000.00 per hour.

B. DOCUMENTS PERUSED

The receiving party prays for 4 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 | HOURLY RATE |
|--|--------------------------------------|---------------------------|-------------|
| Notice of appointment of legal practitioners | 15mins | 15mins | K40,000.00 |
| Defence | 1hr | 30mins | K40,000.00 |
| Notice of change of legal practitioners | 15mins | 15mins | K40,000.00 |
| Notice of change of legal practitioners | 15mins | 15mins | K40,000.00 |
| Notice of change of legal practitioners | 15mins | 15mins | K30,000.00 |
| Order on Assessment of Damages | 2hrs | 30mins | K30,000.00 |
| TOTAL | | | |

I shall allow **K72,500.00** for this part.

C. DOCUMENTS PREPARED

The receiving party prays for 16¼ 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 16 hours put as being number of hours spent preparing the documents is manifestly unreasonable, repetitive and a tactic to inflate costs. 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 | HOURLY RATE |
|---|--------------------------------------|---------------------------|-------------|
| Writ of summons and statement of claim | 3hrs | 2hrs | K40,000.00 |
| Order for directions | 30mins | 30mins | K40,000.00 |
| Claimant's list of documents | 1hr | 30mins | K40,000.00 |
| Bundle of pleadings | 3hrs | 2hrs | K40,000.00 |
| Consent Judgment | 30mins | 15mins | K40,000.00 |
| Assessment bundle | 8hrs | 4hrs | K30,000.00 |
| Notice of appointment to assess damages | 15mins | 15mins | K30,000.00 |
| TOTAL | K337,500.00 | | |

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 8 hours 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 2 hours in total by the paying party is overtly unreasonable. I will allow 4 hours at the hourly rate of K30,000.00 on this part.

E. CASE AUTHORITIES PERUSED

The receiving party has listed 12 cases on this part and they claim a total of 48 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 8 cases with an average of 1 hour each giving a total of **8 hours** at the hourly rate of K30,000.00 making a total of K240,000.00.

F. CONFERENCES

The receiving party proposes 2 hours for attending to the client to discuss the defence on the 29th January 2019, 3 hours for attending upon the clients in conference on 15th June 2012 for a pre-mediation conference and 4 hours for attending upon the clients in conference on 15th May 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 2 hours under this head. I shall allow one hour for each at the rate of K40,000.00 for attending to client to discuss defence and the pre-mediation session and at K30,000.00 for attending to assessment proceedings making a total of K110,000.00.

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 four attendances to mediation on the 20th May 2019 and attending Court on 21st May 2020 for mediation 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 at the hourly rate of K40,000.00 making a total of K320,000.00.

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.

Having considered the complexity of the matter, the difficulty or novelty of the questions raised; the skill, effort, specialized knowledge and responsibility involved I was of the view that K500,000.00 for refresher fees and K1,000,000.00 for instruction fees is reasonable in this matter.

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 K1,506,000.00 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 MK250,000.00 on travelling alone. They propose that expenses under disbursements should be reduced to MK200,000.00.

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 | K500,000.00 | K100,000.00 |
| Filing fees | K56,000.00 | K56,000.00 |
| Phones | K100,000.00 | K20,000.00 |
| Messengers | K200,000.00 | K100,000.00 |
| Photocopying | K10,000.00 | K10,000.00 |
| Secretarial | K500,000.00 | K100,000.00 |
| Fuel | K250,000.00 | K100,000.00 |
| TOTAL | | K586,000.00 |

K. TAXATION

The receiving party proposes 12 hours for preparation of the bill of taxation, 4 hours for attending taxation proceedings and 75% of this item as Care and Conduct. The paying party proposes 3 hours for preparation of the bill of taxation. 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 attending taxation proceedings, the record indicates that the hearing took less than 30 minutes. I believe 30 minutes is reasonable. Lastly, this court is of the view that 50% of this item as Care and Conduct for Taxation is reasonable. This part shall be taxed at K30,000.00 per hour. 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 | K160,000.00 |
| Documents perused | K72,000.00 |
| Documents prepared | K337,500.00 |
| Books and Statutes | K120,000.00 |
| Case authorities | K240,000.00 |

| | |
|--|----------------------|
| Conferences | K110,000.00 |
| Travelling and waiting | K320,000.00 |
| Refresher fees | K300,000.00 |
| Instruction fees | K1,000,000.00 |
| Total for Part A | K2,659,500.00 |
| PART B: General Care and Conduct 50% of Part A | K1,329,750.00 |
| Taxation | K202,500.00 |
| Total Professional Fees | K4,191,750.00 |
| VAT | K691,638.75 |
| Disbursements | K586,000.00 |
| TOTAL | K5,469,388.75 |

The costs are taxed at **K5,469,388.75**.

MADE IN CHAMBERS THIS 13th OF JULY, 2021


WYSON CHANDI BANKHATA

ASSISTANT REGISTRAR