



REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
COMMERCIAL DIVISION, BLANTYRE REGISTRY
COMMERCIAL CASE NO. 27 of 2018
(Before Honourable Justice Msungama)

BETWEEN:

DR. C. MAKADIA.....CLAIMANT

-AND-

FMB CAPITAL HOLDINGS LIMITED PLC.....1ST DEFENDANT
FIRST MERCHANT BANK PLC.....2ND DEFENDANT
DHEERAJ DIKSHIT.....3RD DEFENDANT

Coram

E.M. Zidule : Assistant Registrar
Wanjawanja : Counsel for the Claimant
L. Fraser : Counsel for the Defendants
F. Makata : Court Interpreter

ORDER ON ASSESSMENT OF COSTS

Background

On 25th March 2022, the Court dismissed the action herein on the basis of unprocedural commencement. Costs were awarded to the Defendants. However, the matter was reinstated to the cause list on 9th February, 2023. The Claimant filed an application for permission to withdraw and discontinue the matter on 22nd February, 2023. However, the application was dismissed with costs to the Defendants on 10th May 2023. Costs for the said application were awarded on a Legal Practitioner and own client scale for all proceedings that took place since the order of 25th March, 2022.

Pursuant to the above-mentioned Orders, the Defendants filed two bills of costs dated 12th April, 2022 and 22nd May, 2023 respectively. The total claim for the initial bill amounts

to MK55,853,391.67 while the total for the second bill amounts to MK35,630,536.00. This entails that the total sum being claimed as costs amounts to MK91,483,927.67.

The Claimant filed objections to both bills of costs and submitted that the Defendants be awarded a total sum of MWK6,756,464.59.

The duty of this court is to consider the bill of costs, the objections raised by the Claimant and make a determination on the amount that should be awarded to the Defendants as costs.

Applicable Law

Taxation of costs is governed by Order 31 of the Courts (High Court) (Civil Procedure) Rules 2017 (CPR, 2017). Order 31 rule 5 (3) of the CPR, 2017 requires the court to consider, among others, the amount or value of money or property involved, the importance of the matter to all parties, complexity of the matter and the time spent on the case. Order 31 rule 4 (1) of the CPR, 2017 prohibits the court from allowing costs which have been unreasonably incurred or unreasonable in amount while Order 31 rule 4 (2) of the CPR, 2017 provides that when assessing costs on the standard basis the court is required to (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.

It is prudent that in legal proceedings, the successful party should be allowed to claim costs that were reasonably incurred in prosecuting or defending the case. However, the taxing master must ensure that the amount of costs awarded strikes a balance between the successful litigant, who is entitled to recover costs incurred, and the unsuccessful party, who should not be required to pay an excessive amount. Further to that costs awarded between parties are given by the law as an indemnity to the person entitled to them. They are not meant to be imposed as a punishment on the party who pays them, or given as a bonus to the party who receives them- see **Harold Smith [1860] 5H & N 381**.

Fee earners

The statement of fee earners provided by the Defendants includes Senior Counsel Shabir Latif, whose hourly rate is MK60,000.00, in-house Counsel for the Defendants, namely, Messrs Oswald Mtokale and Kizito Kumwenda, whose hourly rate is MK40,000.00 and

MK30,000.00 respectively. The Defendants have also included Counsel Levison Fraser, whose hourly rate is MK30,000.00. However, the Claimant objects the inclusion of Senior Counsel, Shabir Latif, as his name does not appear on the court documents and that he was not involved in the matter. The Claimant also objects the listing of two in-house Counsel since court documents and appearance indicate single counsel.

Order 31 rule 11 (2) of the CPR, 2017 provides that the Court shall allow Senior Counsel fees where his use or appearance has been determined while Order 31 rule 11 (3) of the CPR, 2017 provides that the Court may disallow Senior Counsel fees where his use or appearance as Senior Counsel in a proceeding has been determined inappropriate and may allow ordinary legal practitioners' fees.

In the case of **Dr Saulos Klaus Chilima & Dr Lazarus McCarthy Chakwera v Professor Arthur Peter Mutharika & Electoral Commission Constitutional Reference Number 1 of 2019** it was stated that it is the discretion of the taxing master to determine the number of counsel to be allowed to claim costs. In exercising this discretion I am guided by what was established in the case of **S v Inspector General of Police Clerk of the National Assembly and Minister of Justice Exparte MM and 18 Others (Judicial Review 7 of 2020)** wherein Justice K. Nyirenda stated as follows;

"To my mind, a Receiving Party must at a minimum adduce evidence in support of his or her claim regarding the number of fee earners such as instruction notes or such other documents. It is also important that a Bill of Costs has to summarise the principal tasks carried out by the fee earners involved in each task (repeat involved in each task) and the time spent on that task. In short, it was incumbent on the Receiving Party to show what each legal practitioner did to entitle her to costs as a fee earner....."

The Defendants have submitted email correspondence, between Counsel Fraser and Senior Counsel Latif, which supposedly shows Senior Counsel Latif providing guidance on the documents prepared by Counsel Fraser. However, upon considering the case of **S v Inspector General of Police Clerk of the National Assembly and Minister of Justice Exparte MM and 18 Others (supra)**, it appears to this court that the email correspondence does not provide sufficient evidence to justify the use of Senior Counsel fee. The email correspondence merely represents discussions between a junior lawyer

and an experienced lawyer. Essentially, this is a supervisory role, and it would be unreasonable to include Senior Counsel fee for supervisory work since it has been submitted in the Bill of Costs that the work was done by Counsel Fraser under the supervision of Senior Counsel Latif. Further, Court record indicates the name of Counsel Fraser as being part of the Coram in attendance. Documents filed with the Court were also signed by Counsel Fraser on behalf of the Law firm representing the Defendants herein. However, considering that the Bill of Costs makes one specific mention of work done by Senior Counsel, the court will only allow the use of Senior Counsel fees for the item under which Senior Counsel's task was specifically mentioned.

On the issue of combined fees charged by Counsel Mtokale and Counsel Kumwenda, Court record indicates that Counsel Mtokale was appointed as the sole Counsel for the Defendants. The notice reads as follows "TAKE NOTICE that the Defendants have appointed OSWALD CHIFUNDO MTOKALE to act on their behalf." His name appears on all the court documents that he handled, and he only appeared in Court once with Counsel Kumwenda. Even though both Lawyers are in-house counsel for the 1st and 2nd Defendants, the notice of appointment specifically indicates that Counsel Mtokale was appointed as Counsel for the Defendants. Therefore, any consultations or discussions between the two should be regarded as colleagues assisting each other and brainstorming for their client. Furthermore, the Defendants have not adduced any evidence of work done by Counsel Kumwenda. The court, therefore, declines to award the Defendants a combined fee of Counsel Mtokale and Counsel Kumwenda. In short, Senior Counsel fee will only be used for the specific task mentioned in the Bill of Costs and it is only Counsel Mtokale's hourly rate that will be used, for reasons aforementioned.

i. Instruction fees on the first bill

As already stated, the first bill will be assessed on a standard basis which requires any doubt to be resolved in favour of the paying party. The Defendants are claiming 19.5 hours, which adds to MK910,000.02, for receiving instructions and attending to the Defendants and the Defendants' officers to establish the defence case. The Claimant submitted that 5.5 hours would be reasonable in the circumstances. The court finds 19.5 hours to be on the higher side and reduces the same to 14 hours. This translates to MK373,333.24. Mention must be made that the court has used the rate of Counsel

Mtokale which is two-thirds of the sum which would have been allowed if the Defendants were represented by a legal practitioner-see Order 31 rule 15 (1) of the CPR, 2017.

ii. Preparation of defence and related processes on the first bill

The Defendants claim a total of 55.5 hours for preparation of defence and notice of appointment of Legal Practitioners. The Defendants have also listed the documents perused by counsel as he was preparing the defence. The Claimant objects the claim and submits that 10.25 hours would be reasonable under this head. Having considered the defence and related processes, the court believes that 35 hours will adequately cover for the time that was spent on thus time. This amounts to **MK933,333.10**.

iii. Interparte application for an injunction

Further the Defendants claim 5 hours, translating to MK233,333.33, for considering and perusing Claimant's inter-parte application for an injunction. The Claimant objects the claim and proposes that 1 hour is adequate for counsel to peruse the application. The court makes an award of 2 hours on this item since it would not take 5 hours for the Defendants to peruse the said application for an injunction. This translates to **MK53,333.32**.

iv. Mediation

A claim of 11 hours was made for perusing Claimant's mediation bundle, preparing and filing Defendants' mediation bundle, travelling to court, waiting and attending mediation on 20th July, 2020. The Claimant objects to the claim and proposes 5 hours as reasonable. The court finds 11 hours to be on the higher side and proceeds to reduce the same to 7 hours. This yields **MK186,666.62**.

v. Pre-trial scheduling processes

A claim of 21 hours was made for perusing and considering, among others, Claimant's pre-trial checklist, drawing and filing Defendants' pre-trial checklist, travelling and attending trial scheduling conference. However, the Claimant submits that 21 hours is on the higher side and proposes that 5 hours would be reasonable in the circumstances. The court believes that 14 hours will adequately cover for the time spent on the above-mentioned items. This translates to **MK373,333.24**.

vi. Claimant's application to strike out defence and enter Judgment and consequent processes

The Defendants claim 42.5 hours for considering Claimant's ex-parte application to strike out defence and enter judgment for the Claimant, considering Claimant's bundle of assessment of damages, drawing and preparing Defendants' application for suspension of enforcement order and assessment of damages and an order thereto, preparing Summons for restoration of action, among others. In response, the Claimant argued that the Defendants did not consider the ex-parte application since it was not served on the Defendants. A proposal of 12.25 hours was therefore made by the Claimant. Having considered the application and the processes perused and prepared in response thereto, the court believes that 35 hours would be reasonable in the circumstances. This yields **MK933,333.10**.

vii. Claimant's application for leave to amend Summons and add parties

The Defendants claim 4 hours for accepting service and considering Claimant's application for leave to amend summons and add parties. In response, the Claimant submits that 1 hour is sufficient for accepting service and considering the application. The court reduces the time claimed by the Defendants to 2 hours, yielding the sum of **MK53,333.32**.

viii. Further processes

An hourly rate of MK30,000.00 will be used from this point to the conclusion of the order since the Defendants had appointed Sacranie & Gow Legal Practitioners to represent them from this stage. An hourly rate of MK60,000.00 shall be used for the document that was prepared by Senior Counsel Latif. The Defendants claim 5.5 hours for attending to their client, accepting instructions and studying the case file. In response, the Claimant submitted that 3 hours would be sufficient under this item. This item will be allowed at 4 hours since there were numerous documents to be considered by Counsel at the time of appointment. This translates to **MK120,000.00**.

ix. Statutes and case authorities considered

A claim of 32 hours was made for conducting research in preparation of skeleton arguments. Counsel submitted that he read the CPR, 2017, Rules of the Supreme Court Practice Note 15/4/2 and 8 case authorities. However, a proposal of 6 hours has been made by the Claimant. Upon considering the authorities cited by the Defendants, the court

believes that 22 hours will be reasonable under this head. This translates to **MK660,000.00**.

Further, the Defendants claim 17.5 hours for, among others, drawing a notice of appointment of Legal Practitioners, drawing and reviewing sworn statement in opposition to the application to amend pleadings and skeleton arguments, drawing and sending a letter to Mackenzie and Patricks on 30th July, 2021, travelling, waiting and attending court on 2nd August, 2021 for Claimant's application to amend pleadings. Even though the Claimant made a proposal of 7.25 hours, the court makes an award of 10 hours, yielding **MK300,000.00** on this item.

x. Claimant's application against the appointment of Sacranie, Gow & Co. as Legal Practitioners for the Defendants

A claim of 65 hours was made for the processes Counsel undertook in response to Claimant's application against the Appointment of Sacranie, Gow & Co. as Legal Practitioners for the Defendants. The Claimant objects to the claimed hours and proposes 18 hours. Having considered the documents considered and prepared under this head, the court allows 4 hours for work that was done by Senior Counsel Latif while work done by Counsel Frazer has been allowed at this item at 36 hours. The total award under this item amounts to **MK1,320,000.00**.

xi. Claimant's application to amend Summons and add parties continued

Further, the Defendants claim 59 hours for processes that counsel undertook in response to the Claimant's application to amend summons and add parties. The Claimant submits that 14.25 hours would be sufficient for this item. The court believes that 30 hours will adequately cover for the time that counsel spent on this item. This yields **MK900,000.00**.

Part B : General Care and Conduct

This has been claimed at 100%. The Defendant argues that the case involved a huge sum of money since the Claimant pegged his claim at a minimum of MK10 billion. The Defendants also argues that many documents had to be perused and prepared by Counsel. As such the case required high level of attention, care and conduct. In response, the Claimant submits that care and conduct should be allowed at 40%. In the case of **Dr. Saulos Klaus Chilima & Another v. Professor Arthur Peter Mutharika & Electoral**

Commission Constitutional Reference Number 1 of 2019, care and conduct was allowed at 100% since the case was 'burdensome, difficult and complex.' The record shows back-and-forth applications based on issues mostly governed by CPR, 2017 and available case law. Further, the matter was dismissed before it reached a complex stage. However, considering the high value of the sum that was being claimed by the Claimant, the court will allow care and conduct at 70% of Part A which translates to **MK4,083,332.89**.

Part C : Expenses

The sum of **MK38,000.00** has been claimed as filing fees and the court proceeds to award the same to the Defendants. A claim of **MWK400,000.00** has been made for printing and photocopying charges while transport and fuel expenses have been pegged at **MK100,000.00** and **MK190,000.00** respectively. Printing and photocopying costs will be pegged at **MK150.00** per page translating to **MK300,000.00**. Transport for service of processes and expenses for fuel and wear and tear will be allowed at a global sum of **MK150,000.00**. The total award under this head amounts to **MK488,000.00**.

Costs on taxation proceedings

A claim of **MK2,745,000.00** has been made for preparing a bill of costs, drafting skeleton arguments in support of taxation of costs and attending taxation proceedings. The Defendants are also claiming general care and conduct at 100% of professional fees on taxation which translates to **MK2,745,000.00**. The total claim for taxation proceedings amounts to **MK5,490,000.00**. The court finds the amount being claimed on the higher side and reduces the same to **MK1,450,000.00**. Care and conduct for taxation will be allowed at 50%, translating to **MK725,000.00**. The total award under this head amounts to **MK2,175,000.00**.

Value added tax for services rendered on the first bill amounts to **MK1,995,124.66**. Part C has not been included since VAT is not charged on filing fees and transport expenses. Further, VAT on fuel is paid when purchasing the product so it cannot be charged twice. The same applies to printing and photocopying costs since VAT is paid when purchasing papers, toner, among others.

Claim for Malawi Law Society levy @ 1%

Section 84 (1) of the Legal Education and Legal Practitioners Act stipulates that a legal practitioner shall charge and levy on every matter on which he presents a bill to a client, and payable to the Society, a levy to be known as "Society Levy." Section 84 (2) of the Act states that the Levy shall be the sum of money equal to one per centum (1%) of the fees the legal practitioner charges a client. Clearly, MLS levy is obtainable from fees payable by clients to their legal practitioners. Party and party costs are awarded by the court, they are not client bills. Consequently, the claim for MLS levy fails.

Second bill of costs

The second bill deals with costs that were awarded to the Defendants on 10th May, 2023. The ruling delivered on 10th May, 2023 awarded additional costs for all the proceedings which took place since the order of 25th March, 2022. The ruling also provides that the additional costs be assessed on a legal practitioner and own client scale. Defendants' understanding of the phrase "on a legal practitioner and own client scale" is that the costs in question should be assessed on an indemnity basis. The Claimant submits that Order 31 of the CPR, 2017 requires costs to be assessed either on a standard basis or an indemnity basis. It is therefore Claimant's argument that Order 31 of CPR, 2017 does not state that legal practitioner and own client fees should be assessed on an indemnity basis.

Assessment of costs on an indemnity basis is broader in scope than assessment of costs on a standard basis. Costs on indemnity basis are awarded, for example, when a party is found to have conducted his or her case improperly or to have wasted the court's and other party's time -see the case of **S v. Inspector General of Police Clerk of the National Assembly and Minister of Justice Exparte MM and 18 Others (Judicial Review 7 of 2020)**. The order of additional costs came after the matter was discontinued on application by the Defendants and later restored by an application of the Claimant. The Claimant later sought to withdraw the matter, which the Court found unusual and determined that the Claimant sought to withdraw the matter in a bid to avoid paying party and party costs. It appears to this court that the Order made on 10th May, 2023 intended to indemnify the Defendants for the waste of time and resources hence requiring costs to be assessed on Legal Practitioner and own Client scale. Order 31 rule 4 (3) of the CPR, 2017 provides that where the amount of costs is to be assessed on the indemnity basis,

the Court will resolve any doubts which it may have as to whether costs were reasonably incurred or were reasonable in amount in favour of the receiving party.

Part A of the second bill : Professional fees

The Defendants claim a total of 164.75 hours for work done under part A of the second bill which translates to MK14,827,500.00. The Claimant objects the claim and proposes a total of 65 hours for work done under this head. Having considered the work done under this item, the court makes an award of 90 hours, translating to **MK2,700,000.00**.

Part B of second bill : General care and conduct

This has been pegged at 100% of part A, translating to MK14,827,500.00. The Claimant submits that general care and conduct should be allowed at 40% of part A. However, the court will allow care and conduct for part A of the second bill at 70%. This translates to **MK1,890,000.00**.

Part C : Expenses

The receiving party claims a total of MWK681,400.00 as the expenses for work done and recorded in the bill. The Claimant objects to the total sum and proposes a sum of MWK427,700.00. The sum of **MK50,000.00** has been awarded as filing fees. Printing and photocopying expenses Printing and photocopying costs will be pegged at MK150.00 per page translating to **MK350,550.00**. Transport for filing and service of processes will be reduced to **MK20,000.00** from MK40,000.00 while expenses for fuel and wear and tear have been assessed at MK90,000.00. The total award under this head amounts to **MK420,550.00**.

Taxation of costs

The Defendants claim a total of MWK2,880,000.00 on taxation of costs. The Claimant contests the claimed amount and proposes the sum of MWK430,000.00. The court finds the claimed amount unreasonable and proceeds to reduce the same to **MK700,000.00**. General care and conduct for taxation proceedings was pegged at 100%. However, care and conduct for this item will be allowed at 50%, translating to **MK350,000.00**.

Further, the Defendants claimed a total sum of MK96,000.00 as filing fees for notice of appointment to tax costs, bill of costs and skeleton arguments. The said sum also includes stationery, transport, fuel and wear and tear expenses for taxation proceedings. However, the court will reduce the claimed amount to **MK60,000.00**.

Value Added Tax for services rendered on the second bill amounts to MK930,600.00.

Conclusion

The court finds the amount claimed by the Defendants excessive and unreasonable. More like punishment to the paying party. However, upon a thorough consideration of both bills and the objections raised by the Claimant, a total sum of **MK21,625,940.25**.

has been awarded as costs herein. For the avoidance of doubt:

First bill of costs amounts to **MWK14,574,790.25** while Second bill of costs amounts to **MWK7,051,150.00**.

Any aggrieved party is at liberty to apply for review or appeal against the decision of this Court within 21 days from the date hereof.

Delivered in Chambers this 15th day of March, 2024 at High Court Commercial Division,
Blantyre Registry.



E. M. Zidule

Assistant Registrar