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REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
PERSONAL INJURY CAUSE NO. 209 OF 2018

BETWEEN:

RASHID TAYUB.....1st CLAIMANT

TRANSGLOBE PRODUCE EXPORT LTD.....2nd CLAIMANT

AND

THE ATTORNEY GENERAL

(DIRECTOR OF PUBLIC PROSECUTIONS).....1ST DEFENDANT

DIRECTOR OF THE ANTI-CORRUPTION BUREAU.....2ND DEFENDANT

CORAM: WYSON CHAMDIMBA NKHATA (AR)

Mr. Chisiza- of Counsel for the Claimant

Ms. Chida- Court Clerk and Official Interpreter

ORDER ON TAXATION OF COSTS

INTRODUCTION

On 17th October, 2018, the claimants commenced these proceedings by writ of summons claiming damages for malicious falsehood, damages for loss of business and costs of this action. The 1st defendant filed its defence denying the claimants' claims in their entirety. On the 23rd November, 2020, the Court dismissed the claimants' action and ordered that the claimants must pay the costs of this action. This is the court's order on assessment of costs. The defendants (hereinafter referred to as the receiving party) through Counsel filed a notice of appointment to assess costs and a bill of costs which Counsel Chisiza 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. They appeared before this court for assessment of costs on the 15th of July, 2021. The Defendants (hereinafter referred to as the paying party) did not attend the proceedings on assessment of costs and neither did they file their objections to the claimants' Party and Party Bill of Costs.

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.

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 ruling 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 K30,000.00 per hour. It is indicated that the matter was handled by Counsel of 5 years standing at the bar. As earlier indicated, the matter was commenced on 17th October, 2018. 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 in the circumstances.

B. ATTENDANCES

The receiving party is claiming 9 hours for the 5 court attendances which they have listed. Further to that they claimant 5 hours for each of the 5 attendances for travelling and waiting. I have gone through the record to verify the court attendances and their duration. I have reason to believe that some are on the higher side and

they ought to be reduced accordingly. I shall allow 5 hours for the attendances. On the part of the travelling and waiting, the court takes note that Counsel was travelling from Lilongwe to Blantyre for the court attendances. I believe 5 hours is in fact a humble proposal. I shall allow the 5 hours for travelling and waiting. In total, the court allows **10 hours** for this part.

C. PREPARATIONS

The receiving party is proposing 10 hours for attending upon the Client to receive instructions to defend the claimant's claim, attending upon and corresponding with the client on divers dates, taking and preparing proofs of evidence. This court is of the view that 10 hours is on the higher side for Counsel to take instructions and record the evidence. Apparently, their position in this matter was clear from the onset that it was that they are not party to the proceedings. It exercises my mind to discern what kind of complicated evidence was needed to advance that position. 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.

Apart from this, the receiving party is claiming costs for preparing for the attendances listed under A. I am afraid this might lead to a duplication. The bill also provides for preparation of documents, perusal of documents and conducting legal research which I believe goes into preparation for a court attendance. Over and above, the bill includes general care and conduct which I believe will adequately cover the time counsel expends preparing for his case. I shall tax off this part.

D. PERUSING AND CONSIDERING DOCUMENTS

The receiving party prays for 42 hours for perusal and consideration of documents in this matter. 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
Summons, statement of case and claimants' list of documents	1hr	1hr
2 nd defendant's statement of defence and list of documents	4hrs	1hr
Skeleton arguments in opposition to application to remove the 1 st defendant as a party	1hr	1hr

Claimants' mediation bundle	4hrs	2hrs
2 nd defendant's mediation bundle	4hrs	2hrs
Notice of mediation	15mins	15mins
Claimants' pre-trial checklist	1hr	30mins
2 nd defendant's pre-trial checklist	1hr	30mins
Notice of scheduling conference	15mins	15mins
Order for directions	30mins	15mins
Claimants' skeleton arguments	1hr	1hr
Claimants' witness statements and skeleton arguments	5hrs	2hrs
2 nd defendant's witness statements and skeleton arguments	5hrs	2hrs
Trial bundle	10hrs	3hrs
TOTAL		16hrs 45mins

E. DOCUMENTS PREPARED

The receiving party prays for 41 hours for preparation of documents in this matter. 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
Letter to client	1hr	30mins
1 st defendant's statement of defence	2hrs	1hr
List of documents	30mins	15mins
Affidavit verifying list of documents	30mins	15mins
Skeleton arguments for an application to dismiss the matter	4hrs	2hrs
1 st defendant's mediation bundle	2hrs	1hr
1 st defendant's witness statement and skeleton arguments	5hrs	2hrs
1 st defendant's pre-trial checklist	2hrs	1hr

1 st defendant's submissions after trial	5hrs	30mins
Bill of costs	6hrs	4hrs
Taxation bundle	8hrs	-
Index and timesheets	2hrs	-
Assembling taxation bundle	3hrs	-
TOTAL		12.5hrs

F. CONDUCTING LEGAL RESEARCH

The receiving party claims 4 hours for conducting legal research in which they consulted Bullen and Leake on precedents with a view to prepare a defence and the Halsbury Law of England (4th Edition) paragraph 20 at page 27. The court has no issues with time allocated on this part. I will allow **4 hours** for this part.

G. CASE AUTHORITIES PERUSED

The receiving party has listed 13 cases on this part and they claim a total of 46 hours. Observably, the listed cases were attached to the Assessment Bundle. 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. In the case of **Madanitsa vs New Building Society (1992) 15 MLR 205**, 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. I shall allow 13 cases with an average of 2 hour each giving a total of **26 hours**.

H. GENERAL CARE AND CONDUCT

The receiving party proposes 80% of Part A as General Care and Conduct. They argue that the case was very important to the defendant and that Counsel ensured that the defence was properly and meticulously prepared. It is further averred that Counsel ensured that all the relevant evidence was available during the whole proceedings. Nonetheless, as earlier stated the 1st defendant's case that the Attorney General was not part of these proceedings. In my opinion, there was nothing novel or new in such application. Clearly, 80% of Part A of the Bill, for care and conduct, is excessive. In this case, I am of the opinion that **60%** of Part A is reasonable.

I. INSTRUCTION FEES

The receiving party is also claiming K1,200,000.00 as instruction fees. They submit that Counsel prepared for the case and perused through various documents. Of paramount importance, the court takes note that Counsel

performed the barrister and solicitor duties to ensure the defence is properly presented. However, there is no evidence that the same was paid by the client. It goes without saying that the fact that the same is provided for under the rules, it does not follow that it has to be paid as a matter of course. I shall exercise doubt by reducing the same and allow **K800,000.00** as instruction fees.

J. DISBURSEMENTS

The receiving party claims K1,050,000.00 for disbursements. They claim K450,000.00 for printing and stationery and K600,000.00 for travelling costs. The court takes note that the said costs for disbursements are not supported by any documents. It must always be borne in mind that according to established practice, such expenses must be strictly proved. The default thereof must compel the court to exercise the doubt in favour of the paying party by reducing the same. The 1st defendant's offices are situated in Lilongwe and they had to travel to Blantyre for the 5 court appearances. The K600,000.00 is reasonable by all standards however in view of failure to provide evidence for same, I shall reduce it to K300,000.00. On the part, of stationery and printing, clearly, K450,000.00 is an overkill. I have seen the record it is quite bulky for a case dismissed at its infancy. However, I am of the view that K200,000.00 would be far more reasonable in the circumstances of this case. In total, the court allows **K500,000.00** for disbursements.

SUMMARY

I therefore tax the bill as follows:

ITEM	COSTS
PART A: Attendances upon client	K300,000.00
Preparations	K120,000.00
Documents perused	K502,500.00
Documents prepared	K375,000.00
Legal research	K120,000.00
Case authorities considered	K780,000.00
Instruction fees	K800,000.00
Total for Part A	K2,997,500.00
General Care and Conduct 60% of Part A	K1,798,500.00
Total Professional Fees	K4,796,000.00
VAT	K791,340.00
Disbursements	K500,000.00
TOTAL	K6,087,340.00

The costs are taxed at K6,087,340.00.

MADE IN CHAMBERS THIS 22ND OF JULY, 2021


WYSON CHAMDIMBANKHATA

ASSISTANT REGISTRAR