



**IN THE HIGH COURT OF MALAWI**

**COMMERCIAL DIVISION**

**Blantyre Registry**

**Commercial Case No. 257 of 2016**

**(Before Honourable Justice Sikwese)**

**BETWEEN**

**SOUTHERN BOTTLERS LIMITED.....CLAIMANT**

**AND**

**SHOSHANA CHITIMBA t/a SHANA WHOLESALERS.....DEFENDANT**

**CORAM: D.H. SANKHULANI, ESQ., ASSISTANT REGISTRAR**

Mr. P. Mpaka, Of Counsel for the Claimant

Mr. D. Kanyenda, Of Counsel for the Defendant

Mr. E. Makombe, Court Clerk

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**Sankhulani, AR**

**ORDER ON TAXATION OF PARTY AND PARTY COSTS**

## **Introduction**

This order follows hearing of proceedings for taxation of party and party costs that was held herein.

## **Background Information**

The Plaintiff commenced the present action by way of writ of summons, claiming, inter alias, the sum of K94,717,014.12 being money owed to it by the Defendant in respect of beverages supplied to, and sold by, the Defendant who was to sell the beverages on the Claimant's behalf and for a commission.

The Defendant duly filed its defence, after which the matter was subjected to mandatory mediation, for which a date was set. On the scheduled mediation date, Counsel for the Claimant did not attend the mediation session, as a consequence of which this action was dismissed with costs.

Subsequently, upon hearing the Claimant's inter partes application to restore the action, the Honourable Judge seized of this matter restored the action. It was a condition of the order restoring the action that Counsel for the Claimant would have to pay the costs, proof of payment of which would be a pre-condition for the re-scheduling of the mediation session.

The parties having failed to agree on the quantum of costs payable, the Defendant took out a notice of appointment to tax costs to which was attached the bill of costs herein. On the scheduled date for taxation, the Defendant presented the bill and the Claimant raised its points of dispute against the same. The Defendant then responded to the said points of dispute. The matter was then adjourned for an order on taxation of costs. Hence the present order.

## **Issues for Determination herein**

- Whether or not costs to be taxed herein are for the whole action up to the present stage.
- Counsel's hourly rate apposite herein.
- The appropriate quantum of costs herein.

### Whether or not Costs to be Taxed Herein are for the Whole Action up to the Present Stage

The Claimant, on the one hand, contends that costs to be taxed herein are not for the whole action but only for the application to restore action. The Defendant, on the other hand, contends that costs to be taxed herein are for the whole action.

Having given this issue a careful thought, I have come to the conclusion that costs to be taxed herein are for the whole action up to the present stage, the reasons for which position I now proceed to give. The starting point for this discourse is the order for costs itself herein, since the present taxation proceedings are premised thereon, in terms of **Order 31 rule 1(2) of the Courts (High Court) (Civil Procedure) Rules 2017**. The order for costs in issue herein is in two forms, one in longhand and the other one in print. On the one hand, the one in longhand is contained in a ruling on the application to restore the action on pages 6 and 7 of the court's record of 9<sup>th</sup> November, 2017, and the relevant part reads as follows, and I quote:

"...I will allow the application to set aside the order dismissing the action for failure to attend mediation session on condition that Counsel in his personal capacity bears the costs of the action to this date (emphasis supplied)..."

In my opinion, the above-quoted passage is clear that costs that were ordered to be paid herein are for the whole action. On the other hand, the printed form of the order for costs, dated 14<sup>th</sup> November 2017, provides for payment only of costs of the application to restore the matter to the cause list. There is, therefore, a clear inconsistency between the order for costs in longhand and the one in print, since the former provides for costs of the whole action whereas the latter only provides for costs of the application to restore matter to the cause list. The question now arises as to which order for costs should take precedence over the other, between the one in longhand and the one in print. I would answer in favour of the former. The reason is simple. On the one hand, the order for costs in print had an external element because it was exclusively drafted by Counsel and was only signed by the Honourable Judge. On the other hand, the order for costs in longhand did not have any external element, since it was exclusively drafted by the Honourable Judge and was also signed by her. Therefore, the order for costs in longhand should take precedence over the one in print, since the former exclusively emanated from the Honourable Judge herself, unlike the latter which contained an external element as above explained. I so opine and find. It is my finding, therefore, that the costs to be taxed herein are for the whole action up to the present stage. Even using a different approach to the present issue leads to the same conclusion. The starting point in the other approach is the order dismissing action that was made herein on 1<sup>st</sup> June, 2017, the scheduled date for mediation session which the Claimant failed to attend. That order is contained in a ruling on the Defendant's application to strike out Claimant's action on page 2 of the court's record of 1<sup>st</sup> June, 2017, and the relevant part reads as follows, and I quote:



“...The Defendant’s application to strike out the Plaintiff’s action is granted. Costs to the Defendant (emphasis supplied).”

Since costs usually follow the event (see **Longwe vs. Council of the University of Malawi [2011] MLR 149**), and since the Claimant’s action was dismissed in its entirety, it means that when the Honourable Judge said ‘costs to the defendant’ as above quoted, what were meant were costs of the whole action up to that stage. This means that even before the order of 9<sup>th</sup> November 2017 restoring the action and granting costs to the Defendant, the Defendant was already entitled to costs of the whole action up to 1<sup>st</sup> June, 2017 when the action was dismissed. The next activity that took place after 1<sup>st</sup> June 2017 had everything to do with the Claimant’s application to restore action. So, even going by the Claimant’s contention that the order for costs made on 9<sup>th</sup> November 2017 was only for costs of the application to restore action, that interpretation changes nothing. I have already held above that the order for costs that was made on 1<sup>st</sup> June 2017 in favour of the Defendant provided for costs of the whole action up to then. Combined, the said order for costs of 1<sup>st</sup> June 2017 and order for costs of 9<sup>th</sup> November 2017 as interpreted by the Claimant have the effect of making costs of the whole action up to the present stage the subject of the present taxation proceedings. I so opine and find. Thus even this approach leads me to the same conclusion as above made. I, therefore, maintain the above finding that costs to be taxed herein are for the whole action up to the present stage. The Defendant rightly billed for the whole action up to the present stage.

#### **Counsel’s Hourly Rate Apposite Herein**

The Defendant’s Counsel herein claims the rate of K30,000.00 per hour. He has got 15 years of standing at the Malawian Bar. The Claimant counter-proposes the rate of K15,000.00 per hour at most.

The issue of hourly rate of Counsel is in the court’s discretion (see **Barrow Investments Ltd vs. MPICO Malls Ltd, Commercial Cause Number 6 of 2013, High Court-Commercial Division, Blantyre Registry, (Unreported)**). Bearing in mind Counsel Kanyenda’s 15-year experience at the Malawian Bar, the factors referred to in **Order 31, rule 5(3) of the Courts (High Court) (Civil Procedure) Rules 2017** and all the circumstances of the present matter, I am of the view that the rate of K15,000.00 per hour as proposed by the Claimant would, for purpose of this taxation, be reasonable. I, therefore, **ORDER** that an hourly rate of K15,000 per hour **be, and is hereby,** adopted, for purposes of the present taxation of party and costs.

### The Appropriate Quantum of Costs Herein

There are two bases on which costs may be taxed, namely standard basis and indemnity basis (**Order 31 rule 4(1) of the Courts (High Court) (Civil Procedure) Rules 2017**). Where an order for costs is made without indicating the basis on which the costs are to be taxed, costs will always be taxed on the standard basis (**Order 31 rule 4(4) of the Courts (High Court) (Civil Procedure) Rules 2017**). In the present matter, the order for costs hereinbefore referred to did not indicate the basis on which the same are to be taxed. It follows, therefore, that the costs herein shall be taxed on the standard basis. Where costs are to be taxed on the standard basis, the court only allows costs which are proportionate to the matters in issue and resolves 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 (**Order 31 rule 4(2) of the Courts (High Court) (Civil Procedure) Rules 2017**). In taxing costs, the court takes into account the conduct of all the parties, 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 or effort or specialized knowledge or responsibility involved, the time spent on the case and the place where and the circumstances in which work or any part of it was done (**Order 31 rule 5(3) of the Courts (High Court) (Civil Procedure) Rules 2017**).

Accordingly, bearing in mind the principles outlined above and taking into account the Defendant's and the Claimant's submissions on the various items of the bill herein, I hereby tax the party and party costs herein as follows:

Date	No.	Particulars and Time Claimed	Amount of Disbursements Granted	Time Granted for Professional Fees	Professional Fees
	1	The narrative of the matter leading up to these taxation proceedings: as already provided above under Background Information			
	2	<b>Fee Earner</b>			
		Mr. David Kanyenda, a Legal Practitioner of Fifteen years standing at the bar whose approved party and party hourly rate is MK15,000.00, as above determined.			

	<b>3</b>	<b>Preparation</b>			
	<b>(a)</b>	<b>Documents Perused</b>			
		i. Finance statements, ( $\frac{1}{2}$ hr);		30 min	K7,500
		ii. Wholesalership agreement, ( $\frac{1}{2}$ hr);		30 min	K7,500
		iii. Emails, ( $\frac{1}{2}$ hr)		15 min	K3,750
	<b>(b)</b>	<b>Court Documents Perused</b>			
		i. Writ of summons together with the statement of claim endorsed thereon, ( <b>1hr</b> );		30 min	K7,500
		ii. Initial directions, ( $\frac{1}{4}$ hr)		5 min	K1,250
		iii. Plaintiff's summons for summary Judgment and Affidavit in support thereof		30 min	K7,500
		iv. Plaintiffs heads of arguments in support of application for summary judgment in admission;		15 min	K3,750
		v. Summons to return matter to cause list.		30 min	K7,500
	<b>(c)</b>	<b>Court Documents Prepared</b>			
		i. Acknowledgement of service of Writ of summons and Statement of Claim, ( $\frac{1}{2}$ hr);		15 min	K3,750
		ii. Defence and list of documents for being			



		vexatious and abuse of the court process affidavit and exhibits, <b>(1hr)</b> ;		60 min	K15,000
		iii. Notice of intention to rely on preliminary objection; <b>(1hr)</b>		60 min	K15,000
		iv. Skeletal arguments in opposition to restore matter to cause list; <b>(1hr)</b>		60 min	K15,000
	(d)	<b>Books Read</b>			
		i. Bullen & Leake		15 min	K3,750
		ii. Jacob's Precedents of Pleadings		15 min	K3,750
		iii. Jacob' Pleadings and Practice		15 min	K3,750
		iv. Odger's Principles of Pleadings and Practice in Actions in the High Court of Justice (22 <sup>nd</sup> ed)		15 min	K3,750
		v. Rules of the Supreme Court, Volume <b>(5hrs)</b>		30 min	K7,500
	(e)	<b>Case Authorities Perused</b>			
		i. <b><i>Robert Herriot Martin vs- Flore-Anne Suzgo Kamanga MSCA Civil Appeal No. 34 of 2014</i></b>		90 min	K22,500
		ii. <b><i>Alexander Solanke and another vs- NBS Bank Limited, Civil Cause No. 34 of 2014 (unrep)</i></b>		60 min	K15,000
		iii. <b><i>FBC Bank Limited vs- Robert Chiwanza</i></b>			

		<b>Civil Appeal No. SC 719 of 2016</b>		60 min	K15,000
		iv. <b>Enans vs- Bartlam (1937) A.C 473, 480</b>		10 min	K2,500
		v. <b>Cropper vs- Smith (1883) 26 Ch. D700, 701 -711</b>		10 min	K2,500
		vi. <b>Lewis vs- Daily Telegraph Ltd. (No.2) [1964] 2 Q.B 601; [1964] 1 All E.R 705</b>		10 min	K2,500
		vii. <b>Preston Bankng Co. vs- Allsup [1895]</b>		10 min	K2,500
		viii. <b>Ford-Hunt vs- Singh [1973] 1 W.L.R 738; [1973] 2 All E.R 700</b>		10 min	K2,500
		ix. <b>Saloojee &amp; Anor NNO vs- Minister of Community Development (supra)</b>		15 min	K3,750
		x. <b>Hepworths Ltd. Vs- Thornole &amp; Clarkson Ltd 1922 TPD 336</b>		10 min	K2,500
		xi. <b>Kingsborough Town Council vs- Thirlwell &amp; Anor 1957(4) SA 533(N)</b>		10 min	K2,500
		xii. <b>Bailey vs- Marinof (1971) 125 CLR 529</b>		15 min	K3,750
	(f)	<b>Statutes Considered</b>			
		The High Court (Commercial Court Division Rules 2007, <b>(1hr)</b>		30 min	K7,500
		High Court Commercial Division Mandatory Mediation Rules, 2007; <b>(1hr)</b>		30 min	K7,500
	(g)	<b>Conferences</b>			
		i. Counsel attended upon the client in conference on receiving instructions, <b>(1½hrs);</b>		90 min	K22,500



	4	<b>Court Attendance</b>			
		<b><u>Interlocutory Attendance</u></b>			
		i. Attending Court on 9 <sup>th</sup> March 2017 for mediation session;  <b>(a) Hearing time, (½hr)</b>  <b>(b) Travelling time, (½hr)</b>		30 min  30 min	K7,500  K7,500
		ii. Attending court on 9 <sup>th</sup> November for summons to restore matter to cause list; (½hr)		30 min	K7,500
		<b>Care and Conduct</b>			
		i. Counsel took great care to ensure that the applicant to strike out action was brought within the Rules;		N/A	
		ii. Attending Court on 1 <sup>st</sup> June, 2017 for mediation session;  <b>(a) Hearing time minutes, (¼hr)</b>  <b>(b) Travelling time, (¼hr)</b>		15 min  15 min	K3,750  K3,750

		<b>Sub total of Part 3 &amp; 4</b>			<b>K262,500</b>
	5	<b>General Care and Conduct</b>			
		<p>This case, in particular the defence case, was very important to the client. It was necessary for the Defendant as a matter of principle that the Plaintiff should not be allowed to abuse the court process by refusing to attend mediation session without any cogent reason.</p> <p>Counsel worked hard and displayed remarkable skill in presenting the facts and the law, particularly the law on preparing for the mediation session and the law governing restoration of actions to the cause list.</p> <p>(60% of Part 3 &amp; 4)</p>			<b>K157,500</b>
		<b>Totals of Parts 3, 4 &amp; 5</b>			<b>K420,000</b>
		<b>Other Outlays</b>			
		<p>1. Stationery</p> <p>2. Court Fees</p> <p>    i. Preliminary objection</p> <p>    ii. Affidavit in opposition to summons to restore matter to cause list.</p> <p>    iii. Skeletal arguments in opposition to the summons to restore matter to the cause</p>	<p><b>K5,000.00</b></p> <p><b>K1,000.00</b></p> <p><b>K1,000.00</b></p>		

		list.			
		iv. Mediation Bundle	K1,000.00 K1,000.00		
		<b>Sub Total Part 6</b>	<b>K9,000.00</b>		
	<b>7</b>	<b>Taxation</b>			
		i. Preparing bill for taxation and obtaining appointment for taxation, <b>(3hrs)</b> ;		180 min	K45,000
		ii. Attending taxation proceedings.			
		(a) Hearing time; <b>(1¼hrs)</b>		41 min	K10,250
		(b) Travelling time, <b>(½hr)</b>		30 min	K7,500
		(c) Court Fees	<b>K7,000</b>		
		<b>Care and Conduct</b> Counsel ensured that the bill contains all the relevant points and supervised the secretary to ensure the bill was prepared accordingly (50% of i & ii(a) & ii(b))			K31,375
		<b>Sub Total of Part 7</b>			<b>K94,125</b>
		<b>Total Outlays</b>	<b>K16,0000</b>		



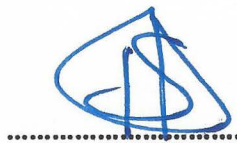
		<b>Total Professional Fees</b>			<b>K514,125</b>
		<b>16% V.A.T. on Professional Fees</b>			<b>K84,830. 63</b>
		<b>GRAND TOTAL PAYABLE</b>			<b>K614,955 .63</b>

**Final Order**

I view of the foregoing taxation, the party and party costs herein are hereby taxed at **K614,955.63.**

The Defendant shall file a certificate of taxation for issuing.

Delivered in Chambers at Blantyre Registry of the Commercial Division of the High Court this 16<sup>th</sup> day of November 2018.



**D.H. SANKHULANI**

**ASSISTANT REGISTRAR**

