

THE HIGH COURT  
(COMMERCIAL DIVISION)  
BLANTYRE  
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IN THE HIGH COURT OF MALAWI  
COMMERCIAL DIVISION  
BLANTYRE REGISTRY  
COMMERCIAL CASE NO. 413 of 2019  
(Before Msungama, J.)

**BETWEEN:**

**ICL (MALAWI) LIMITED** ..... CLAIMANT  
**AND**  
**NALIKULE COLLEGE OF EDUCATION** ..... DEFENDANT

**CORAM:**

**Msungama, J.**  
Counsel Nampota, for the Claimant  
Counsel Matola & McJessie, for the Defendant  
Makonyo, Court Clerk

**Ruling**

1. In this matter, the Claimant obtained a default judgment against the Defendant for the payment of certain amounts of money. Later the Defendant applied for and got an order suspending the enforcement of the default judgment pending the hearing of an application to set it aside. Subsequently, the default judgment was set aside by consent of the parties.
2. After further liaison between the parties, they entered into an agreed order (which I will also refer to as “consent judgment”) by which the Defendant agreed to pay certain sums of money to the Claimant. This agreed order is dated 8<sup>th</sup> June, 2021. On certain aspects of the Claimant’s claim which the parties could not agree on, they agreed that these

should be determined by the court. Thus, paragraph 3 of the agreed order states as follows:

*3. The following issues be subject to the determination by the court:*

*3.1 Whether or not reimbursement of Solicitor and own client costs on a restitutio non integrum basis is payable by the Defendant to the Claimant.*

*3.2 Whether or not reimbursement of 15% collection costs on all sums found due and payable by the defendant in terms of the Legal Practitioners (Scale and Minimum Charges) Rules.*

3. Then on the 16<sup>th</sup> June, 2021 the Claimant filed a summons for determination of costs. On top of the summons document the Claimant made the following endorsement: "*filed pursuant to the agreed order dated 8<sup>th</sup> day of June, 2021.*" Before the summons for determination of the costs came up for hearing, the Defendant filed a notice of preliminary objection to the hearing thereof on the basis that the said application is irregular and/ or improper as it does state the rule /law under which the said application is brought. The Defendant argues that the failure by the Claimant to cite the rule/ law under which the application is made has the effect of prejudicing the Defendant who does not appreciate the nature or basis upon which the claimant's application is premised. Counsel for the Defendant have cited to me several local authorities to support their position including **The State v Minister of Finance & Another ex parte Bazuka Mhango and others-** MSCA Civil Appeal Number 17 of 2009 (Unreported); **FW Kalinda (Male) v Limbe Leaf Tobacco Company**, Civil Cause Number 1542 of 1995 (High Court). In the latter case Chimasula J stated that the rationale behind indicating the provisions under which an application is made is to ensure that both the court and the other party are given an opportunity to prepare for the matter.
4. Counsel Nampota is of the view that this preliminary objection is superfluous. Counsel is firmly of the view that since the application for determination of the costs is premised

on a judgment of the court, there was no need to cite any provision under which the application was being made other than the judgment itself. He argues that issues of surprise on the other party or the court do not arise especially when you consider that parties actually executed a consent judgment which provided for the determination of the costs. He opines that the preliminary objection is without merit and should be dismissed with costs.

5. I have carefully looked at the consent judgment executed by the parties. It clearly provides that certain issues including those to do with costs will be determined by the court. The summons for determination of costs clearly cites the judgment of the court as the authority under which the application for the determination of the costs is premised. In my humble view, the question of surprise on either the court or the Defendant does not even arise. The Defendant is being disingenuous. The authority under which the application is made is clearly indicated by the Claimant on the face of the summons. I must add that in this particular case, even if the Claimant had not indicated the authority under which the application was made, I would have been inclined to exercise my discretion to allow the application proceed since it is based on what the parties themselves agreed.

6. This objection has no basis. It is dismissed with costs to the Claimant.

Delivered in Chambers on the 24<sup>th</sup> day of March, 2022 at the High Court, Commercial Division, Blantyre Registry.



M.T. Msungama

**JUDGE**