



REPUBLIC OF MALAWI
IN THE SUPREME COURT OF APPEAL
MSCA CONSTITUTIONAL APPEAL NO. 1 OF 2020

BEING HIGH COURT (LILONGWE REGISTRY) CONSTITUTIONAL REFERENCE NO. 1 OF 2019

PROFESSOR ARTHUR PETER MUTHARIKA..... 1ST APPELLANT
THE ELECTORAL COMMISSION.....2ND APPELLANT

AND

DR. SAULOS KLAUS CHILIMA..... 1ST RESPONDENT
DR. LAZARUS McCARTHY CHAKWERA.....2ND RESPONDENT

CORAM: PATEMBA, REGISTRAR

Theu, of Counsel for the 1st Respondent

Likongwe, of Counsel for the 2nd Respondent

Chokhotho, of Counsel for the 2nd Appellant

Kumwenda, Court Clerk

RULING

1.0 Introduction

1.1. The matter is coming for assessment of taxation of costs following the Court judgment delivered on the 8th May 2020 by the Supreme Court of Appeal in Lilongwe. The Court

awarded costs to the First and Second Respondents and ordered that the same be taxed by the Registrar.

1.2. The First Respondent filed the notice of appointment for taxation of costs with the Court containing a total bill of K 1, 398, 754, 385.72, while the Second Respondent filed a bill amounting to K1, 106, 635, 625.00. The Second Appellant filed their points of dispute against the two bills that were filed by both receiving parties.

2.0 Legal Issues

2.1. Most of the issues raised by the parties have been dealt with by this Court in the High Court matter. Suffice to say that, although more than one counsel appearing for a party can claim costs, the law places in the taxing master the discretion to determine the number of counsel to be allowed to claim costs- **Taehwa Construction Company Limited v Carpet and Furnishing Centre Limited** 11 MLR 29; **Re Potts, Ex p Epstein v Trustee & Bankrupt** [1935] Ch 334; **Friend v Solly** (1847) 10 Beav 329.

2.2. Though the Second Appellant argued that care and conduct should not be awarded to the Respondents, however, case authority confirms that care and conduct has been allowed since after the coming into force of the Courts (High Court) (Civil Procedure) Rules, 2017. See the case of **Veronica Chipoka v. Chibuku Products Limited and NICO General Insurance Company Limited**, Civil Cause No. 838 of 2014, delivered on the 27th November 2018, (unreported).

2.3. This Court has no better reason to disallow care and conduct in the present proceedings. The question is whether to allow it at 120% as prayed by the receiving parties. 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 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. 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 of accident cases results in allowance 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 mean that the case approaches the exceptional. A figure above 100% would seem to be appropriate only when the individual case, or cases of the 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.this litigation is not above mid-scale in the degree of complexity and difficulty, being neither straightforward, on the one hand, nor as burdensome as many cases, particularly heavy 'test' cases, sometimes are rare.

3.0 Application of the law to the issues raised

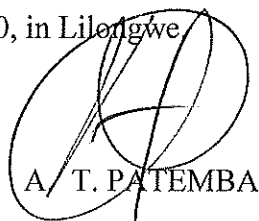
3.1. Counsel for the 2nd Appellant argued that the Court should award costs for two legal practitioners for each party. He argued that even the Supreme Court marvelled at the number of legal practitioners that appeared in the Court below, no wonder the Supreme Court restricted the number of legal practitioners to two for each party during the hearing of the appeal. While Counsel for the Second Respondent argued that the restriction by the Supreme Court was due to COVID-19. While COVID-19 was one of the reasons why the Supreme Court restricted the number of legal practitioners to two, however, it was clear that the Supreme Court did not find it necessary that all the legal practitioners that appeared in the Court below should appear before it. That is the whole reason why the Supreme Court had to plainly put on record that the number of legal practitioners in the Court below were too many. Be as it may, the discretion to award costs lies with a registrar.

3.2. Counsel for the 2nd Appellant argued that in the circumstances that the Court considers awarding care and conduct to the Respondents, it should be at 50% and not 120% as prayed by the respondents. Considering the case of **Johnson case** (supra), courts should consider awarding care and conduct above 100% if the case is exceptional. The present case was in the degree of complexity, difficulty and burdensome. Therefore, the Court would grant it at 100%.

4.0 Conclusion

4.1. Considering all arguments from both sides, the position of the law, the discretion of the Court in taxation matters, the Court orders that the bill for the First Respondent be taxed at a total amount of **K 877, 760, 000.00** and **K 726, 463, 920.00** for the Second Respondent. The full amount to be paid within 30 days from the date of the Court order.

Made in Chamber this 10th August 2020, in Lilongwe.



A. T. PATEMBA
REGISTRAR