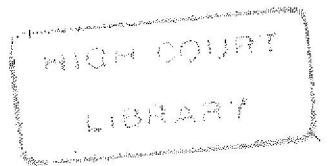


REPUBLIC OF MALAWI



IN THE HIGH COURT OF MALAWI

LILONGWE DISTRICT REGISTRY

CIVIL CAUSE NO 63 OF 2021

BETWEEN

THE STATE [ON THE APPLICATION OF STANLEY

LEONARD TADEYO CHIPTEA] CLAIMANT

AND

COUNCIL OF MZUZU UNIVERSITY..... DEFENDANT

Coram: A.P KAPASWICHE

ASSISTANT REGISTRAR

Kadzipatike

Counsel for the Claimant

Chibwe

For the Defence

Kumwenda

Court Clerk /Official Interpreter

ORDER ON TAXATION OF COSTS

BACKGROUND

The Claimant commenced this action against the Defendant challenging the decisions of failure to process his academic grades despite the Claimant completing his studies in 2020. After a full trial, the High Court found for the Claimant and ordered that the Claimant's grades be processed within 90 days and the Claimant was also awarded costs of the action hence the present proceedings. The Claimant filled a bill of costs totalling to MK164,472,280.00. The Defendant filled points of dispute to the bill. On the date of hearing; the parties made their brief oral submissions in support of their respective positions.

THE LAW AND APPLICABLE PRINCIPLES ON ASSESSMENT ON COSTS

The principle upon which costs are taxed is that the successful party should be allowed costs reasonably incurred in prosecuting or defending the action. The taxing master must hold a balance. On one hand, the successful litigant, who has been awarded the costs so that he is able to recover costs necessarily incurred and on another the unsuccessful party so that he does not pay an excessive amount of money. In the case of **Harold Smith [1860] 5H & N 381**, the court stated that Costs as between party and party are given by the law as an indemnity to the person entitled to them; they are not imposed as a punishment on the party who pays them, or given as a bonus to the party who receives them. In **Smith v Buller [1875] LR 19 Eq 473**, Sir Richard Malins V.C. stated that:

It is of great importance to litigants who are unsuccessful that they should not be oppressed into having to pay an excessive amount of costs ... the costs chargeable under a taxation as between party and party are all that are necessary to enable the adverse party to conduct litigation and no more. Any charges merely for conducting litigation more conveniently may be called luxuries and must be paid by the party incurring them.

Order 31(5) (3) of the Courts (High Court) (Civil Procedure) Rules 2017 hereinafter CPR 2017 provides that in awarding costs the court shall also have regard among other things to the amount or value of any money or property involved; the importance of the matter to all the parties; the particular complexity of the matter or the difficulty or novelty of the

questions raised; the skill, effort, specialized knowledge and responsibility involved and the time spent on the case.

Order 31 rule 5 of the CPR provides that the court should have regard to whether the costs were proportionate and reasonable in amount. **Order 31(4)(1)** provides that where the Court is to assess the amount of costs, whether by summary or detailed assessment, those costs shall be assessed on the standard basis or the indemnity basis, but the Court will not in either case allow costs which have been unreasonably incurred or are unreasonable in amount. **Order 31(4) (2)** provides that where the amount of costs is to be assessed on the standard basis, the Court shall (a) only allow costs which are proportionate to the matters in issue and (b) resolve any doubt which it may have as to whether costs were reasonably incurred or reasonable and proportionate in amount in favour of the paying party.

THE BASIS FOR THE ASSESSMENT IN THIS MATTER

Order 31(4) (4) of the CPR provides that where the Court makes an order about costs without indicating the basis on which the costs are to be assessed or the Court makes an order for costs to be assessed on a basis other than the standard basis or the indemnity basis, the costs will be assessed on the standard basis. In this case, the order on costs as stipulated in the Judgment does not indicate the basis upon which the costs ought to be assessed. It follows therefore that this court ought to assess the costs on standard basis which according to **Order 31(4) (2)** of the CPR the court ought to allow only those costs which are proportionate to the matters in issue and resolve any doubt which it may have as to whether costs were reasonably incurred or reasonable and proportionate in amount in favour of the paying party.

ANALYSIS AND DETERMINATION OF THE COSTS PAYABLE

THE HOURLY RATE

There is no dispute with respect to the rate to be used in the present assesment of costs. The matter was handled by Counsel George Jivason Kadzipatike of 12 years standing at the

bar whose hourly rate is MK40, 000.00 per hour as per the Legal Practitioners (Hourly Expenses Rates for the purpose of Taxing Party and Party Costs) Rules, 2018. The rate to be used is therefore MK40, 000.00 per hour.

ANALYSIS OF PART A

INSTRUCTION FEE/ BRIEF FEE

The Claimant prayed for payment of MK30,000,000.00 as instruction fee. The Defence argued that a sum of MK3,000,000.00 is reasonable and proportionate in the present case on the basis that the present matter was a straight forward matter and that it did not have public significance; the issues were not complex; the number and nature of documents was not complicated and very few and there was no need for specialised skill by Counsel. The Defence stated that this matter should be gaged in the same realm as personal injury cases. I do not think that it is appropriate to liken the present case to personal injury cases when dealing with instruction fee. I do agree with submissions from the Defence as quoted from the case of **Crotty v. An Taoiseach (1990) I.L.R.M 617** that when determining instruction fee; some important factors to be considered are the magnitude of the case; the unique and complex nature of the case; the importance of the case; time spent on the case; volume of the documents involved among other factors.

Having appreciated the nature of the present matter; this Court is of the view that the matter was very important as it concerned the violation of the right to education of the Claimant as his grades were not being processed having done what is required in his studies for PHD. The Claimant had worked hard up to the completion of his studies and the only thing that remained was the processing of his results. Considering the value and importance of education in the present era; any well minded person will agree with this court that this was a very important case as it had the future and the hard work of the Claimant at stake. The Defence cannot underestimate the value of academic qualifications and issues of education are some of the very important issues. It is my view, therefore, that a sum of MK7,000,000.00 is reasonable as instruction fee considering the nature and circumstances of the present case.

The Claimant further claimed brief fees of MK45,000,000.00 on the basis that Counsel engaged other Counsels in researching and appearing before the Court on his behalf. The said prayer is dismissed as brief fees are not payable in the present matter. **Order 31 Rule 10 (3) of the CPR 2017** provides that 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. Jivason and Company conducted the matter from commencement to conclusion and they got their instructions from the Claimant and not another legal firm. Counsel cannot, therefore, claim brief fees having had an award of instruction fees. It is the finding of this court that brief fee is not payable in the present case hence I dismiss the prayer for payment of brief fees.

PREPARATION

I will summarise my determinations on this item in the table below having taken into consideration the prayer made, the arguments in dispute and the documents referred to.

ITEM	PROPOSED TIME(HRS)	TIME ALLOWED(HRS)
1. Drafting a demand letter	3	1
2. Reading of reply to the demand letter and advising the Claimant on the way forward.	2	1
3. Drafting application for leave to move for Judicial review out of time and skeleton arguments in support	40	16
4. Drafting supplementary sworn statement justifying the commencement of the present matter in the Lilongwe Registry.	3	1.5
5. Drafting order for leave; Notice of Motion for Judicial Review; Form 86A; Sworn statement in	125	60

support of the application for judicial review and skeleton arguments.		
6. Perusal of the notice of appointment of legal practitioners; the Sworn statement for the Defendant; the defence filled and skeleton arguments.	25	14
7. Briefing client on the probable way forward after the closure of pleadings by the parties	1	1
8. Drafting the Claimant's Pre-Trial Checklist	4	2
9. Going through the Defendant's Pre-Trial Checklist	2	1
10. Preparation of the trial bundle for the Claimant	10	2
11. Perusal of the Defendant's trial bundle	6	2
Total		101.5

The total amount allowable under this segment is MK4,060,000.00

COURT ATTENDANCES

The Claimant Claimed a total of 12 hours on this item. 2 hours were for the travelling and attending pre-trial conference including waiting while the other 10 hours were for travelling from Mzuzu for the hearing of the case. The defence counter-proposed 2.5 hours on the basis that the first Court attendance lasted for only 10 minutes and the parties did not wait. For the hearing; it took one hour and the parties had waited for 25 minutes. The Defence argued that it the Claimant's lawyers have an office in Lilongwe hence it is unreasonable to charge for a lawyer's travelling from Mzuzu. I do agree with the observation of the Defence as actually the reason why the matter was heard in Lilongwe was the it was convenient for the Claimant who stays in Ntcheu and the lawyers who have

offices in Lilongwe. The offices for the Claimant's Counsel are located in Area 15 and from there to Court 30 minutes is reasonable time to and from. 1 hour is, therefore, reasonable time for the first court appearance while for the second Court appearance I award 2.5 hours considering that there was one -hour hearing; travelling and waiting. The total time allowed under this item is, therefore, 3.5 hours.

The total amount allowed under this segment is MK140,000.00.

RESEARCH

CASE AUTHORITIES READ

Counsel listed 35 cases as cases that he read in preparation of his documentation and further 2 cases cited by the Defendant in their skeleton arguments. The Defence argued that it was unreasonable for Counsel to read 35 cases over this case and the proposal from the defence was that this Court should allow 10 cases only with each case given 1 hour. This Court has already stated earlier on that the present case was a very important case as it involved the infringement of the right to education of the Claimant. Despite the said importance; I do agree with the Defence that it was not reasonable for Counsel to read 35 cases. Having appreciated the nature and circumstances of the present case; this Court will allow 14 cases for the Claimant and 2 cases cited by the Defendant making it a total of 16 allowed cases with each case given 1.5 hours. The total hours allowed under cases comes to 24.

STATUTES AND UNIVERSITY REGULATIONS

Counsel claimed 10 hours for reading the Constitution of the Republic of Malawi; the Courts (High Court) (Civil Procedure Rules) 2017 and the Mzuzu University Student Information Handbook. The defence argued that this part should be disallowed as there is no particular reference to the areas read by Counsel. The statutes referred to by the Claimant are very critical statutes and they are the core of the present application and they just had to be read. Considering the nature of the present case; I will allow 2 hours for reading the Constitution; 4 hours for the CPR 2017 and 2 hours for the Student Information handbook. The total allowable is 7 hours.

The total hours on research come to 31 and amounts to a sum of MK1,240,000.00.

There is also a claim of 4 hours on reading the Judgment and updating the client on the outcome. The Judgment is 16 pages long and together with the time for informing the client on the outcome; this Court is of the view that a total time of 2.5 hours is reasonable for the reading and updating the client.

The total on reading the judgment and briefing the client amounts to MK100,000.00.

The total amount allowed under Part A is MK12,540,000.00.

PART B: CARE AND CONDUCT

The next item is on Part B which is about Care and Conduct. It was submitted by Counsel for the claimant that he exercised a lot of Care in the conduct of the present matter as the matter concerned the violation of the Claimant's right to education and fair administrative action hence he claimed 80% of Part A considering the importance of the present case to the Claimant. The defence argued that the Court should award Care and Conduct at 70% as the present case was a typical judicial review matter and it has nothing exceptional and complicated.

The case of **Dr Saulos Klaus Chilima, Dr Lazarus McCarthy Chakwera v. Prof. Peter Mutharika and Electoral Commission, Constitutional Reference Number 1 of 2019** gave more guidance on the issue of Care and Conduct awards. The said case quoted with approval the English case of **Johnson v. Reed Corrugated Cases Ltd [1992] 1 All ER 169** and the court was as follows;

“in the case of **Johnson v. Reed Corrugated Cases Ltd [1992] 1 All ER 169 QBD**, the plaintiff had claimed 150% and the defendant contended that 60% was appropriate and at first instance on taxation the Registrar had allowed 90%. Evans J allowed 75% and said ‘I approach the assesment 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. The figure increases above 50% so as 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...”

Having appreciated the arguments from the parties and having appreciated the nature of the present case in light with the above cited case; this Court is of the view that 75% of part A is reasonable as Care and Conduct in the present case. I, therefore, proceed to award 75% of Part A as Care and Conduct.

The total costs under Part B are, therefore, 75% of MK12,540,000.00 which is MK9,405,000.00.

PART C: DISBURSEMENTS

The next claim was on disbursements or outlays. This was billed at MK2,500,000.00. It includes secretarial duties, stationery, printing, photocopying, postages, messengerial duties of filling and serving documents, Internet, communication, filling fees, transport among other expenses. The defence counter-proposed a sum of MK300,000.00 on the basis that the MK2,500,000.00 prayed for is not justified with proper expenditure breakdown. In my view, much as I agree that the MK2,500,000.00 prayed for is on the

higher side; the MK300,000.00 counter-proposed is on the lower side having appreciated the file. Having appreciated the documentation involved in the present case; it is my view that a sum of MK1,500,000.00 is adequate under this item and I proceed to award MK1,500,000.00 under this segment.

PART D: TAXATION

This part caters for the work done in the preparations and filling of the bill and its assesment bundle and the court attendance for taxation. The item has been billed at 130 hours. The elements of this item include preparing the bill for assesment by going through the whole file; preparation of the assesment bundle; obtaining an appropriate appointment for assesment; travelling to and from court for taxation proceedings; the actual hearing of actual taxation and issuing a certificate of taxation. Having considered the work done under this segment; the 130 hours prayed for are on a very higher side and unreasonable. I do appreciate that the work done under this item requires taking into account all the processes with regard to the file including the preparation of the huge taxation bundle filled by the Claimant for taxation. Despite these facts, the 130 hours claimed is not justifiable. The defence counter-proposed 6 hours for preparation of the taxation bill and 2 hours for the actual taxation. I find the counter-proposal to be on the very lower side considering the totality of the word done on taxation. Having considered the circumstances of the present case; I proceed to award 48 hours under this item as I deem the said 48 hours as reasonable.

The total awarded under this item comes to MK1,920,000.00.

PART E: CARE AND CONDUCT ON TAXATION

On Care and Conduct on taxation, the court proceeds to award 50% of Part D as Care and Conduct on taxation on the same basis as under Part B. **The total on this part is therefore 50% of MK1,920,000.00 which is MK960,000.00.**

SUMMARY

PART A	MK12,540,000.00	
PART B	MK9,405,000.00	
Taxation (Part D)	MK1,920,000.00	
Care and Conduct on Taxation (Part E)	MK960,000.00	
Total professional fees	MK24,825,000.00	
VAT (16.5%)	MK4,096,125.00	
Part C	MK1,500,000.00	
Grand Total		MK30,421,125.00

The costs are taxed at **MK30,421,125.00**.

Delivered on this 29th Day of JUNE 2022 AT LILONGWE



ANTHONY PITILIZANI KAPASWICHE

ASSISTANT REGISTRAR