REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

PERSONAL INJURY CASE NO. 219 OF 2016

BETWEEN

CHIKONDI BANDA.....CLAIMANT

AND

SATEMWA TEA ESTATE LIMITED.....DEFENDANT

Coram: **WYSON CHAMDIMBA NKHATA** (AR)

Kusiwa- of Counsel for the Claimant

Kalanda- of Counsel for the Claimant

Mndolo-of Counsel for the Defendant

Chitsulo- Court Clerk and Official Interpreter

ORDER ON ASSESSMENT OF COSTS

INTRODUCTION

The claimant was injured while in the employment with the defendant when he was mopping a garage. On the 24th of May 2016, the court entered a default judgment with costs to the claimant for failure by the defendant to file a defence. The defendant then filed an application to set aside the default judgment and the application was denied by the court orders dated 31st January 2018 and 18th June 2018. The matter proceeded to assessment of damages and on 16th January 2019, the court awarded the claimant the sum of K3,579,200.00. This court was then appointed to assess costs. This is the court's order on assessment costs.

The receiving party filed their Bill of Costs in which they are claiming K6,372,500.00. The paying party opposes the bill. Counsel representing the paying party stated that there were duplications and inclusion of items not supposed to form part of the proceedings in the bill. She took the court through the bill item by item highlighting the parts they were challenging. I shall go through same later in this ruling. Suffice to say for now, that this court has been appointed to tax the costs and arrive at a reasonable amount to cover the claimant on the costs reasonably incurred in prosecuting this matter.

THE LAW

Basically, the principle upon which costs should be 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 made whole by being able to recover costs necessarily incurred and on another the unsuccessful party so that he does not pay an excessive amount of money.

Order 31(5)(3) of the Courts (High Court) (Civil Procedure) Rules 2017 provides that in awarding costs the Court shall also have regard among others things 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(4)(1) states 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) states 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.

HOURLY RATE

The receiving party seeks K25,000.00 as the hourly rate. They indicate that the matter was handled by Charles Kusiwa and Patrick Kalanda of 6 and 16 years respectively standing at the bar. There was no contention on this part. The court adopts the K25,000.00 proposed by the receiving party.

CONSIDERATION OF THE ITEMS OF THE BILL

INTERLOCUTORY ATTENDANCES

The receiving party proposes 1 hour for attending hearing of the application to set aside default judgment on the 20th of June 2017. Counsel representing the paying party argues that the hearing took 40 minutes. I checked the record. Unfortunately, the record only indicates that the matter started at 9:50am but there is no indication of the finishing time. I shall exercise doubt in favour of the paying party by allowing the 40 minutes which has been counter-proposed.

The receiving party also claims one hour each for travelling and waiting at court on the 20th of June 2017, 20th of November 2018, 18th June 2018 and 16th of January 2019. However, the paying party is of the view that 30 minutes is more reasonable. For the 18th of June 2019, the paying party argues that the Registrar was not available and they only got the order from the clerk. One thing that was not mentioned is that the parties still travelled to court to collect the said order. All the same, mindful that the parties sometimes have to contend with traffic jams along the way to and from the court, I will allow 45 minutes each.

PREPARATION

The receiving party is claiming a total of 8 hours for taking instructions from the client to sue, to attend hearing on application to set aside default judgment, to attend assessment of damages, attending upon and corresponding with the client and taking and preparing proofs of evidence. It is contended for the paying party that there are duplications and that this was a straight forward case which did not need so much time. The receiving party argues that time taken also depends on the caliber of the client. They submit that in this case their client was a typical villager who was working as a laborer for the defendant and it was not simple to explain some legal processes and legal jargon. In my opinion, that notwithstanding, 8 hours is an exaggeration. I shall allow 4 hours for this part.

NEGOTIATIONS

The receiving party is claiming 2 hours for holding out of court negotiations with the defendant. It is contended for the paying party that there is no order on costs regarding negotiations as such the same ought to be disregarded. The receiving party argues that under the new Rules there is no prescribed form

for assessment of party and party costs. He therefore invites the court to have recourse to order 62 of the RSC under appendix 29 which indicates that negotiations are taxable.

Indeed, order 62/A2/21(x) of the RSC provides for taxation of costs for work done in connection with negotiations with a view to settlement. In this case, there is evidence that Counsel Kalanda traveled to Satemwa to meet Mr. Mandala on the 1st of September 2016 with a view of arriving at an out of court settlement. Clearly, time and other resources were expended in the conduct of this matter pursuant to the public policy that it is ideal that matters are settled out of court. I believe it is only proper that the 2 hours claimed is allowed.

DISCOVERY

On this part, it is argued for the paying party that the documents herein are a duplication of documents listed under documents prepared. The receiving party calls upon the court to consider order 62/A2/21(viii) of the Rules of the Supreme Court which provides for taxation of costs for work done during discovery. What is lacking here is the justification for the duplication of the documents. I went through the list and it is evident that the documents listed are the same with documents listed under documents prepared. I take note that it was submitted that Counsel needs to go through the Police Report and the Medical Report in order to establish if they disclose a reasonable cause of action. However, the two documents have not been included on the list for discovery. I agree with counsel for the paying party the documents listed under discovery must be disregarded for duplicity.

DOCUMENTS PREPARED

The parties did not agree on the time allocated for some of the documents prepared. It was contended by the paying party that the witness statement on assessment of damages ought not to have taken an hour for Counsel albeit its importance. Further, it was observed that the skeleton arguments on quantum is a one paged document where two cases were cited and would not have taken 2 hours. It is therefore suggested that each be taxed at 30 minutes mindful that Counsel representing the receiving party has done so many personal injury cases and had previously prepared many similar documents. The receiving party insists that the same are reasonable in that it is not the length of the document but its importance to the matter. Much as I agree that the importance of the document plays a great role, it still begs the question whether counsel of 16 years standing at the bar could take 2 hours preparing a one paged document being skeleton arguments on quantum bearing five obvious statements. Observably, the witness statement reiterates issues raised on the Medical Report. I exercise my doubt in favour of the paying party and allow 30 minutes each of these two documents bring a total of 7 hours 45 minutes.

DOCUMENTS PERUSED AND CONSIDERED

The main contention under this part was the time allocated to some of the documents. The paying party suggests there have been exaggerations while the receiving party is of the view that the time is reasonable considering that some of the documents need to be read with care for one to properly understand the issues. Having seen the documents in question and having considered their complexity and importance to the matter, this court summed up the contentions and its findings as follows:

	RECEIVING PARTY'S PROPOSAL	PAYING PARTY'S PROPOSAL	COURT'S FINDING
Order staying assessment proceedings	15 mins	-	15 mins
Defendants' summons and affidavit to set aside default judgment	1 hr	45 mins	45 mins
Skeleton arguments in support of the application to set aside default judgment	1 hr	30 mins	1 hr
Defendant's supplementary affidavit	1 hr	30 mins	1 hr
Defendant's supplementary skeleton arguments to set aside judgment	1 hr	-	1 hr
Order sustaining the default judgment	1 hr	45 mins	45 mins
Order dismissing appeal against the sustaining of the default judgment and vacating stay order	30 mins	15 mins	30 mins
Order on assessment	1 hr	30 mins	30 mins
TOTAL			**5 hrs 45 mins**

CASES

Counsel representing the paying party had issues with the cases listed by the receiving party in their bill. She observed that there are 6 cases that were attached to the assessment bundle. She is of the view that since the rest not attached there is no proof that they were read. It was her submission further that they had observed that some of the cases had been cited in other cases and since the copies had not been made available they took it that they had not been read. She listed the cases that had been made available as follows:

- Malikebu v Pemba
- Jack Magwede v Prime Insurance Compqany Limited
- World Vision International v HL Phiri t/a Construction Services
- Mwavi Coal Ltd v Press Cane Limited
- Trastel Supplies Ltd v Mwakalinga

She further submitted that the Jack Magwede case related to assessment of damages and not setting aside the Default Judgment. For these cases, they submit that they do not have issues with the 30 minutes proposed by the receiving party. However, they suggest 15 minutes each of following cases:

- Praise Chitete v Prime Insurance Company Limited
- Emmanuel Byton v Prime Insurance Company Limited

It is her contention that cases from the case of Muhammad Mpulula going down in the assessment bundle were never cited. She avers that the same relate to assessment of damages and yet the claimant only relied on two cases which are Praise Chitete case and the Emmanuel Byton case. She contends that after assessment of damages, the claimant stated that they would not file written submissions but would rely on skeleton arguments where they had used only two cases. She moves the court to disregard the rest of the cases from Muhammad Mpulula going down.

In their response, the receiving party states that the cases from Singh v Stambrook up to the case of Emmanuel Byton v Prime Insurance Company Limited were cited in the skeleton arguments. They challenged the court to check and verify. They further argue that the issue is not about relevance but that it was reasonable or necessary that the cases be read. It is their opinion that the mere fact that these were the only cases cited does not mean that they were the only cases read but rather that out of a litany of cases the injuries sustained by the claimant were comparable with those cases. They nevertheless concede having omitted to attach some of the cases. It is their contention that the omitted cases are only a few.

Having checked the two sets of skeleton arguments that were used in this matter, I was able to confirm what Counsel representing the paying party was arguing in that only a few cases were cited against the 44 cases that were listed in the assessment bundle. However, it is true that some cases may have been read but not cited as argued by counsel representing the receiving party. The doubt thereof must however be exercised in favour of the paying party by trimming down the cases. Further to that, without unnecessarily encouraging a sloppy approach to conduct of matters on the part of counsel, I believe for Counsel of 16 years standing at the bar with all the experience in similar matters, it was unnecessary industry on the part of Counsel to have read such a plethora of cases, this being a simply personal injury matter irrespective of the interlocutory proceedings that came in. I shall allow 20 cases with an average of 30 minutes each.

INSTRUCTIONS FEES

The receiving party proposes K2,000,000.00 as instruction fees. However, the paying party argues that order 31 of the CPR 2017 provides that a legal firm shall be entitled to instruction fees where a party has been instructed to act for a party from the commencement of proceedings to trial. It is contended that the judgment on liability in this matter was by default as such the instruction fees is not allowable. The receiving party opposes the contention in that this matter in fact went through trial. It is argued that assessment of damages is also trial on its own and if the issue of liability had not been settled by a default judgment, this matter could have undergone two sets of trial. This court was called upon to have recourse to the case of **Chirambo v Stagecoach Malawi Ltd** (1992) 15 MLR 102 in which Justice Mwaungulu as he was then states that although only damages had to be assessed, there was a hearing. He further points out that in some cases assessment of damages may be more rigorous than an actual trial. I agree with the receiving party that instruction fees are payable in this matter considering that it went through assessment proceedings of which there is abundant authority in fact indicating that assessment proceedings are a trial. I will however allow K1,500,000.00 for instruction fees.

GENERAL CARE AND CONDUCT

The receiving party proposes 65% of Part A as General Care and Conduct. They argue that this was a personal injuries matter which did not involve any novel issues and ordinarily it was supposed to attract a 55% General Care and Conduct. It is their opinion, that owing to the defendant's insistence on defending the matter, the claimant was compelled to do some additional research on the applicable law to sustain the default judgment obtained. They contend that this ultimately increased the amount of work done by Counsel since Counsel was compelled to thoroughly prepare for the hearing. The paying party contends that the matter was not complicated. It was submitted that the defendant was simply asking court to set aside default judgment on grounds that the matter was statute barred. The paying party therefore proposes 45% as General care and Conduct.

On this regard. I believe this matter was a straight forward matter even in the light of other interlocutory applications that were made. I am of the view that 45% suggested by the paying party is below what has been upheld in some judicial pronouncements by the High Court. I have in mind the case of **Kavwenje v Chilambe** 1996 MLR 113 in which it was stated that for ordinary cases Care and Conduct should be between 50% and 60%. In this case, I am of the opinion that 50% General Care and Conduct is reasonable.

DISBURSEMENTS

The receiving party lists disbursements as follows:

Filing fees	K26,000.00
Stationery	K10,000.00
Telephone/emails	K5,000.00
Messengerial services	K10,000.00
Transport money	K50,000.00
Fuel	K20,000.00
Wear and tear	K10,000.00
Total	**K131,000.00**

Counsel representing the paying party is challenging the filing fees. She observes that the receiving party did not file a list of the documents filed and that going through her record the documents could not amount to K26,000.00. Upon going through the filing fees for the documents in court, it was clear that the filing fees was way beyond K26,000.00. Probably, it could have served the court a great deal of purpose if the documents had been listed with an indication of the filing fee for each. I shall allow the K26,000.00 as indicated in the bill.

Counsel representing the paying party also questioned the inclusion of transport money alongside a claim of fuel. In their response, the receiving party stated that the fuel was for the Lawyers as they travelled in conduct of this matter. It was stated that at some point Counsel travelled to Satemwa for negotiations in a bid to have the matter settled out of court. They further submitted that the transport money was for the claimant as he travelled to court. However, the figure given is merely speculative. There were no tickets produced or at least a breakdown on how they arrived at K50,000.00. I shall allow K15,000.00. I disregard the wear and tear as I see no basis how the receiving party arrived at the claimed figure. Essentially, this court allows K86,000.00 for disbursements.

TAXATION

The receiving party proposes 3 hours for preparation of the bill of costs. The paying party is of the view that if the receiving party had concentrated on the cases relevant to this matter, time spent would have been much lower. They are of the view that 2 hrs is reasonable. On this item, I shall allow 2 hours having seen the bundle on taxation.

On the issue of attending taxation proceedings, the receiving party proposes 2 hours and the paying party is of the view that the actual time taken should be used by the court. The record indicates that the hearing started at 9:41am and ended at 11:37am. I find that the 2 hours claimed is justifiable.

The receiving party further claims 4 hours for travelling to Satemwa to attend out of court negotiations and waiting. As earlier observed, the paying party moves the court to disregard the same in that they do not form part of the proceedings. This court holds the view that the same should be included. However, I am of the view that 2 hours is reasonable. The receiving party is also granted 60% Care and Conduct for Taxation. In total, the court allows K120,000.00 for taxation of costs.

SUMMARY

I therefore tax the bill as follows:

PART	AMOUNT
Interlocutory attendances	K100,000.00
Preparations	K100,000.00
Negotiations	K50,000.00
Discovery	-
Documents prepared	K193,750.00
Documents perused	K 143,750.00
Authorities perused	K250,000.00
Instruction Fee	K1,500,000.00
	K2,337,502.00
General Care and Conduct (Part A)	K1,168,751.00
	K3,506,253.00
Taxation	K120,000.00
	K3,626,253.00
16.5 % Surtax	K598,331.75
Add disbursements	K86,000.00
TOTAL	**K4,310,584.75**

The costs are taxed at **K4,310,584.75.**

MADE IN CHAMBERS THIS 23rd OF APRIL, 2019

WYSON CHAMDIMBA NKHATA

ASSISTANT REGISTR