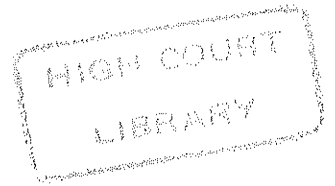


REPUBLIC OF MALAWI



IN THE HIGH COURT OF MALAWI

(COMMERCIAL DIVISION)

LILONGWE REGISTRY

COMMERCIAL CAUSE NUMBER 09 OF 2020

BETWEEN

FISD LIMITED COMPANY.....CLAIMANT

-AND-

ATTORNEY GENERAL (MINISTRY OF AGRICULTURE, IRRIGATION AND WATER DEVELOPMENT).....DEFENDANT

Coram: A.P KAPASWICHE

ASSISTANT REGISTRAR

Nankhuni/ Katundu

For the Claimant

Chisiza

For the Defendants

Ndhlazi

Court Clerk /Official Interpreter

ORDER ON TAXATION OF COSTS

BACKGROUND

This matter was scheduled for hearing on assesment of costs and interests. It was initially set to be heard on the 15th of February 2021 but it was adjourned and heard on 5th day of March 2021 as the defence had other matters to attend to on the first date. On the date of hearing, this court only proceeded with assesment of costs as both parties submitted that they are working on a consent order with respect to the claim of interest. The claimants filled their bill of costs on 11th day of September 2020 and the claim is of a total sum of MK245, 573,321.20. The defence filled their reply to the claimant's party and party bill of costs in which they vehemently opposed the bill of costs as being excessive and exaggerated. On the date of hearing, both parties adopted their documents submitted to court and submitted that this court should proceed making a determination based on the adopted documents. The claimants further submitted a taxation bundle upon being ordered by this court to do so.

The claimant commenced an action against the defendant by way of Exparte Application for Suspension of Enforcement of Arbitral Award pending hearing of an application to set aside the Arbitration Award. The claimant succeeded and costs were awarded to the claimant. A new arbitrator was appointed who delivered an award in favour of the claimant which award was registered as an order of the court. The award awarded the Claimant Costs of the second arbitration proceedings including fees of both arbitrators.

PRELIMINARY ISSUES

Before I proceed to analyse the bill of costs, the defendants raised one general observation in their reply to the bill of costs. They argued that the bill of costs is not ready for taxation on the basis that the bill has not properly separated the costs in relation to arbitration fees and expenses and the expenses incurred in relation to court processes. My understanding of the present matter is that the costs being taxed are costs for the entire proceedings from the arbitration processes as well as court processes as the latest arbitration that is now enforced as a Judgment of the court found the defendants on the wrong for termination of the contract hence the costs being taxed are for all the process regarding

this matter from the beginning to the end. I, therefore, do not see merit in the preliminary issue that was raised by the defence.

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 seized with the matter was Mr. Gift Nankhuni and Mr. Wapota Kita whose approved minimum hourly rate is MK40, 000.00. The rate to be used is therefore, MK40, 000.00 per hour.

ANALYSIS OF PART A

PREPARATION

DOCUMENTS PERUSED

The first item is on the perusal of contract No. 021/SRWIHL/W/2017/015a (Construction and Rehabilitation of Gravity Fed Schemes in Ntcheu District). This item is billed at 32 hours. The defence argued that the 32 hours prayed for is on the higher side and counter-proposed 1 hour as reasonable time on this item. I have gone through the contract in question. It is a huge document with over 270 pages. It has to be emphasized that the

whole case rests upon this contract as it is the document that gave rise to the parties duties and obligations and the source of the dispute in question. It was very important that Counsel should have ample time to properly go through the contract and understand it to map the best way forward on the matter. Counter-proposing 1 hour on a very important document with over 270 pages is just impractical and unrealistic. In my view, the proposal for 32 hours is much more reasonable considering that the contract is a huge and technical document that needs proper understanding. I will allow the 32 hours proposed on this item for the reasons that I have provided.

The next item is perusing the first request for contract extension which has been billed at 1 hour. The defence counter-proposed 5 mins on this item on the basis that 1 hour is exaggerated. I have seen the letter and it is a four paged letter requesting extension of time and stating the reasons thereof. The five minutes counter-proposed by the defence is not reasonable in the present circumstances and the 1 hour proposed is also on the higher side. I will allow 30mins on this item.

The next item is response from the respondent on the first request for contract extension and it is billed at 1 hour and the defence counter-proposed 5 mins. I will also allow 30mins for this item having seen the letter. The next item is on perusing the second request for contract extension. I will also allow 30 mins on this item for the reasons given pertaining to the other letters. The next item is on perusing of the recommendation for contract extension for the engineer billed at 2 hours and the stand of the defence was that 5 mins is sufficient. I am of the view that 1 hour is appropriate in going through this item and I, therefore, allow the said 1 hour. Items 3 (vi) to 3 (viii) are items that deserve 30 mins each and I so do order that each of the items vi, vii, and viii be taxed at 30mins each.

The next item is billed at 8 hours. It is about progress report minutes and the defence counter-proposed 5 mins. I have gone through the document. It is a five paged document full of information as these are minutes giving the progress of the works carried under the project and it is my view that 4 hours is ideal time for Counsel for the claimant to go through these minutes. I, therefore, proceed to allow the said 4 hours on this item. The next item is letter to the defendant on conflict of interest billed at 1 hour and counter-proposed at 5mins. This document was prepared by Counsel for the claimant hence

counsel was perusing his own letter that he had written and I will allow 30 mins on this item.

The next item is billed at one hour. It is about perusing summons between Kondwani Msowoya v Frank Mwenechanya and FISA Ltd Co Civil Cause No. 430 of 2019. The summons have been included in the taxation bundle and 1 hour is reasonable to go through the said summons. The defence argued that this should not be included on the basis that government should not bear the costs incurred as a result of actions of private individuals. I have considered this argument and I do not agree with this reasoning. Mr Msowoya was the Coordinator of the project under which Mr Mwenechanya and FISA Ltd Company had a contract and the issues giving rise to the civil suit arose from these circumstances. In my view, this is an expense that still has to be catered for by the defendants of these proceedings hence I allow 1 hour for this item. For perusing the notice of discontinuance; 15 mins is reasonable and I allow 15 minutes on this item.

The next item is on perusing test results for Phalombe tank which is billed at 1 hour. The defence counter-proposed 5 mins. I will allow 30 mins on this item. The next item is on Joint Assessment of works with the consultant billed at 2 hours and the counter-proposal was 15 mins. I am of the view that 1 hour is reasonable and I proceed to tax this item at 1 hour. The next item is on perusal of DVD of programmes by MBC TV billed at 30mins. I allow the 30 mins on this item.

Items xviii to item xlix are mostly various letters; emails; arbitration directions and a notice of adjournment. For all the letters under this segment the defence counter-proposed 5 mins on each letter. The claimant proposed time ranging between 1 hour to 2 hours and rarely 3 hours. This court will allow 30 mins on each letter, arbitration direction and notice of adjournment under this segment. I will proceed to assess few items under this segment that are not catered by the categories stated above. The first item to be considered is item numbered xxxiii which is a letter from the Claimant to the defendant and it has been billed at 12 hours. There is no indication as to the date of this letter and I tried to check in the taxation bundle submitted but could not locate it. I will not give an award on this item as it is nowhere to be traced in the taxation bundle.

There is an item numbered xxxix which is billed at 23 hours. This is about the points of defence. These were points of defence on the first Arbitration that was before Engineer W.T.M Chirwa and it was filled by the claimants who were the defendants in the said arbitration proceedings. This document has over 30 pages fully packed with relevant information. Having gone through the document, I am of the view that 15 hours is reasonable and I will allow 15 hours on this item. Item xl involves perusing the final award by the first arbitrator billed at 3 hours. The said 3 hours are very reasonable for reading an award that is 23 pages long and this was not just any document but a determination of an Arbitrator hence Counsel had to have ample time to understand the determination for purposes of deciding the best way forward. This court allows 3 hours on this item.

Item xli is billed at 4 hours. It is an arbitration award by the second arbitrator. This order is 14 pages and was made after hearing the claimant only as the defence did not avail themselves. In the circumstances; it is my view that the 4 hours suggested are on the higher side and I will allow 2 hours on this item. Item xlii is billed at 6 hours. This is about going through the Inter-parte Application in a proceeding for an Order Setting Aside or Varying the Order of the Court, Defendants sworn statement in support of the application and skeleton arguments. Having gone through the documentation under this item, it is my view that 4 hours is adequate for counsel to go through and consider these documents. The next item is xliii which is on sworn statement in Opposition to an application for committal and skeleton arguments. It is billed at 6 hours. Having gone through the documents under this item, I am of the view that 4 hours is adequate and I proceed to allow 4 hours.

The total hours allowed under this section are 84 hours and 15 mins.

CONFERENCES

The claimant prayed for a total of 120 hours under this item. The description of the item was that Counsel attended upon clients advising them on the way forward and to get instructions as well as prepare for the two hearings as well as preliminary hearings in both arbitrations and the court appearances and further to get instructions to prepare documents to be filled on various dates. Reading the contents of this item; one would see that it encompasses all the meetings that Counsel had with the clients on getting

instructions; general preparation of the case and preparation for attendances of mediation sessions and court appearances. The disputes over this matter have lasted over a period of two years and the 120 hours prayed for is reasonable. Translating the hours into days, one can see that the 120 hours translate into 5 days and 5 days as time for conferences covering the period of the whole proceedings from the point of first arbitration to court processes is very reasonable time. I will, therefore, allow 120 hours prayed for on this item.

The total number of hours allowed under this segment is 120 hours.

BOOKS READ

On this segment, Counsel claimed 90 hours for reading seven books and Black's Law Dictionary making it 8 items. The defence argued that each item of the 8 items should be given 30 mins as it has not been shown how the passages read from the books were used in the present proceedings. I do agree with the reasoning of the defendants on this point that much details have not been given as to what areas of law were the readings all about. The claim of the 90 hours against 8 items means that each item was taking more than 10 hours. This could have been properly justified if there was an explanation for the court to appreciate. However, the 30minutes counter-proposed by the defence is on the lower side and I will allow 5 hours per item making a total of 40 hours on this segment.

The total number of hours allowed under this segment is 40.

CASE AUTHORITIES PERUSED

The claimant claimed 54 hours on reading 15 cases. This means that on each case the claimants spent over 3.6 hours. The defence argued that 30mins per case is reasonable. The claimant filled a special folder containing case authorities and this court appreciated the said authorities. In my view, reading a case requires considerable time. It requires understanding the case and making proper comparisons with the case at hand so as to properly apply the case read filing which a lawyer runs the risk of inappropriately applying some principles. In my view, considering the cases in question 3 hours per each case authority is sufficient hence I allow the 45 hours on this item.

The total number of hours allowed under this item is 45 hours.

STATUTES PERUSED

This claim has 24 hours. It is for the reading of six statutes relevant to these proceedings. These statutes are the National Construction Industry Act; Engineers Act; Arbitration Act; Commercial Court Rules; Civil Procedure (Suits by or Against the Government or Public Officers Act) and the Courts Act. The defence stated that 30 mins per statute is reasonable. The defence proposal is on the lower side and I am of the view that 3 hours is reasonable per statute read hence I proceed to allow 18 hours on this item.

The total number of hours allowed under this segment is 18.

DOCUMENTS PREPARED

All the documents prepared by the claimants are before this court in the court file and the taxation bundle and this court took time to appreciate the said documents. I have taken into account both the proposals and counter-proposals on this segment and I will summarise my awards on documents prepared in the table below;

DOCUMENT	PAGES	DEFENDANT PROPOSAL(hrs)	ALLOWED (hrs)
1. Letter dated 13 th July 2019		3	1
2. Letter dated 26 th July 2019	1	1	0.5
3. Letter dated 31 st July 2019	1	1	0.5
4. Letter dated 20 th August 2019	1	1	0.5
5. Letter dated 20 th September 2019	1	1	0.5
6. Statement of claim for first arbitration	20	90	40
7. Letter dated 8 th October 2020	1	1	0.5
8. Certificate of extreme urgency	1	0.5	0.5

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The total number of hours allowed under this segment is 18.

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All the documents prepared by the claimants are before this court in the court file and the taxation bundle and this court took time to appreciate the said documents. I have taken into account both the proposals and counter-proposals on this segment and I will summarise my awards on documents prepared in the table below;

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4. Letter dated 20 th August 2019	1	1	0.5
5. Letter dated 20 th September 2019	1	1	0.5
6. Statement of claim for first arbitration	20	90	40
7. Letter dated 8 th October 2020	1	1	0.5
8. Certificate of extreme urgency	1	0.5	0.5

9. Ex-party application for suspension of arbitral award.	2	1	0.5
10. Sworn statement in support of the above application.	9	12	5
11. Inter-party application to set aside arbitration award; sworn statement and skeleton arguments		8	6
12. Letter to second arbitrator of 4-03-2020	1	1	0.5
13. Order of stay of arbitration award	1	1	0.5
14. Letter dated 4-03-2020 to second arbitrator	1	1	Nil-repetition
15. Statement of claim filled to the second arbitrator		48	38
16. Submissions of arbitration		72	36
17. Notice of appointment of legal practitioners	1	0.5	0.5
18. Application for leave to enforce an arbitral award as judgment of the court and sworn statement in support	3	5	4
19. Order granting leave as applied above	1	0.5	0.5
20. Letter dated 7 th April 2020	1	1.5	0.5
21. Application to fix time of payment of judgment debt and sworn statement	4	6	3

22. Order fixing time for payment	1	0.5	0.5
23. Exparte application to substitute a party and sworn statement.	3	3	1
24. Order of substitution of a party	1	0.5	0.5
25. Application for committal and sworn statement	4	6	2
26. Skeleton arguments in support of the application above		6	4
27. Supplementary sworn statement in opposition to the application for contempt of court		4	Not applicable
28. Notice of adjournment of the application for contempt of court	1	0.5	0.5
Total			147.5

COURT AND ARBITRATION ATTENDANCES INCLUDING TRAVELLING

This segment caters for travelling to and from court for various reasons as well as travelling and attending to mediation sessions. I must mention that I have noted that counsel claimed some items that are purely messengerial or clerical duties and not duties to be discharged by Counsel. There are a number of case authorities supporting the position that filling and serving of documents is not the duty of Counsel and in our case, there are items on disbursement that caters for such services. I will not allow any item concerning filling and service of documents unless there is mention of specific reasons that necessitated Counsel to file and serve the documents.

The first and second items are similar as they both concern travelling to and from Capital hotel attending arbitration. 1 hour for each of these items is reasonable hence I allow 1 hour for the first item and 1 hour for the second item. Items number iii, iv, v are disallowed as they are messengerial duties. Item vi is allowed taxed at 1 hour that has been proposed as the said hour is reasonable. Items vij to ix are disallowed for being messengerial duties. On item x I will allow 3.5 hours prayed for as they are reasonable. On item number xi I will allow 4.5 hours. On item xii I will allow 2.5 hours as reasonable time. On item number xiii I will allow the 4 hours prayed for. For item xiv I will allow 3 hours. On item xv I will allow 4 hours and on item number xvi I will allow the 3 hours proposed.

The total hours allowed for this segment comes to 27.5.

BRIEF FEE

The claimants prayed for MK56, 040,000.00 as brief fee for appearing before Hon. Justice K. Manda. The defence argued, rightly in my view, that brief fee is not payable in the present matter Order 31 rule 10(3) stipulates that a legal practitioner or his law firm shall be entitled to a brief fee where he or his law firm have instructions from another legal firm or practitioner to appear on behalf of that legal practitioner or firm at trial. Going through the proceedings of the present matter, one would note that there was no trial as the matter only came to court for enforcement of an arbitral award as a court judgment. In these circumstances, I see no basis of awarding a brief fee to the claimants.

ARBITRATION FEES

The claimant prayed for a sum of MK6, 755,195.00 as arbitration fees paid to the first arbitrator and MK18, 000,000.00 as fees paid to the second arbitrator. There is no dispute to the effect that these amounts were paid and I allow a total of MK24, 755,195.00.

The total hours on Part A are 482 hours and 15 minutes amounting to a sum of MK19, 290,000.00 plus MK24, 755,195.00 being arbitration fees which comes to MK44, 045,195.00.

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 claimant that he exercised a lot of care in the conduct of the present matter as this

matter was very important to the claimants. He claimed 80% of Part A as Care and Conduct fee. The defence argued for 50% on the basis that there was nothing novel or special with the present matter as this was a simple matter. The defence cited the case of **Kavwenje v. Chilambe and another [1996] MLR 113** where it was held that routine cases should reflect a percentage rate of 50-65% while complex cases should be in the range of 60-80%. It was argued by the defence that the court should take into account the fact that the matter was poorly defended from the second arbitration to court applications and that the nature of the matter was straight forward.

I do not understand the contention of the defence that the matter was straight forward. In my appreciation of the matter, I would put it in the category of complex matters as it involved two arbitrations with two different arbitrators and the claimants had to exercise due diligence to ensure that the interests of their client are served. They successfully challenged the first arbitration and were successful in the second arbitration. The lapses in the defence due to their alleged internal problems should not be used to defeat the due Counsel for the claimant.

In the case of **Dr Saulos Klaus Chilima, Dr Lazarus McCarthy Chakwera v. Prof. Peter Mutharika and Electoral 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** and the court was 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..."

The above cited case gives guidance on how to approach simple and complex matters when it comes to determinations of awards on Care and Conduct. The level of effort put by Counsel and the diligence displayed in the present matter cannot be put at the same level of a "run of the mill" personal injury case or other simple straightforward cases as the defence wants to put it. Having considered the particular circumstances of the present matter, I will allow the 80% under Care and Conduct. **The total costs under Part B is the 80% of MK 44,045,195.00 which is MK35, 236,156.00.**

PART C: DISBURSEMENTS

The next claim was on disbursements or outlays. The claimant prayed for MK1, 000,000.00 for stationery. The defence argued that this is on the higher side and counter-proposed MK5, 000.00. Both the proposed and counter-proposed amounts are not reasonable as they are too high and too low respectively. In my view, MK400, 000.00 is reasonable to cater for general stationery used by the claimant in these proceedings. I will, therefore, allow MK400, 000.00 as stationery amount. I will also allow a total of MK37, 000.00 for court fees for various documents filed in court as stated in the bill. I will allow MK80, 000.00 on telephone; Mk60, 000.00 on messengerial costs; MK50, 000.00 for secretarial services and MK50, 000 for travel. **The total on outlays comes to MK677, 000.00.**

PART D: TAXATION

Counsel claimed a total of 28 hours for the preparation of the bill of costs and obtaining appointment of taxation. The defence suggested 3 hours. There are also claims for

attending taxation proceedings and filling fees for taxation related documents. I have to state that the hearing of the present matter took place via zoom and it did not go over 1 hour as parties just adopted their documents. The bill has a total of 25 pages and the task of preparing a bill is not an easy task as a lawyer is required to go through all the work done on the case and consolidate. After the hearing of the matter; this court ordered that the claimants should file a complete taxation bundle containing all the documents relied on the bill. This essentially meant assembling all documentation related to the case including reading materials. It was not surprising that the taxation bundle had four huge files full of documents for this court's appreciation. Counsel for the claimant had to ask for two days to arrange the complete bundle. Having considered all the circumstances as stated; I will allow a total of 72 hours for the whole taxation process. The amount awarded on this segment is therefore MK2, 880,000.00.

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 will allow the 80% proposed as Care and Conduct on the reason that I already stated in my previous analysis of Care and Conduct and considering that the claimants did a thorough job on the taxation documentation and bundle. The total on this part is therefore 80% of MK2, 880, 000.00 which is MK2, 304, 000.00.

SUMMARY

PART A	MK44,045,195.00	
PART B	MK35,236,156.00	
Taxation (Part D)	MK2, 880,000.00	
Care and Conduct on Taxation (Part E)	MK2, 304, 000.00	
Total professional fees	MK84,465,351.00	
VAT (16.5%)	MK13,936,784.915	
Part C	MK677, 000.00	
Sub -total payable	MK99,079,135.915	
Add 1% MLS Levy	MK990,791.35915	
Grand Total		MK100,069,927.27

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Add 1% MLS Levy	MK990,791.35915	
Grand Total		MK100,069,927.27

The costs are taxed at MK100, 069,927.27. Payment should be made within 14 days.

Delivered on this 19th Day of APRIL 2021 AT LILONGWE Commercial Court Division.

A handwritten signature in black ink, consisting of a stylized capital letter 'A' enclosed within a circle.

ANTHONY RILLIZANI KAPASWICHE

ASSISTANT REGISTRAR