



**REPUBLIC OF MALAWI  
IN THE HIGH COURT OF MALAWI  
LILONGWE DISTRICT REGISTRY  
CIVIL DIVISION**

Constitutional Reference Number 3 of 2019

**THE STATE**

**VERSUS**

**MALAWI COMMUNICATION REGULATORY AUTHORITY.....DEFENDANT  
(on application of)**

**THE REGISTERED TRUSTEES OF MEDIA INSTITUTE  
OF SOUTHERN AFRICA.....1<sup>ST</sup> APPLICANT**

**TIMES RADIO STATION LIMITED.....2<sup>ND</sup> APPLICANT**

**ZODIAK BROADCASTING STATION LIMITED.....3<sup>RD</sup> APPLICANT**

**CAPITAL RADIO (MALAWI) LIMITED.....4<sup>TH</sup> APPLICANT**

<b>CORAM:</b>	<b>CM MANDALA:</b>	<b>ASSISTANT REGISTRAR</b>
	J Suzi-Banda & C Makoko:	Counsel for 1 <sup>st</sup> and 4 <sup>th</sup> Applicant of JB Suzi & Company
	D Silungwe:	Counsel for 3 <sup>rd</sup> Applicant on brief from Malera & Company
	M Chakhala:	In - House Counsel for the 2 <sup>nd</sup> Applicant
	Kadam'manja:	In - House Counsel for the Defendant
	Kumwenda:	Court Clerk

**REVIEWED ASSESSMENT OF COSTS**

**C MANDALA, AR:**

**INTRODUCTION AND BACKGROUND**

This is an order for assessment of costs pursuant to a Judgment made by the Honorable Judges on 29<sup>th</sup> May 2020. The Applicants filed a Bill of Costs on 12<sup>th</sup> August 2020 proposing a total sum of K169,414,840.00 to be awarded as costs. On 26<sup>th</sup> November 2020, this Court awarded the sum of K73,599,329.30 as costs to the Applicants. Counsel for the Defendant applied for a review of the taxed bill and submitted objections to the bill as taxed. Counsel for the Applicants similarly filed responses to the objections. These will be tackled in turn. The review hearing on assessment of costs was conducted on 6<sup>th</sup> April 2021 and this ruling stems from that hearing.

**THE LAW**

One of the powers and functions of registrars is to assess costs. Order 25 rule 1(o) of the *Courts (High Court) (Civil Procedure) Rules* of 2017. Costs are to be assessed on a standard or indemnity basis and the court will not allow costs that are unreasonably in their incurrence or amount. Order 31 rule 4 of the *Courts (High Court) (Civil Procedure) Rules* of 2017. In assessing costs, according to Order 31 rule of the *Courts (High Court) (Civil Procedure) Rules* of 2017, the Court will consider the following circumstances in assessing costs:

- 5.—(1) *The Court shall have regard to all the circumstances in deciding whether costs were*  
*(a) if it is assessing costs on the standard basis\_\_\_*

- (i) proportionately and reasonably incurred; or
- (ii) were proportionate and reasonable in amount, or
- (b) if it is assessing costs on the indemnity basis\_\_
  - (i) unreasonably incurred; or
  - (ii) unreasonable in amount.

Additionally,

- (3) The Court shall also have regard to\_\_
  - (a) the conduct of all the parties, including in particular\_\_
    - (i) conduct before, as well as during, the proceedings; and
    - (ii) the efforts made, if any, before and during the proceedings in order to try to resolve the dispute;
  - (b) the amount or value of any money or property involved;
  - (c) the importance of the matter to all the parties;
  - (d) the particular complexity of the matter or the difficulty or novelty of the questions raised;
  - (e) the skill, effort, specialized knowledge and responsibility involved;
  - (f) the time spent on the case; and
  - (g) the place where and the circumstances in which work or any part of it was done.

Order 31 (17) of the **Courts (High Court) (Civil Procedure) Rules** of 2017 provides for review of decision on costs. It states:

- 17.—(1) A party to assessment of costs who is dissatisfied with any decision of the Court may, within 21 days after that decision, apply to the Court to review its decision.
- (2) An application under sub rule (1) shall specify, in writing, the nature and grounds of the objections.
- (3) The objections under sub rule (2) shall be served on every other party to the proceeding, and the other party shall, within 21 days from the date of service, deliver answers to the Court, the applicant or other party to the proceeding.
- (4) The Court may receive further evidence at the hearing of an application under sub rule (1) and may order costs as it shall deem appropriate in the circumstances.

### ISSUES

The issues raised for the Court's Determination are:

1. The Care and Conduct at 100% was excessive
2. Instruction fee of K20,000,000.00 was excessive
3. The 2<sup>nd</sup> Applicant (Times Radio Limited) Should be Awarded Party and Party Costs
4. Distribution of Costs
5. Objections to Specific Line Items

### DISCUSSION

#### *1. Care and Conduct*

The taxed Bill of Costs pegged Care and Conduct at 100%. Counsel for the Defendant argues that the present matter cannot be put at par with the case of **Dr Saulos Klaus Chilima & Dr Lazarus McCarthy Chakwera v Professor Arthur Peter Mutharika & Electoral Commission** - Constitutional Reference Number 1 of 2019. That case was 'particularly burdensome, difficult, and complex', and therefore cannot be compared to the present matter. Counsel for the Defendant proposed that Care and Conduct be pegged between 65% and 70%. Counsel for the Applicants opposed this stating that the present matter was complex as it was an attempt by the director general to muzzle citizens. Counsel Suzi-Banda further argued that the judgment itself was a jurisprudential milestone on the subsidiary legislation making process and the separation of powers.

In **Ruth Belentino v Hanif Mahommed & General Alliance Insurance Company Limited** - Personal Injury Cause Number 914 of 2016, the Assistant Registrar discussed Care and Conduct as follows:

**The State v Malawi Communications Regulatory Authority (on the application of The Registered Trustees of National Media Institute of Southern Africa and 3 others)** – Constitutional Case Number 3 of 2019.

*‘On this regard, I wish to agree with Counsel representing the receiving party in that the new Rules specifically provide for Care and Conduct albeit not having been stated verbatim. General care and conduct cover the imponderable for which no direct time can be substantiated. It is a percentage mark-up of the costs allowed depending on the difficulty, responsibility, and importance of the case to the client. I believe this is what Order 31 rule 5(3)(d) and (e) covers.’*

It is trite that parties are entitled to awards for care and conduct. Although care and conduct are not expressly mentioned in the **Courts (High Court) (Civil Procedure) Rules**, courts have been making awards for care and conduct: see **Dr Saulos Klaus Chilima & Dr Lazarus McCarthy Chakwera v Professor Arthur Peter Mutharika & Electoral Commission** - Constitutional Reference Number 1 of 2019 and **Ruth Belentino v Hanif Mahommed & General Alliance Insurance Company Limited** - Personal Injury Cause Number 914 of 2016.

The issue to be considered is the percentage to be awarded for care and conduct. The Registrar, in **Dr Saulos Klaus Chilima & Dr Lazarus McCarthy Chakwera v Professor Arthur Peter Mutharika & Electoral Commission** Constitutional Reference Number 1 of 2019, awarded 100% for care and conduct because the case was ‘burdensome, difficult and complex’. She cited the case of *Johnson v Reed Corrugated Cases Ltd* [1992] 1 All ER 169 QBD which states:

*‘I am advised that the range normal i.e non-exceptional, cases start 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% 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 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.’*

This court appreciates the amount of work that had to be put into prosecuting this matter as explained by Counsel. In the **Dr Saulos Klaus Chilima Case**, Care and Conduct was pegged at 100% for a matter that had volumes of documentation, sometimes complex evidence and spanned a period of over a year. The matter at hand was similarly taxing, was of national importance, and held a determination on fundamental rights as enshrined in the Constitution. This Court will maintain Care and Conduct at 100%.

## 2. Instruction Fee

The Taxed Bill of Costs pegs instruction fee at the rate of K10,000,000 (ten million kwacha) per Counsel, totalling K20,000,000 (twenty million kwacha). Counsel for the Defendant argues, in opposition, that the Court ought to be conservative in its awards for instruction fees. Counsel further argued that the fee is excessive for a hearing that only lasted 1.5 hours and proposed the sum of K3 million for instruction fees. Counsel for the Applicants argued that the matter was complex and cited the case of **Gift Trapence et al** where the Court awarded instruction fee of K6 million and the **Chief Justice Removal Case** where the Court awarded instruction fee of K10 million.

Order 31 rule 10 of the **Courts (High Court) (Civil Procedure) Rules** of 2017 provides for instruction fee as follows:

- 10.—(1) *A legal practitioner or his law firm shall be entitled to an instruction fee and not a brief fee where he or his firm have had instructions to act for a party from the commencement of a proceeding to trial.*
- (2) *The Court may allow a legal practitioner or his law firm to be entitled to a single fee.*

*(3) 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.*

In ***Ruth Belentino v Hanif Mahommed & General Alliance Insurance Company Limited*** - Personal Injury Cause Number 914 of 2016, the Assistant Registrar opined that an award for instruction fee cannot be disallowed but that the amount claimed was excessive. He reduced the instruction fee from K3,000,000.00 (three million kwacha) to K1,000,000.00 (one million kwacha).

As a compromise, this court will reduce instruction fee to K8,000,000.00 (eight million kwacha) per Counsel.

### 3. 2<sup>nd</sup> Applicant's Award of Party and Party Costs

Counsel for the Applicants argued that this Court did not have jurisdiction to exclude Counsel Chakhala, as in-house Counsel from receiving Costs. Counsel Suzi-Banda argued that, in effect, this Court usurped the jurisdiction of the Constitutional Court by making this determination. In response, Counsel for the Defendant stated that Costs are awarded to parties and not to lawyers, excluding Counsel Chakhala for receiving Costs did not mean that the 2<sup>nd</sup> Applicant was not awarded the Costs, it just meant that Counsel Chakhala could not personally receive them as in-house Counsel since he receives compensation for representing Times Radio Station Limited through his monthly salary.

This court will reproduce its reasoning for the exclusion below – reference is made to page 4 of the original Assessment of Costs:

*'The position of the [Malawi Law] Society seems to be that in-house Counsel ought not to engage in work where the Scale charges could apply. Scale Charges are payable to individual legal practitioners and not to legal houses, therefore, any work that attracts Scale Charges cannot be engaged in by 'a corporation or any of their employees as such even if that employee is a person entitled to practice law.' In as much as in-house Counsel may appear in person on behalf of the corporation, they may not engage in work that attracts the Scale Charges. It appears the Society was encouraging the outsourcing of legal services for the purpose of litigation to not conflate the roles of in-house Counsel and Counsel operating a/ employed in private law practice.*

*The Society therefore allows in-house Counsel to appear in person in three instances: 1) where Counsel operates a private law practice independent of the employer, 2) on behalf of the corporation by which he is employed, and 3) on his own behalf where he is a party to the proceedings. With these considerations, this Court finds that Counsel Chakhala in his capacity as in-house Counsel for the Times Radio Station Limited is not entitled to party and party costs. Counsel Chakhala will therefore be awarded zero costs for his role in these proceedings.'*

This court maintains its position on Counsel Chakhala not being awarded costs in the proceedings. It further goes on to clarify that the 2<sup>nd</sup> Applicant has not been excluded from Costs, rather Counsel Chakhala himself is excluded from receipt of the costs. The 2<sup>nd</sup> Applicant, Times Radio Station Limited, will receive their costs directly, through an institutional bank account, as a party to these proceedings.

### 4. Distribution of Costs

Counsel Silungwe made an application that the Court should allocate specific sums to clarify how much is being awarded to each party. A perusal of Order 31 of the ***Courts (High Court) (Civil Procedure) Rules*** does not provide for this. The Court's discretion on costs is set out in Order 31(3) (1), it states:

3.—(1) *The Court has discretion as to:*  
 (a) *whether costs are payable by one party to another;*

***The State v Malawi Communications Regulatory Authority (on the application of The Registered Trustees of National Media Institute of Southern Africa and 3 others)*** – Constitutional Case Number 3 of 2019.

- (b) the amount of those costs; and  
(c) when they are to be paid.

Counsel Suzi-Banda had informed the Court that all lawyers were operating under the firm of JB Suzi & Company, despite Counsel Malera running his own practice, and Counsel Chakhala being in-house Counsel. This court believes they had an agreement on their mode of operation, and by extension, how costs would be allocated if they were successful. Further, looking at Order 31 in its entirety, the division of Costs to each individual Applicant would have been in the purview of the Court if individual Counsel had filed separate Bills. This Court taxed one Bill filed by JB Suzi and Company that included all legal practitioners. This court believes the determination of how much goes to who should be left with Counsel.

#### 5. *Objections to Specific Line Items*

Counsel for the Defendant submitted detailed objections to some specific items. Counsel for the Applicants opposed these objections. I agree with Counsel for the Applicants arguments. The Court taxed every item individually and came to the Bill having been satisfied that the costs awarded were fair. The court will thereby dismiss this objection and maintain the costs as initially awarded.

The summary of the reviewed bill is included herein:

#### **BILL OF COSTS AS TAXED ON REVIEW**

Two Legal Practitioners allowed: Mr Ian Malera and Mr John Suzi-Banda. Both are legal practitioners of more than 10 years standing at the bar, whose approved hourly rate is MWK40, 000.00.

#### **SUMMARY OF BILL<sup>1</sup>**

<b><u>DETAILS</u></b>	<b><u>TAXED AMOUNT (MWK)</u></b>
<b>Part A</b>	
• Documents Read	946,666.65
• Court Documents Read	1,906,665.00
• Court Documents Prepared	3,519,999.99
• Books Read (1 hour per book)	1,520,000.00
• Cases Read (50 allowed at 1 hour per case)	4,000,000.00
• Statutes Read (1 hour per statute)	1,920,000.00
• Conferences (11 allowed 3 hours per conference)	2,640,000.00
• Court Attendances	4,200,000.00
Total Part A	20,653,331.60
Part B - Care and Conduct at 100%	20,653,331.60
Instruction Fee – K8,000,00.00 per lawyer	16,000,000.00

<sup>1</sup> Full Bill as taxed attached.

Disbursements	1,000,000.00
Preparation	480,000.00
<b>Professional Fees</b>	<b>61,786,663.30</b>
<b>Value Added Tax (16.5%)</b>	<b>10,194,799.40.40</b>
<b>MLS Levy (1%)</b>	<b>617,866.63</b>
<b>Add Disbursements</b>	<b>1,000,000.00</b>
<b>TOTAL PAYABLE</b>	<b>69,599,329.30</b>

DISPOSAL

The Bill of Costs is hereby taxed at **MWK69,599,329.30 (sixty-nine million, five hundred ninety-nine thousand, three hundred- and twenty-nine-kwacha, thirty tambala.**

Each party is at liberty to appeal to the Supreme Court of Appeal within the requisite time frames. Leave to appeal is hereby granted.

Ordered in Chambers on the 12<sup>th</sup> day of May 2021 at the High Court, Lilongwe.



CM Mandala

**ASSISTANT REGISTRAR**