



**REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL DIVISION**

Judicial Review Number 10 of 2020

THE STATE

**(on application of Timothy Mtambo, MacDonald Sembereka and Gift Trapence).....CLAIMANTS
VERSUS**

**THE INSPECTOR GENERAL OF POLICE.....1ST DEFENDANT
OFFICER IN CHARGE – LILONGWE POLICE STATION.....2ND DEFENDANT**

CORAM: C MANDALA: ASSISTANT REGISTRAR
K Soko: Counsel for Applicants of Soko & Co
N Chisiza: Attorney General's Chambers for the Defendants
C Zude: Court Clerk

ASSESSMENT OF COSTS

C MANDALA, AR:

INTRODUCTION AND BACKGROUND

This is an order for assessment of costs pursuant to a Consent Order issued on 7th September 2020 by the Honorable Justice KK Nyirenda. The Applicants filed a Bill of Costs on 8th October 2020 proposing a total sum of K17,986,435.00 to be awarded as costs. Counsel for the Defendant filed objections to the Bill of Taxation and laid out numerous heads upon which they were objecting. The hearing on assessment of costs was conducted virtually, by way of submissions, on 13th January 2021 and 17th January 2021, and this ruling stems from that hearing.

THE LAW

One of the powers and functions of registrars is to assess costs. Order 25 rule 1(o) of the *Courts (High Court) (Civil Procedure) Rules* of 2017. Costs are to be assessed on a standard or indemnity basis and the court will not allow costs that are unreasonably in their incurrence or amount. Order 31 rule 4 of the *Courts (High Court) (Civil Procedure) Rules* of 2017. In assessing costs, according to Order 31 rule of *the Courts (High Court) (Civil Procedure) Rules* of 2017, the Court will consider the following circumstances in assessing costs:

- 5.—(1) *The Court shall have regard to all the circumstances in deciding whether costs were*
- (a) *if it is assessing costs on the standard basis__*
 - (i) *proportionately and reasonably incurred; or*
 - (ii) *were proportionate and reasonable in amount, or*
 - (b) *if it is assessing costs on the indemnity basis__*
 - (i) *unreasonably incurred; or*
 - (ii) *unreasonable in amount.*

Additionally,

- (3) *The Court shall also have regard to__*
- (a) *the conduct of all the parties, including in particular__*
 - (i) *conduct before, as well as during, the proceedings; and*

- (ii) *the efforts made, if any, before and during the proceedings in order to try to resolve the dispute;*
- (b) *the amount or value of any money or property involved;*
- (c) *the importance of the matter to all the parties;*
- (d) *the particular complexity of the matter or the difficulty or novelty of the questions raised;*
- (e) *the skill, effort, specialized knowledge and responsibility involved;*
- (f) *the time spent on the case; and*
- (g) *the place where and the circumstances in which work or any part of it was done.*

ISSUES

The issues raised for the Court's Determination are:

1. The Appropriate percentage for Care and Conduct and whether it ought to be applied to every line item or the total amount
2. The total amount to be awarded as costs – with specific objections raised to the following items: 2(a)(ii), 5(A), and 1(C).

DISCUSSION

1. *Care and Conduct*

The Bill of Costs pegs Care and Conduct at 80%. In opposition, Counsel for the Defendants argues that this case was neither complicated nor unique. Further, Counsel argued that Judicial Review is not a court action per se. Counsel for the Applicants responded by stating that this was complex public law litigation where Counsel had to navigate both criminal law and civil law terrains to challenge the state's powers of arrest and prosecution.

In ***Ruth Belentino v Hanif Mahommed & General Alliance Insurance Company Limited*** - Personal Injury Cause Number 914 of 2016, the Assistant Registrar discussed Care and Conduct 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 mark-up 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.'

It is trite that parties are entitled to awards for care and conduct. Although care and conduct is not expressly mentioned in the ***Courts (High Court) (Civil Procedure) Rules***, courts have been making awards for care and conduct: see ***Dr Saulos Klaus Chilima & Dr Lazarus McCarthy Chakwera v Professor Arthur Peter Mutharika & Electoral Commission*** - Constitutional Reference Number 1 of 2019 and ***Ruth Belentino v Hanif Mahommed & General Alliance Insurance Company Limited*** - Personal Injury Cause Number 914 of 2016.

The issue to be considered is the percentage to be awarded for care and conduct. The Registrar, in ***Dr Saulos Klaus Chilima & Dr Lazarus McCarthy Chakwera v Professor Arthur Peter Mutharika & Electoral Commission*** Constitutional Reference Number 1 of 2019, awarded 100% for care and conduct because the case was 'burdensome, difficult and complex'. She cited the case of *Johnson v Reed Corrugated Cases Ltd* [1992] 1 All ER 169 QBD which states:

'I am advised that the range 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 of accident cases results in allowance of over 70%. To justify a figure of 100% or even one closely approaching there must be some factor or combination of factors which mean that the

case approaches the exceptional. A figure above 100% would seem to be appropriate only when the individual case, or cases of the particular kind, can properly be regarded as exceptional, and such cases will be rare.'

In the matter of *The Attorney General v Gift Trapence, Timothy Mtambo, and Malawi Human Rights Defenders Coalition* Civil Cause Number 566 of 2019, this court pegged care and conduct at 80% and cited the following reasons:

'The matter at hand lasted a very short period, while the importance of the subject matter is appreciated, maintaining care and conduct at 120% would be excessive.'

In the *Dr Saulos Klaus Chilima Case*, Care and Conduct was pegged at 100% for a matter that had volumes of documentation, sometimes complex evidence and spanned a period of over a year. In the *Attorney General v Gift Trapence et al Case*, care and conduct was pegged at 80% for a matter that was as short and non-complex. The current matter had similar circumstances and was eventually settled by consent. This court believes that 80% for care and conduct would be excessive. This matter was not exceptional and while Counsel's industry is appreciated, this court believes that 70% for care and conduct is adequate in the circumstances. This court therefore pegs Care and Conduct at 70%.

Counsel for the Defendants further made an objection on care and conduct being applied to every single application as opposed to care and conduct being applied to the total bill. Counsel for the Applicants argued that there is no prescribed format for Bills of Costs and the formats adopted by various Counsel are just a matter of preference. This court will apply care and conduct to the total bill.

2. Taxed Bill

This matter was handled by Mr Khumbo Bonzoe Soko, a Legal Practitioner of ten (10) years standing at the Malawi Bar. In terms of Rule 2 of the **Legal Practitioners (Hourly Expense Rates for Purposes of Taxing Party and Party Costs) Rules, 2018**, Counsel is entitled to the hourly rate of K40,000.

SUMMARY OF BILL¹

<u>DETAILS</u>	<u>TAXED AMOUNT (MWK)</u>
Interlocutory Attendances	K435,000.00
Instruction Fee	K6,000,000.00
Part I – Preparatory Work	
• The Client	K160,000.00
• Documents Perused	K330,000.00
• Documents Prepared	K550,000.00
• Correspondence written and dispatched to other parties	K10,000.00
• Case authorities perused and cited on opinion, Defendants and Claimants skeletal arguments (10 allowed at 1 hour each)	K400,000.00


¹ Full Bill as taxed attached.

• Legislation read and considered	K40,000.00
Part I - Total	K1,330,000.00
Sub Total for Interlocutory Attendances, Instruction Fee and Part I	K7, 765,000.00
Part II - Care and Conduct at 70%	K5,435,500.00
Part III – Court and oath fees, travelling expenses and waiting time	K185,000.00
Disbursements	K85,000.00
Assessment of Costs	K204,000.00
Disbursements on taxation	K21,000.00
Travelling and waiting	K37,000.00
Professional Fees	K15,432,500.00
Value Added Tax (16.5%)	K2,546,362.50
MLS Levy (1%)	K154,325
TOTAL PAYABLE	K17,133,187.5

DISPOSAL

The Bill of Costs is hereby taxed at **MWK17,133,187.50 (seventeen million one hundred thirty-three thousand, one hundred and eighty-seven kwacha, fifty tambala).**

Ordered in Chambers on the 7th day of May 2021 at the High Court, Civil Division, Lilongwe.



CM Mandala

ASSISTANT REGISTRAR