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REPUBLIC OF MALAWI  
IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY

PERSONAL INJURY CAUSE NUMBER 608 OF 2020

**BETWEEN:**

PATRICIA SAIDI (Suing through litigation Guardian, FRANK THOBOWA).....CLAIMANT

**AND**

ELECTRICITY SUPPLY CORPORATION OF MALAWI.....DEFENDANT

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

Mr. Ndhlovu - of Counsel for the Claimant

Ms. Kamfose - of Counsel for the Defendant

Ms. Chida- Court Clerk and Official Interpreter

**ORDER ON TAXATION OF COSTS**

The claimant was electrocuted upon being exposed to heavy electric shocks that emanated from a live wire that had tilted to the ground after a heavy rainfall. Apparently, the claimant suffered heavy injuries from the incident. Through a writ of summons issued on the 4<sup>th</sup> of August 2020, the Claimant through a litigation guardian commenced this action claiming damages for pain and suffering, loss of amenities of life, deformity, special damages and costs of this action. The defendant was sued by virtue of being a company involved in transmission and distribution of electricity. In default of entering defence, judgment on liability was entered in favour of the claimant on the 1<sup>st</sup> of November, 2020 and the matter proceeded for assessment of damages in which the claimant was awarded K20,000,000.00 under all heads claimed and proved. Subsequently, the matter came for assessment of costs which is the subject of this ruling.

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The parties appeared before this court for assessment of costs on the 15<sup>th</sup> of June 2020. The claimant (hereinafter referred to as the receiving party) through Counsel filed a bill of costs which Counsel Ndhlovu appearing on brief representing the receiving party adopted in court. In the said bill of costs, the receiving party is claiming K11,400,916.00 as costs of this action. The Defendants (hereinafter referred to as the paying party) filed points of dispute on some of the items on the bill of costs. In addition to that, both parties made 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**

##### **A. HOURLY RATE**

The receiving party moves the court to use K40,000.00 as the hourly rate. It is indicated that the matter was handled by Counsel Tusume Mwabungulu of 19 years standing at the Malawi Bar whose prescribed expense rate is at K40,000.00 per hour. There was no objection on the part of the paying party. Since the matter was commenced on the 4<sup>th</sup> of August 2020, there is no doubt that the K40,000.00 provided under the Legal

Practitioners Hourly Expense Rate for Purposes of Taxing Party and Party Costs which came into force on the 16<sup>th</sup> of November 2018 is applicable.

#### B. ATTENDANCES UPON THE CLIENT

Counsel representing the receiving party is proposing 5 hours for attendances upon the client holding several conferences. Further to that, Counsel submits that they spent an hour in settlement discussions with the defendant. The paying party, however, is of the view that 5 hours suggested for holding conferences with the client is exaggerated. They counter-propose 1 hour. I wish to agree with the paying party that 5 hours is a little on the higher side just for conferences with the client. I shall allow 3 hours for the conferences and an hour for the settlement discussions. In total, the court allows 4 hours for this part.

#### C. DOCUMENTS PERUSED

The receiving party claims 30 minutes each for perusal of the Medical Report and the Police Report. However, the paying party is of the view that most of the time proposed is exaggerated. They counter proposed 10 minutes for each. On this regard, I am inclined to agree with the receiving party that at this stage it is not a matter of just reading through the document. Counsel had to read with care to establish if the said documents disclose a cause of action worth pursuing. I shall allow 30 minutes each as claimed by the receiving party. In total, I allow one hour on this part.

#### D. COURT DOCUMENTS PERUSED

On this part, the receiving party listed 14 courts documents that they claim to have perused. They claim a total of 40.2 hours. The paying party however calls upon the court to consider that the receiving party attached only two case authorities to their bill contrary to o.31 r. 12 of the CPR 2017 which 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. They contend that it is hard to confirm that the cases were read in the circumstances. They counter-propose 5 hours for all the documents and attached to the bill. I agree with the paying party that the receiving party did not fulfil their obligation under o. 31 r. 12 of the CPR 2017. Clearly, the doubt thereof must be exercised in favour of the paying party by trimming down the cases. The fact that the cases attached are lengthy does not absolve them from failure to comply with o.31 r.12 of the CPR. Having seen the said cases, the court makes the following conclusion:

<b>COURT PERUSED</b>	<b>DOCUMENTS</b>	<b>TIME PROPOSED BY THE RECEIVING PARTY</b>	<b>TIME PROPOSED BY THE PAYING PARTY</b>	<b>TIME ALLOWED BY THE COURT</b>
Livingstone V Rawyards Coal Company		4hrs		2hrs
Cassel and Company vs Broome		8hrs		5hrs
<b>TOTAL</b>			5hrs	<b>7hrs</b>

#### E. DOCUMENTS PREPARED

Having looked at the proposals made by the parties and having considered the length and complexity of the documents listed and attached to the bill, this court was of the view that the reasonable amounts to allow would be as follows:

<b>DOCUMENTS</b>	<b>TIME PROPOSED BY THE RECEIVING PARTY</b>	<b>TIME PROPOSED BY THE PAYING PARTY</b>	<b>TIME ALLOWED BY THE COURT</b>
Writ of Summons and Statement of Claim and acknowledgment of service form	4hrs	1hr	2hrs
Sworn statement by a legal practitioner for a person under disability	0.5hrs		0.5hrs
Letter dated 2 <sup>nd</sup> March 2021 from the claimant to the defendant	0.1hrs		0.1hrs
Letter dated 25 <sup>th</sup> March 2021 from the claimant to the defendant	0.1hrs		0.1hrs
Letter dated 1 <sup>st</sup> April 2021 from the claimant to the defendant	0.1hrs		0.1hrs
Assessment bundle	2.5hrs		2.5hrs
Notice of Assessment	0.1hrs		0.1hrs

Witness Statement (assessment)	2hrs	1hr	1hr
Skeleton arguments for Assessment of damages	9hrs		3hrs
List of Authorities	0.5hrs		0.5
Sworn statement verifying witness Statement	0.1hrs		0.1hrs
Default judgment	0.1hrs		0.1hrs
Application without notice for default judgment and sworn statement in support	1hr		1hr
Sworn statement of personal service	0.1		0.1
<b>TOTAL</b>			<b>11.2hrs</b>

#### F. COURT ATTENDANCES

The receiving party claims 6.2 hours for court attendances. All the listed attendances involve filing of documents. The paying party contends that this is work that was done by a messenger consider that TJM and Associates is a well established law firm. They submit that in any case the travelling expenses have been captured under travelling expenses. The receiving party contends that there is a knowledge gap between Counsel and a messenger as such in some cases it is only proper that Counsel files the documents In any case, I agree with Counsel Kamfose in that this is messengerial and does not warrant taxation based on the lawyer's hourly rate. I believe there is nothing complex with filing of documents that a messenger would not get correctly. I am compelled to tax off the costs claimed to have been expended under this part.

#### G. GENERAL CARE AND CONDUCT FOR PART A

On this part, Counsel for the claimant is seeking 60% of Part 2 and 3. It is submitted that this was an important case to the claimant. They point out that the claimant sustained personal injuries of various nature and that Counsel exercised great skill and care at all times to ensure that the case was successful. The paying party did not raise issues with the proposal. 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 higher level of skill on the part of the legal teams involved. I am of the view that **60%** would be reasonable.