

REPUBLIC OF MALAWI



IN THE HIGH COURT OF MALAWI

LILONGWE REGISTRY

CIVIL CAUSE NUMBER 448 OF 2019

BETWEEN

AUBREY GAMA (suing as administrator of the estate of

AMOS NKHATA on behalf of the estate

And dependants of the deceased)CLAIMANT

AND

DANIEL BANDA.....1ST DEFENDANT

MCHINJI DISTRICT ASSEMBLY.....2ND DEFENDANT

PRIME INSURANCE COMPANY LILITED.....3RD DEFENDANT

Coram: A.P KAPASWICHE

ASSISTANT REGISTRAR

Silungwe

Counsel for the Claimant

Sikwese

Counsel for the Defendant

Kumwenda

Court Clerk /Official Interpreter

ORDER ON TAXATION OF COSTS

BACKGROUND

By an Interim Third-Party Debt Order dated 17th June, 2020, the third parties were ordered to attach funds sufficient to satisfy the judgment debt and costs of the third-party proceedings. The 2nd defendant/ enforcement debtor filled a sworn statement opposing the third-party debt order proceedings on grounds that the 2nd defendant desired to pay the judgment debt by instalments. By a ruling dated 11th August 2020, the court directed that the 2nd defendant should file application to pay debt by instalments, which the 2nd defendant did and the application was heard on 18th August 2020. By a ruling dated 21st August, 2020 the 2nd defendant's application to pay debt by instalments was dismissed. By a final third-party debt order dated 21st August, 2020 the claimant was awarded costs of the said Third Party Debt Order Proceedings.

ISSUES

The duty of this court is to determine the reasonable costs to be paid by the defendants to the claimants for this matter.

THE LAW AND 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 mitigation 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 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 2017 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 2017 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

The matter was handled by Counsel Donovan Silungwe of more than 10 years' experience whose hourly rate is at MK40, 000.00 as per the Legal Practitioners (Hourly Expenses Rates for purposes of Party and Party Costs). The rate to be used in the present assessment is, therefore, MK40, 000.00 per hour.

ANALYSIS OF PART A

INSTRUCTION FEE

The claimant prayed for payment of a sum of MK2, 000,000 as instruction fee. Having gone through the file, I note that this is a second assessment of costs in the present matter and this assessment is only with regard the enforcement of judgment proceedings. An assessment of costs on process from commencement to trial was already done and that assessment also had a claim of instruction fee. Entertaining a claim of instruction fee now means that the said fee is being paid twice which is unfair and I, therefore, deny to make an order on instruction fees.

PREPARATION AND PERUSING OF DOCUMENTS

This segment deals with preparation and perusal of various documents by Counsel Silungwe. I have considered the claimed amounts in line with the documents as the documents referred to are in the file and I have gone through them to appreciate their length and content so as to determine what reasonable time should be awarded.

Document	Proposed time	Time allowed
Application without notice for interim third-party debt order	4	2

Sworn statement from standard bank	30mins	10mins
Sworn statement from FDH Bank Limited	30mins	10mins
Sworn statement from NBS Bank	30mins	10mins
Sworn statement from My bucks Banking corporation Limited	30mins	10 mins
Sworn statement from Ecobank Limited	30 mins	10mins
Judgment debtors sworn statement in opposition to the application for final third- party debt order.	1	30mins
Ruling of the court on objection to final third- party debt order	2	1.5 hrs
Enforcement debtor's application to pay debt by instalments with supporting sworn statement	5	1.5 hrs
Enforcement debtor's skeleton arguments on application to pay debt by instalment.	6	2.5 hrs
Enforcement creditor's sworn statement in	6	4

opposition to the application to pay debt in instalment.		
Enforcement creditor's skeleton arguments in opposition to application to pay debt by instalments, and to issue final third-party debt order	10	5
Final third-party debt order	1	25 mins

The total under this segment comes to 18 hours and 15 minutes

RESEARCH AND READING

On this item, Counsel claimed 4 hours for reading Courts (High Court) (Civil Procedure) Rules, 2017. I will allow the said 4 hours considering the fact that all the applications made herein are premised on the said CPR 2017 hence counsel needed time to read the rules now and again. Counsel went on to claim a total of 29 hours for reading cases. 9 cases were listed on the list of cases read. This court was not given an opportunity to appreciate these cases against the times indicated in the claims as the cases were not attached as is required by law under **Order 31 (12) (3) of the CPR 2017** which stipulates that a bill of costs shall be accompanied by an assessment bundle which shall contain all documents, excluding those on the Court file, that a party shall rely on at the assessment hearing. I will, therefore, allow a minimal time of one hour per case hence I proceed to allow 9 hours for reading cases.

The total allowed under this segment is 13 hours.

COURT ATTENDANCES

The claimant claimed a total of 15 hours for various court attendances though there is no specific indications of time against each claim as the hours have just been lumped up. The first two claims are more of clerical works than works to be undertaken by Counsel. Counsel claims that he attended court on 15th June 2020 to file an application for third party debt order and then also attended court on 17th June 2020 when the application was issued and the third-party debt order granted. I do not see any reason why Counsel had to come in person for filling and checking the issuing of the application as his clerks should have easily done this. I will not award any hours for the above two items. For the other four court appearances, one hour per court appearance is reasonable hence I proceed to allow 4 hours for the four court attendances.

The total allowed under this section is, therefore, 4 hours.

TRAVELLING AND WAITING

The claimant claimed a total of 8 hours on travelling and waiting with respect to court appearances. This court has only allowed four court appearances as reasonable ones and on each appearance I will allow one hour to cater for travelling and waiting hence I allow 4 hours under this segment. **The total time allowed under this item is, therefore, 4 hours.**

The total hours allowed under Part A are 39 hours and 15 minutes amounting to MK1,570,000.00

PART B: CARE AND CONDUCT

The next item is on Part B which is about Care and Conduct. Counsel for the claimant claimed 70% of Part A as care and conduct. This matter is a mere enforcement of judgment matter and there is nothing complex in it. In the case of **Kavwenje v Chilambe (1996 MLR 113)** it was stated that for ordinary cases Care and Conduct should be between 50% and 60%. Having considered the present matter in line with the case authority cited, I will allow 50% of Part A as Care and Conduct.

The total costs under Part B is 50% of MK1,570,000.00 which is MK785,000.00

PART C: DISBURSEMENTS

The next claim was on Part C involving disbursements. There are filling fees amounting to MK10, 000,000 and a claim of MK400,000.00 for secretarial duties; stationery; sundry; fuel and postages. Having considered the circumstances of the matter, the claim of MK400,000.00 on the mentioned items is not reasonable and my view is that MK250, 000.00 is a reasonable sum to cater for secretarial duties; stationery; sundry; fuel and postages. Added to the filling fees; the total under disbursements comes to MK260, 000,00.

PART D: TAXATION

The claimant prayed for 10 hours for time spent on preparing the bill for taxation, obtaining appointment for taxation; issuing certificate and attending taxation hearing. I will allow 8 hours to cater for all taxation related work like preparing the bill, obtaining date of assessment, attending the assessment hearing, travelling and waiting and certificate of assessment.

The total allowed is, therefore, 10 hours amounting to MK320,000.00.

PART E: CARE AND CONDUCT ON TAXATION

The claimant prayed for 50% of Part D as care and Conduct on Taxation. The said 50% is reasonable hence I award 50% of Part D as Care and Conduct on taxation. The total for Part E is MK160, 000.00.

SUMMARY

PART A	MK 1,570,000.00
PART B	MK785,000.00
Taxation (Part D)	MK320,000.00

Care and Conduct on Taxation (Part E)	MK160,000.00	
Total professional fees	MK2,835,000.00	
VAT (16.5%)	MK467,775.00	
Part C	MK260,000.00	
Grand Total		MK3,562,775.00

The costs are taxed at MK3,562,775.00. These costs are to be paid within a period of 21 days from today.

Delivered on this ^{12th}.....Day of JULY 2021 AT LILONGWE


ANTHONY PITILIZANI KAPASWICHE
ASSISTANT REGISTRAR