REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI

(COMMERCIAL DIVISION)

LILONGWE REGISTRY

COMMERCIAL CAUSE NUMBER 65 OF 2020

BETWEEN

NAMZA ALI MOOSA.....CLAIMANT

-AND-

MPICO LIMITED.....DEFENDANT

Coram: A.P KAPASWICHE	**ASSISTANT REGISTRAR**
Mr. Kaduya	Counsel for the Claimant
Mr. Amidu	Counsel for the Defendants
Mr. Ndhlazi	Court Clerk /Official Interpreter

ORDER ON TAXATION OF COSTS

BACKGROUND

The claimant commenced this action against the defendant claiming that the Court should make declarations that the contract of sale of land had suffered frustration due to excessive delay hence it should be terminated; that the sum of MK5,400,000 paid by the defendant to the claimant be treated as rental charges for the period ; make an order compelling the defendant to vacate the claimants plot ; make an order compelling the defendant to demolish part of its building and lawn that extended into claimant's plot and an order for costs. The defendant filled a defence denying the claims and stated that the action be dismissed for being an abuse of the court process as the same case was dismissed by the High Court in Mzuzu. The defence further made an application to dismiss the action for want of prosecution and further for being an abuse of the court process as the same case seeking the same reliefs between the same parties was dismissed by the Court in Mzuzu. The court, by its order of 30th November 2020 dismissed the action for want of prosecution as the claimant did not prosecute the matter and also for being an abuse of court process. Costs were awarded to the defendant.

This court heard the matter on costs and this is the determination of the court on the same. The defendant filed his bill of costs. The claimant filled their points of dispute to the defence's bill of costs. The parties also made their oral arguments at the hearing of the present application. The defendant is claiming costs amounting to MK7, 765,700.00 while the claimant proposes MK385, 230.00 as costs to be paid.

THE LAW AND APPLICABLE PRINCIPLES ON ASSESSMENT ON COSTS

The principle upon which costs are 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 able to recover costs necessarily incurred and on another the unsuccessful party so that he does not pay an excessive amount of money. In the case of **Harold Smith [1860] 5H & N 381**, the court stated that Costs as between party and party are given by the law as an indemnity to the person entitled to them; they are not imposed as a punishment on the party who pays them, or given as a bonus to the party who receives them. In **Smith v Buller [1875] LR 19 Eq 473**, Sir Richard Malins V.C. stated that:

> It is of great importance to litigants who are unsuccessful that they should not be oppressed into having to pay an excessive amount of costs … the costs

chargeable under a taxation as between party and party are all that are necessary to enable the adverse party to conduct litigation and no more. Any charges merely for conducting litigation more conveniently may be called luxuries and must be paid by the party incurring them.

Order 31(5) (3) of the Courts (High Court) (Civil Procedure) Rules 2017 hereinafter CPR 2017 provides that in awarding costs the court shall also have regard among other things to 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 rule 5 of the CPR provides that the court should have regard to whether the costs were proportionate and reasonable in amount. **Order 31(4)(1)** provides 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)** provides 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.

THE BASIS FOR THE ASSESSMENT IN THIS MATTER

Order 31(4) (4) of the CPR provides that where the Court makes an order about costs without indicating the basis on which the costs are to be assessed or the Court makes an order for costs to be assessed on a basis other than the standard basis or the indemnity basis, the costs will be assessed on the standard basis. In this case, the order on costs as stipulated in the Judgment does not indicate the basis upon which the costs ought to be assessed. It follows therefore that this court ought to assess the costs on standard basis which according to Order 31(4) (2) of the CPR the court ought to allow only those costs which are proportionate to the matters in issue and 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.

ANALYSIS AND DETERMINATION OF THE COSTS PAYABLE

THE HOURLY RATE

There is no dispute with regard to the rate applicable in the present matter. Counsel who was seized with the matter was Mr. Francis Kaduya of 7 years standing at the bar whose hourly rate is MK30, 000.00 as per the Legal Practitioners (Hourly Expenses Rates for the purpose of Taxing Party and Party Costs) Rules, 2018. The rate to be used is therefore, MK30, 000.00 per hour.

INSTRUCTION FEES

Counsel for the defendant prayed for payment of MK1,000,000.00 as instruction fees. The claimant argued that instruction fees are not payable in the present case. The reason advanced by the claimant against the payment of instruction fees is that the present taxation of costs is being done on standard basis and not on indemnity basis and as such payment of the instruction fees is as if the client is being indemnified. The argument from the claimant was that instruction fee is only payable where the costs are being assessed on an indemnity basis and not on a standard basis as is the case in the present matter. The defence disagreed with the take of the claimant and maintained that the court should award instruction fees in the present matter.

Counsel for the defendant argued that the law is very clear under **Order 31 rule 10 (1)** of the CPR 2017. The rule provides that a legal practitioner or his law firm shall be entitled to an instruction fee where he or his firm have had instructions to act for a party from the commencement of the proceeding to trial. It was argued that the condition for payment of instruction fees is that the legal practitioner or a law firm has conduct of the matter from commencement to trial and there is no requirement that it is dependent on whether the assessment is being done on a standard or indemnity basis. This court agrees with the defence that indeed Order 31 rule 10 does not place a condition that is being advanced by the claimant in opposing to the instruction fee. In my understanding of the rule, all what a lawyer has to do to qualify for an instruction fee is to represent a client from commencement of the matter to trial. It is my finding that instruction fees are payable.

The claimant went further to argue that in any event; there is no proof that the amount of instruction fees was indeed paid to Counsel. It is indeed true that no receipts were submitted in this court for payment if instruction fees but I am of the view that this cannot be used to deny the defendant from having the instruction fee payable at the law does not provide that instruction fees are only payable upon production of receipts. I will proceed to allow MK1,

000,000 as instruction fees as I deem the amount to be fair considering the nature of the case at hand.

PREPARATION; RESEARCH; READING AND PREPARING DOCUMENTS, ATTENDANCES

The first item was receiving instructions from the client to defend the action and this was billed at 5 hours. The claimant proposed 30mins for this item on the basis that this was not the first time the matter was coming to the attention of Counsel as Counsel had prior knowledge of the matter from the proceedings of the matter that was dismissed in Mzuzu. Counsel for the defence maintained the prayer for the 5 hours on the basis that when the matter came to him; he had to take considerable time to understand it regardless of the fact that there was already a similar matter in Mzuzu previously. I have heard both sides on the matter. It is true that the matter was not new as it had already gone before a court in Mzuzu hence the parties were familiar with the matter. However, the fact that there was a similar matter in Mzuzu would be the more reason a diligent Counsel would want to have more time to understand the newly commenced matter as any reasonable Counsel would assume that there is something different from the previous matter since if the matter is not different there would be no need for it to come in a different court. So the need for enough time for the defence is justified as they had to have a better understanding of the claim in question. I will, however, allow 3 hours on this item as I deem that the said 3 hours is reasonable time to get a clear understanding of the matter.

The next item is reading the documentation provided by the clients which included Summons; List of documents; Sworn Statement verifying the list of documents, Statement of case, Sale Agreement, Survey reports and letters to the Regional Commissioner for lands. This item is billed at 10hours. The claimant counter-proposed 45mins on the basis that according to his experience; Counsel for the defendant cannot take up to the said 10 hours in reading the said documents that are usually in standard form. Counsel for the defendant maintained the 10 hours on the basis that he had to take his time to read and understand the documents in question and further that he does not possess the same experience as Counsel for the claimant as Counsel for the claimant is senior to Counsel for the defendant. I do agree that measuring the defence counsel on the same yardstick as the counsel for the claimant is unfair as the two do not possess the same experience. Again, I do not agree with the simplistic approach taken by Counsel for the Claimant. It is improper to take things as usual in legal practice as this leads to complacency which mostly jeopardises the interest of clients. A diligent counsel is expected to treat every

case with utmost care and attention hence there is no time in the legal practice to allow laziness by assuming that a particular document is a simple or easy document. Having gone through the documentation subject to this item; I will allow 6 hours.

The next item is on Preparing, drafting, filling and serving a defence together with documents and summons from the client. This was billed at 10 hours. The Claimant counter proposed 1 hour on the basis that counsel does not file and serve documents as those are clerical duties and further that the defence prepared is just three pages. Counsel for the defendant argued that the defence might be three pages but it took time to prepare and draft it hence maintaining his prayer for 10 hours. I must firstly agree with Counsel for the claimant that indeed filling and serving of court documents falls under clerical duties not duties to be undertaken by Counsel. I also agree with the defence that much as a defence may be only three pages; there is a lot that goes into the preparation of the said defence hence it is not as simple as how the claimant wants to put it. Having looked at the defence and my views on the service and filling of the documents; I will allow 3 hours on this item.

The next item is billed at 15 hours. It is about preparing; drafting, filling and serving the defendant's application to dismiss the action for being an abuse of the court process and for want of prosecution which included sworn statement of counsel. The claimant counter-proposed one hour on the same reasoning provided under the previous item. I will adopt my reasoning provided in the previous item and proceed to allow 3 hours as I deem it reasonable for purposes of preparing and drafting the application to dismiss the action. The filling and serving of the documents are clerical duties.

The next item is on preparation of skeleton arguments in support of an application to dismiss the action stated above. This is billed at 10 hours. The defence counter-proposed 1:30mins for this on the basis that it is a four paged document. I will allow 5 hours on this item as the skeleton arguments preparation considered the law as well as a number of cases that had to be considered in drafting the skeleton arguments.

The next item is billed at 4 hours. It is about court attendance of 16th November 2020 on hearing of the application to dismiss the action including travelling and waiting. Claimant counter-proposed 10mins. It was argued that the application was not opposed and attending to it in the chambers of the Judge would take 10mins as it only involved addressing the court and adopting the documents filled. It was argued that waiting to enter into the chambers of a judge cannot take 3 hours. The summons show that the matter was scheduled to be heard at 11:00 AM on

the 16th day of November 2020. Defence Counsel left his office at 10:30 which is reasonable and he had to wait for the Judge at the court premises as hearing did not start at 11 as scheduled. The record shows that hearing started at 11:22 AM. The record also shows that the ruling was delivered at 11:31 meaning that this is the time that the matter was done. I will allow an allowance of 30mins to allow Counsel travel back to his office meaning that the hours allowable are from 10:30 to 12noon which is 1:30mins.

The next item has a total number of 20 hours. This involves reading and consideration of various legal instruments, texts and materials in aid of the defendant's case at various stages. Each of the items read has five hours. The items read are Courts (High Court) (Civil Procedure) Rules; Bishop Abraham Simama and another v. Puma Energy Limited, Commercial Case No. 90 of 2018; Malawi revenue Authority v Azam Transways Limited, Civil Appeal No. 83 of 2005 and Finance Bank of Malawi (in Liquidation) v. Lorgart and Another. The claimant submitted that this part is not complying with **Order 31 rule 12 (3)** of the CPR 2017 as no copies of the relevant pages of Order 31 of the CPR 2017 and the case authorities, which are not on Court's file, are attached to prove the time expense indicated against each authority. It was submitted that the claims under these paragraphs should not be allowed as they have not been proved. In the event that this court allows these items; the counter proposal was 50mins for the whole of this item. It is true that Counsel for the defendant has not complied with Order 31 rule 12 (3) of the CPR 2017 which demands that a bill of costs shall be accompanied by an assessment bundle which shall contain all the documents that the party shall rely on assessment excluding those documents already on court file. The items listed here are not on court file and they have not been presented in this court for this court to appreciate the time taken. I will however, exercise my discretion under order 2 rule 3(d) of the CPR 2017. This court will allow time of 30mins per each read item and a total of 2 hours under this part mainly due to the failure by defence Counsel to provide the copies of the readings cited.

The total hours allowed under this head are 23 hours and 30mins which comes to MK705,000.00. The total for Part A is MK1, 000, 000.00 + MK705, 000.00 which is **MK1,705,000.00**

PART B: CARE AND CONDUCT

The next item is on Part B which is about Care and Conduct. It was submitted by Counsel for the defendant that he exercised a lot of care in the conduct of the present matter. He claimed 80% of Part A as Care and Conduct fee. The defence argued that the care and conduct should

not be paid in the present matter as the matter only involved filling a defence and making an application to dismiss the matter. It was further stated that narration by the defence on the care and conduct states that he took special care to represent the 2nd respondent's interest. The argument here was that this matter did not have a second respondent as it only involved the claimant and the defendant hence the care and conduct referred by the defence is not the care and conduct of this matter.

The defence submitted that the reference of the 2nd respondent in the narration was just an error hence this cannot be used to deny the defence payment of care and Conduct fee. The defence maintained that they exercise great care on the matter and maintained their prayer for 80% of Part A. I do not see the reason why the defendant should not be considered for Care and Conduct as I am of the view that the issue of the reference of 2nd respondent is just a typing error. As to what percentage I should allow; I will seek guidance from the case of **Dr Saulos Klaus Chilima, Dr Lazarus McCarthy Chakwera v. Prof. Peter Mutharika and Electroral Commission, Constitutional Reference Number 1 of 2019** which followed with approval the English case of **Johnson v. Reed Corrugated Cases Ltd [1992] 1 All ER 169** where it was stated as follows;

> "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 assesment 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 accident cases results 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 means that the case approaches the exceptional. A figure

above 100% would seem to be appropriate only when the individual case, or cases of a 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..."

In my view, this is a normal case and there was nothing exceptional about it and it did not take more time as it only involved filling a defence and an application to dismiss the action which was unopposed. I will allow 50% as Care and Conduct. The total under this part comes to 50% of MK1,705, 000.00 which is **MK852,500.00**.

DISBURSEMENTS

The next claim was on disbursements. This was billed at MK100,000.00. They include secretarial duties, stationery, courier, messengerial duties of filling and serving documents, Internet, airtime among others. The claimant counter-proposed MK80,000.00 and it is my view that the said MK80, 000.00 is reasonable hence I will allow **MK80, 000.00** on disbursements.

TAXATION

Counsel claimed a total of 30 hours for both the preparations and filling of the bill and its attachments and the court attendance for taxation. The defendant counter-proposed 3 hours on the basis that the bill of costs is only seven pages and it is only accompanied by a notice of taxation of costs with no attachments of documents to be relied by the defence. I do agree with the submission of the claimant that the work done under the preparation of the bill for taxation does not justify the 30 hours that have been prayed for. I will allow 4 hours for preparation of the bill and 2 hours for the actual taxation hearing. This court, therefore, allows a total of 6 hours on taxation. **The amount allowed is MK180, 000.00**

CARE AND CONDUCT ON TAXATION

The next item is on care and conduct on taxation which is billed at 80% of the taxation amount. I agree with the submission of the claimant that the bill was filled in contravention of the rules as documents relied were not attached and it contained some errors that have already been noted in this ruling. I will allow 40% as care and Conduct on Taxation. The total on this part is therefore 40% of MK180, 000.00 which is **MK72,000.00.**

SUMMARY

PART A	MK1,705,000.00	
PART B	MK852,500.00	
Taxation	MK180,000.00	
Care and Conduct on Taxation on Taxation	MK72,000.00	
Total professional fees	**MK2,809,500.00**	
VAT (16.5%)	MK463,567.5	
Disbursements	MK80, 000.00	
Grand Total		**MK3,353,067.5**

The costs are taxed at **MK3, 353,067.5** and payment should be made within 14 days.

Delivered on this ..19th..Day of MARCH 2021 AT LILONGWE

ANTHONY PITILIZANI KAPASWICHE

ASSISTANT REGISTRAR