IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 86 OF 1985

BETWEEN:

A. KACHINGWE (MALE) ..... 1ST PLAINTIFF

KACHINGWE & COMPANY LTD. ..... 2ND PLAINTIFF

- and -

MANGWIRO TRANSPORT MOTORWAYS LTD. ..... DEFENDANT

Coram: MAKUTA, CHIEF JUSTICE

Nakanga of Counsel for the Plaintiffs
Msisha of Counsel for the Defendant
Kalimbuka, Court Clerk

R U L I N G

On 20th June, 1986, the Taxing Master taxed a solicitor and own clients bill of costs in the sum of K11,841.00. The bill was filed by Messrs. Nakanga and Company. Mr. Msisha of Messrs. Savjani and Company represented the plaintiffs only as to costs. Mr. Msisha on behalf of the defendant raised some objections and on 2nd September, 1986 the Taxing Master made a ruling reducing the bill to K7,341.00. The objections were directed to instruction fees, brief fees and refreshers. Mr. Nakanga is appealing against the decision of the Taxing Master and is asking for the review of the deductions.

In the action itself, which arose from a road accident, there was a claim by the plaintiffs and a counterclaim by the defendant. Two sets of instruction fees were claimed, one for the plaintiffs' claim and the other for the defendants' counterclaim. K3,000.00 was allowed for the claim and K2,000.00 for the counterclaim making a total of K5,000.00 on instruction fees alone. During the review the K2,000.00 was taxed off on the ground that there can be only one allowance for instruction fees in any action, cause or matter. The Taxing Master relied on 0.62/A2/22 of the Rules of the Supreme Court.

Mr. Nakanga submitted that this is wrong since a counterclaim, for all purposes, is a cross action and should therefore attract separate fees. I do not think that there

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is a dispute as to whether a counterclaim is a separate or a cross action. 0.15/2 so provides. Just to bring home this point it was held in Provincial Bill Posting Company vs. Low Moor Iron Co. (1902) 2 K.B p.344 that the court may give the plaintiff judgment on the claim and costs of the action, save in so far as they were increased by the counterclaim, and the defendant judgment on the counterclaim with costs solely referrable to the counterclaim: see also Chell Engineering Ltd. vs. Unit Two and Engineering Company Ltd. (1950) 1 All.E.R. p.378.

What is being disputed are separate fees for counterclaim. In fairness it must be mentioned that the Taxing Master addressed his mind to the past practice where separate costs for claim and counterclaim were allowed. He, however, had misgivings as to whether the practice has a force of law as it might have developed on wrong premises. He, however stated that he had had no occasion to look at the question because counsel never raised the issue before.

Taxing of costs is dealt with under Order 62 of the Rules of the Supreme Court. 0.62/A2/22 provides:

"Only one allowance will be made for instructions in any action, cause or matter....."

Further examination of this, especially the notes, reveals that the matters to be considered include the taking of instructions to sue, defend, counterclaim or appeal; considering facts and law; inspecting any property or place, material to the proceedings; perusing pleadings, affidavits and relative documents; general care and conduct of the proceedings etc. etc. Mr. Nakanga submitted that 0.62/A2/22 only deals with preparation for trial. With respect it will be noted from above that other matters, not necessarily dealing with preparation for trial are dealt with: See note to item 10 under 0.62/A2/23 of the 1985 Rules of Supreme Court at page 962.

Mr. Nakanga also submitted that the Taxing Master was wrong in relying on 0.62/9/13 when he ordered that there should be one instruction fee because that merely gives guidance when both the claim and counterclaim has been dismissed or when the claim and counterclaim has succeeded. With respect, the rule provides much more than that. It provides that where claim and counterclaim are both dismissed with costs, upon taxation, the claim should be treated as if it stood alone and the counterclaim should bear only the amount by which the costs of the proceedings have been increased by it. No costs not incurred by reason of counter-claim can be costs of the action. In the absence of directions by the court, there should be no apportionment. The same principle applies where a claim and the counterclaim have succeeded: see Medway Oil and Storage Company vs. Continental Contractors (1929) A.C. p.88. In my view, if on taxation, the counterclaim is to bear only the amount by which the costs of the proceedings have been increased by it, then I do not see where the Taxing Master went wrong.

I entirely agree with the Taxing Master that the nature of this case is such that the counterclaim could not have increased the costs of the proceedings substantially. The facts of the counterclaim, apart from the damages, were substantially the same as those for the main claim. The facts of the case are not complex and there was nothing difficult or novel in the questions involved. In a case where the facts of the counterclaim are completely different, not in any way related to the main claim, I can see a lot of justification for claiming a separate fee for instructions. In such a situation the plaintiffs would, of necessity, give the legal practitioner fresh instructions as to how the counterclaim arose and whether there is any defence to the counterclaim etc. etc.

I now turn to the brief fees. I think it is important to look at the basis of the brief fee. Where the profession is split a solicitor will deliver a brief to counsel who will then charge his fee on it. This is done when the case is ready for trial. In our fused profession one person, say an advocate, deals with all the matters right from inception of the case to the end. There can therefore be only one brief fee for the entire action. I do not see any justification for two brief fees where there is a counterclaim in a case like the present one. The counter-claim, as already mentioned earlier, was based on the same facts. There was therefore common question of fact relating to liability. In the circumstances I do not intend to interfere with the Taxing Master's ruling in this matter.

On refreshers, the amount of K4,000.00 originally claimed was in my view far too high. It was unprecedented. Mr. Nakanga has submitted that the Taxing Master did not give reasons for reduction. I think that the exorbitant figure alone was sufficient reason for the reduction. It was submitted that the refresher should be calculated at two-thirds of the brief fee. Since there were two refreshers it should have been two-thirds times two. This rule entitled junior counsel, who appeared with a leader, to be paid two-thirds of the fee payable to his leader. It is not clear how the rule acquired its present form in our system and I am wondering whether it is appropriate since our profession is fused. It is already abrogated in the system where it originated. Be that as it may I do not intend to interfere with the amount allowed.

I would like to observe that it is of great importance that litigants who are unsuccessful should not be oppressed by having to pay an excessive amount of costs. It has been stated that when it is a solicitor and his own clients, taxation is more generous. It is therefore not in keeping with this to note that bills from a solicitor to his client are exorbitant. I would have thought that a solicitor should be more generous to his client especially if he is unsuccessful. One gets the impression that the bills are pitched high in the hope that when they are taxed

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there still remains a substantial amount. The Taxing Master should be on the look out for this. I have not interfered with the amounts allowed but this is only because there was no request to reduce the amounts further. I only hope that they will not form a precedent.

MADE in Chambers this 28th day of November, 1986, at Blantyre.

F. L. Makuta
CHIEF JUSTICE