JUDICIARY
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY (CIVIL DIVISION)
JUDICIAL REVIEW CAUSE NO. 7 OF 2020

BETWEEN

THE STATE

AND

THE INSPECTOR GENERAL OF POLICE …… 1st RESPONDENT

THE CLERK OF THE NATIONAL ASSEMBLY …..…… 2nd RESPONDENT

THE MINISTER OF JUSTICE ……..…… 3rd RESPONDENT

EX-PARTE M.M. AND 18 OTHERS ……..……. APPLICANTS

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA
Mmes. Soko and Liabunya, Counsel for the Applicants
Mr. Thabo Nyirenda, Attorney General and Mr. Chirwa, Senior State Advocate, Counsel for the Respondents
Mr. Henry Kachingwe, Court Clerk

ORDER ON REVIEW

Kenyatta Nyirenda, J.

Introduction

1. This is this Court's Ruling on application by the Respondents (Paying Party) for review of costs. The application is brought under Order 31, rule 17, of the Courts (High Court) (Civil Procedure) Rules [Hereinafter referred to as the "CPR"] and the Court Order dated 6th August 2021. The Paying Party has advanced twenty four grounds in support of the present application. The Applicants (Receiving Party) are opposed to the application.

2. By its judgment dated 13th August 2020, the High Court awarded costs to the Receiving Party. The Receiving Party filed a Bill of Costs on 24th May 2021

proposing a total sum of K215,628,102.00 to be awarded as costs. The Paying Party raised its points of objections.

3. On 6th August 2021, the Assistant Registrar (Taxing Officer) delivered a ruling which assessed the costs payable to be K255,684,112.00. Being dissatisfied with the assessment order, the Paying Party on 29th August, 2022 filed an application to have the costs reviewed. The review of costs session was scheduled to take place before the Taxing Officer. The Taxing Officer handled two (preliminary) applications in relation to review of costs. On 12th November 2021, the Taxing Officer, in exercise of powers under Order 25, rule 2, of the CPR, referred the review of costs proceedings to a Judge in Chambers.

4. The matter has been the subject of a number of applications before this Court in the intervening period, including an application to amend the grounds for review of costs to better identify the issues between the parties, provide better facts about each issue and to correct mistakes. The application to amend the grounds for review of costs was granted on 12th April 2022.

The applicable law

5. Assessment of costs in the High Court is governed by Order 31 of the CPR and rules 4, 5, 10 and 17 thereof are directly relevant. Rule 4 provides as follows:

> *"(1) 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.*
>
> *(2) 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.*
>
> *(3) Where the amount of costs is to be assessed on the indemnity basis, the Court will resolve any doubt which it may have as to whether costs were reasonably incurred or were reasonable in amount in favour of the receiving party.*
>
> *(4) 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."*

6. Rule 5 sets out circumstances to consider in assessing costs and it is couched in the following terms:

"(1) The Court shall have regard to all the circumstances in deciding whether costs were–

(a) if it is assessing costs on the standard basis–

(i) proportionately and reasonably incurred; or

(ii) were proportionate and reasonable in amount, or

(b) if it is assessing costs on the indemnity basis–

(i) unreasonably incurred; or

(ii) unreasonable in amount.

(2) In particular, the Court shall give effect to any orders which have already been made.

(3) The Court shall also have regard to–

(a) the conduct of all the parties, including in particular–

(i) conduct before, as well as during, the proceedings; and

(ii) the efforts made, if any, before and during the proceedings in order to try to resolve the dispute;

(b) the amount or value of any money or property involved;

(c) the importance of the matter to all the parties;

(d) the particular complexity of the matter or the difficulty or novelty of the questions raised;

(e) the skill, effort, specialized knowledge and responsibility involved;

(f) the time spent on the case; and

(g) the place where and the circumstances in which work or any part of it was done."

7. In terms of rules 4 and 5, a taxing officer is expected to conduct an enquiry into the reasonableness of fees and disbursements that a successful party claims from the unsuccessful party. To discharge that obligation, the rules confer upon a taxing officer a discretion to allow costs incurred by the successful party which appear to the taxing officer to have been necessary or proper for the attainment of justice or defending the rights of the successful party.

8. It follows that in exercising the discretion conferred upon him or her, a taxing officer may not allow the costs which have been incurred or increased through over-caution, negligence or mistake, or by payment of a special fee to another legal practitioner, or special charges and expenses to witnesses or other persons or by other unusual expenses. In short, a taxing officer can only allow bona fide and necessary costs on every taxation.

9. Rule 10 makes provision regarding fees for legal practitioners and it states as follows:

> "*(1) A legal practitioner or his law firm shall be entitled to an instruction fee and not a brief fee where he or his firm have had instructions to act for a party from the commencement of a proceeding to trial.*
>
> *(2) The Court may allow a legal practitioner or his law firm to be entitled to a single fee.*
>
> *(3) A legal practitioner or his law firm shall be entitled to a brief fee where he or his firm have instructions from another legal practitioner or firm to appear on behalf of that legal practitioner or firm at trial."*

10. It is important to remember that costs are not imposed as a punishment on the paying party or given as a bonus to the receiving party. The following dicta by Sir Richard Malins V.C in **Smith v. Buller** [1875] LR 19 Eq 473 is instructive:

> *"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 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 litigation more conveniently may be called luxuries and must be paid by the party incurring them."* – Emphasis by underlining supplied

11. All in all, the powers of a taxing master are regulated by law and may not be exercised outside the parameters set out by the relevant laws.

12. While allowing costs is the preserve of a taxing officer, rule 17 makes provision regarding review of decisions on costs and it is worded thus:

> *"(1) A party to assessment of costs who is dissatisfied with any decision of the Court may, within 21 days after that decision, apply to the Court to review its decision.*
>
> *(2) An application under sub rule (1) shall specify, in writing, the nature and grounds of the objections.*

> *(3) The objections under sub rule (2) shall be served on every other party to the proceeding, and the other party shall, within 21 days from the date of service, deliver answers to the Court, the applicant or other party to the proceeding.*
>
> *(4) The Court may receive further evidence at the hearing of an application under sub rule (1) and may order costs as it shall deem appropriate in the circumstances."*

13. In exercising its powers of review under rule 17, the Court may interfere with the order of taxation of costs in certain circumstances. The principles applicable in reviewing the order of taxation are the same as apply to reviews in general. There are two instances in which a court may competently interfere with the decision of a taxing officer.

14. Firstly, where a finding is made that the taxing officer's decision was grossly unreasonable or that the taxing officer erred on a point of principle or law. For example, in a case where the discretion has been improperly exercised, that is, where the taxing officer has been actuated by some improper motive, or has not brought his or her mind to bear upon the question, or where he or she has adopted some principle which the Court considers unsound.

15. Secondly, a Court is entitled to interfere where the taxing officer was clearly wrong regarding some item. In such a case, the Court will substitute its own opinion for that of the taxing officer even if it is a matter involving degree.

16. Unless the two grounds can be established, the Court will be very slow to interfere with the exercise of the discretion of the taxing officer.

17. As stated at paragraph 1 of this Judgment, the Paying Party has advanced twenty-four grounds for review and each ground will be addressed separately and in seriatim.

Ground No. 1 – Alleged Failure to Conduct a Detailed Assessment of Costs

18. Under this ground, the Paying Party espouses the view that the Taxing Officer failed to conduct a detailed assessment of costs either on an indemnity or standard basis in accordance with Order 31 rule 4(1) and (4) of the CPR despite being presented with several objections.

19. The position of the Receiving Party is that the Paying Party has not fully grasped the concepts of standard and indemnity. The point was put thus:

> *"There is also a bungling up of the concept of standard and indemnity basis. How this can arise is also rather mystifying. The issue of standard and indemnity basis is covered under Order 31 rule 4. The two bases for assessing costs are different. Under the standard basis, all doubts in whether the claimed expense was reasonably incurred is resolved in favour of the paying party. The claimed costs should also be proportionate. While under the indemnity basis, doubt is resolved in favour of the receiving party. An indemnity costs basis has to be specifically made in the costs order to punish unreasonable conduct on the part of a party see Dixon* ***[2016] EWHC 3485 (QB)****. It cannot be assumed. That is why Order 31 rule 4 (4) is clear that in the absence of specificity, the assumption must be that the costs are to be assessed on a standard basis. This is what the Court did in this case. The objections on this aspect are regrettably not well grounded and should be dismissed."*

20. I have considered the submissions by both the Paying Party and the Receiving Party and, to my mind, both have good understanding of the concepts under consideration. Costs on standard basis (formerly known as 'party and party costs') obtain where the Court will only allow costs which are reasonable in amount, and reasonably incurred, and proportionate to the matters in issue. Any doubt which the Court may have in respect of costs on standard basis has to be resolved in favour of a paying party. This means that a receiving party has to prove the reasonableness and proportionality of the amount claimed. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred.

21. It is clear that Order 31 of the CPR draws distinctions between assessment of costs on standard basis and assessment of costs on indemnity basis. The first difference is on the bearer of the onus to establish that the costs were reasonable. In the case of assessment of costs on standard basis, the onus is on the receiving party. Once a paying party establishes a prima facie basis for objecting to an item, the onus shifts to a receiving party to establish the reasonableness and propriety of the item. In the case of assessment of costs on indemnity basis, the onus of showing that the costs are not reasonable is on the paying party.

22. The second distinction lies in the fact that, whereas in the case of assessment of costs on standard basis the court will only allow costs which are proportionate to the matters in issue, this requirement of proportionality does not exist in relation to assessment of costs on the indemnity basis. This is a matter of great and real significance in a number of respects. In the first place, it means that an assessment on indemnity basis does not have the important requirement of proportionality which is intended to reduce the amount of costs which are payable in consequence of litigation. Provided the costs are reasonable, they will be allowed, even if the Court is in doubt about whether they have been reasonably incurred. In the same vein, an

assessment on indemnity basis means that a receiving party is more likely to recover a sum which reflects the actual costs in the proceedings.

23. Thirdly, assessments of costs on indemnity basis are broader in scope than assessments of costs on 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 the other party's time.

24. In either case, that is, assessment of costs on indemnity basis or assessment of costs on standard basis, the Court will not allow costs which have been unreasonably incurred or are unreasonable in amount.

25. In the present case, the all-important question is whether or not the Taxing Officer correctly applied the concept of assessment of costs on standard basis. For example, did the Taxing Officer:

(a) only allow costs which were reasonable in amount, and reasonably incurred, and proportionate to the matters in issue?

(b) resolve any doubt which the Officer had in respect of costs on standard basis in favour of the paying party?

(c) bear in mind that the onus was on the Receiving Party to prove the reasonableness and proportionality of the amounts claimed?

(d) appreciate that costs which are disproportionate in amount had to be disallowed or reduced even if they were reasonably or necessarily incurred?

26. The Court will be guided by the foregoing matters as it considers the grounds for review of costs.

27. The Court is also alive to the fact that this is a civil case and as such the Receiving Party has to prove its claims regarding costs on a balance of probabilities. In the case of **Commercial Bank of Malawi v. Mhango [2002-2003] MLR 43 (SCA)**, the Court observed as follows:

> *"Ordinarily, the law is that the burden of proof lies on a party who substantially asserts the affirmative of the issue. The principle was stated in the case of Robins v National Trust Co [1927] AC 515 that the burden of proof in any particular case depends on the circumstances in which the claim arises. In general, the rule is Ei qui affirmat non qui negat incumbit probatio which means the burden of proof lies on him who alleges, and not*

him who denies. Lord Megham, again, in Constantine Line v Imperial Smelting Corporation [1943] AC 154, 174 stated that it is an ancient rule founded on considerations of good sense and should not be departed from without strong reasons. The judge said that the rule is adopted principally because it is but just that he who invokes the aid of the law should be the first to prove his case because in the nature of things, a negative is more difficult to establish than an affirmative. However, in a civil action the burden of proof may be varied by the agreement of the parties – see Bond Air Services Ltd v Hill [1955] 2 QB 417."

Ground No. 2 – Number of Fee Earners

28. The issue of fee earners is stated in the Bill of Costs as follows

"This matter was handled by five (5) Counsel of various years of standing at the Malawi bar. In terms of Rule 2 of the Legal Practitioners (Hourly Expense Rate for Purposes of Taxing Party and Party Costs) Rules, 2018, the Bill will be assessed at the following hourly rates:

- *Counsel Charlotte Wezi Malonda of 19 years standing at the bar- MK40,000.00/hr.*
- *Counsel Hilda Soko of 10 years standing at the bar MK40,000.00/hr.*
- *Counsel Tadala Chinkwezule of 10 years standing at the bar – K40,000.00/hr.*
- *Counsel Carol Tendai Makoko of 4 years standing at the bar-K30,000.00/h.*
- *Counsel Immaculate Maluza of 3 years standing at the bar-K30,000.00/hr.*

Therefore the bill will be assessed at MK180,000.00/hr." – Emphasis by underlining supplied

29. I pause to observe that a lot of problems in this matter were caused by the approach taken by the Receiving Party in assessing the bill of costs using a method whereby a claim in respect of each and every item was at the rate of K180,000.00/hr irrespective of the number of fee earners involved in relation to that item. This approach, that is, "*Therefore the bill will be assessed at MK180,000.00/hr"* was applied across the board without any qualification or distinction. I very much doubt the legal basis of this approach/method. For example, it is only Counsel Hilda Soko who attended the scheduling conference on 23rd March 2020. Why should the bill be assessed at the rate of MK180,000.00/hr in respect of the scheduling conference? Similarly, how is it possible for the Receiving Party to seriously argue that a sworn statement of service was prepared by five Counsel and that it took them 15 minutes

to prepare it and, therefore, K45,000.00 was payable? I am baffled. We will revert to these points in due course.

30. Having listed the fee earners, the Ruling by the Taxing Master deals with the issue of fee earners as follows:

> *"Counsel for the respondents argues that most of the documents were prepared by three counsels only, namely, Counsel Soko, Counsel Makoko and Counsel Maluza. The number of counsels was increased to five at assessment of compensation. The judgment on Judicial Review only lists three Counsels on the Coram. Counsel for the Defendant requested that each Counsel should show what they did to entitle them to costs. In response, Counsel for the Applicants stated that they did not include Counsel who worked on the matter. Due to Covid restrictions, not all Counsel present were seated at the bar and Counsel Chinkhwzule and Counsel Dr Malunga had to sit in the gallery. Counsel further averred that there were 18 Applicants with different cases and assigned four (4) applicants to one Counsel was reasonable.*
>
> *The Registrar has the discretion to determine the number of Counsel to claim costs. The Registrar, in Dr Saulos Klaus Chilima & Dr Lazarus McCarthy Chakwera v Professor Arthur Peter Mutharika & Electoral Commission Constitutional Reference No. 1 of 2019, limited the number of Counsel representing each party to 5. In making her determination, she considered the complexity of the matter, the importance of the case to the nation and factors raised by Counsel'. Some other issues raised by Counsel were that 'it was one of the most important cases in the history of Malawi and a good number of lawyers was needed to scrutinise the volume of documents in the case. Although all this was true, the Registrar noted that the receiving party should not incur unnecessary expenses under the guise of national importance and the historic nature of the case.*
>
> *There are 18 Applicants in this matter, and each one of them is entitled to legal representation, having (5) five lawyers acting under the Women Lawyers Association was fair in the circumstances. The number of Lawyers will be maintained as proposed."*

31. A central element in the argument of the Paying Party on this ground is that the Taxing Master disregarded the objection by the Paying Party on the number of fee earners. The Paying Party strenuously submitted that the number of five fee earners was unreasonable and bloated:

> *"We submit that the court should allow party and party costs for two counsel's fees only and no more. It should be noted that the matter herein was a judicial review and not subject to stringent level of proof. The court should also be mindful that donors pumped in a lot of money to Women Lawyers Association under which the counsel herein operated under. The said Association was funded by both national and international organisations, as such it will be punishing the paying party just to consider each counsel who appeared on only specific assignment. As court records will show, the lawyers acting as an Association were*

appearing in rotation as such it will be naïve to award every counsel as if they all did the same tasks. The court record will show that at times counsel for the Applicants would come 3, sometimes 4 at times 5. We are of the view that one counsel was regular in all court processes, that is counsel Soko hence it will not be absurd to tax party and party costs to one counsel."

32. The Paying Party cited the cases of **Taehwa Construction Company Ltd v. Carpet and Furnishing Centre Ltd** 11 MLR 21 and **Ampex Limited v. Mota Engil** Commercial Case Number 178 of 2013 (HC/PR) (unreported). In the latter case, the matter was handled on behalf of the defendants by two counsel but the court allowed the expense rate of only one counsel.

33. The main thrust of the submissions by the Receiving Party is that the Paying Party has underestimated the work that the Receiving Party undertook in this case:

"1. ***Number of Counsel to be allowed to claim costs***

1.1 it is the discretion of the taxing master to determine the number of counsel to be allowed to claim costs. ***Dr Saulos Klaus Chilima & Dr McCarthy Chakwera v Professor Arthur Peter Mutharika & Electoral Commission, Constitutional Reference No. 1 of 2019; Taehwa Construction Company Ltd v Carpet and Furnishing Centre Ltd 11 MLR 21; Re Potts, Exp. Epstein v Trustee & Bankrupt [1935] ch 334***

1.2 The fact that the matter was commenced by way of judicial review cannot be a factor used to argue that only one counsel should benefit from party to party costs. Regardless of the mode of commencement, the court should be guided by factors that are outlined in Order 31 Rule 5(3) as are applicable to this case which include:

a. The conduct of the parties;

b. the importance of the matter to all parties;

c. complexity of the matter or difficulty or novelty of questions raised;

d. skill, effort specialized knowledge and responsibility involved;

e. time spent on the case; and

f. place where and circumstances in which work or any part of it was done.

1.3 Counsel dealt with 19 applicants who had different stories based on different factual basis. Obtaining instructions and preparing court papers including sworn statements which were required at different stages of the proceedings entailed dealing with each applicant individually. This is not work that can be and was done by one counsel.

1.4 The case involved a lot of research, high risk and intense engagement with 18 highly traumatized applicants who remained so during the whole period of trial and were undergoing trauma related psychiatric treatment. The responsibility involved in this case was very huge as to be taken by one counsel and was not taken by one counsel.

1.5 The case was not and did not involve money, but it is beyond money. It is a case of sexual assault by a state institution resulting in serious violations of human rights and lifelong traumatization of the victims/applicants. The case was of national importance and it held determination of fundamental rights in relation to a state institution that is key to the enjoyment of rights of all Malawians. The AG should not belittle its importance and the responsibility involved simply by referring to the mode of commencement. As a matter of fact, mode of commencement is not a consideration the court ought to take into account under Order 31 rule 5(3).

*1.6 In the most recent case **Dr Saulos Klaus Chilima & Dr McCarthy Chakwera v Professor Arthur Peter Mutharika & Electoral Commission, Constitutional Reference No. 1 of 2019,** the registrar ordered that 5 legal practitioners for each applicant will be allowed to be awarded party to party costs.*

1.7 In the case under review, where there are 19 applicants, the taxing master, in exercising her discretion ordered that 5 lawyers be awarded party to party costs. Effectively, each applicant had less than 1 lawyer (0.27 of a lawyer).

*1.8 In the case of **The State and Malawi Revenue Authority on the application of The Registered Trustees of National Media Institute of Africa and 3 others Constitutional Case No. 3 of 2019,** a case whose hearing lasted only 1.5 hours and involved 4 applicants, the court allowed 4 counsel to claim costs.*

1.9 For the Attorney General to come on review and argue that 0.27 of a lawyer (less than 1 lawyer) for each applicant was too much, in a case that required a lot of research, carried high risk for the lawyers and bestowed high responsibility on counsel due to the traumatized state that each applicant was in throughout the 15+ months the applicants were seeking justice, is absolutely shocking.

1.10 The Attorney General alludes to unsubstantiated claims that there are donors who pumped in a lot of money in the case. As the head of Bar, the Attorney General surely ought to know that the court does not make its decisions based on 'information' in the public domain. It is the Attorney General himself who made these unsupported and unfounded allegations on social media including granting interviews to international media and cannot surely want the court to base its review on the same. Without evidence to that effect and without a chance for the Applicants to cross-examine the AG to ascertain veracity of allegations, would be a great injustice and highly prejudicial.

1.11 In any case, this was not an issue during the review proceedings and the court should not be drawn to decide on belated objections."

34. I have considered the respective submissions on this issue. In terms of Order 31, rule 4(1) and (4), of the CPR, and the general rule applicable to civil cases, the Receiving Party bears the onus of establishing the number of fee earners. How is this to be done? How do you come up with a list of fee earners? Who is a fee earner? Is it enough for a receiving party to simply state that so and so worked on the case? Let us give some context to these questions. Counsel Liabunya appeared in Court on behalf of the Receiving Party but her name is not listed in the Bill of Costs as a fee earner. There is also Dr. Malunga. The Receiving Party claims that Dr. Malunga was part of the team of legal practitioners representing the Receiving Party in this case but her name is not listed among fee earners.

35. 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 Receiving Party failed to do. Instead, the Receiving Party resorted to the method referred to paragraph 29 of this Judgment.

36. I have meticulously gone through all the court files on which this matter rests in search of direct evidence regarding fee earners but my search has been in vain. What I have come across of relevance is as follows:

(a) <u>Application for Permission to Apply for Judicial Review</u>

Applicant's Legal Practitioners are stated to be "Women Lawyers Association and the Application was signed by "Hilda Soko, legal practitioner for the Applicants"

(b) Scheduling Conference – 13 March 2020

Counsel Hilda Soko attended Court and the Conference lasted 15 minutes from 10:10 am to 10:25 am

(c) Scheduling Conference – 23 March 2020

Counsel Hilda Soko attended Court and the Conference lasted 18 minutes from 2:32 pm to 2:50 pm

(d) Hearing of Application for sanction and striking out the defence – 2 July 2020

The coram sheet shows that Counsel Soko, Maluza and Makoko attended Court on behalf of the Receiving Party. The session lasted not more than 20 minutes because the matter took a new twist and this led to an adjournment of the hearing of the application.

(e) Hearing of Application for sanction and striking out the defence – 16 July 2020

The coram sheet shows that Counsel Soko, Maluza and Makoko attended Court on behalf of the Receiving Party. The session lasted two hours.

(f) Session for assessment of compensation before the Assistant Registar – 30 September 2020

The coram sheet shows that Counsel Soko, Maluza, Malonda, Chimkwezule and Makoko attended Court on behalf of the Receiving Party. The session lasted 7 hours and 17 minutes from 9:16 am to 4:33pm

(g) Session for taxation of costs before the Assistant Registrar – 9 June 2021

> The coram sheet shows that (i) Counsel Soko, Makoko, Liabunya and Maluza attended Court on behalf of the Receiving Party and (ii) the session started from 1:21 pm. The time when the session ended is not recorded

35. Much as the foregoing shows that certain aspects of the legal work were done by five legal practitioners, namely, Counsel Soko, Maluza, Malonda, Chimkwezule and Makoko, it is a grave error to proceed as though each and every aspect of the legal work was done by them as a group in the absence of evidence to that effect. In this regard, I don't subscribe to the notion that what is important for taxation is whether or not such an assignment was carried out. There has to be evidence (a) that a particular assignment was carried, (b) of the persons who carried out the particular assignment and (c) of the duration of the input into the particular assignment by the respective persons. It would be wrong in principle for a taxing master to hold, for example, that since the volume or complexity of the work done by one legal practitioner is such that it could have been done by at least three legal practitioners, the bill would assessed as though the work was undertaken by three lawyers.

38. It is thus important that where a receiving party is represented by a number of legal practitioners during the course of the proceedings, the bill of costs must be divided into different parts so as to distinguish between the costs payable in respect of each legal representative. Of course, the claims have to be supported by copies of the fee notes and such other written evidence.

39. We will elaborate on the principles discussed in relation to this ground when we go into the detailed examination of the bill of costs.

Ground No. 3 – Instruction Fees

40. The Taxing Master dealt with the issue of instruction fees in the following manner:

> *"The Taxed Bill of Costs pegs instruction fee at the rate of K75,000.00 (seventy-five million kwacha). Counsel for the Defendant argues, in opposition, that the Counsel are from the Women Lawyers Association (WLA) and WLA is not a law firm. Second, instruction fee should come by showing the number of hours that Counsel spend on receiving instruction. The clients are women and children of limited means so it is not expected that these clients will raise K75,000,000.00. Counsel for the Defendant further averred that Counsel came from different legal houses and it's not possible that the Applicants went to different legal houses to give instructions to Counsel. In response, Counsel Makoko for the Applicants averred that this was a delayed objection as WLA being an NGO was already dealt with at*

the inception. Order 31 rule 10 of the Courts (High Court) (Civil Procedure) Rules says, ' a legal practitioner or his law firm' and can be understood not necessarily as only entitling a legal house to instruction fee. Counsel Makoko cited SA History Archive Trust v SA Reserve Bank Number 117 of 2019 where it was held that people with limited means can access Courts through NGOs. Instruction fee in that case was upheld for both Counsel in their own their own right, and the NGO. Finally, Counsel Makoko noted that instruction fee does not require evidence such as time sheets as the production of these does not take away from the fact that Counsel received instructions. Counsel Maluza further submitted that they had demonstrated a clear connection between their expenditures and the proceedings as per Dudgeon v United Kingdom European Court of Human Rights Article 50 [1983] Series Number 59.

Order 31 rule 10 of the Courts (High Court) (Civil Procedure) Rules of 2017 provides for instruction fee as follows:

> *" ... [Text set out at paragraph 9 of this Judgment] ..."*

In Ruth Belentino v Hanif Mahommed & General Alliance Insurance Company Limited – Personal Injury Cause Number 914 of 2016, the Assistant Registrar opined that an award for instruction fee cannot be disallowed but that the amount claimed was excessive. He reduced the instruction fee from K3,000,000.00 (three million kwacha) to K1,000,000.00 (one million kwacha).

Following from the Ruth Belentino Case, As is the case here, this Court believed the instruction fee is excessive. The Court will therefore award K10,000,000.00 (ten million kwacha) as instruction fees to each Counsel. The total instruction fee is therefore reduced to K50,000,000.00."

41. The Paying Party asserts that the Taxing Master disregarded the Paying Party's objection to the effect that legal practitioners for the Receiving Party were not entitled to the instruction fees (a) having taken the matter on pro bono basis, (b) having not charged their clients who are people of limited means, (c) there being no documentation, such as a receipt or written agreement, to support the claim for instruction fees and (d) because they had failed to produce evidence showing the number of hours that each legal practitioner spent on receiving instructions from the clients.

42. To my mind, there are two important questions in relation to this ground of review. The first question is whether or not instruction fees are payable in the present case? If instruction fees are payable, to whom are they payable?

43. The answer to the first question has to be in the positive and the reasons for holding so are many but I am content to reproduce the reasons given by the Receiving Party, which reasons I fully endorse:

"Courts are duty bound to apply a Statute as it is. It is a trite rule in interpreting written documents and instruments that where the words used are clear and unambiguous, no more should be done than to simply attach to them the ordinary meaning that they convey. There is no need for semantic pole-vaulting. See ***Reserve Bank of Malawi v Review Committee of the Public Procurement and Disposal of Assets Authority, Civil Review Cause No. 13 of 2021****. In this case Order 31 rule 10 could not have been clearer. It states:*

> *"…. [as set out above at paragraph 9 of this Judgment]*

1. *The rule is clear. Firstly, the instruction fees are claimable by a Legal Practitioner or his Law firm. The Applicants were being represented by licensed Legal Practitioners and so therefore the instruction fee is claimable. Secondly, the entitlement to claim the instruction fees arises where the Legal Practitioner has had instructions to act for a party from the commencement of a proceeding to trial. The law is very clear here. The framers of the rule did not precondition the entitlement of the fees on whether the instructions were accepted on a pro bono basis or not. This issue, at this stage, is an absolute irrelevance. The Court should not read into Order 31 rule 10 what is not there. The questions that the Court should ask itself are merely two: Did the Applicants give instructions to Legal Practitioners? And secondly, did these Legal Practitioners have instructions from commencement of the matter up to trial? If the answers to this question be in the affirmative, as they should be, then instruction fees cannot lawfully be denied. The pro bono argument is a red herring and a solicitation to the Court to amend the law. The Court cannot amend the law. It is bound to follow the law as it is. Pointedly, one observes that the proposition that instruction fees are not payable where counsel acted pro bono is not supported by any authority or precedent. The assertion is bizarre and devoid of logic. No counsel can act without instructions. In any case Order 31 rule 1(3) allows the courts to order costs in a pro bono representation, which was the case herein.*

2. *The nature of costs assessment proceedings must be appreciated. The fountain of assessment of costs proceedings is what is known as the 'costs order'. This is clear from Order 31 rule 3 (2) of the Civil Procedure Rules. Without a costs order, there can be no assessment proceedings. See* ***Ex parte HRDC at al, Judicial Review No 33 of 2020 [Per Registrar Patrick Chirwa.]*** *The costs orders in this case are to be found in the decision of Justice Kenyatta Nyirenda made on 13th August 2021 and the Order of the Honarable Assistant Registrar Madalitso Chimwaza made on 9th March 2021 on assessment of damages. These costs orders cannot be reversed now by the Registrar during the review proceedings, nor could they have been reversed during the assessment itself. All the Registrar is empowered to do is assess costs as directed by the costs orders previously made.* ***The Ex Parte HRDC et al*** *decision eloquently speaks to this position. If the Attorney General is to be believed that it was in the public domain that the Legal Practitioners for the Applicants were acting pro bono, then it must be assumed, correctly so, that both Justice Nyirenda and Her Honour Chimwaza weighed this factor in exercising their costs discretion under section 30 of the Courts Act. Having decided to grant and award costs, it cannot*

now lie in the mouth of the Attorney General that the costs should now be reduced or denied on that score. If the Attorney General was unhappy with these 2 costs orders, he should have appealed to the Supreme Court of Appeal within the time limits prescribed by the law. After all, costs orders are appealable to the Supreme Court of Appeal with leave of the High Court or the Supreme Court. This is clear from the proviso to section 21 of the Supreme Court of Appeal Act which provides that:

…

3. *What the Objection of the Attorney General now attempts to do is to prosecute an appeal against a costs order in this same Court. This of course cannot happen. When the Judge and the Assistant Registrar made their respective costs orders, they exhausted their jurisdiction in respect of the issue of liability for costs as guided by section 30 of the Courts Act as well as the Order 31 of the Civil Procedure Rules. They are now functus officio to use the Latin jargon. They have exhausted their jurisdiction in so far as the issue of who pays whose costs is concerned. They can no longer sit to preside over the issue save to determine the question of quantum of costs. See* ***Chilima and another v Mutharika and another Constitutional Reference No. 1 of 2019.***

4. *The best time to convince the High Court that costs were not payable to the Applicants [for whatever reason including those now being advanced by the Attorney General] was before the costs orders had been made. Once the costs orders were made, the horses bolted. If the Attorney General is minded to pursue them, it should cross the great Shire river and head to Blantyre. There, it will find them grazing on the succulent grass within the grounds of the Supreme Court of Appeal at Chichiri. It is there that it must confront and deal with them. Not here. Not in this Court.*

5. *The Objection, therefore, has no leg to stand on and should be dismissed with costs."*

44. Having held that instruction fees are payable, we have to turn to the next question, that is, to whom are the instruction fees payable in the present case? It is important to give the context to this question. Order 31, rule 10 (1) of the CPR, states that "a legal practitioner or his law firm shall be entitled to an instruction fee where he or his firm have had instructions to act for a party from the commencement of the proceeding to trial". It is clear from this provision that the entitlement to instruction fees is to either a legal practitioner or his law firm but not to both. The vexing question is how do you decide between a legal practitioner and his firm?

45. As already stated at paragraph 36 of this Judgment, it is commonplace that the Applicants were being represented by the Women Lawyers Association. I take it that when the Application for Permission to Apply for Judicial Review states that the Applicant's Legal Practitioners are "Women Lawyers Association", it is the Women Lawyers Association that was given instructions to act for the Claimants from the commencement of the proceeding to trial. There is no evidence on the Court file to the contrary. In this regard, the Taxing Master erred in law in awarding instruction fees to each Counsel. The total instruction fee in the sum of K10,000,000.00 is awarded to the Women Lawyers Association. It is so ordered.

46. Before moving on, a word or two about Order 33 of the CPR might not be out of order. The order deals with change of legal practitioners and it provides, among other matters, that:

(a) a party who is represented by a legal practitioner in a proceeding may change his legal practitioner without an order of the Court;

(b) the party or his legal practitioner shall file with the Court a notice of the change and shall serve the notice on each party to the proceeding.

(c) a legal practitioner may apply for an order declaring that he has ceased to be the legal practitioner acting on behalf of a party.

47. Unfortunately, there is no corresponding provision in the CPR regarding appointment by a party of his or her legal practitioners. It seems to me, in my not so fanciful thinking, that such a provision would have been of much help in resolving some of the issues raised by this ground of review. I have no doubt that the Chief Justice will give his attention to this matter in the course of exercising his powers under Order 36 of the CPR.

Ground No. 4 – Care and Conduct

48. Care and conduct has to be understood in the context of the particular case that is before a court for its consideration and determination. In the present case, the Receiving Party summarized the case in the Party and Party Bill of Costs, under "Short narrative" and "Issue", as follows:

> *"**Short narrative***
>
> *The Applicants herein commenced the within action by way of Judicial Review seeking inter alia the review of the failure by the 1st Respondent to put in place a credible system of ensuring that officers of the MPS should discharge their duties in a manner that was not*

in violation of the Constitution and the Police Act; the applicants further sought the review of the failure of the 1st Respondent to conduct prompt, proper, effective and professional investigations into the complaints of sexual assault and rape made by the applicants; Further, the applicants sought the review of the failure by the 2nd Respondent to advertise the position of and appoint an Independent Complaints Commissioner and operationalize the Independent Police Complaints Commission; the Applicants also sought various remedies for Constitutional violations before the court including an order of compensation.

Issue

Whether or not the applicants were entitled to the reliefs sought herein."

49. The Taxing Master put care and conduct at 100% and the explanation was put thus:

"In the Dr. Saulos Klaus Chilima case, Care and Conduct was pegged at 100% for a matter that had volumes of documentation, sometimes complex evidence and spanned a period of over a year. In the Attorney General v Gift Trapence et al Case, care and conduct was pegged at 80% for a matter that was as short and non-complex.

This court appreciates the amount of work that had to be put into prosecution this matter as explained by Counsel. In the Dr Saulos Klaus Chilima Case, Care and Conduct was pegged at 100% for a matter that had volumes of documentation, sometimes complex evidence and spanned a period of over a year. The matter at hand was similarly taxing, was of national importance, and held a determination on fundamental rights as enshrined in the Constitution. This Court will maintain Care and Conduct at 100%.

Further, Counsel for the Defendants further made an objection on care and conduct being applied to every single application as opposed to care and conduct being applied to the total bill. Counsel for the Applicants argued that there is no prescribed format for Bills of Costs and the formats adopted by various Counsel are just a matter of preference. <u>This court will apply care and conduct to the total bill</u>." – Emphasis by underlining supplied

50. I pause to observe that the Receiving Party and the Paying Party held different views regarding the approach to take in respect of care and conduct, that is, whether to apply care and conduct to each application singularly or to apply care and conduct to the total. Although the Paying Party had applied the former approach, the Taxing Officer adopted the latter approach without giving any reasons for taking the said approach. It is trite that a decision on a point of determination must set out the reasons for the decision: see section 9A of the Courts Act and Order 23 of the CPR.

51. It is the case of the Paying Party that the Taxing Master failed to consider objections by the Paying Party in relation to the percentage to be apportioned to care and conduct. The Paying Party submitted that the reasonable percentage of care and conduct be at 50% because the matter, which was a judicial review, was not complicated and that most of the work had been done by the Malawi Human Rights Commission. Based on the foregoing, the Paying Party asserts that the award for care and conduct at 100% is unreasonable in the circumstances of the case and considering the simplicity of the process involved and the experience of Counsel recorded as involved in the matter and the unreasonableness of and excessive time claims set out in the Bill of Costs.

52. The position of the Receiving Party is that the present ground of review lacks merit. It is expedient that submissions of the Receiving Party on this ground of review be set out in full:

> *"1. The Respondent contend that the maximum care and conduct that is claimable is 80%. They have cited the Taxation Practice Direction 1 of 1995 which they argue was cited with approval in the case of Kavwenje v Chilambe and another [1996] MLR 113 (HC). On the basis of these authorities, they argue that care and conduct cannot be taxed at 100%.*
>
> *2. The contention made by the Respondent is misleading, the Practice Direction cited in the Kavwenje case is the Practice Direction of England and not Malawi. Such a Practice Direction is not binding on the courts of Malawi.*
>
> *3. The award of care and conduct is based on exercise of judicial discretion which must be done in compliance with the rules and guided by precedence. While courts must look at each case on its merits, the orders they make must be guided by legal precedence.*
>
> *4. In considering the question of care and conduct in the Kawvenje case, Justice Chimasula Phiri emphasized the importance of precedence and held that going by precedence in the court, the routine cases should reflect a percentage rate of 50-60% while unique and complicated cases should be the range of 60-80%.*
>
> *5. It is surprising that the Respondent while relying on the Kavwenje case which emphasizes precedence, they have themselves ignored precedence. The Attorney General is relying on 1993 case authority when there are new and recent case authorities on care and conduct.*
>
> *6. In the recent case of Dr Saulosi Klaus Chilima & Dr McCarthy Chakwera v Professor Arthur Peter Mutharika & Electoral Commission, Constitutional*

Reference No. 1 of 2019, the court awarded 100% care and conduct on account of the nature of the case itself- "burdensome, difficult and complex".

7. *In the case of The State on the application of Human Rights Defenders Coalition Limited, Association of Magistrates in Malawi and Malawi Law Society v The President of the Republic of Malawi and Secretary to the Cabinet, Judicial Review No.33 of 2020, the court awarded 85% in care and conduct for a judicial review matter which was not contested and the decision that was subject of the review reversed before trial. The award of 85% for care and conduct was maintained on review and in so doing, the court stated that the fact that the matter was not defended does not take away its importance.*

8. *In the case of The State v MACRA on the application of The Registered Trustees of Media Institute of Southern Africa and others Constitutional Reference No. 3 of 2019, the court awarded 100% for care and conduct for the reason that the matter was taxing, was of national importance and held a determination of fundamental rights enshrined in the Constitution.*

9. *One wonders why the Attorney General has chosen to ignore these most recent awards of care and conduct by the High Court of Malawi and is relying on a 1993 case authority and a Practice Direction of England. The law moves with time and surely one cannot ignore more recent precedents and rely on a 1993 case authority, this is ultimately ignoring basic law principles, i.e., principle of stare decisis.*

10. *It is clear from these case authorities that the maximum % of care and conduct that can be claimed is not 80%. Courts can award care and conduct of 100% and beyond depending on the circumstances of the case"*

53. I have considered the respective submissions by the Paying Party and the Receiving Party. There is no question that the Receiving Party should be considered for care and conduct. The question is as regards the percentage to be allowed. My port of call has to be the case of **Dr. Saulos Klaus Chilima, Dr. Lazarus McCarthy Chakwera v. Prof. Peter Mutharika and Electoral Commission**, Constitutional Reference Number 1 of 2019 which followed with approval the English case of **Johnson v. Reed Corrugated Cases Ltd** [1921 1 All ER 169.

54. In **Johnson v. Reed Corrugated Cases Ltd**, supra, the plaintiff had claimed 150% and the defendant contended that 60% was appropriate. At first instance on taxation, the Registrar allowed 90%. On review, the Court allowed only 75% and it observed as follows:

"I approach the assessment on the following basis. I am advised that the range for normal i.e non-exceptional cases starts at 50% which the Registrar regarded, rightly in my view, as an appropriate figure for "run of the mill" cases. <u>The figure increases above 50% so as</u>

to reflect a number of possible factors —including the complexity of the case, any particular need for special attention to be paid to it and any additional responsibilities which the solicitor may have undertaken toward the client, and others depending on the circumstances-but only a small percentage accident cases results of over 70%. To justify a figure of 100% or even one closely approaching 100% there must be some factor or combination of factors which means that the case approaches the exceptional. A figure above 100% would seem to be appropriate only when the individual case, or cases of a particular kind, can properly be regarded as exceptional, and such cases will be rare. I am aware that the figures cannot be precise, but equally in my view, the need for consistency and fairness means that some limits, however elastic, should be recognised..." - Emphasis by underlining supplied

55. As already stated at paragraph 48 of this Judgment, care and conduct cannot be decided without having regard to what the case is about. It might also be relevant to consider the issues for determination in a particular case. What were the issues in the present case? The issues were set out in the Order of Directions as follows:

"(a) whether or not there was failure by the 1st Respondent to put in place a credible system of monitoring the conduct of the officers of the Malawi Police Service, who were perpetrators of sexual violence and rape against the Applicants and if yes:

(i) whether that failure resulted in the violation of the Applicants right to dignity, equality and access to justice as provided for under sections 19 (1), 20 and 41 of the Constitution;

(ii) whether that failure resulted in torture, cruel, inhuman and degrading treatment and punishment towards the Applicants as proscribed under section 19(3) of the Constitution;

(iii) whether that failure is lawful and reasonable?

(b) whether or not there was failure by the 1st Respondent to take concrete steps to investigate and arrest the officers of the Malawi Police Service, who were perpetrators of sexual violence and rape against the Applicants? And if yes, whether the failure violates the Applicant's right to equality, dignity, access to justice and effective remedies as provided for under sections 19, 20 and 41 of the Constitution?

(c) whether or not there was failure by the 1st Respondent to conduct prompt, proper, effective and professional investigations into the complaints of rape and sexual assault made by the Applicants and if yes:

(i) whether that failure was lawful and reasonable?

(ii) whether the failure to arrest perpetrators amounts to dereliction of duty on the part of the 1st Respondent contrary to sections 153 and 154 of the Constitution?

(d) whether or not the failure by the 2nd Respondent to advertise and operationalize the ICC as provided for under section 133(2) of the Police violates the applicant's right of access to justice as provided for under Section 41 of the Constitution?

(e) whether or not the failure by the 2nd Respondent to advertise and operationalize the ICC as provided for under section 133(2) of the Police Act is unlawful and unreasonable?

(f) whether or not the failure by the 2nd Respondent to advertise and appoint the ICC under section 128 of the Police Act perpetuates acts of impunity by officers of the Malawi Police Service who commit crimes or act unlawfully in the discharge of duties?

(g) whether or not the failure by the 3rd Respondent to lay before the National Assembly for its approval of a budget for the operationalization of the ICC is unlawful and unreasonable?

56. Based on the short narrative, the issues for determination and the assessment of compensation awarded for the violation of human rights, I have great difficulties how this case would fall outside the category of a normal case. If it does, I very much doubt that the circumstances of the case are such as to justify a figure exceeding 80%. Figures between 90% and 100% must be reserved for exceptional cases and, as correctly observed in **Johnson v. Reed Corrugated Cases Ltd**, supra, such cases will be rare.

57. All things considered, I fail to understand how the present case can properly be labelled as an exceptional case. Firstly, the issues raised by the case were neither difficult nor novel as such. Secondly, the Defence filed by the Paying Party was struck out and the Paying Party conceded to almost all the reliefs sought by the Receiving Party. Thirdly, it is not in dispute that the Claimants relied heavily on the "Investigations Report by the Malawi Human Rights Commission into the Alleged Rape, Defilement and Indecent Assault by Police Officers on Some Women and Girls in Lilongwe": see paragraph 38 of the Judgment dated 13th August 2020. Accordingly, I will allow 80% for care and conduct.

Ground No. 5 – Alleged Exaggerated Hours of Work

58. On this ground of review, the Paying Party espouses the view that Receiving Party exaggerated hours of work. The ground of review was worded as follows:

> *"The Assistant Registrar disregarded the Respondents' objection to; the exaggerated hours of work on conferences with clients and expert witnesses; documents prepared and perused; hours on perusing case authorities and; duplication of activities carried out by legal practitioners and; the clerical work done by all the fee earners."*

59. On its part, the Receiving Party asserts that this ground of review lacks merit and the response was couched in the following terms:

> *"On conferences, Counsel for the Applicants met with them on several occasions starting from the giving of instructions through to the conduct of the litigation and conclusion of the trial. There were so many security risks undertaken by Counsel and meetings always took place in distant locations in Nsundwe, M'bwatalika and Mpingu areas. The Attorney General did not provide cogent reasons for the arguments that the hours were unreasonable. We submit that this ground for review should also fail."*

60. The best approach to take in considering this ground of review is to put all disputed items relating to hours of work under the microscope.

A. Interlocutory attendances and court hearings

> Counsel attending to an ex-parte application for anonymity orders and that judicial review proceedings be held in camera dated January 27, 2020.

61. The general practice that obtains with regard to handling of ex-parte application is as follows.

62. Documents from legal houses are brought to Court for filing by court processors. They are then taken to the accounts office for payment of filing fees by the same court processors.

63. From the accounts office, the documents are taken to the Civil Registry for further processing. The further processing involves registering the documents, stamping, arranging pages, pinning, binding, sorting them according to Judges concerned and putting them on relevant case files. When the Registry is done with its processes, the documents are then taken to the Assistant Registrar for checking and issuance.

64. Checking involves scrutiny of documents for compliance with the law in terms of filing. Once the Assistant Registrar is convinced that the filing is in order, a distribution list is sought for guidance on the next Judge to handle the matter if it

is new. The Court file is then relayed to the Judge for his or her consideration/attention.

65. The first filing process (from payment of filing fees in the accounts department to the bringing of the documents to the Registrar for checking and issuance) takes a minimum of 30 minutes. It may take a bit longer if there are a lot of documents being received and processed at the same time. However, the delay is mitigated by team work as there are three accounts officers and five court clerks who are able to assist customers together.

66. Lawyers are not usually involved in the above-stated filing procedures since they use court processors to work on their behalf. In very rare instances, lawyers come to court to do filing by themselves. Experience reveals that they usually participate in filing procedures in very urgent or sensitive matters. If they come, they are assisted in the same manner and with the same diligence.

67. Once taken before a Judge, an ex-parte application is ordinarily dealt with in a summary fashion, that is, the Judge peruses the Court file in chambers and determines the application without a hearing: see **State and others; Ex parte Ziliro Qabaniso Chibambo [2007] MLR 372** and **George Kainja and Director of the Anti-Corruption Bureau and Others,** Judicial Review Cause No. 48 of 2022.

68. Given the said procedure, I do not understand why Counsel had to hang around the Court for one hour. There is no explanation why Counsel had to wait, if at all. I, accordingly, hold that it was unreasonably for Counsel to be waiting at the Court.

69. The application for anonymity orders was prepared by Counsel Hilda Soko and it is supported by sworn statement made by her. The application was handled by Justice Mkandawire, as he then was. Counsel did not physically appear before the Judge. In the circumstances, the claim in respect of waiting time and hearing time are disallowed.

70. In any case, it is not all the five Counsel that went to Court to present the application. There is, therefore, no justification for making a claim as though all the five Counsel went to Court to argue the application.

Counsel Soko - K40,000.00/hr
Travelling Time (0.5hrs) - K20,000.00

~~Waiting Time (1hr)~~
~~Hearing time (0.525hrs)~~
~~Care and conduct (100)~~
Travelling expenses - K5,000.00

Counsel attending to an ex-parte application for permission to commence judicial review dated on February 7, 2020.

71. The general practice that obtains with regard to handling of ex-parte application described above applies with equal force to this item. Given the said procedure, I do not understand why Counsel had to hang around the Court for one hour. There is no explanation why Counsel had to wait, if at all. I, accordingly, hold that it was unreasonably for Counsel to be waiting at the Court.

72. The application for permission to commence judicial review was handled by Justice Mkandawire, as he then was. Counsel did not physically appear before the Judge. In the circumstances, the claim in respect of waiting time and hearing time are disallowed.

73. In any case, it is not all the five Counsel that went to Court to present the application. The application was signed by Counsel Hilda Soko. In the absence of evidence to the contrary, the Court is entitled to assume that it is Counsel Soko who had conduct of this application. There is, therefore, no justification for making a claim as though all the five Counsel went to Court to argue the application.

Counsel Soko - K40,000.00/hr
Travelling Time (0.5hrs) - K20,000.00
~~Waiting Time (1hr)~~
~~Hearing time (0.5hrs)~~
~~Care and conduct (100%)~~
Travelling expenses - K5,000.00

Counsel attending to scheduling conference on March 13, 2020

74. The scheduling conference was slated for 10’clock. Why then would Counsel arrive at the Court at 9 o’clock for a matter set for 10 o’clock? Further, as already stated, it is only Counsel Hilda Soko who attended Court and the scheduling conference lasted 15 minutes from 10:10 am to 10:25 am.

75. In view of the foregoing, there is no justification at all for making a claim as though all the five Counsel went to Court to argue the application.

Counsel Soko - K40,000.00/hr		
Travelling Time (0.5hrs)	-	K20,000.00
Waiting Time (~~1~~ 10 min)	-	K6,667.00
Hearing time (0.~~5~~25hrs)	-	K10,000.00
~~Care and conduct (100%)~~		
Travelling expenses - K5,000.00		

Counsel attending to scheduling conference on March 23, 2020.

76. The scheduling conference was slated for 2 o'clock. Why then would Counsel arrive at the Court at 1 o'clock for a matter set for 2 o'clock? Further, as already stated at paragraph 72, it is only Counsel Hilda Soko who attended Court and the scheduling conference lasted 18 minutes from 2:32 pm to 2:50 pm.

77. Based on the foregoing, there is no justification at all for making a claim as though all the five Counsel went to Court to argue the application.

Counsel Soko - K40,000.00/hr		
Travelling Time (0.5hrs)	-	K20,000.00
Waiting Time (~~1~~ 0.5hr)	-	K20,000.00
Hearing time (~~0.5~~ 18 min)	-	K7,200.00
~~Care and conduct (100%)~~		
Travelling expenses K5,000		

Hearing on 16th July 2000 of Application for sanction and striking out the defence

78. Only three Counsel, namely, Counsel Soko, Counsel Maluza and Counsel Makoko, attended Court on behalf of the Receiving Party. There is, therefore, no justification at all for making a claim as though all the five Counsel went to Court to argue the application.

79. Further, the hearing of the application was scheduled for 9 o'clock. Why then would Counsel arrive at the Court at 8 o'clock (1 hour earlier) for a matter set for 9 o'clock?

Counsel Soko - K40,000.00/hr
Counsel Maluza - K30,000.00/hr
Counsel Makoko - K30,000.00/hr

Travelling Time (0.5hrs) - K50,000.00
~~Waiting Time (1 hr)~~
Hearing time (2hrs) - K200,000.00
~~Care and conduct (100%)~~

Travelling expenses ~~(K35,000)~~ K15,000

Counsel attending to delivery of judgment dated August 13, 2020

80. As was correctly stated by the Paying Party, there was no delivery of judgment as such but both the Paying Party and the Receiving Party were instructed to collect their respective copies of the Judgment from the Civil Registry. In the circumstances, I do not understand why Counsel had to hang around the Court for one hour. There is no explanation why Counsel had to wait, if at all. I, accordingly, hold that it was unreasonably for Counsel to be waiting at the Court. Further, Counsel did not physically appear before the Judge. In the circumstances, the claim in respect of waiting time and hearing time are disallowed.

81. In any case, I really doubt that all the five Counsel went to Court to get a copy of the Judgment. In the absence of evidence to the contrary, the Court would be entitled to assume that only one Counsel went to the Civil Registry to get a copy of the Judgment. There is, therefore, no justification for making a claim as though all the five Counsel went to Court to get a copy of the Judgment. On this item, the Court will only allow the claim in respect of travelling time and travelling expenses for one Counsel.

82. Exercising doubt in favour of the Paying Party, the Court will assume that it was a junior Counsel that was tasked to collect a copy of the Judgement.

Counsel …….- K30,000.00/hr
Travelling Time (0.5hrs) - K20,000.00
~~Waiting Time (1 0…..hr)~~
~~Hearing time (0.5 ….hrs)~~
~~Care and conduct (100%)~~
Travelling expenses K5,000

Counsel attending to an application for permission to call experts during assessment proceedings dated September 16, 2020.

83. I have not been able to trace a record of proceedings in relation to this item. The Ruling on Assessment of Compensation makes no mention of experts having giving evidence.

84. Even if this application was indeed filed with the Court, I really doubt that Counsel had to wait for one hour before the application was heard. I also doubt that all the five Counsel attended Court for this application. In the circumstances, there is no justification at all for making a claim as though all the five Counsel went to Court to argue the application. In circumstances, I will allow claim on this item in respect of only one Counsel.

85. Exercising doubt in favour of the Paying Party, the Court will assume that it was a junior Counsel that was tasked to collect a copy of the Judgement

Counsel …. – K30,000.00/hr		
Travelling Time (0.5hrs)	-	K20,000.00
Waiting Time (~~1~~ 0.5 hr)	-	K20,000.00
Hearing time (0.5hrs)	-	K20,000.00
~~Care and conduct (100%)~~		
Travelling expenses K5,000		

Counsel attending to an application for appointment guardian ad litem on September 24, 2020.

86. I have not been able to trace a record of proceedings in relation to this item. I really doubt that Counsel had to wait for 30 minutes before the application was heard. I also doubt that all the five Counsel attended Court for this application. In the circumstances, there is no justification at all for making a claim as though all the five Counsel went to Court to argue the application. In the circumstances, I will allow claim on this item in respect of only one Counsel.

87. Exercising doubt in favour of the Paying Party, the Court will assume that it was a junior Counsel that attended to the application on 24th September 2020.

Counsel …. – K30,000.00/hr		
Travelling Time (0.5hrs)	-	K15,000.00

Waiting Time (0.~~5~~ 25hrs)	-	K7,500.00
Hearing time (0.~~5~~25hrs)	-	K7,500.00
~~Care and conduct (100%)~~		
Travelling expenses K5,000		

Counsel attending to an assessment of damages on September 30, 2020.

88. The Paying Party did not take issue with this item except on waiting time. According to the coram sheet, six Counsel, namely, Counsel Soko, Counsel Makoko, Counsel Maluza, Counsel Malonda, Counsel Chimkwezule and Counsel Mesikano, attended Court on behalf of the Receiving Party.

89. It is worth noting that Counsel Mesikano is not listed in the Bill of Costs and no claim was ever made in respect of her attendance.

90. The session was scheduled to start 9 o'clock but hearing commenced at 9:16am. The waiting time was, therefore, 16 minutes. The time when the session ended is not recorded.

Counsel Soko	-	K40,000.00/hr
Counsel Makoko	-	K30,000.00/hr
Counsel Maluza	-	K30,000.00/hr
Counsel Malonda	-	K40,000.00/hr
Counsel Chinkwezule	-	K40,000.00/hr

Travelling time (0.5hrs)	-	K90,000.00
Waiting time (~~1hr~~ 16 min)	-	K48,000.00
Hearing time (8hr)	-	K1,440,000.00
~~Care and conduct (100%)~~		
Travelling expenses ~~K35,000~~ K25,000		

Counsel attended to the ruling on the assessment of damages dated 9th March 2021

91. I have not been able to trace a record of proceedings in relation to this item. Nevertheless, I really doubt that Counsel had to wait for one hour before the delivery of the ruling. I also doubt that all the five Counsel attended Court for the delivery of the ruling. If they did so, it was unreasonable to do so. In the circumstances, I will allow the claim on this item in respect of only one Counsel.

92. Exercising doubt in favour of the Paying Party, the Court will assume that it was a junior Counsel that attended to the application on 24th September 2020.

Counsel …. – K30,000.00/hr		
Travelling Time (0.5hrs)	-	K15,000.00
Waiting Time (~~1~~ 0.25hr)	-	K7,500.00
Hearing time (1hrs)	-	K30,000.00
~~Care and conduct (100%)~~		
Travelling expenses ~~K35,000~~ K5,000.00		

B. Preparatory work

Conference with the Clients

93. The Receiving Party claims K5,400,000.00 for the following item:

> *"The clients met with counsel on several occasions to give them instructions on the conduct of the matter. Due to security concerns, the meetings always took place at distant locations within the Mbwatalika/Nsundwe area. (30 Hrs)"*

94. Needless to say the words "on several occasions" are most vague. Surely, the Receiving Party, through its legal practitioners, must know the number of the meetings and their respective duration. These should have been stated. In the circumstances, I will give the benefit of the doubt to the Paying Party by reducing the duration of these meetings from 30 hours to 15 hours.

95. Further, I doubt that all the five Counsel attended all the meetings with the clients. If they did so, it was unreasonable to do so. In the circumstances, I will allow the claim on this item in respect of only three Counsel, one senior Counsel and two junior Counsel as follows:

Counsel	-	K40,000.00/hr x 15	= K600,000.00
Counsel	-	K30,000.00/hr x 15	= K450,000.00
Counsel	-	K30,000.00/hr x 15	= K450,000.00

Conference with the Expert witnesses

96. The Receiving Party claims K2,700,000.00 for the following item:

"Counsel met with Expert Witnesses (Prof. Chiwoza Bandawe and Dr Mweso) to instruct them on matters on which their expertise was required during the trial of the case, to consider and discuss their reports and to prepare them for the trial. (15 Hrs)"

97. It is to be observed that the number and duration of these meetings are not stated. Surely, the Receiving Party, through its legal practitioners, must know the number of the meetings and their respective duration. I will give the benefit of the doubt to the Paying Party by reducing the duration of these meetings from 15 hours to 10 hours.

98. Further, I doubt that all the five Counsel attended all the meetings with the expert witnesses. If they did so, it was unreasonable to do so. In the circumstances, I will allow the claim on this item in respect of only three Counsel, one senior Counsel and two junior Counsel as follows:

Counsel Soko	-	K40,000.00/hr x 10	= K400,000.00
Counsel Makoko	-	K30,000.00/hr x 10	= K300,000.00
Counsel Maluza	-	K30,000.00/hr x 10	= K300,000.00

Preparation of Documents

99. The Consolidated Issues filed with the Court on 26th March 2020 was signed by Counsel Hilda Soko in her capacity as "Legal Practitioner for the Applicants"). This is a 2 paged document. I see no justification for taking more than 15 minutes to prepare such a document.

Ground No. 6 – Fees to Expert Witnesses

100. The Taxing Officer, under "Other expenses", awarded fees for independent experts as follows:

Dr. Ngcimezile Mweso, MK 320,000/day for 7 days	K2,240,000.00
Dr. Chioza Bandawe, MK350,000/day for 5 days	K1,750,000.00

101. The two experts, that is, Dr. Mgcimezile Mbano-Mweso and Dr. Chioza Bandawe produced reports. The report by Dr. Mgcimezile Mbano-Mweso is 25 pages long and the report by Dr. Chioza Bandawe comprises 28 pages. The probative value of these reports does not appear to be much: the Ruling on Assessment of

Compensation makes no mention of experts having giving evidence. There is also no reference in the said Ruling to the evidence of the said experts.

102. Under this ground of review, the Paying Party questions the award of fees in respect of expert witnesses. The ground of review was worded thus:

> *"The Assistant Registrar awarded fees to expert witnesses yet there was no evidence, such as a receipt or written agreement, that the legal practitioners had paid the same to these expert witnesses. Further, there is evidence that the expert witnesses were fully paid by donors."*

103. It is the case of the Receiving Party that the Taxing Master did not err by proceeding to award fees in respect of the experts although there was no evidence of receipts. The argument was put thus:

> "*7. Order 17 Rule 19.—(1) A party may not call an expert or put in evidence an expert's report without the permission of the Court. (5) The Court may limit the amount of a party's expert's fees and expenses that may be recovered from any other party.*
>
> *8. Expert witnesses can only give evidence on the permission of the court. In this case, the Applicants called two expert witnesses, and this is clearly evidenced by the court record. The power is on the court to limit the amount of a party's expert fees and expenses. The court is not called upon to determine expert fees using receipts or written agreement. Order 17 rule 19(5) suggest that even if the receipts or a written agreements are given, the court can still depart from what was paid in the receipts or what was in the written agreement. As such the contention that the Assistant Registrar was wrong to award fees where there was no evidence of receipts, or a written agreement is not founded in law and contradicts the current law*
>
> *9. The state did not contest the expert fees when the matter went for assessment of costs. In the case of The State (On the Application of The Human Rights Defenders Coalition and others vs The President of the Republic of Malawi (Professor Arthur Peter Mutharika) and Another, Judicial Review No 33 of 2020, the Court stated that an application for review is not time for a party that feels not satisfied with an initial order of assessment to bring in new arguments or challenge on points that were not initially challenged. It would be very unfair to allow them at this point in time to introduce issues of receipts and written agreements when the same was not raised in the assessment. The fact that the state did not raise this issue clearly indicates that they were satisfied with the fees that the applicants asked from the court. The argument from the state has therefore been raised in bad faith. The truth of the matter is that the state is abusing the court by wasting its time and resources*

> *to adjudicate on matters that were already settled. Such practices should not be allowed at any cost."*

104. With due respect to the Receiving Party, a claim for fees in relation to expert witnesses has to be supported by experts' fee notes, explanation of the work involved, time spent writing, etc.,: see **Deutsche Bank AG. Vik [2020] 3 WLUK 118.** There is no such evidence in the present case. To my mind, the fact that such evidence was not produced gives credence to the assertion by the Paying Party that these experts were paid not by the Receiving Party but by third parties. Accordingly, I am persuaded to exercise the benefit of doubt in favour of the Paying Party: see Order 31, rule 4(2)(b), of the CPR.

105. For the sake of clarity, the issue here is not about the work not been carried out. Copies of the report by the experts are there on the Court file. The issue has to do with the terms and conditions governing the work to be carried out by the experts, particularly the agreement, if any, regarding fees to be paid to the experts. There is no such evidence before the Court. As rightly conceded by the Receiving Party, the Court "has power limit the amount of a party's expert fees and expenses": see paragraph 103 of this Judgment. How would the Taxing Officer or indeed this Court exercise this power when the Receiving Party has not put before the Court the necessary information?

106. In view of the foregoing, the award by the Taxing Officer of fees to expert witnesses is disallowed. It is so ordered.

Ground No. 7 – Award on Assessment of Costs

107. The Paying Party takes issue with the award of K2, 160,000.00 on assessment of costs. The Paying Party states that the said sum is way above the hours taken in preparation and assessing the costs since the latter took utmost two hours.

108. The Receiving Party contends that the award cannot be faulted:

> *"The detailed assessment of costs proceedings was conducted over a period of 2 hours in the presence of both parties. The Court calculate the costs payable for the 2 hours to be Mk 360,000.00. The Attorney General did not take issue with the 10 hours that was taken for the preparation of the bill of costs and bundle which was 24 pages including the attached documents and the court awarded the sum of MK 1, 800,000 for the 10 hours of work. The total awarded was therefore a sum of MK 2, 160,000.00. The Attorney General, not having raised any issue with the hours of preparation cannot now retreat and make a submission on review."*

109. I have considered the respective submissions. The assessment of costs was dealt with in the Bill of Costs as follows

> ***"c) Assessment of Costs***
> *i. Preparing the Party and Party Bill of Costs, statement of parties, notice of appointment to assess costs and Certificate of Assessment (10hrs) 1,800,000.00*
> *ii. Attending assessment proceedings (3 hr) 540,000.00*
> *iii. Care and conduct Counsel took care in preparing the bill in a thorough and meticulous manner (100% of (i) & (ii) 2,340,000.00*
> *d)* ***Disbursements on taxation***
> *i. Assessment bundle 2,000.00*
> *ii Sworn statement of service 2000.00*
> *iii. Certificate of assessment 2,000.00*
> *iv. Photocopying & binding assessment bundle 25,000.00*
>
> ***Travelling and waiting***
> *i. Travelling time (0.5hrs)*
> *ii. Waiting time (0.25hrs)*
> *iii. Travelling expenses on filing and on attending assessment"*

110. The relevant part of the record on assessment of costs states:

> *"Chirwa: On Assessment of Costs YH*
> *- Certificate of assessment hasn't been done*
> *i) We propose 1 hour 15 minutes*
> *ii) It will depend on how the matter was done*
> *iii) we propose 50% and the bill is everywhere*
> *d) Disbursements*
> *iv) These were already catered in part …, We proposue K5,000*
>
> *Travelling and waiting is fine, YH you can give them"*

111. My perusal of the record shows that neither the Receiving Party nor the Taxing Officer addressed the points that were raised by the Paying Party other than Counsel Maluza withdrawing the claim with respect to statement of parties and certificate of assessment. The Ruling on Assessment of Costs, under Summary of Bill, simply states "Assessment of Costs K2,160,000.00". How this figure was arrived is not explained.

112. There is another point to bear in mind. The Party and Party Bill of Costs dated 29th May 2021 was "prepared and filed by Hilda Soko of Women Lawyers Association". These words are plain to see on the said document. Clearly, payment

in respect of item (i) has to be exclusively in relation to Counsel Hilda Soko. There is, therefore, no justification at all for making a claim as though all the five Counsel were involved in preparing and filing the Bill of Costs.

113. I am, therefore, compelled to reduce the award on Assessment of Costs as follows:

"Counsel Soko	-	*K40,000.00/hr*
Counsel Makoko	-	*K30,000.00/hr*
Counsel Maluza	-	*K30,000.00/hr*
Counsel Malonda	-	*K40,000.00/hr*
Counsel Chinkwezule	-	*K40,000.00/hr*

c) Assessment of Costs

i. Preparing the Party and Party Bill of Costs, notice of appointment to assess costs (5 hrs) 200,000.00

ii. Attending assessment proceedings (2 hr) 360,000.00

~~*iii. Care and conduct Counsel took care in preparing the bill in a thorough and meticulous manner (60 % of (i) & (ii)*~~ *[The Court applied care and conduct on the whole Bill of Costs: see paragraph 49 of this Judgment]*

d) Disbursements on taxation

i. Assessment bundle 2,000.00
ii Sworn statement of service 2000.00
iv. Photocopying & binding assessment bundle K15,000.00

Travelling and waiting

i. Travelling time (0.5hrs) 90,000.00
ii. Waiting time (0.25hrs) 45,000.00
iii. Travelling expenses on filing and on attending assessment 35,000.00

Ground No. 8 – 1% Levy to Malawi Law Society

114. Under this ground of review, the Paying Party asserts that the Taxing Master erred in awarding 1% levy to Malawi Law Society as the legal practitioner's did not charge the clients since the matter was handled on pro bono basis.

115. The issue of the matter being handled on pro bono basis has already been dealt with under Ground No. 3. For the reasons already given, this ground of review lacks merit. In any case, as was rightly submitted by the Receiving Party, section 84 of the

Legal Education and Legal Practitioners Act is clear that a levy is payable and must be included in a bill. The provision does not make any distinction whatsoever between pro bono litigation and non-gratuitous litigation. Accordingly, this ground of review is dismissed.

Ground No. 9 – Awarded Costs Above Amount Presented by the Claimants

116. The Paying Party faults the Taxing Officer for awarding costs which were over and above the amount presented in the Bill of Costs. The grand total in the Bill of Costs came to K215,628,102.00 but the Bill of Costs was taxed at K255,684,112.00 even though certain sums of money were deducted from the original Bill of Costs. In the circumstances, I agree with the Paying Party that the Taxing Officer erred to award costs above the amount presented by the Receiving Party.

Ground No. 10 – Assessed Costs are Unreasonable

117. The Paying Party contends that overly the assessed costs are unreasonable in the circumstances. To my mind, the answer to this issues lies in the analysis and determination of the other grounds of review. The issue will, accordingly, be discussed in the concluding part of this Ruling.

Ground No. 11 – Court's Power to Depart from its Earlier Award

118. It is the case of the Paying Party that the Court has powers to depart from its earlier award. Reliance has been placed on Order 31, rule 17, of the CPR and the **case of Taehwa Construction Company Ltd v. Carpet and Furnishing Centre Ltd** 11 MLR 21. The Court's special attention was drawn to the following observations by Unyolo J:

> *"I shall deal first with the question relating to the disallowance of two sets of fees in lieu of brief. The first point taken by Mr. Mhango is that it must be inferred that the learned Taxing Master allowed the two sets of fees on the earlier taxation after he had exercised his discretion based on a consideration of the facts of the case. Mr. Mhango then argues that that being the case the same Taxing Master could not at the review shift from his earlier position. With due deference I am unable to accompany Mr. Mhango in this journey. In my view a Taxing Master on a review has powers under the provisions of O.62/34 of the Rules of the Supreme Court, to differ from his earlier decision on the first taxation if, having reviewed and reconsidered the facts and/or the law, he comes to the conclusion that his earlier stand is not made out."*

119. I agree with the Paying Party that the position under Order 31 of the CPR is the same as expounded by Unyolo J in **Taehwa Construction Company Ltd v. Carpet and Furnishing Centre Ltd,** supra. On review, Order 31, rule 17(4), of the CPR enjoins the Court to order costs as it shall deem appropriate in the circumstances.

Ground No. 12 – Failure to Appreciate the Rationale Behind Party and Party Costs

120. The Paying Party claims that the assessment failed to appreciate the rationale behind party and party costs. This matter has already been dealt with under Ground of Review No.1.

Ground No. 13 – Costs should have been Awarded to One Counsel

121. The Paying Party asserts that assessment should not have awarded costs to more than one counsel. This matter has already been dealt with in the course of considering the issue of the number of fee earners: see Ground of Review No. 2

Ground No. 14 – Wrong to Award 100% as Care and Conduct

122. This matter has already been dealt with under Ground of Review No.4 and the Court has capped care and conduct at 80%.

Ground No. 15 – Wrong to Include Items Incurred by a Donor Funded Women Lawyers Associations

123. Under this ground of review, the Paying Party questions the assessment for including items which were "incurred by a donor funded Women Lawyers Association as if the same was incurred in running a law firm"

124. This ground of review has already been dealt with in the course of considering the issue of instruction fees: see Ground of Review No. 3

Ground No. 16 – Wrong to Include Instruction Fees

125. The Paying Party asserts that it was wrong for the assessment to include instruction fees which are not claimable on pro bono basis.

126. This ground of review has been thrashed by the Receiving Party. It is expedient that the relevant submissions by the Receiving Party be quoted in full:

> *"The contention that once costs are awarded, the amount to be taxed for a party who was represented by counsel on pro bono basis should be different and lower than for a party who was not represented on pro bono basis, is absurd and not supported by any legal position whatsoever*
>
> *The receiving party submits that the court should find such a line of argument absurd for the following reasons:*
>
> *a. The basis of the quantum of costs does not change whether counsel is representing a party on pro bono basis or not.*
> *In deciding how much a party should be awarded in costs, three main factors inform the court: time spent prosecuting the case; the costs incurred in prosecuting the case; and care and conduct provided by counsel in prosecuting the matter. Accepting the argument that an applicant who is represented by counsel on pro bono basis is entitled to less cost, would be saying:*
> - *Less time is spent on the assignments, processes, and tasks when an applicant is represented by counsel on pro bono basis which is very absurd and not true;*
> - *It costs less to counsel when he or she is representing a party on a pro bono basis, which is also absurd. The filing fees does not change because counsel is representing a party on a pro bono basis. The distance to court, cost of printing, cost of fuel etc, do not change because counsel is representing a party on a pro bono basis.*
> - *Counsel exercises less care and can conduct themselves in any manner they deem fit when representing a party on a pro bono basis, which is also extremely absurd. Just as in any other case it is counsel's duty and responsibility to handle any case with utmost care and conduct.*
>
> *Since there is no change in terms of time spent, costs incurred and care and conduct provided when counsel is representing a party on a pro bono basis, there is no justification for contending that a party represented by counsel on pro bono basis is entitled to less costs.*
>
> *b.* ***It is not and should not be the business of the court to inquire or concern itself with the source of funding for litigants or how litigants are paying for the costs of prosecuting claims****.*
>
> *Whether a litigant is financing their case using funds from a relation or a bank loan or well-wisher, should not and is not the business of the court when awarding and reviewing costs. What the court is and should be concerned with should be how many hours counsel spent on tasks and assignments related to the case, what is the cost incurred in prosecuting the claim and what is the level of care and conduct provided.*

c. The same argument cannot be made if the opposite was obtaining

If the Applicants were condemned in costs, would the Respondent have taken the position that they will not claim costs or will claim costs that are less than what is payable because the Applicants were represented by counsel on pro bono basis. If the answer is 'No', then it will be absurd to be asking the court to order that the Applicants are not entitled to costs or are entitled to less costs simply because counsel was representing them on pro bono basis.

The Attorney has already demonstrated that the fact that an Applicant was represented by counsel on pro bono basis does not matter when the Court is considering the question of costs. He strongly argued for a cost order to be made against the Applicants in the case of ***Mundango Nyirenda and another v Ministry of Health, Speaker of Parliament, Attorney General and Unknown Others, Judicial Review Case No. 66 of 2021,*** *where the Applicants were represented on pro bono basis.*

In the case of ***Dr George Chaponda and The State President of Malawi Ex Parte Charles Kajoloweka and Others MSCA Civil Appeal Number 5 of 2017****, the court made an order of costs personally against Mr Kajoloweka. The risk of representing a party on a pro bono basis means that the party represented, and counsel expose themselves to adverse cost orders. Such a risk cannot be overlooked or become irrelevant when an award of costs is given to a party where counsel is representing such a party on a pro bono basis.*

Justice Kenyatta Nyirenda in the case of ***Mundango Nyirenda and another v Ministry of Health, Speaker of Parliament, Attorney General and Unknown Others, Judicial Review Case No. 66 of 2021****, where Counsel for the Applicants asked the court that each part should bear its own costs. He specifically indicated that he was representing the Applicants on pro-bono basis. The Attorney General specifically argued against a no-cost order. In awarding costs to the Defendant in this case, the court made these critical remarks among others:*

"… What comes out from the examination of the documents filed with the Court by the Applicants is that the Applicants were too casual. They forgot that as one eminent judge keeps reminding us, 'litigation is serious business, and it has to be handled as such.' In short, there was shameful laxity on the part of the Applicants and their Counsel in a case whose stakes are very high."

If the court still imposed costs in a matter where counsel represented a party on pro bono basis citing that stakes were high, there is therefore no legal basis nor justifiable reason why a party who is represented by counsel on pro bono basis should be entitled to no or lesser costs.

Further, it is also argued that there was laxity on the part of Respondents herein in prosecuting the taxation proceedings. Despite being served with a bill of costs, they did not file any document but chose to appear on the day of hearing and made oral objections. They cannot come on review and attempt to do what they ought to have done in the initial proceedings. Surely, this would be rewarding laxity.

> *The Attorney General did not even contest the claim or award of costs. The Respondent's cannot on review start contending what and what not the Applicant are entitled to in terms of costs. This will result in appealing against the order of costs via the back door. This court should guard against affording the Respondent an appeal against the order of costs via the back door. It should resist from examining whether costs were appropriately awarded to the Applicants in these proceedings.*
>
> *Chikopa JA in the case of* ***The State on the Application of MRA and the Chairperson of the Industrial Relations Court and Roza Mbilizi, MSCA Case Number 56 of 202, being Judicial***
>
> ***Review Case Number 52 of 2021 (HC)****, stated in clear terms that "a party should not be allowed to get via the backdoor what they are reluctant to get through the front door."*

127. I have considered the respective submissions on this ground of review and I generally agree with the views put across by the Receiving Party primarily because these views are in line with my holding on Ground of Review No. 3, namely, that it was not wrong for the Taxing Officer to award instruction fees in the present case. In short, the argument that a party who is represented by legal practitioner on a pro bono basis is (a) not entitled to costs or (b) entitled to lesser costs lacks legal basis.

Ground No. 17 – Receiving Party Awarded More than Sum Claimed

128. The Paying Party asserts that the Taxing Master erred in that although the bill that was presented was for the sum of K215,628,102.00, the receiving party was awarded a total sum of K255,684,112.00. To my mind, this ground of review is a duplication of Ground of Review No. 9. As already held at paragraph 116 of this Judgement, the Taxing Officer erred to award costs above the amount presented by the Receiving Party.

Ground No. 18 – Award has Effect of Clogging Access to Justice

129. The Paying Party contends that the assessment failed to appreciate the fact that awarding such huge costs has an effect of clogging parties to access justice:

> *"The huge costs claimed have the net effect of clogging the constitutionally protected right to access justice under section 41 of the Republic of Malawi Constitution which states that 'every person shall have the right of access to any court of law or any other tribunal with jurisdiction for final settlement of legal issues.' Litigants would be deterred by the huge costs that the courts award and refrain from approaching the courts to settle their disputes."*

130. To my mind, this ground of review has already been dealt with in the course of considering the other issues above.

Ground No. 19 – Failure to Weigh Proportionality and Reasonableness of Amounts Claimed

131. It is the case of the Paying Party that the assessment omitted to weigh the proportionality and reasonableness of amounts claimed on each item of the bill and/or to assess and determine whether, if each item of claim was incurred, it was reasonably so incurred and this was contrary to Order 31, rule 4(1), of the CPR.

132. The Receiving Party asserts that this ground of review lacks merit. The point was put thus:

> *"The taxation proceedings took almost over two hours within which time the court allowed the paying party to raise all issues that they had with the items, time and the amounts claimed. The court also allowed the receiving party to respond to all the issues that were raised. The court therefore had enough material to assess and weigh the proportionality and reasonableness of the amounts claimed.*
>
> *The paying party has not provided any basis for contending that the court did not weigh the proportionality and reasonableness of the amounts claimed. The fact that the court allowed the time and amounts claimed cannot in itself be a ground for contending that it did not weigh the proportionality and reasonableness of the amounts claims without pointing to any evidence of such.*
>
> *The paying party cannot be allowed to make unsubstantiated and baseless contentions, they ought to have been specific on items and/or amounts that they allege are unproportionate and unreasonable."*

133. I have considered the submissions by the Paying Party and the Receiving Party respectively. The first thing to note is that the Order on Assessment of Costs does not in any way discuss the concepts of proportionality and reasonableness. As a matter of fact, a majority of (if not all) orders on assessment of costs that I have come across do not do so. I am not surprised by this. This is because although legal cost proportionality sounds simple, it is very elusive within the context of legal proceedings. In this regard, a word or two regarding the concept of proportionality might not be out of order.

134. Proportionality as a concept came into English law as part of the Woolf reforms: see Sir Rupert Jackson's Review of Civil Litigation Costs: Final Report

("FR"), Chapter 3, §3.2. (p.30). The rules which followed those reforms (the English CPR) included a requirement for a court assessing costs on the standard basis to consider whether they were proportionate to the matters in issue: see old English CPR r.44.4(2).

135. In **Lownds v. Home Office** [2002] 1 WLR 2450 Lord Woolf was given the chance to interpret the rules he had helped originate. At the heart of that appeal was the question of whether the new proportionality test was to be applied globally or on an item by item basis, or both globally and on an item by item basis: see §10.

136. The Court of Appeal resolved this question in favour of what it described as a two-stage approach. First, the court was to ask itself whether the total costs claimed were proportionate. If they were, then the court would allow costs on an item by item basis which were reasonably incurred and where the cost for that item appeared reasonable. However, if the total sum claimed was not proportionate, then the court would need to be satisfied that each item was necessary and, if necessary that the amount claimed for that item was reasonable.

137. The salient features of this two-stage test were that:

(a) proportionality was considered at the start of the process;

(b) the test was considered in relation to the total costs claimed; and

(c) the test informed the nature and degree of scrutiny applied by the court when it subsequently conducted an item by item assessment.

138. The test as propounded in **Lownds v. Home Office**, supra, was found wanting, because "its effect was to insert the Victorian test of necessity into the modern concept of proportionality": see FR, Ch. 3, §5.11 (p.37). This was inconsistent with the concept of proportionality, because "if the level of costs incurred is out of proportion to the circumstances of the case, they cannot become proportionate simply because they were "necessary" in order to bring or defend the claim": *ibid*. §5.10. This led to change in the English CPR by having a specific provision to the effect that "costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred" (Emphasis by underlined supplied).

139. The change, to my mind, means the pre-eminence of proportionality should affect the manner in which an assessment on the standard basis is done. Specifically,

proportionality should be considered in respect of the total sum once the court has assessed the reasonableness of each item on the bill individually. In other words, having undertaken a line by line assessment, "the court should then stand back and consider whether the total figure is proportionate" and, if not, should make "an appropriate reduction": *ibid.* §5.13.

140. One of the leading case on how to approach the proportionality test is **West v. Stockport NHS Foundation Trust** [2019] EWCA Civ 1220. and the relevant guidance is tucked away at §88-93:

> *"88. First, the judge should go through the bill line-by-line, assessing the reasonableness of each item of cost. If the judge considers it possible, appropriate and convenient when undertaking that exercise, he or she may also address the proportionality of any particular item at the same time. That is because, although reasonableness and proportionality are conceptually distinct, there can be an overlap between them, not least because reasonableness may be a necessary condition of proportionality: see Rogers at paragraph 104. This will be a matter for the judge. It will apply, for example, when the judge considers an item to be clearly disproportionate, irrespective of the final figures.*
>
> *89. At the conclusion of the line-by-line exercise, there will be a total figure which the judge considers to be reasonable (and which may, as indicated, also take into account at least some aspects of proportionality). That total figure will have involved an assessment of every item of cost, including court fees, the ATE premium and the like.*
>
> *90. The proportionality of that total figure must be assessed by reference to both r.44.3(5) and r.44.4(1). If that total figure is found to be proportionate, then no further assessment is required. If the judge regards the overall figure as disproportionate, then a further assessment is required. That should not be line-by-line, but should instead consider various categories of cost, such as disclosure or expert's reports, or specific periods where particular costs were incurred, or particular parts of the profit costs.*
>
> *91. At that stage, however, any reductions for proportionality should exclude those elements of costs which are properly regarded as unavoidable, such as court fees, the reasonable element of the ATE premium in clinical negligence cases, and the like. Specifically, therefore, if the ATE premium is assessed as reasonable, it will not fall to be reduced by any further assessment of proportionality.*
>
> *92. The judge will undertake the proportionality assessment by looking at the different categories of costs (excluding the unavoidable items noted above) and considering, in respect of each such category, whether the costs incurred were disproportionate.*

> *If yes, then the judge will make such reduction as is appropriate. In that way, reductions for proportionality will be clear and transparent for both sides.*
>
> *93. Once any further reductions have been made, the resulting figure will be the final amount of the costs assessment. There would be no further stage of standing back and, if necessary, undertaking a yet further review by reference to proportionality. That would introduce the risk of double-counting."*

141. It is clear from the foregoing that proportionality is central to assessment on the standard basis and it trumps reasonableness: see **Optical Express Limited v. Associated Newspapers Ltd** [2017] 6 Costs LR 803 and **Kellie v. Wheatley and Lloyd Architects)** 2014 EWHC 2886(TCC). Proportionality is a separate check on costs in addition to reasonableness: see **Malmsten v. Bohinc** [2019] EWHC 1386. Items of cost that are *"unavoidable"* with which the litigation could not have progressed, such as Court fees, are to be ring fenced from the proportionality test: see **West v. Stockport NHS Foundation Trust** [2019] EWCA Civ 1220.

142. All in all, I agree with the Paying Party that the Taxing Master committed a grave error by omitting to weigh proportionality and reasonableness of amounts claimed.

Ground No. 20 – Wrong to Allow Normal Overheard Expenditure

143. Under this ground of review, the Paying Party claims that the assessment allowed normal overhead expenditure and provided allowance for an excessive amount not justified on the process presented before the Court or at all.

144. To my mind, this ground of review has been addressed in the course of dealing with the other grounds of review.

Ground No. 21 – Wrong to Allow Claims in Respect of Irrelevant and Elementary or Common Knowledge Case Law

145. The Paying Party asserts that the assessment allowed claims for entries in Part 3(d) in respect of irrelevant and elementary or common knowledge case law whose reference in the Bill of Costs if proved was unreasonable in respect of the amount of time provided for and allowed in the assessment;

146. According to the Bill of Costs, case authorities read are fourty-one in total and each of the five fee earners spent one hour each reading one case authority. The total

amount claimed on Part 3(d) came to K7,920,000.00. The Ruling on Assessment of Costs, under Summary of Bill, deals with the issue of case authorities as follows:

> "*Case authorities perused and cited on opinion, Defendants and Claimants skeletal arguments (10 allowed at 1 hour each) & Legislation read and considered - K7,920,000.00"* - Emphasis by underlining supplied

147. Having allowed only ten case authorities at 1 hour each, the taxed amount for case authorities ought to have been K2,700,000.00. This sum plus K540,000.00 for "Legislation read and considered" gives a subtotal of K3, 240,000. To my mind, the taxed amount of K7,920,000.00 was as a result of arithmetic error.

148. The decision by the Taxing Officer to allow only ten case authorities out of a list of fourty-one case authorities has in a way dealt with the concern by the Paying Party that some of the cases cited by the Receiving Party were irrelevant and elementary or common knowledge.

149. In view of the foregoing, the taxed amount for entries in Part 3(d) is reduced from K7,920,000.00 to K3,240,000.0. It is so ordered.

i.	**EL (Female) v Republic, Crim. Appeal No. 36 of 2016.** (1hr)	180,000.00
ii.	**R v Cheuka & 3 Others, Criminal Case No. 73 of 2008.** (1hr)	180,000.00
iii.	**R v Chapman (1997) ZASCA 45.** (1hr)	180,000.00
iv.	**Masiya v DPP (Centre for Applied Legal Studies and Another as Amici Curiae) [2007] ZACC 9**. (1hr)	180,000.00
v.	**Tshabalala v S; Ntuli v S (2019) ZACC 48**. (1hr)	180,000.00
vi.	**Mayeso Gwanda v S, Constitutional Case No 5 of 2015**. (1hr)	180,000.00
vii.	**Egyptian Initiative for Personal Rights & Interights v Egypt, Communication 323/06 of 2011**. (1hr)	180,000.00
viii.	**Gonzalez and others v Mexico, Judgment 16 November, 2009**. (1hr)	180,000.00
ix.	**O'Keeffe v Ireland, Application No 35810/09 of 2014**. (1hr)	180,000.00
x.	**MC v Bulgeria (2003) ECHR**. (1hr)	180,000.00

Legislation read and considered

i.	The Constitution of the Republic of Malawi (1hr)	180,000.00
ii.	Courts (High Court) (Civil Procedure) Rules 2017 (1hr)	180,000.00
iii.	Police Act (1hr)	180,000.00

Ground No. 22 – Assessment bill was at law no bill at all for assessment purposes

150. The Paying Party takes the position that the assessment bill was at law no bill at all for assessment purposes and/or could not be a basis for making the award made in that the Claimants had failed or neglected to accompany the bill with an assessment bundle containing all documents, including time sheets meant to be relied on at the assessment, contrary to Order 31, rule 12(3), of the CPR.

151. In response, the Receiving Party argues that the Paying Party has misunderstood the requirements of Order 31, rule 12(3), of the CPR. The argument by the Receiving Party will be quoted in full:

> *"1. There is a contention that the Registrar erred in awarding costs without an assessment bundle being filed. This contention is based on the lack of appreciation of the provisions of order 31 Rule 12(3). When the issue was raised during the taxation proceedings, the Registrar rightly directed that the Respondent could make reference to the court file since all the documents are on the court file. To emphasize, all documents that were filed with the Court were also duly served on the Respondent including the appointment of experts and their reports. The Attorney General brought to Court all the documents that were served on them and had a chance to refer to them at any given point in time.*
>
> *2. Order 31 Rule 12 (3) states that a bill of cost **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.*
>
> *3. The Respondents have focused on the word "shall" to argue that the rule makes it mandatory for every bill of costs to be accompanied by an assessment bundle. The Respondents have completely ignored the words "excluding those on the court file" that are used in the rule. The Applicants relied on documents that were already on the court file, as such, they were not required to file the same documents in an assessment bundle. Further, the Attorney General, was also served with all decisions that were referred to by the Applicants in the prosecution of the judicial review matters, assessment of damages proceedings and all other interlocutory applications.*
>
> *4. The Respondents never raised the issue of documentation such as receipts and written agreements during the proceedings, when the Registrar indicated that they could use the court record as the documents are on the file. They should not be allowed to raise them on review."*

152. I have considered the respective submissions. At first blush, the arguments by the Receiving Party appear to have considerable attractions, but I believe that they

are deficient in that they do not address the question of how the Court is to determine the amount of time spent on an item in the absence of time sheets or similar documentary evidence. In a majority of cases, the fact that a particular activity was undertaken will not be in dispute but parties will be divided on the duration of that activity, particularly for activities which are not done in the presence of the other party such as, for example, perusing case authorities.

153. The issue of timesheets will be fully discussed under the following ground of review, namely, Ground of Review No. 23.

Ground No. 23 – Failure to Identify the Time when each Assignment was Carried Out

154. The case of the Paying Party is that the assessment bill failed to identify the time when each assignment on each item of claim was carried out and this failure made the bill incapable of due assessment as against the applicable or reasonable rate applicable at the time of such claim.

155. The position of the Receiving Party is that what the Paying Party seeks has no legal basis. The relevant submissions by the Receiving Party were couched in the following manner:

> *"The Respondent have also not provided any legal basis requiring the receiving party to identify the time when each assignment on each item of the claim was carried out. What is important for taxation is whether or not such an assignment was carried out and the duration. Even where the duration is provided through time sheets, such time sheets do not bind the court. The court can still reduce the duration entered in the time sheets during taxation proceedings.*
>
> *The Respondents have also not pointed out any task or assignment in the taxed bill that they allege was not carried out. Even during the taxation proceedings, the Respondent never identified and challenged any task or assignment on the ground that it was never undertaken. There is therefore no value in requiring that the receiving party identifies the time when each assignment on each item was carried out."*

156. Implicit in the submissions by the Receiving Party is an admission or concession that the Receiving Party did not adduce any time sheets in support of the claims. With due respect to the Receiving Party, the importance of having time sheets cannot be overstressed.

157. A timesheet is a data table used to track the time a particular person has worked on tasks during a certain period. Businesses use timesheets to record time spent on tasks, projects, or clients. A legal practitioner must accurately account for the time he or she spends on tasks. Time entry involves entering the time a legal practitioner starts and ends work on a task. This data is then used in client billing as well as taxation of costs. It is recommended to enter time against tasks in a schedule.

158. There being no timesheets in the present case, the Court has to examine items relating to time, other than court proceedings.

Other documents perused

159. Two documents fall under this category, namely, Psychologist Expert Report and Human Rights and Gender Expert Opinion. The Psychologist Expert Report comprises 28 pages in generally simple forward language. I do not understand why it would take 3 hours to peruse such a report. To my mind, 1 hour 30 minutes is reasonable. This also goes for the Human Rights and Gender Expert Opinion which is 25 pages long.

Psychologist expert report dated October 8, 2020. ~~(3 hrs)~~ 1.5hrs 270,000.00

Human Rights and gender expert opinion
dated October 9, 2020. ~~(3 hrs)~~ 1.5hrs 270,000.00

Court documents perused

160. I have gone through the documents under this item and I agree with the Paying Party that the time taken to peruse these documents were very much overstated. To my mind, the reasonable time periods that I will allow are as follows:

"Counsel Soko	-	K40,000.00/hr
Counsel Makoko	-	K30,000.00/hr
Counsel Maluza	-	K30,000.00/hr
Counsel Malonda	-	K40,000.00/hr
Counsel Chinkwezule	-	K40,000.00/hr

Defendant's trial check-list dated March 12, 2020. (1hr)	4 pages	0.25hr	45,000.00
Defendant's statement of defence dated			

March 12, 2020. (1hr)	3 pages	0.25hr	45,000.00
Order for directions dated April 16, 2020. (1hr)	6 pages	0.25hr	45,000.00
Notice of hearing dated July 2, 2020. (0.25hrs)	1 page	5 min	45,000.00
Defendant's response to claimants' Application dated July 21, 2020. (1hr)	4 pages	0.5hr	90,000.00
Judgment dated August 13, 2020. (2hrs)	47 pages	1.5hrs	270,000.00
Notice of cross-examination dated September 28, 2020. (0.25hrs)	1 page	5 min	45,000.00

Court documents prepared

161. I have examined the documents under this item and I agree with the Paying Party that the time taken to peruse these documents were very much overstated.

162. One other important point to bear in mind is that the respective contents of the sworn statements by the Applicants in support of the Application for Judicial Review (dated 12th February 2020), the witness statements by the Applicants (dated 11th May 2020) and witness statements of the Applicants on assessment of damages (4th September 2020) are almost the same (word for word in many respects).

163. Additionally, there is duplication in relation to the Assessment of Damages Bundle. The Assessment of Damages Bundle dated 4th September 2020 comprises witness statements, sworn statements verifying witness statements and skeleton arguments. The Receiving Party has claimed in respect of the Assessment of Damages Bundle (as an item by itself) and then proceeded to again make claims in respect of witness statements, sworn statements verifying witness statements and skeleton arguments as though these are separate and distinct from the Assessment of Damages Bundle. To avoid the duplication, the claim in respect of the Assessment of Damages Bundle has to be disallowed. It is so ordered.

164. There is another issue regarding witness statements. The Bill of Costs has listed 19 witness statements dated 11 May 2020 but the Court only saw 17 witness statements: see paragraph 8 of the Judgment of the Court dated 13th August 2020 which reads:

> *"8. The Applicants complied with the Order of Directions by, among other matters, filing with the Court seventeen witness statements. The statements contain various*

accounts of the pain, distress and hardship that the Applicants …" – Emphasis by underlining supplied

165. I believe there was duplication. Bearing in mind the anonymity order that was granted, I believe the witness statement of Mo….. Ka… dated May 12, 2020 must be the same as the witness statement of MK.

166. In this regard, the reasonable time periods that I will allow in respect of the following items are as follows:

Counsel Soko	-	K40,000.00/hr x 10	= K400,000.00
Counsel Makoko	-	K30,000.00/hr x 10	= K300,000.00
Counsel Maluza	-	K30,000.00/hr x 10	= K300,000.00

Ex-parte application for permission to commence judicial review dated January 27, 2020. (1.5hrs) (Counsel Soko)	31 pages	1.5hrs	60,000.00
Ex-parte application for anonymity orders and that judicial review proceedings be held in camera dated January 27, 2020. (2hrs) (Counsel Soko)	5 pages	0.5hr	20,000.00
Skeleton arguments dated January 27, 2020. (3hrs)	4 pages	0.5hr	20,000.00
Sworn statement of service dated February 12, 2020. (0.25hrs)	1 page	0.25hr	10,000.00
Application for Judicial Review dated February 21, 2020. (1hr)	2 pages	0.5hr	20,000.00
Sworn statement in support of application made by F.C February 27, 2020. (1hr)	5 pages	0.5hr	20,000.00
Sworn statement in support of application made by E.C February 12, 2020. (1hr)	5 pages	0.5hr	20,000.00

Sworn statement in support of application made by L.M February 12, 2020. (1hr)	5 pages	0.5hr	20,000.00
Sworn statement in support of application made by F.C February 27, 2020. (1hr)	3 pages	0.5hr	20,000.00
Sworn statement in support of application made by A.L February 12, 2020. (1hr)	3 pages	0.5hr	20,000.00
Sworn statement in support of application made by D.T February 27, 2020. (1hr)	3 pages	0.5hr	20,000.00
Sworn statement in support of application made by S.B February 12, 2020. (1hr)	3 pages	0.5hr	20,000.00
Sworn statement in support of application made by M.K February 12, 2020. (1hr)	3 pages	0.5hr	20,000.00
Sworn statement in support of application made by E.W February 12, 2020. (1hr)	3 pages	0.5hr	20,000.00
Sworn statement in support of application made by E.S February 12, 2020. (1hr)	3 pages	0.5hr	20,000.00
Sworn statement in support of application made by D.K February 27, 2020. (1hr)	3 pages	0.5hr	20,000.00
Sworn statement in support of application made by E.M February 12, 2020. (1hr)	5 pages	0.5hr	20,000.00
Sworn statement in support of application made by A.M February 12, 2020. (1hr)	4 pages	0.5hr	20,000.00
Sworn statement in support of application made by E.B February 12, 2020. (1hr)	3 pages	0.5hr	20,000.00
Sworn statement in support of application made by E.S February 12, 2020. (1hr)	3 pages	0.5hr	20,000.00

Sworn statement in support of application made by C.T February 12, 2020. (1hr)	3 pages	0.5hr	20,000.00
Sworn statement in support of application made by A.K February 12, 2020. (1hr)	3 pages	0.5hr	20,000.00
Sworn statement in support of application made by M.M February 12, 2020. (1hr)	3 pages	0.5hr	20,000.00
Notice of scheduling conference dated February 26, 2020. (0.25hrs)	2 pages	0.25hr	10,000.00
Sworn statement of service dated March 5, 2020. (0.5hrs)	2 pages	0.25hr	10,000.00
Trial check-list dated March 16, 2020. (1hr) (All Fee Earners)	…. pages	1hr	180,000,00
Sworn statement of service dated March 18, 2020. (0.5hrs)	2 pages	0.5hr	20,000.00
Consolidated issues dated March 24, 2020. (1hr)	2 pages	0.25hr	10,000.00
Notice of appointment of legal practitioners dated April 23, 2020. (0.5hrs)	1 Page	0.25hr	10,000.00
Applicants' list of witnesses dated April 23, 2020. (0.5hrs)	…. Pages	0.25hr	10,000.00
Skeleton arguments dated May 12, 2020. (10hrs)	…. pages	10hrs	1,800,000.00
~~Witness statement of Mo…. Ka… dated May 12, 2020. (1hr)~~			
Witness statement of P.Y dated May 11, 2020. (1hr)	…. pages	0.5hr	20,000.00

Witness statement of F.C dated May 11, 2020. (1hr)	…. pages	0.5hr	20,000.00
Witness statement of E.C. dated May 11, 2020. (1hr)	…. pages	0.5hr	20,000.00
Witness statement of L.M. dated May 11, 2020. (1hr)	…. pages	0.5hr	20,000.00
Witness statement of A.L. dated May 11, 2020. (1hr)	…. pages	0.5hr	20,000.00
Witness statement of D.T. dated May 11, 2020. (1hr)	…. pages	0.5hr	20,000.00
Witness statement of S.B. dated May 11, 2020. (1hr)	…. pages	0.5hr	20,000.00
Witness statement of M.K. dated May 11, 2020. (1hr)	…. pages	0.5hr	20,000.00
Witness statement of E.W. dated May 11, 2020. (1hr)	…. pages	0.5hr	20,000.00
Witness statement of E.S. dated May 11, 2020. (1hr)	…. pages	0.5hr	20,000.00
Witness statement of D.K. dated May 11, 2020. (1hr)	…. pages	0.5hr	20,000.00
Witness statement of E.M. dated May 11, 2020. (1hr)	…. pages	0.5hr	20,000.00
Witness statement of A.M dated May 11, 2020. (1hr)	…. pages	0.5hr	20,000.00
Witness statement of E.B dated May 11, 2020. (1hr)	…. pages	0.5hr	20,000.00
Witness statement of E.S dated			

May 11, 2020. (1hr)	…. pages	0.5hr	20,000.00
Witness statement of C.T dated May 11, 2020. (1hr)	…. pages	0.5hr	20,000.00
Witness statement of M.M dated May 11, 2020. (1hr)	…. pages	0.5hr	20,000.00
Witness statement of A.K dated May 11, 2020. (1hr)	…. pages	0.5hr	20,000.00
Chronology of events dated May 17, 2020. (1hr)	….pages	0.25hr	10,000.00
Trial bundle dated May 17, 2020. (5 hrs)	... pages	5hrs	900,000.00
Sworn statement of service dated July 10, 2020. (0.5hrs)	…. pages	0.25hr	10,000.00
Application for a sanction dated July 2, 2020. (2 hr)	…. pages	2hrs	360,000.00
Application for permission to call experts during assessment proceedings dated September 16, 2020. (1hr)	…. pages	1hr	180,000.00
Skeleton arguments dated September 10, 2020. (5 hrs)	…. pages	5 hrs	900,000.00
Notice of appointment to assess damages dated September 1, 2020. (0.25hrs)	1 page	0.25hrs	10,000.00
Witness statement of M.M on assessment of damages dated September 4, 2020. (1hr)	5 pages	0.5hr	20,000.00
Witness statement of A.K on assessment of damages dated September 4, 2020. (1hr)	4 pages	0.5hr	20,000.00
Witness statement of C.T on assessment			

of damages dated September 4, 2020. (1hr)	3 pages	0.5hr	20,000.00
Witness statement of E.S on assessment of damages dated September 4, 2020. (1hr)	5 pages	0.5hr	20,000.00
Witness statement of E.B on assessment of damages dated September 4, 2020. (1hr)	5 pages	0.5hr	20,000.00
Witness statement of A.M on assessment of damages dated September 4, 2020. (1hr)	6 pages	0.5hr	20,000.00
Witness statement of E.M on assessment of damages dated September 4, 2020. (1hr)	7 pages	0.5hr	20,000.00
Witness statement of D.K on assessment of damages dated September 4, 2020. (1hr)	5 pages	0.5hr	20,000.00
Witness statement of E.S on assessment of damages dated September 4, 2020. (1hr)	5 pages	0.5hr	20,000.00
Witness statement of E.W on assessment of damages dated September 4, 2020. (1hr)	5 pages	0.5hr	20,000.00
Witness statement of M.K on assessment of damages dated September 4, 2020. (1hr)	5 pages	0.5hr	20,000.00
Witness statement of S.B on assessment of damages dated September 4, 2020. (1hr)	4 pages	0.5hr	20,000.00
Witness statement of D.T on assessment of damages dated September 4, 2020. (1hr)	5 pages	0.5hr	20,000.00
Witness statement of A.L on assessment of damages dated September 4, 2020. (1hr)	4 pages	0.5hr	20,000.00
Witness statement of L.M on assessment of damages dated September 4, 2020. (1hr)	6 pages	0.5hr	20,000.00
Witness statement of E.C on assessment of			

damages dated September 4, 2020. (1hr)	6 pages	0.5hr	20,000.00
Witness statement of F.C on assessment of damages dated September 4, 2020. (1hr)	5 pages	0.5hr	20,000.00
Witness statement of P.Y on assessment of damages dated September 4, 2020. (1hr)	4 pages	0.5hr	20,000.00
Skeleton arguments dated September 4, 2020. (15 hrs)	36 pages	15 hrs	2,700,000.00
~~Assessment bundle dated September 4, 2020. (5 hrs)~~	~~218 pages~~	~~5 hrs~~	
Final Submissions dated October 6, 2020. (15hrs)	…. pages	15hrs	2,700,000.00

Ground No. 24 – Omission to Weigh Benefit of Doubt in Favour of the Respondents.

167. The Paying Party faults the Taxing Master for omitting to give the benefit of doubt to the Paying Party. The ground of review was worded as follow:

> *"Given the several omissions in the preparation of the bill as identified above, the assessment omitted to weigh the benefit of doubt in favour of the Respondents contrary to Ord. 31 r. 4(2)(b) CPR and did so in disregard of principle and practice judicial exercise of discretion at taxation of costs and further contrary to the parties' case management agreement and therefore contrary to Ord. 1 r. 5 CPR"*

168. The issue of omissions by the Taxing Master to weigh benefit of doubt in favour of the Paying Party has already been dealt with under several grounds of review, such as Grounds of Review Nos. 3, 5 and 6. Actually, if truth be told, a critical analysis of the general approach taken by the Taxing Master was to resolve doubts in favour of the Receiving Party instead of the Paying Party as required by the provisions of Order 31, rule 4(2)(b), of the CPR. In the circumstances, there is clearly a basis for this Court to interfere with the discretion exercised by the Taxing Master in making the awards in the Order on Assessment of Costs.

Proportionality and Reasonableness

169. Now that we have concluded the line-by-line exercise and have a total figure of K70,895,618.21, the question to ask is whether this sum is proportionate: see

paragraph 140 of this Judgment. Considering all the circumstances of this case, including the fact that the award of compensation to the Applicants totaled the sum of K121,500,000, it is my holding that the total taxed costs in the sum of K70,895,618.21 is proportionate.

Disposal

170. Following the review herein by this Court, the Bill of Costs is hereby taxed at **K70,895,618.21** (seventy million eight hundred and ninty five thousand, six hundred and eighteen kwacha and twenty one tambala) and the breakdown thereof is set out below.

DETAILS	**TAXED AMOUNT BY THE TAXING MASTER (MWK)**	**AMOUNT AFTER THE REVIEW OF COSTS**
Interlocutory Attendances and Court Hearings	K5,040,000.00	K2,124,167.00
Instruction fee	K50,000,000.00	K10,000,000.00
Part I – Preparatory Work		
• Conferences - With Clients - With Expert Witnesses	 K5,400,000.00 K2,700,000.00	 K1,500,000.00 K1,000,000.00
• Court Documents Perused	K10,350,000.00	K1,125,000.00
• Court Documents Prepared	K22,815,000.00	K12,110.300.00
• Case authorities perused and cited on opinion, Defendants and Claimants skeletal arguments (10 allowed at 1 hour each) & Legislation read and considered	K 7,920.000.00	K2,340,000.00
Part I – Total	K49,185,000.00	**K18,075,300.00**

Sub Total for Interlocutory Attendances, Instruction Fee and Part I	K104,225.000.00	**K30,199,467.00**
Part II – Care and Conduct at 100%	K104,225,000.00	K27,774,633.60
Part III – Court and oath fees, travelling expenses and waiting time	K2,302,500.00	K500,000.00
Disbursements	K500,000.00	K500,000.00
• Fees for independent experts: - Dr Ngcimezile Mweso, MK 320,000/day for 7 days - Dr. Chioza Bandawe, MK350,000/day for 5 days	K2,240,000.00 K1,750,000.00	Nil Nil
Assessment of Costs	K2,160,000.00	K1,008,000.00
Disbursements on taxation	K31,000.00	K21,000.00
Travelling and waiting	K170,000.00	K170,000.00
Professional fees	K217,603,500.00	**K60,173,100.60**
Add outlays		K165,000.00
		K60,338,100.60
Value added Tax (16.5%)	K35,904,577.50	K9,955,786.60
MLS Levy (1%)	K2,176,035.00	K601,731.01
TOTAL PAYABLE	K255,684,112.00	**K70,895,618.21**

Conclusion

171. Both the Parties and the Taxing Master did not pay due attention to the principles for assessing costs as set out in Order 31 of the CPR. It is important that all concerned parties should ensure that taxation of costs does not boil down into an exercise of mastery of guesses, that is, "my guess is better than yours".

172. Each item being claimed must be backed by evidence. A claim that is not supported by evidence must not be allowed. The answer does not lie in simply reducing amounts in respect of an item that has not been proved. Reduction of amounts is only appropriate where an item has been proved but there are questions

regarding the amount. Take for example the preparation of a statement of case. A receiving party will usually agree that the statement of case was prepared but question why it could have taken twelve hours to prepare the statement of case that is one page long. This is where the test of reasonableness comes into play.

173. All in all, the assessed costs by the Taxing Master in the sum of K255,684,112.00 were unreasonable and, following the review of costs herein, will be replaced by the sum of K70,895,618.21. It is so ordered.

Pronounced in Court this 20th day of December 2022 at Lilongwe in the Republic of Malawi.

Kenyatta Nyirenda
JUDGE