



IN THE HIGH COURT OF MALAWI
COMMERCIAL DIVISION
BLANTYRE REGISTRY
COMMERCIAL CAUSE NO. 157 OF 2022
(Before Honourable Justice Manda)

BETWEEN

SOUTHERN BOTTLERS LIMITED.....CLAIMANT

AND

NISSAN MALAWI/IMPERIAL MOTORS LIMITED.....DEFENDANT

Coram: E. Mvula : Assistant Registrar
A. Umali : Counsel for the Claimant
F. Kalonga : Counsel for the Defendant
B. Ntonya : Court Clerk

ORDER ON ASSESSMENT OF COSTS

Brief background

By a ruling dated 13th July, 2023, the Court struck off Claimant's action with costs to the Defendant since there was inexcusable and inordinate delay by the Claimant to prosecute the matter. It is on this basis that this Court proceeded to conduct proceedings for assessment of costs on 13th November, 2023.

The court is called upon to determine the appropriate quantum that should be awarded to the Claimant as party and party costs.

What is the appropriate quantum to be awarded to the Defendant as party and party costs?

Order 31 rule 4 (1) of the Courts (High Court) (Civil Procedure) Rules 2017 (hereinafter the CPR) provides as follows:

“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.”

The court shall assess costs on the standard basis and such being the case, any doubt pertaining to whether costs were reasonably incurred shall be resolved in favour of the paying party, the Claimant. Further, in order to ensure that the Defendant has been awarded costs that were reasonably incurred to defend this matter, the court shall consider the factors outlined under Order 31 rule 5 of the CPR when making its determination.

Fee earners

The Defendant submitted that the matter was being handled by two Legal Practitioners, namely, Counsel Jonathan Kara whose hourly rate is MK40,000.00 and Counsel Andrew Umali whose rate is MK30,000.00 per hour.

PART A : PREPARATION AND COURT ATTENDANCES

A. Conferences

A claim of 1 hour 15 minutes at the rate of MK40,000.00 was made for receiving instructions and holding several conferences with the client. However, the total amount being claimed under conferences is MK216,666.67 which does not tally with the hourly rate used by the Defendant. This is because 1 hour 15 minutes at the rate of MK40,000.00 amounts to MK50,000.00 and not MK216,666.67 as it appears in the party and party bill of costs. The Claimant argued that 1 hour 15 minutes is an exaggeration and proposed that the claim for conferences should be allowed at 20 minutes. The court finds the time proposed by the Claimant to be on the lower side and proceeds to make an award of MK40,000.00 under this head.

B. Documents perused

The Defendant claimed 1 hour 45 minutes at the rate of MK40,000.00 for perusing vehicle quotation, local purchase order and a letter from the Claimant. However, the Claimant argued that 5 minutes is reasonable since the documents that they perused are not voluminous. Upon considering that the letter from the Claimant is 2 pages while the vehicle quotation and local

purchase order are 1 page each, the court believes that 30 minutes will adequately cover for the time that was spent to peruse the above mentioned documents. This translates to MK20,000.00.

C. Statutes considered

A claim of 7 hours 35 minutes was made, at an hourly rate of MK40,000.00, for considering the Courts Act, CPR, 2017, Sale of Goods Act and the Legal Practitioners (Hourly Expenses) Rates for purposes of party and party costs Rules, 2018. However, the Claimant argued that the Courts Act and Sale of Goods Act should not be considered by the Court since it was not necessary for the Defendant to read the same. The Claimant also submitted that a Legal Practitioner of 25 years at the bar would not take 3 hours 10 minutes to look at the CPR, 2017 as such Counsel argued that this claim is a gross exaggeration. The court perused the skeleton arguments filed in support of Defendant's application to strike out proceedings for want of prosecution and noted that the Defendant only cited Order 12 rule 56 of the CPR, 2017. The court will make an award of 2 hours since the use of the Courts Act and Sale of Goods Act has not been clearly shown by the Defendant. This translates to MK80,000.00.

D. Case authorities considered

A claim of 33 hours 50 minutes was made at MK70,000.00 per hour since the research was conducted by both fee earners in this matter. The total amount claimed under this head is MK1,353,333.33. However, the Claimant argued that the Defendant has claimed 2 hours for most of the cases which raises doubts if they really spent the time that is being claimed to read the cases. The Claimant also argued that it is only one lawyer who can claim costs under this item since it is unreasonable for both fee earners to claim costs under this item. Further, the Claimant submitted that 12 of the cases listed by the Defendant¹ should not be considered since they are

¹ **Alden Shipping v. Interbulk Ltd** [1986] AC 965, **Chihana v. Speaker of the National Assembly and Malawi Electoral Commission** Miscellaneous Civil Cause Number 2933 of 2005 (HC), **Dr. Saulos Klaus Chilima and Another v. Professor Arthur Peter Mutharika and Another** Constitutional Referral Number 1 of 2019, **Gestetner Ltd v. Malawi Revenue Authority** Commercial Cause Number 1 of 2008, **Gunde v. Msiska** [1961-1963] 2 ALR (Mal) 465, **ICL (Malawi) Ltd v. Attorney General (Department of Human Resources Management and Development)** Commercial Cause Number 86 of 2014, **Malawi Revenue Authority v. Nadeem Munshi** Civil Appeal Number 67 of 2023, **Mulli Brothers v. Malawi Savings Bank** Civil Appeal Number 48 of 2014, **Re Potts, Exp. Epstein v. Trustee & Bankrupt** [1935] CH 334, **Sembereka v. City of Blantyre** 11 MLR 372, **The Attorney General v. Gift Trapence and Others** Civil Cause Number 566 of 2019, **The State and Malawi Revenue Authority on the application of The**

irrelevant to the matter herein. A submission was also made by the Claimant that the remaining 11 cases should be allowed at 1 hour 31 minutes. Even though Defendant's claim is unreasonable, the court also finds Claimant's proposal to be on the lower side. The court believes that a global sum of MK600,000.00 will be fair and reasonable since some of the 12 cases have been cited in Defendant's skeleton arguments in support of an application to strike out proceedings for want of prosecution while some have not been cited in any of the work filed by the Defendant.

E. Books read

The Defendant claimed 20 hours 5 minutes, at MK40,000.00 per hour, for reading Halsbury's Laws of England Volume 11, 5th Ed. (2009) and Volume 28 3rd Ed.; Bullen and Leake, Precedents and Pleadings; Black's Law Dictionary 6th Ed., Cheshire F. Furmston, Law of Contract, 12th Ed. (1991); Chitty on Contracts, 29th Ed., Volume 1; McGregor on Damages, 19th Ed.; Phipson on Evidence, 10th Ed. and Blackstone, Civil Practice 2019. The Claimant argued that the time being claimed is a gross exaggeration since there is no basis for claiming costs on this item. However, the Claimant submitted that in the event that the court allows this item, 20 minutes will be reasonable in the circumstances. The court agrees with the Claimant that the claim under this item is highly exaggerated. However, the court finds the proposal made by the Claimant to be on the lower side and unreasonable. The Court believes that an award of 3 hours, translating to MK120,000.00, will be reasonable since the Defendant did not read the entire book in order to find the relevant principles used in its work.

F. Documents prepared

The Defendant claims 5 hours 15 minutes for preparing a defence, notice of appointment of Legal Practitioners, application to strike out proceedings, sworn statement and skeleton arguments in support of application to strike out proceedings and [draft] order striking out proceedings. In response, the Claimant argued that 1 hour 7 minutes is reasonable since Counsel of 25 years at the bar would not take 5 hours 15 minutes to prepare the above mentioned documents.

Notice of appointment is a routine document which requires editing the names of the parties, case number among other things. It is unreasonable for Counsel to argue that he spent 30 minutes just to prepare a notice of appointment of Legal Practitioners. It is also unreasonable for the Defendant

to claim 45 minutes to prepare a draft order. The court will therefore make an award of 3 hours under this head, translating to MK120,000.00.

G. Court attendances

The Defendant submitted that hearing of its application to strike out proceedings on 27th June, 2023 took 1 hour 40 minutes. However, the Claimant argued that the time claimed is a gross exaggeration since the hearing was brief. The Claimant therefore submitted that 20 minutes is reasonable. Court record shows that hearing of the application started at 11:40 am. However, the record is silent on the time of finishing to hear the application. The court will assess the only attendance at 30 minutes, translating to MK20,000.00.

Part B: General care and conduct

This was claimed at 80% of part A, amounting to MK2,996,666.66, since the Defendant considered the imponderables for the skill, high level of responsibility and the value of the matter in the preparation of court documents and submissions. In response, the Claimant submitted that care and conduct should be allowed at 30% of part A since the matter did not go up to trial. The court understands that the Defendant needed to handle the matter with skill and great care considering the high value of the same. However, the court finds that this was not a complex matter and proceeds to grant care and conduct at 60%. General care and conduct at 60% of part A translates to MK600,000.00.

Part C : Instruction fee

This was pegged at MK5,000,000.00. However, the Claimant argued that instruction fee is not payable since the matter did not proceed to trial. The Claimant relied on Order 31 Rule 10 (1) of the CPR which provides as follows;

“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.”

Alternatively, the Claimant submitted that if this will be allowed then the amount payable should be MK500,000.00. This court agrees with Defendant's submission that instruction fee is payable since Counsel had instructions to act for the Defendant **from commencement** of the matter to **its conclusion**. Counsel could have handled the matter up to trial had it not been for the premature death that it suffered. However, the court finds the amount claimed as instruction fees to be on the higher side and proceeds to reduce the same to MK1,200,000.00.

Part D: Disbursements

a. Court fees

These are awarded as prayed for. For the avoidance of doubt, the sum payable as court fees amounts to MK17,000.00.

b. Secretarial services

The Defendant claimed the sum of MK500,000.00 for secretarial and messengerial services, internet, printing, photocopying, communication, transportation and accessories. In response, the Claimant argued that these should be disallowed since the Defendant did not provide proof and based the claim on estimations. The court understands and appreciates the importance of attaching proof, such as receipts, to substantiate the claim for disbursements. However, it appears to this court that these are still payable since the Defendant used paper, tonner, among others, to print and photocopy documents. It is also obvious that the Defendant needed transport to come to court to file documents and attend hearing of their application to strike out the action for want of prosecution. The court, therefore, believes that the sum of MK150,000.00 will adequately cover for the expenses under this item.

Part E : Taxation

The Defendant claimed 11 hours 50 minutes at MK30,000.00 to prepare party and party bill of costs, notice of appointment to assess costs among others. In response, the Claimant argued that 1 hour is reasonable since Defendant's application for costs seems like a punishment to the paying party. The court finds the claimed amount to be unreasonable. It is for this reason that the court proceeds to reduce the same to 6 hours at the rate of MK30,000.00. This translates to MK180,000.00.

Care and conduct for taxation will also be allowed at 60%, yielding MK108,000.00.

The Defendant also claimed 1 hour 30 minutes for travelling to and from court for taxation proceedings and waiting. The court agrees with the proposal made by the Claimant that 1 hour is reasonable and makes an award of MK30,000.00 for travelling and waiting under this part.

Value Added Tax at 16.5% of the services rendered by the Defendant amounts to MK509,520.00.

MLS levy at 1% amounts to MK32,550.00.

Conclusion

Upon considering that Defendant's bill of costs was unreasonable and somehow like a punishment to the paying party, the Court makes a total award of MK3,797,070.00 as party and party costs.

Any aggrieved party is at liberty to apply for review or appeal against the decision of this Court within twenty one days from the date hereof.

Delivered in Chambers this 20th day of November, 2023 at High Court Commercial Division, Blantyre Registry.



E. Mvula

ASSISTANT REGISTRAR