M.S.C.A. CIVIL APPEAL NO. 2 OF 1987
(Being Civil Cause No. 528 of 1985)

BETWEEN:

JAMES WALUBE ..... **APPELLANT**

- and -

S. MATUPA ..... **RESPONDENT**

CORAM: Mtegha, J.

Kamwambe, Counsel for the Plaintiff
Msisha, Counsel for the Defendant
Kadyakale, Law Clerk

RULING

There are two applications in this case. The parties are the same. Both applications are requesting this Court for an order to tax costs as between solicitor and client. For the sake of convenience I will deal with both applications in this ruling.

The defendant in this matter was sued before the High Court for possession of certain premises belonging to the plaintiff and mesne profits. The defendant was represented by Bazuka and Company. The case went on up to trial, and at the end of the day the plaintiff succeeded and judgment in favour of the plaintiff was entered on 12th December,1986. This was Civil Cause No. 528 of 1985.

On 31st January, 1987, Bazuka and Company prepared a bill of costs as between solicitor and client amounting to K1,000.00 and served upon their client, the defendant in the matter. The client accepted this bill of costs. It may be pertinent to state what this bill said. It said:

"To our professional charges for taking instructions to defend you in the above proceedings and for doing so K850.00
Add disbursements 150.00
Plus Outlays 150.00
Total K1,000.00"

On 23rd January 1987 an appeal was filed with the Supreme Court by Bazuka & Company on behalf of their client, who now became the appellant in M.S.C.A. Civil No. 2 of 1987. On 24th February 1987 Messrs Nyirenda & Company were appointed legal practitioners for the appellant. By that stage Bazuka & Company ceased to act for the appellant/defendant. Subsequently, on 21st July 1988 Bazuka & Company prepared another bill of costs as between solicitor and client. This bill stated:

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"To our final professional charges for considering your defence attending to your consideration of documents discovery and to general care and conduct including fee of brief and to court attendances K5634.00

Less amount billed on our Bill of Cost No. 280/86 of 31st December, 1986 ..... 1000.00

K4634.00

Paid ~~disbursements~~ for Court fees 9.00

K4643.00"

This bill of costs was served on the client, who refused to accept it contending that he had already accepted the bill of K1000.00.

Now, on 22nd July, 1988, Bazuka & Company prepared another Bill of Costs as between themselves and the client in the sum of K855.00. This Bill of Costs stipulated:

"To our final professional charges for lodging your appeal and attending to you on taking instructions and attending court on settling the record K850.00

By disbursement for filing court fees 5.00

Plus Outlays 5.00

K855.00"

This Bill of Costs was in respect of M.S.C.A. 2/87. The client declined to accept this bill as well, contending that he had already accepted the bill for K1000.00, hence these proceedings.

I will first of all deal with the bill for K4643.00 in Civil Cause No. 528 of 1985.

It is not disputed by both counsel that the procedure to be followed is that solicitor must deliver the Bill of Costs to his client, and if the client refuses to accept the Bill or if some disagreements have arisen in respect of the Bill, the so icitor or the client can apply to the court to have the bill taxed by a Taxing Master - see Paragraph 3698 of R.S.C.

It has been contended by Mr. Kamwambe, for Bazuka & Co, that the bill was delivered to the client, and the client rejected it, therefore it should be taxed. On the other hand, Mr. Msisha, on behalf of the client, submits that this is a fresh bill of costs and on the authorities, it cannot be taxed.

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It is settled law that if a bill has been delivered to a client it cannot be substituted by a new bill without the consent of the client.

Farwell L.J. in the case of SADD V. GRIFFIN (1908) 2KB 510 had this to say at p. 512:

> "The Act of 1843 imposes on a solicitor the duty of sending to his client a signed bill of fees, charges and disbursements. Until he has done this, and a month has elapsed, he can bring no action to recover them. If and when he does sue, he sues on the bill so delivered and no other. If the client pays without taxation, he pays the bill so delivered. There is but one bill, and its delivery is condition precedent to payment."

In the same case Farwell L.J. cited the case of In Re Thomson 30 ch.1) 441 at p. 448 where Cotton L.J. said:

> "It has been well established that, when a solicitor sends in his bill, he gives the client to whom he sends it in a right to have that bill taxed. That rule was laid down to prevent any attempt being made by solicitors to impose on clients who did not know what the proper charges were, by sending in a bill which would not stand taxation, and then, when taxation was insisted on or threatened, sending in another bill which they knew could stand taxation. The rule had been carried so far that even where objections have been made to particular items of the bill delivered and the solicitors have, with the assent of the client, taken back the bill for the purpose of reconsideration and have struck out certain items the court has held that the bill to be taxed must be the bill as it originally sent in and not the bill as amended."

To some extent this rule has been modified in that an order of the court in its discretion can, in certain cases allow the bill to be substituted. This was clearly demonstrated in the case of Polac v. Machioness of Manchester (1956) 1WLR 819 at p.820 where Jenkins L.J. said: "that the court should be perfectly satisfied that the error in the bill as originally delivered was due to a bona fide mistake," but he went on to say, at page 827:

> "I entirely agree with the judge when he said that one has to take a strict view to maintain the necessary safeguards, and nothing I say is

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> to be regarded as suggesting to solicitors that they can be careless or unbusinesslike in a matter such as this and then of course apply for and receive the assistance sought to be given. It is only in exceptional cases, cases of special circumstances, of genuine mistake of inadvertence, that assistance can be given."

It was on these grounds that Lawton L.J. in Chappell and Another v. Mehta upheld a decision of the lower court to allow solicitors to substitute their bills of costs. The Australian case of Redfern v. Mineral Engineering (Pty) Ltd (1987) VR518 cited to me by Mr. Msiska expouses the same principles. This is the law as I can see it. What is the position in this case? It appears to me that the wording of the Bill of 31st July, 1988, is an extention of the wording of the Bill of 31st December, 1986. The only difference is that the bill of 31st July, 1988, has additional items.

It must be pointed out that both bills were delivered after the case had been concluded in the High Court. One would have expected Bazuka and Compayy to deliver one bill of costs and only one bill, to their client. As the case is at present, one would think that the second bill was prompted by the fact that another legal practitioner was appointed in February, 1987. It has not been shown to me that there was a bona fide mistake in the first bill. This application cannot, therefore, succeed. I dismiss it.

I will now turn to the application in respect of the Bill of Costs in M.S.C.A. Civil Cause No. 2 of 1987. The arguments advanced by both parties are the same as those advanced in the earlier application, and the facts are the same except that the bill of costs now relates to the amount of K855.00.

It is clear that this bill of costs arose because of the appeal. Bazuka and Company attended the appeal when they lodged it with the Supreme Court until the record was settled and then they were stopped to act for the client. These costs therefore had nothing to do with those in the High Court; it cannot be said therefore, that they were substituting this bill for the earlier bill, because at that time these costs had not been incurred.

It has been submitted that the application in respect of this bill is misconceived because this is a Supreme Court matter and it should have been commenced by motion. The application as it is, Mr. Msisha submits, directs the High Court to deal with the matter which is not seized. He cited to me 0.106/5. I have looked at 0.106/5. That order relates to the application in relation to power to order solicitor to deliver cash account, deliver money or securities etc. It never talks about costs.

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I should also point out that it might be Mr. Msiska's thinking that since the heading of the papers are headed "Supreme Court"of Malawi, it is only the Supreme Court that can deal with the matter.

It is clearly stipulated, in O.3698 that it is the High Court that can initially order that the costs should be taxed, even if they stem from the proceedings in the Supreme Court. I do not acceede to this submission. I have the jurisdiction, as a High Court Judge, to determine this issue. The issues are clear. These costs arose in the Supreme Court, not in the High Court. The Bill, therefore, does not purport to substitute for the bill of costs in the High Court. The two are completely different bills of costs and not related at all. I will, therefore, allow the application. This bill of K855.00 to be taxed. Each party will pay their own costs of each application.

MADE in Chambers this 14th day of February, 1989, at Blantyre.

H. M. Mtegha
JUDGE