

COUR DE JUSTICE



محكمة العدل



COURT OF JUSTICE

IN THE FIRST INSTANCE DIVISION OF THE COURT OF JUSTICE OF THE
COMMON MARKET FOR EASTERN AND SOUTHERN AFRICA
TEMPORARILY SITTING AT NAIROBI, KENYA

TAXATION APPEAL NO. 2 OF 2019

Arising from

TAXATION NO. 1 OF 2019
(Appeal against Re-Taxation)

IN REFERENCE NO. 1 OF 2017
THE COMMON MARKET FOR EASTERN
& SOUTHERN AFRICA (COMESA)APPELLANT

VERSUS

MALAWI MOBILE LIMITED RESPONDENT

CORAM:

Honourable Mr. Justice Bernard Georges – Presiding Judge

For the Applicant: Mr. David Kanyenda

For the Respondent: Mr. Gabriel Masuku

RULING

1. In this appeal, the Appellant is the Common Market for Eastern and Southern Africa (COMESA) and the Respondent is Malawi Mobile Limited.
2. This is an appeal by the Appellant against the re-taxation of the Bill of Costs submitted by the Respondent.

History

3. The Appellant was a Respondent in a Reference brought by the Respondent herein before the COMESA Court of Justice seeking relief allegedly denied it before the Courts of Malawi. On an objection by the Appellant as to the jurisdiction of the Court to hear the matter, the Court ruled that it had jurisdiction. Within the same proceedings, the Respondent sought the curricula vitae of two Appellate Division Justices. The Court awarded the Respondent two-thirds of its costs incurred in defending the preliminary objection as to jurisdiction and full costs incurred in its motion for the production of the Judges' curricula vitae.
4. The Appellant submitted its Bill of Costs to the Registry for taxation. The Bill, in a total sum of US\$773,024.47, was taxed by the Registrar and Assistant Registrar, acting as Taxing Masters, at US\$39,977.34, with VAT at 16.5% thereon and interest at the commercial rate applicable in Malawi from the date of the taxation ruling until payment in full. Dissatisfied with the sum awarded by the Taxing Masters, the Respondent herein appealed. I was appointed to hear the appeal and, in a reserved ruling dated 3 September 2019, I allowed the appeal, gave directions as to how the Bill should be taxed, and remitted the Bill to the Registrar to be taxed anew on the basis of the directions given.
5. Following representations by the parties, the Registrar and Assistant Registrar on 15 November 2019 issued a fresh taxation ruling, taxing the Bill of Costs at '*US\$175,522.00 less the amount paid in satisfaction of the previous Taxation Ruling (US\$46,573.60) leaving the total payable at US\$128,948.40*' with VAT thereon at the rate of 16.5% and interest on the costs awarded, if not paid within 60 days of the ruling, at '*commercial bank rates prevailing in the Republic of Malawi until payment in full.*' Dissatisfied with this further taxation, the Appellant has now appealed against it. I have again been directed by the Presiding Judge to hear this further appeal.
6. In view of the continuing Covid-19 pandemic, the parties agreed that the appeal would be decided on the basis of pleadings and written submissions. These were filed. I am indebted to both Counsel for their comprehensive submissions and authorities cited to me.

Taxing Masters' Ruling

7. The Bill of Costs submitted for taxation comprised five sections: Preparation (including five sub-heads), General Care and Conduct, Counsel's Court Attendances, Preparation of the Bill of Costs, and Disbursements.

8. Following directions given in my 2019 ruling, the Registrar and Assistant Registrar, acting as Taxing Masters, reviewed their previous taxation and made the following awards:
- i. The recoverable hourly rate claimed at US\$300.00 for Counsel's fees was reduced to US\$250.00;
 - ii. The Brief and Instruction fee was reduced from US\$40,000.00 claimed to US\$26,666.67;
 - iii. The claim for general preparation was reduced from US\$10,800.00 to US\$6,500.00;
 - iv. The claim for preparation of documents was reduced from US\$37,500.00 to US\$8,000.00;
 - v. The claim for perusal of documents was reduced from US\$17,700.00 to US\$5,000.00;
 - vi. The claim for research was reduced from US\$48,600.00 to US\$7,625.00;
 - vii. The total awarded for preparation, perusal and research was US\$20,625.00;
 - viii. The Taxing Masters awarded US\$21,516.67.00, under the claim for General Care and Conduct, being 40% of the total of the foregoing claims for preparation;
 - ix. Out of US\$253,200.00 claimed for court appearances, travelling and waiting, a sum of US\$23,100.00 was awarded. The large difference here arose from allowing the hourly rate only for actual Court time and not for travelling and waiting, which were awarded at Schedule II rates;
 - x. The claim of US\$18,000.00 for the preparation of the Bill and taxation was reduced to US\$2,250.00;
 - xi. In respect of disbursements, the claims were thoroughly scrutinised and sums of US\$ 21,659.50 for air tickets and accommodation, US\$20,951.80 for translation of documents and US\$5,000.00 for sundry expenses (making a total of S\$47, 611.30) were awarded, against a claim of US\$70, 947.69 under this head;
 - xii. US\$2,398.00 was awarded for the fresh taxation;
 - xiii. Additionally, the Taxing Masters allowed the claim of 16.5% VAT, payable in Malawi, on the final total awarded in the fresh taxation of the Bill of Costs of the Respondent.
9. The Registrar and Assistant Registrar were careful to comply with my 2019 ruling in reaching the foregoing decisions and making the awards. In particular, they applied an hourly rate for Counsel's charges, reducing this, as mentioned earlier, to US\$250.00 from US\$300.00 claimed and applying it to the times which Counsel actually devoted to legal work, and not to travelling and waiting, as had been claimed. Likewise, where Schedule II charges were felt to be appropriate, these were awarded, leaving a higher charge to be allowed where these were felt to be inappropriately low.

Appellant's Case

10. The fresh taxation was accepted by the Respondent, but not the Appellant. Dissatisfied with the sums awarded, it has appealed on no fewer than 21 grounds, set out in extenso hereafter, challenging the following decisions:



1. *The decision taken by the Taxing Master fixing the taxed hourly rate at US\$250 and applying it throughout the taxation as reflected in paragraphs 11, 20, 23, 24, 26, 27, 32, 33, 36, 39, 47, 55 and 56 of the Ruling;*
2. *The decision that the two interlocutory applications that resulted in the award of 2/3 costs were complex as per paragraph 18;*
3. *The erroneous decision taken by the Taxing Master allowing a Brief and Instruction fee in the matter on 2 interlocutory applications that resulted in the issue of the taxation of 2/3 costs in paragraphs 18, 32 and 55;*
4. *The erroneous award of US\$10,000 costs against Appellant (COMESA) under the sub-heading of Reference and Amended Reference as per paragraph 18(a) which matter Respondent lost hence resulting in the Court entering an Order against it directing it to amend its papers and ameliorate the improper citation of the COMESA Authority, COMESA Council of Ministers and COMESA Secretary General;*
5. *The dismissal of Appellant's submission requesting for time sheets to be tendered as proof to support time based claims in taxation as being "neither the norm nor the practice" as reflected in paragraph 20;*
6. *The failure by the Taxing Master to subject claims made for time based work to a judicious process of enquiry and ascertaining whether or not these were actually valid claims as was directed by the Court in the Ruling of Taxation Appeal No. 1 of 2019 dated 3rd September, 2019 in paragraphs 64, 65, 76, 91(b) and 91(e) and 95 vis-a-vis paragraphs 23, 24, 25, 26, 27, 35, 36, 47, 55 and 56 of the Taxation Ruling being challenged;*
7. *The award of unreasonable time related claims for service of affidavits, heads of argument and list of authorities, as referred to in paragraph 25, without having first called for proof for these to be tendered in support their claim as per the Guidelines issued by the Court in paragraphs 64, 65, 76, 91(b) and 91(e) and 95 in the Ruling of Taxation Appeal No. 1 of 2019 dated 3rd September, 2019;*
8. *The erroneous award of US\$500 against the Appellant (COMESA) for a "Response by 1st and 2nd Respondents to Applicant's Reference" on paragraph 25 as for the 2 interlocutory motions, COMESA was the only Respondent;*
9. *The double award for an alleged consideration of 'Rules of Procedure for the Election of the Judges of the CCJ (2005)' under paragraphs 26 and 27;*
10. *The unreasonable claim of 3 hours and resultant generous 1 hour award for consideration of the judges' curricular vitae at paragraph 25;*
11. *Allowing for a double surcharge in the claim of perusing and research of documents under separate headings, which is the same continuous activity, under paragraphs 24, 25, 26 and 27 but being billed repeatedly;*
12. *Improper exercise of discretion in deviating from what is provided for in the COMESA Court of Justice Rules of Procedure and jurisprudence of the Court through allowing General Care and Conduct as referenced under paragraph 30;*
13. *Allowing for an unreasonable double payment for Brief and Instruction Fee and General Care and Conduct at paragraph 32;*
14. *Impropriety in not following a judicious process of interrogating and validating claims made before taxing them as was pleaded in paragraph 34 but not applied in paragraphs 35 and 36 and as per the Guidelines issued by the Court in paragraphs 64, 65, 76,*

- 91(b) and 91(e) and 95 in the Ruling of Taxation Appeal No. 1 of 2019 dated 3rd September, 2019;
15. Allowing for an award of US\$2,250 in paragraph 39 without following the Guidelines issued by the Court in paragraphs 64, 65, 76, 91(b) and 91(e) and 95 in the Ruling of Taxation Appeal No. 1 of 2019 dated 3d September, 2019;
 16. The erroneous award of 50% costs against the Appellant for the Reference and Amended Reference in paragraph 41 despite Appellant having succeeded in the motion that gave rise to the Amended Reference;
 17. Allowing for unreasonable travel expenses for unknown persons (Naka and Tsaperas) who are not on record as being part of the proceedings and allowing unnecessary and unsubstantiated claims that are not party-party costs of suit such as travels to Johannesburg under paragraph 43; Respondent (Malawi Mobile Limited) is on record as being based in Blantyre, Malawi, whilst the Appellant is based in Lusaka, Zambia and the Court is in Khartoum, Sudan - none of the parties or even the Court is in Johannesburg, South Africa;
 18. Allowing for a blanket translation of documents that are not specified with neither an indication of the folio numbers of pages dealt with nor the expense rate that was allowed for each folio page of the document translated;
 19. Allowing for sundry expenses without having subjected them to the Guidelines issued by the Court in paragraphs 64, 65, 76, 91(b) and 91(e) and 95 in the Ruling of Taxation Appeal No. 1 of 2019 dated 3rd September, 2019;
 20. Allowing only the Respondent costs of US\$2,393 for attending the Re-Taxation/Fresh Taxation despite the Taxing Master's having acknowledged that Appellant was also in attendance in paragraphs 46 and 47 hence by implication it had also incurred costs in attending the taxation; and
 21. Allowing VAT against Appellant in paragraphs 53, 54 and 55 despite it having provided a Legal Notice No. 2 of 1983 exempting it from being liable to pay it in paragraph 49; the Court had even taken judicial notice "of the status of the Respondent (COMESA) as an entity exempt from taxes" under paragraph 95 of the Ruling of Taxation Appeal No. 1 of 2019 dated 3d September, 2019.
11. The Appellant seeks orders:
- (a) Granting the appeal;
 - (b) Setting aside the Re-taxation Ruling by the Taxing Master and Assistant Taxing Master dated 15th November, 2019;
 - (c) Directing that the Bill of Costs be re-taxed in line with the Guidelines given by the Court in the Ruling of Taxation Appeal No. 1 of 2019 dated 3rd September, 2019;
 - (d) Costs of suit;
 - (e) Any further and/or alternative relief.
12. In support of its appeal, the Appellant submits that the Registrar and Assistant Registrar failed to apply the guidelines set out in my 2019 ruling as to the methodology in taxing Bills of Costs and, in consequence, did not seek out proof of the several claims made, and whether or not they had actually been incurred, and applied a wrong hourly rate to the claims based on Counsel's fees. The Appellant submitted that the guidelines in *Premchand*

Raichand Ltd and Another v Quarry Services of East Africa Ltd and others (No 3) had not been followed, with the result that two relatively straightforward interlocutory applications had resulted in an award of costs of about US\$175,000.00, which the Appellant considered punitive in the circumstances. The Appellant cited the Zimbabwean case of *Crief Investments (PVT) Ltd & Anor v Grand Home Centre (PVT) Ltd & Ors 12/126113/16 & 8895/12* in support of its submission.

13. The Appellant submitted that the Taxing Masters had erred in basing themselves on the claim of US\$66 million brought by the Respondent in Malawi, rather than the two applications before the Court, which were not so based. Consequently, the claims for Instructions, Brief Fee and Care and Conduct, based on the claim in that sum, were misguided and should have been ignored for the purposes of the taxation.
14. Additionally, several double awards were made and inadequate consideration was given to the fact that some claims were patently wrong. Where discretionary awards were warranted, the Appellant felt that the Taxing Masters had made these unfairly and whimsically. No order for the costs of the re-taxation of the Bill had been made, yet costs were awarded to the Respondent.
15. As it had done in the first taxation, the Appellant took issue with the award of Value Added Tax on the award of costs. In its submissions, COMESA, being VAT-exempt in Member States, ought not to bear the burden of paying VAT on the award of costs.
16. Finally, the Appellant took issue with the manner in which the re-taxation proceeded. This, in its submission, should have followed an inquisitorial process, with the Respondent required to discharge the burden of proving every item claimed against a properly itemized Bill, which was not the case with the Bill presented for taxation.

Respondent's Case

17. The Respondent was satisfied with the fresh ruling on taxation and sought the following orders:
 - a. Summary dismissal of the Appeal in entirety under Rule 99 of the Rules of Procedure or alternatively dismissal thereof after a hearing;
 - b. Upholding of the Taxing Master's Ruling on fresh taxation dated 15 November 2019;
 - c. Costs for defending this appeal in any event;
 - d. Any other relief as the Court might deem fit and expedient.
18. In support of the fresh taxation ruling, and in answer to the submissions of the Appellant, the Respondent submits that the Taxing Master faithfully followed the directions I outlined in my 2019 ruling.
19. Citing *Preller v Jordaan (2009) (5) SA 227(C)*, *Ocean Commodities Inc & Others v Standard Bank of SA Ltd & Others (1984) ZASCA 2:1984(3) SA 15 at 18F-G* and *Kenya*

Airports Authority vs- Mitu-Belle Welfare Society and 2 Others [2016] eKLR, the Appellant submitted that the role of an appellate court is a limited one, in cases generally, but especially in taxation appeals. The appellate court's role is circumscribed by the fact that it cannot substitute its decision on an issue for that of the Taxing Master, unless the decision is clearly shown to have been based on wrong legal principles, substantial errors of fact, a misdirection and the like. Where a decision is made on the basis a discretion vested in the decision-maker, an appellate court will not interfere simply because it would have exercised its discretion differently, unless the exercise of the discretion is shown to have been capricious or perverse, or where the outcome would be clearly unjust.

20. The Respondent submitted that there was nothing in the re-taxation ruling that indicated that any item of costs awarded was unjust, or that a discretion made had been actuated by improper motives. The Respondent thus urged the Court to uphold the taxation ruling.

Determination

21. In my 2019 ruling, in which I ordered a re-taxation of the Respondent's Bill of Costs, I outlined the procedures to be followed by the Taxing Master in cases before the Court in the following terms:

'91. The consequence of these findings is that, in taxing a Bill of Costs in terms of Rule 79(2), the Registrar should follow the following procedures and be guided by the following considerations.

- a. Firstly, the Registrar must set out separately any claim by or in respect of witnesses and experts.*
- b. Next, the Registrar must, in respect of other claims, including but not limited to, travel and subsistence, and remuneration of Counsel, assess whether these were necessarily incurred for the purpose of the proceedings. If they were, the claims should be set aside for further consideration. If they were not, they should be summarily rejected. Claims here would include necessary disbursements not otherwise specified. They can also be broken up among those which were necessarily incurred and those which were not.*
- c. The Registrar should then assess each head of sums payable to witnesses and 04/09/2019 experts, travel and subsistence and any others, but not remuneration of Counsel and award proven and reasonable claims. The Registrar has a discretion, to be exercised judicially and not whimsically, in respect of each claim under these heads. In exercising this discretion, the Registrar should act fairly, as enjoined by the Rules, fairness being applied not only to the party claiming, but also to the party paying the costs.*
- d. Finally, in respect of claims for remuneration of Counsel, the Registrar should then assess each claim formulated and, in respect of heads which are mentioned in Schedule II, take the scales there into account when awarding a sum. The Registrar is not bound to grant the scale costs in Schedule II, but he or she must not ignore them either. In this respect also, the Registrar has a discretion, to be*

exercised judicially and not whimsically, in respect of each claim. This discretion extends to reducing any claim felt, when considering the scale of charges in Schedule II, to be unreasonably high, or increasing it beyond the scale charge when this is felt to inadequately compensate the party awarded costs. In respect of any items claimed which do not fall neatly into a Schedule II item, the discretion of the Registrar is complete.

Two examples are necessary here to guide future taxations. The scale charge for preparing and issuing a Reference under Schedule II is US\$90.00. Counsel charging US\$300.00 an hour cannot by any stretch of the imagination produce a Reference in 18 minutes, which is what US\$90.00 would buy in terms of his or her time. The Taxing Master here should consider the claim in the Bill of Costs in respect of the time charged by Counsel for drawing up a Reference and may properly depart from the scale charge in Schedule II. The Taxing Master will do so by allocating a reasonable time for the drawing of the Reference and a reasonable charge per hour for doing so. On the other hand, Schedule II allows US\$50.00 per half hour waiting on the Court. That sum may be considered reasonable even when Counsel is on a higher time charge with the client and may be awarded by the Taxing Master on the Schedule II scale as reasonable. Likewise, US\$90.00 for a power of attorney.

e. Where the Registrar has a discretion, that should be exercised with a view to achieving a fair reimbursement for costs incurred by the successful party without penalising the unsuccessful party. A proper balance should be achieved by the taxation. The aim is neither to allow a successful party to recover all expenditure incurred, nor to arbitrarily reduce expenditure properly incurred. It is, rather, to assess each head and item and allow a fair and reasonable sum for each. This may be what is claimed, but it does not have to be, if that is considered to be exaggerated.

This exercise will be easier for disbursements, where claims will usually be supported by receipts. In these cases, the Taxing Master will have to assess, first, whether the claim was necessarily incurred in the proceedings and, separately, whether the sum is reasonable or inflated. Consideration may include the route 04/09/2019 travelled, the class of fare booked, the price of accommodation reserved and the number of persons travelling for the matter.

For time-related charges the Taxing Master will have to, first, decide in each case whether the hourly rate is fair and reasonable and then, separately, assess the number of hours claimed. Different rates can be awarded for different items of work. For instance, reading time is usually charged at a lower rate than drafting time and, in recognition of the fact that court time is not as intense as drafting, court time is often charged at a daily rate lower than a mathematical calculation of an hourly rate for the number of hours spent in court. Where the taxation process

does not allow for this mathematical application, a discretionary lump sum award may be made, bearing in mind the foregoing criteria.'

22. As will be discerned from the foregoing, taxation of a Bill of Costs includes both a mechanical exercise and a discretionary one. It is mechanical where a set item is claimable (such as a witness fee) or where the sum is fixed (such as the drawing of a power of attorney in the example given above). It is discretionary where the Taxing Master is called upon to decide conflicting claims, or assess an unfixed claim (such as an hourly rate charged by Counsel).
23. In taxing a Bill, thus, the Taxing Master is obliged to carry out the following exercises: to ascertain which are the allowable claims, to then award the fixed sums (where applicable), and then to make a discretionary assessment of the sum to be awarded in respect of each unfixed claim which has been ascertained to be allowable. So long as the Taxing Master applies these rules properly – and discretions are judicially made – the taxation will not be called into question by an appellate authority, except in very exceptional cases, even if that authority would have made different decisions.
24. I am satisfied that the role of a court sitting on appeal on a matter generally, and on a taxation appeal specifically, should be guided by the considerations set out in the authorities cited by Counsel for the Respondent in his submissions. The basis of the principle is that courts will be reluctant to interfere with the exercise of a Taxing Master's discretion and will not readily do so, except on certain well-known grounds. Courts will, however, more readily interfere with a wrong decision relating to the mechanical exercise of a taxation decision. This is because the appellate court is in as good a position as the Taxing Master to make an award on an item the cost of which is fixed. Thus, if a power of attorney is allowed by a schedule of costs at US\$90.00 and the Taxing Master awards US\$45.00, that decision may be interfered with and corrected on appeal. But if the Taxing Master awards US\$100.00 as an hourly rate when US\$150.00 would have been more appropriate, but US\$100.00 not wholly inappropriate, an appellate court will not (in the absence of any other factor) likely interfere with the discretion of the Taxing Master to award the lower of the two sums.
25. The South African case of *Preller v Jordaan and Another (1957) (3) SA 201* is authority for the rule that there should be no interference by an appellate court over the exercise by a taxing master *'unless it is found that he [the taxing master] has not exercised his discretion properly, as for example, when he has been actuated by some improper motive, or has not applied his mind to the matter, or has disregarded factors or principles which were proper for him to consider, or considered others which it was improper for him to consider, or acted upon wrong principles or wrongly interpreted rules of law, or gave a ruling which no reasonable man would have given.'*
26. These principles have been the subject of much interpretation in numerous cases, but they have stood the test of time, and I propose to apply them to this matter.

27. There is, however, a qualification to the overarching principle of non-interference, namely '*... where the point in issue is a point on which the Court is able to form as good an opinion as the Taxing Master and perhaps, even a better opinion*': *President of the Republic of South Africa and Others v Gauteng Lions Rugby Union and Another* 2002 (2) SA 64 (CC).
28. Courts, therefore:
- i. May interfere to correct an error in the mechanical award, or lack of award, of a sum;
 - ii. May interfere to correct the exercise of a discretion vested in a Taxing Master where one of the matters set out in *Preller, supra*, is shown to have affected the exercise, or where the Court is in as good a position to make the decision as the Taxing Master;
 - iii. Will not otherwise interfere in the exercise of a discretion properly arrived at by a Taxing Master.
29. I shall now proceed to apply the foregoing rules and principles to the re-taxation of the Bill of Costs.
30. The Appellant's first ground of appeal challenges the hourly rate of US\$250.00 charged by Counsel and awarded to the Respondent. I can find no reason to interfere with this assessment of the hourly rate. The rate is perfectly consistent with rates charged by Counsel in many jurisdictions.
31. The Appellant's second ground challenges the determination of the Taxing Masters that the matters at issue were complex. I understand the thrust of the submission of the Appellant here to be that the interlocutory applications were not sufficiently complex as to produce an award of costs of the order of US\$175,000. While this, taken out of context, may well be a reasonable submission, the Taxing Masters made it clear that the interlocutory applications could not be divorced from the Reference in which they were made and costs incurred in the preparation of the Reference had to be considered when assessing those to be awarded. The Appellant's objection as to jurisdiction was an attempt to stop the Reference. It cannot be divorced from the Reference itself. I am unable to find that the Registrar and Assistant Registrar erred in their statement that this was a complex matter.
32. The third ground of appeal challenges the award of a Brief and Instruction fee. The Appellant submits that these amount to a double charge in that the same work had to be done for the two applications and they did not require separate awards. In my 2019 ruling I had stated that a brief fee was appropriate in big money cases, which this was. The Appellant claims in this context that the big money case was the one filed in Malawi, and not the two interlocutory applications for which costs were awarded. Counsel misapprehends the matter. While it is true that the main claim was brought before the Malawi courts, the Reference to this Court arose from the dismissal of that claim. The outcome of a successful claim by the Respondent before this Court would have been to put the Respondent in the money it claimed. Hence, the Registrar and Assistant Registrar did

not err when they considered the matter as a big money matter in respect of which a brief fee would be an acceptable charge. The fee of US\$40,000.00 claimed was determined by the Registrar and Assistant Registrar to be excessive. They reduced this to US\$26,666.67. While this may be felt to be high, and I might have been less generous, I am not of the view that the discretion was exercised in a manner which warrants my interference.

33. The fourth ground of appeal is an extension of the third and finds fault with the assessment of the Brief fee of US\$10,000.00 awarded for the Reference and Amended Reference. For the reasons given above, I am not of the view that there was any error in the award which warrants my interference. Whether or not the Reference had had to be amended, the brief fee of US\$10,000 for the Reference would have been a proper award.
34. Grounds 5, 6 and 7 of the Appellant challenge the acceptance by the Registrar and Assistant Registrar of the time-related charges of the Respondent in the absence of documented time sheets. The Appellant criticizes the taxation of the charges as having been effected in a non-judicious and whimsical manner, in breach of guidelines provided in my 2019 ruling. I am unable to agree with the Appellant on this issue. While time sheets are a desirable feature in any set of Chambers, and will be of clear assistance in both billing and claiming costs, they are not essential to either operation. Where they are not produced, the Taxing Master must (having assessed what an hourly rate should be for the particular claimant) make a reasonable assessment of the time which would have been spent on each item claimed. This is precisely what the Registrar and Assistant Registrar have done. They have produced in tabular form each item claimed, the hours claimed and their assessment of the time which they consider was proper. I have considered each item separately and am unable to say that there has been any error made to the Appellant's detriment.
35. In ground 8, the Appellant challenges an award of US\$500.00 for preparation of a 'response by the 1st and 2nd Respondents' and alleges that there was only one Respondent who filed a response. In my view, this is a de minimis issue and there can be little, if any, difference in the time spent in preparing a response for one party or for two.
36. Grounds 9 to 16, both inclusive, seek to challenge the several sums awarded. With the exception of ground 12, which will be considered separately, I am not inclined to interfere with the discretionary awards of the Taxing Masters, nor with their consideration of what sums should be allowed in each case. I am satisfied that they correctly applied their minds to each item claimed and, where necessary, were fair in the time allocated or the sum awarded.
37. In ground 12, the Appellant challenges the claim for General Care and Conduct of the case and the award of 40% of the Brief and Instruction Fee under that head. In making the award, the Taxing Masters had two discretions to exercise: whether to award a sum under the head at all, and what that sum should be. In exercising their first discretion, the Taxing Masters considered that the claim was valid and could be entertained as it was a recoverable head in Malawi. In exercise of their second discretion, they calculated their award in the basis

of the sum awarded as Brief Fee, Instructions and Preparation, and awarded 40% of that award. Was this a proper approach?

38. In my 2019 ruling, I made it clear that the task of taxing a Bill of Costs was for the Taxing Master to tax the Bill submitted, as it was submitted. I also made it clear that fees of Counsel were recoverable. How these fees are claimed or calculated will naturally vary across Member States. The issue is not so much the categorization of the heads, but the overall fairness of the claim. On that reading, thus, there is nothing per se wrong with separate claims for a Brief Fee, Instructions and Preparation, on the one hand, and a separate claim for General Care and Conduct of the case on the other. There will clearly be some overlap between these heads – the one will relate principally to pre-trial services, the other to the conduct of the trial itself, using the information obtained and preparation made in the first phase to guide the matter through the hearing phase.
39. General Care and Conduct is not a head of claim in every jurisdiction. The Taxing Masters realised and acknowledged this. It is, however, a possible claim. The question for my determination is whether the award of 40% of the award for Brief Fee, Instructions and Preparation was a fair award – in other words, was this an exercise of discretion which is amenable to be interfered with?
40. I am of the view that it is, on the basis that the sum awarded is, in all the circumstances, unreasonably high. I am of the view that this is a matter on which I am in as good a position as the Taxing Masters to make a determination.
41. In their first taxation ruling, the Taxing Masters awarded the Respondent 30% of the sum claimed in Part A of the Bill of Costs (which included taking instructions, preparation, meetings, and preparation and perusal of documents). In their re-taxation, the Taxing Masters awarded 40% of the same group of claims, but this time including a Brief Fee, which had not been awarded in the first taxation. The consequence of this was that the sums awarded were US\$53,791.67 for Instructions, Brief Fee, Preparation and the like, and US\$21,516.67 for General Care and Conduct. I am of the view that the award of General Care and Conduct was overly generous, given that a substantial fee had already been allowed as a Brief Fee. In the circumstances, I reduce the sum awarded for General Care and Conduct to 10% of the award for Brief Fee, Instructions and Preparation, and substitute the award of US\$21,516.67 with an award of US\$5,379.17.
42. In ground 17, the Appellant challenges the award of travel expenses for several persons, including Messrs. Naka and Tsaperas, who are based in Johannesburg, a location remote from Malawi, Zambia and Sudan, where the respective Counsel and the Court are located. The Taxing Masters were meticulous in their approach to these claims. They awarded some, denied others and reduced a third category of travel claims. Taking instructions from a client the representatives of which are remotely located from the chambers of Counsel will naturally involve some travelling and accommodation costs, as well as consulting with persons perhaps not directly related to the matter, but who may have important information

to impart. I am unable to find any reason to interfere with the manner in which the Taxing Masters discharged their duty of fairness in the taxing of these heads.

43. Ground 18 challenges the award of US\$20,951.79 for translation expenses. The Appellant submits that there was no meticulous consideration of the items claimed by the Taxing Masters. I respectfully disagree. The manner of taxing the claims was correct. Some claims were dismissed outright, or reduced, which underlines the meticulous approach undertaken by the Taxing Masters.
44. Ground 19 challenges the award of US\$5,000.00 as sundry expenses. The complaint of the Appellant is that there was no judicious examination of these. I again respectfully disagree. The sum awarded was clearly an arbitrary one, based on the Taxing Masters' assessment of the expenses properly incurred in the matter. I see no reason to interfere with their assessment, which is not patently unfair.
45. Ground 20 finds fault with the award of the costs of the re-taxation of the Bill to the Respondent and not making a similar award to the Appellant who had also attended the re-taxation. I am unable to follow the reasoning of the Appellant here as it is trite that costs follow the event and the Appellant was successful in the re-taxation and thus entitled to its costs.
46. The Appellant's last ground of appeal challenges the award of VAT at 16.5% on the costs awarded. This was made because the Respondent is liable to pay VAT in Malawi at the rate mentioned on the costs it is awarded.
47. This issue is easily resolved without recourse being had to the legal authorities cited. It is undisputed that the Appellant is a regional body which should be exempted from the payment of taxes, including VAT, in its member states. That is the clear intent of the Legal Notice No. 2 of 1983 to which I have been referred. The issue here is different. Whether or not the Appellant is exempt from VAT, the Respondent clearly is not. The Respondent, being under a legal obligation to pay VAT on the costs awarded to it, must recover the VAT from the Appellant. The Appellant's recourse is simple, and it exists under the Legal Notice itself, namely to seek an exemption on behalf of the Respondent from the payment, or, if it pays the VAT, to claim a refund from the Government of Malawi for the same, again in accordance with the Legal Notice. It must succeed in one or the other of these avenues.
48. The Appellant also disputes the propriety of paying the costs to an account in a South African bank and submits that this may lead to the Government of Malawi being deprived of the tax. I am unable to follow the argument. VAT is an obligation imposed on a taxpayer or party obtaining a fee subject to the tax. It does not matter where the VAT is paid. The party responsible for payment of the tax in Malawi is obliged to account to the Malawi revenue authority for the tax. VAT is in the nature of a trust sum – the payee holds the amount of VAT in trust for the revenue authority to which it is payable. The matter is one for the Respondent, not the Court or COMESA as a regional body exempt from taxation.

If COMESA has any obligation in the matter, it is not to prevent payment of the VAT element awarded to the Respondent; it is to alert the Malawi Government of the fact of the payment and claim prior exemption or a later refund of the sum.

49. The Appellant has raised a number of alleged procedural irregularities in the manner the taxation exercise was conducted. I am unable to find that the taxation exercise proceeded in any manner other than proper. Save for the reduction in the award of Care and Conduct, the taxation exercise cannot be faulted. This was a large Bill, containing multiple claims under different, often overlapping, heads. The Taxing Masters deserve credit for having applied themselves as they did to the exercise.

Result

50. In the final analysis, the appeal succeeds partially in that the sum awarded for Care and Conduct is reduced from US\$21,516.67 to US\$5,379.17. The appeal is otherwise dismissed.
51. Subject to the previous paragraph, I uphold the re-taxation of the Bill of Costs in the revised total sum of US\$159,384.50.
52. The sum of US\$46,573.60 having already been settled, the balance due to be paid is US\$112,810.90.
53. Interest will run on that sum as provided in the taxation ruling. I waive interest for the months of September and October 2020 on account of the delay in rendering this ruling. The fault is the Court's and the Appellant should not be penalized for this.
54. I uphold the award of Value Added Tax on the costs awarded at the rate of 16.5%.

DONE at VICTORIA, SEYCHELLES this 6th day of November 2020


 HON. MR. JUSTICE BERNARD GEORGES
 PRESIDING JUDGE