



**IN THE HIGH COURT OF MALAWI**

**COMMERCIAL DIVISION**

**Lilongwe Registry**

**Commercial Case No. 362 of 2021**

**(Before Honorable Justice K.T Manda)**

**BETWEEN**

**AMARANTH DEVELOPMENT LIMITED.....CLAIMANT**

**AND**

**MALAWI HOUSING CORPORATION.....DEFENDANT**

**CORAM: A.Z GUMULIRA, ASSISTANT REGISTRAR**

Mulemba, Of Counsel for the Claimant

Mzanda, Of Counsel for the Defendant

Mwale, Court Clerk

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**Gumulira, AR**

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

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### **Introduction and Background Information**

This order follows a hearing of proceedings for taxation of party and party costs held on the 9<sup>th</sup> of November, 2022, pursuant to a Judgment for specific performance entered in favor of the Claimant on 21<sup>st</sup> July, 2022. The Court, in the presence of both parties conducted an item by item assessment of the costs, wherein the court made awards on the items billed cost payable in the matter came up to MK 17,496,000.00.

During the assessment proceedings, the Defendant raised an objection in the award of a percentage for care and conduct to the Claimant. They argued that the same is not specifically mentioned under the new rules of the High Court, namely, the **Courts (High Court) (Civil Procedure) Rules 2017**(Hereinafter, the CPR). They laid a contrast with the preceding set of Rules of the Supreme Court Practice an award of care and conduct was specifically expressly provided for.

### **The Law and Reasoned Analysis**

The Defendants cite **Ruth Belentino v Hanif Mahommed & General Insurance Company Limited Personal Injury Cause No. 914 of 2016** as authority for the position that an award of care and conduct is the imponderable for which no direct time can be substantiated, and that it is based on the difficulty, responsibility and importance of the case to the client. The defendants liken these considerations to the ones used in the determination of lawyer's fee as prescribed under the **Legal Practitioners (Scale and Minimum Charges) Rules and the Malawi Law Society Code of Ethics**, which fees are already payable under **Order 31 Rule 10** of the CPR.

I am bewildered by Counsel's decision to only quote a portion of the Court's decision to guide this court as to the definition of care and conduct, when the same paragraph from which the portion relayed by counsel was taken, settles the objection that they now raise in these proceedings. The whole paragraph from which counsel makes their argument reads as follows:

*"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 covers the imponderable for which no direct time can be substantiated. It is a percentage markup 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."*

This is not the only case that has held that a percentage of care and conduct is payable under the new rules.

**In Dr Saulos Klaus Chilima & Dr Lazarus Mc Carthy Chakwera v Professor Peter Mutharika & Electoral Commission, Constitutional Reference Number 1 of 2019**, the Supreme Court awarded 100% for care and conduct because the case was burdensome, difficult and complex.

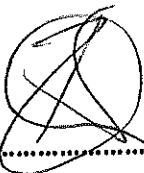
Not only am I bound to follow the cited cases on point, but I am convinced that they represent the correct position of law in this regard. It is my most considered opinion that the absence of the words "care and conduct" under the new rules, does not take away the fact that there are other items that ought to be billed to which no direct time can be substantiated. I do not agree that these would be covered under legal practitioner's fees today as argued by counsel because there is now a fixed sum depending on a particular legal practitioner's number of years at the

bar, in terms of **Rule 2 of the Legal Practitioners (Hourly Expense Rates for Purposes of Taxing Party and Party Costs) Rules, 2018**. It would therefore follow that a situation under Part 3 of the Legal Practitioners (Scale and Minimum Charges) Rules would hardly arise. There would therefore be no double award as argued by the Defendants because the imponderables for which no direct time can be substantiated are only considered in the actual work done per given matter, thus justifying the variations in the percentages awarded under care and conduct.

**Final order**

On this reasoning, we find that the award of care and conduct in this case was reasonable and fair. The costs payable in this matter remain as earlier assessed, in the sum of **MK 17,496,000.00**.

Delivered in Chambers at the Lilongwe Registry of the Commercial Division of the High Court, this 28<sup>th</sup> day of March 2023.



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**A.Z. GUMULIRA**

**ASSISTANT REGISTRAR**