COUR DE JUSTICE

COMESA

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. 1 OF 2019

Arising from

TAXATION NO. 1 OF 2018

IN REFERENCE NO. 1 OF 2017

MALAWI MOBILE LIMITED .....APPLICANT

VERSUS

THE COMMON MARKET FOR EASTERN & SOUTHERN AFRICA (COMESA)..... RESPONDENT

CORAM:
Honourable Mr. Justice Bernard Georges – Presiding Judge

For the Applicant: Mr. David Kanyenda

For the Respondent: Mr. Gabriel Masuku

RULING

1. The Appellant, Malawi Mobile Limited, being dissatisfied with a decision of the Registrar and Assistant Registrar on taxing a Bill of Costs submitted for taxation, has appealed under Rule 80(2) of the COMESA Court of Justice Rules of Procedure 2016 (hereafter the 'Rules'). In accordance with the Rules, the Principal Judge has nominated me to hear this appeal.

2. The appeal was heard in Nairobi on 24 June 2019.

3. The Appellant, per its memorandum of appeal, seeks the following relief:

   (a) An order allowing the appeal;

   (b) An order setting aside parts of the award by the Taxing Master and Assistant Taxing Master complained of;

   (c) An order that the Bill of costs be re-taxed or that the taxation matter be remitted back to the Taxing Master and Assistant Taxing Master of the Court for a fresh taxation in compliance with the Judge's directions;

   (d) An order awarding costs of prosecuting the present appeal;

   (e) Any other order or relief the Court may deem fit and expedient.

4. The facts which give rise to this appeal are briefly stated in the Appellant's Motion for Taxation of Bill of Costs and are reproduced therefrom.

5. The Appellant filed a Reference to the First Instance Division of the Court. Concurrently, it also filed an *inter partes* Notice of Motion seeking the suspension of Judge President Chibesakunda Lombe and Justice Abdalla El Bashir. The Reference was opposed by the Respondent. As a preliminary issue, the Respondent challenged the jurisdiction of the Court to hear and determine the Reference. In a ruling dated 12 January 2018 the Court dismissed the preliminary objection on jurisdiction and ordered the Appellant to amend its Reference in respect of the identity of one of the Respondents. It ordered that costs of the preliminary issue would be costs in the cause.

6. Subsequently, the Appellant amended both the Reference and the Notice of Motion consistent with the ruling. The Appellant sought from the Respondent disclosure of the curricula vitae of the two Judges. The Respondent declined to accede to the written request of the Appellant, as a consequence of which the Appellant lodged a Notice of Motion seeking disclosure of the curricula vitae. In a ruling dated 4 August 2018, the Court ordered the Respondent to disclose the curricula vitae. Again, costs were ordered to be in the cause.

7. Following the dismissal of the Reference, the Court awarded the Appellant 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.

8. The Appellant in due course filed its Bill of Costs, claiming a total sum of US$773,024.47, with the Court. This was taxed by the Registrar sitting as Taxing

Master, with the Assistant Registrar as Assistant Taxing Master, after hearing representations made by Counsel appearing for the parties, in the sum of 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. It is from this taxation ruling that the Appellant now appeals.

Appellant's Appeal

9. The Appellant has filed an extensive Memorandum of Appeal ranging over 40 grounds attacking the taxation of the Bill of Costs.

10. The Memorandum has substantial areas of overlap and much repetition but, in addition to specific complaints, the Appellant generally faults:

    (a) The reduction or dismissal of some claims for travel, translation and subsistence, as well as counsel's fees;

    (b) The failure to have considered the time input, the seniority of Counsel and the hourly rate Counsel for the Appellant charges;

    (c) The pegging of some sums awarded to the Schedule II scale of the Rules;

    (d) The non-recognition of overlaps between work done in respect of the case as a whole (for which no costs were awarded) and those where costs had been awarded;

    (e) The distinction made between party/party costs and client/attorney costs, and the consequent denial of the latter as a basis for taxation;

    (f) The ignoring of the hourly rate charged by Counsel in agreement with the Appellant, and the lack of attention given to the 'remuneration of Counsel' phrase in the Rules;

    (g) The method of computation of reasonable time spent by Counsel in the preparation of the case;

    (h) The arbitrary nature of some calculations of costs due.

11. In addition to these complaints, the Appellant also challenges as procedurally irregular the leave given to the Respondent to make representations at the taxation hearing in spite of the Respondent not having filed any reply to the motion for taxation. It categorises this failure as an ambush and a lack of due process which amounts to a mistrial and vitiates the whole process.

Respondent's Appeal

12. In its reply to the appeal, the Respondent has raised two grounds of cross-appeal.

(a) It opposes the award of US$2,384.00 for General Care and Conduct, being 30% of the total award of costs for Court Attendances and Preparation and Perusal of Documents;

(b) It challenges the award of VAT at 16.5% on the costs awarded.

13. Before proceeding to consider the submissions of the parties in this appeal, it is worth explaining the claim of the Appellant for costs and the decision of the Registrar thereon.

The Appellant' Bill of Costs

14. The Appellant filed its Bill of Costs for taxation under cover of a Notice of Motion supported by affidavit pursuant to Rules 79 and 41 of the Rules. The ruling on costs at paragraphs 4-10 clearly and succinctly summarises the contents of the Bill.

15. The Bill comprised a short introduction which qualified the Appellant's counsel as the fee-earner charging an agreed rate of US$300.00 per hour.

16. The Bill itself was structured over five parts, marked alphabetically between A and E. The first four parts were calculated on the hourly rate of US$300.00. The fifth part, relating to disbursements, was claimed on a cost-expended basis.

17. Part A was entitled 'Preparation' and comprised taking instructions and liaising with other parties, for which the Appellant claimed US$10,800.00 for 36 chargeable hours; preparation of documents over 125 hours for a charge of US$37,500.00; perusal of documents relating to the case over 59 hours and 30 minutes for a charge of US$17,700.00; and research – including a detailed list of authorities consulted – over 162 hours for a charge of US$48,600.00. The total sum claimed under this part was US$114,600.00.

18. Part B, entitled 'General Care and Conduct', was predicated on the complex and novel nature of the matter and the attention which the Appellant's Counsel consequently had to give to it over and above actions in normal cases. The claim under this head was calculated as 90% the claim under Part A. The sum claimed was US$103,140.00.

19. Part C related to Court Attendances by Counsel for the Appellant. These attendances were calculated to include travelling and waiting time and were based on the hourly rate of US$300.00. A total of 844 hours produced a claim of US$253,200.00. Additionally, the brief fee of US$40,000.00 agreed between Counsel and the Appellant was claimed, making the total under this head US$293,200.00.

20. US$18,000.00 was claimed under Part D for 60 hours of work incurred in preparing the Bill of Costs and attending at the taxation thereof.

21. Part E claimed US$134,600.32 under the heading 'Disbursements'. The claim was broken down into three subheads: Air tickets and Accommodation – US$70.947.69; Translation costs – US$58,652.63; Sundry expenses (Visa fees, Photocopying, Telephone expenses, Emails, Transport) – US$5,000.00. These claims were generally supported by receipts and written documents.

22. The Appellant also claimed VAT at 16.5% on the sums claimed.

Registrar's Decision

23. The Registrar and Assistant Registrar heard the parties orally and taxed the Bill of Costs at US$39,977.34. VAT at 16.5% was awarded on that sum.

24. In so deciding they were motivated by the following considerations:

(a) That the claim of fees based on an hourly rate of US$300.00 was more in the nature of attorney/clients costs rather than party/party costs and could not form the basis of taxing costs on a party/party basis. The Ruling states, in this context, 'What is before the Court is taxation of Party-and-Party costs.'

(b) That, taking Canadian and Ugandan authorities into consideration, costs which are awarded to a litigant are in the nature of party/party costs and not attorney/client costs, which are due to the attorney from his client irrespective of the outcome of a matter or of an award of costs.

(c) That the words in Rule 79(1)(b) of the Rules obliged the Taxing Master to be guided by the rates in Schedule II of the Rules. In their words: 'We have noted that Counsel for the Applicant seems to have totally disregarded Schedule II when he prepared the Bill of Costs. We do not know why.'

(d) That the Taxing Master had a discretion in taxing, and should do so in a manner that was fair and just, but that at all times guidance should be had from Schedule II.

(e) That, because VAT would be payable in Malawi on the costs awarded, that should be awarded at the rate claimed.

25. Basing themselves on the foregoing, the Registrar and Deputy Registrar proceeded to tax the Bill of Costs as follows:

a. Where items were recoverable under Schedule II, they were guided by the scale therein set out. Otherwise, they awarded a discretionary lump sum.

b. With regard to the items of Preparations and Instructions in Part A, they were not persuaded, in the absence of details of the hours worked and whether payment had actually been received, that the claim was valid. However, they agreed that costs related to instructions were recoverable and awarded US$2,000.00 for the Preliminary Objection application and US$1,000.00 for the Application for Production of curricula vitae.

c. Likewise, as concerned the Part C claim for travelling for court appearances, including waiting time, in the absence of a breakdown of the actual hours claimed, discretionary lump sum awards of US$5,000.00 and US$2,000.00 for the Preliminary Objection and Application for production of curricula vitae were respectively made. The Registrar and Deputy Registrar felt that the first was more important in that, on its success, rested the whole of the Appellant's case.

d. As regards the claim in Part A for documents prepared, these were taxed on the Schedule II scale and not on the time-charge scale. A total sum of US$946.66 was awarded. Claims for documents consulted for research purposes were not allowed on the basis that this work was included in the award for Instructions.

e. The Part B claim for General Care and Conduct was felt to be allowable as this was usual in Common Law jurisdictions. The claim of 90% was felt to be high and was reduced to 30% of the total sum of US$7,946.66 awarded in respect of Court Attendances and Preparation, and Perusal of Documents. A sum of US$2,384.00 was thus awarded.

f. In respect of Part D, those taxing the Bill felt the claim of US$18,000.00 for 60 hours of preparation of the Bill of Costs and attendance at the taxation to be high. Guided by Schedule II and the actual time spent at the taxation, they awarded a discretionary sum of US$1,000.00.

g. As for the claim for disbursements, these were considered item by item and allowed, refused or reduced depending on whether they were completely or partially proved, or within the scope of the two matters in respect of which costs were being claimed. A total sum of US$11,970.30 was allowed for travelling and accommodation and US$16,176.38 for translation services. Photocopying costs claimed were awarded in a discretionary lump sum of US$500.00 on the basis that no invoices were produced to support the claim of US$5,000.00.

Appellant's Submissions on Appeal

26. In his oral submissions, Mr Kanyenda, Counsel for the Appellant, expanded on his filed written submissions. He began by stating that the sole valid appeal before the Court was the one filed by the Appellant. The Respondent had not filed an appeal despite being advised by the Court Registry to seek leave to file one out of time.

27. Counsel set out what he considered were the legal principles governing the appeal. He referred to the COMESA Court case of *Polytol Paints & Adhesives Manufacturers Co. Ltd. v The Republic of Mauritius* CCJ Ref No 1 of 2012 which stated that the ordinary words of the Treaty should be adhered to where these were not ambiguous, and the Vienna Convention on the Law of Treaties which urged that treaties be interpreted in good faith and in accordance with the ordinary meaning of their words.

28. He cited American authorities and drew therefrom the principle of law that a court must first of all seek the meaning of a statute from a plain and ordinary reading of the words and that one should look no further than the text where the words were unambiguous. He relied on the *Sussex Peerage Case* (1844) 11 CL & Fin 85 and the words of Lord Wensleydale in *Grey v Pearson* (1857) 6 HL Cas 61 to the effect that the plain and ordinary words of a statute were its best method of construction, unless to do so would lead to absurdity, repugnance or conflict with the rest of the instrument.

29. Counsel did admit however that the golden rule of construction allows departure from a literal interpretation where that is necessary. Where there was a conflict between a parent enactment and subsidiary legislation, the former would prevail over the latter.

30. Counsel proceeded to examine general principles governing costs. He stated that the notorious practice was for counsel to charge fees on the basis of time spent. In that context, he referred the Court to South African decisions and submitted that these concluded that it was normal for practitioners to prepare their Bill of Costs for taxation on the basis of time charges. The case of *City of Cape Town v Arun Property Development (Pty) Ltd & Or* was particularly relevant. There, the court had stated that in taxing a Bill of Costs,

> '*Consideration should have been given to the importance of the matter, its financial value to the parties and the complexity of the issues raised and/or required to be canvassed.*'

31. According to Counsel, this was a novel matter, one which relied on no known precedent and one which was useful to the future development of COMESA law and policy regarding the suitability of nominees for election to the COMESA Court. It was a complex matter with a high financial value where the Appellant was claiming US$ 66 million.

32. The Registrar should have given sufficient weight to these considerations when taxing the Bill of Costs. In accordance with the guidelines from the cited authorities and bearing in mind the Vienna Convention, the first task of the Court is to be fair to the successful party.

33. Counsel felt that, taking these matters into consideration, the taxed costs awarded had been manifestly low. A Taxing Master must act judiciously and not whimsically.

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Here, some arbitrary awards had been made, contrary to the taxing principles submitted.

34. Counsel admitted that, although an appellate court will be slow to interfere unless the court below had misdirected itself, on appeal from a Taxing Master a Court is allowed to interfere if the taxed costs are manifestly low or high. Here, Counsel submitted they were manifestly low and invited the Court to interfere.

35. Counsel grounded his submissions in this respect on the words of Rule 79(1)(b). This Rule, headed 'Recoverable Costs', reads:

'*1. Without prejudice to Rule 78, the following shall be regarded as recoverable costs:*

(a) Sums payable to witnesses and experts under Rule 57; and

(b) Expenses necessarily incurred by the parties for the purpose of the proceedings, in particular the travel and subsistence expenses and the remuneration of Counsel.

2. If costs are disputed by a party, the party awarded costs by the Court may, within thirty (30) days of such award, submit a bill of costs to the Registrar for taxation.

3. In taxing such bill of costs, the Registrar shall take into account the legal practitioner's costs in contentious matters stipulated in Schedule II hereto.

4. The Court may amend the scale of legal practitioners' costs contained in Schedule II.'

36. Schedule II is headed SCALE OF PRACTITIOINERS' COSTS IN CONTENTIOUS MATTERS and in 10 parts lists set charges for various claimable items. The schedule is clearly the equivalent of the scale charges provided for as party/party costs in rules of municipal courts across the COMESA member states.

37. Counsel argued that the term 'expenses necessarily incurred' in Rule 79(1)(b) was broad. Additionally, the phrase identified three specific items of recoverable costs: travel, subsistence and remuneration of Counsel. Counsel postulated that travel expenses were inserted because of the recognition that the Court's seat is in Khartoum and parties would be required to travel there from all over the COMESA region.

38. With regard to the remuneration of Counsel, the same broad interpretation should apply and cover the remuneration as defined in ordinary dictionary parlance. Since authorities cited were to the effect that Counsel predominantly charged fees calculated on time spent, taxed costs relating to this head should be so based and not fixed on set charges in Schedule II. To hold otherwise would be to make the Schedule run counter to the Rule. Had the framers of the Rule intended remuneration

of Counsel to be limited to Schedule II rates, they would have stopped the Rule after the words 'subsistence expenses'.

39. The Rules are unique and should be interpreted uniquely. The only proper way of achieving fairness was therefore to use the attorney/client scale in respect of remuneration of Counsel.

40. From time to time the Taxing Master departed from her own strict application of the Schedule II rates. She was thereby inconsistent. In some matters she referred to Schedule II; in others she did not. A proper approach should have been to apply the attorney/client rates claimed and, if she felt these to be unreasonable, to reduce the time claim or the hourly rate, not ignore them altogether.

41. Counsel also submitted that there were procedural irregularities in the manner of taxing the Bill of Costs. While he had filed the Bill of Costs under cover of a motion pursuant to Rule 41, the Respondent had not filed any pleading or counter-application. As a consequence, the Appellant had not been put on notice of the matters raised by the Respondent at taxation. That was unfair.

42. Counsel submitted that the *audi alteram partem* rule in Rule 80(1) required the party wishing to be heard to file pleadings in order to be heard. Otherwise he would be shut out. Issue could only be joined through written pleadings, not oral argument. Counsel however properly conceded that the presence of opposing Counsel did not affect the outcome insofar that the Taxing Master could have arrived at the same conclusion she did without his presence. Counsel would be content with an expression of disquiet from the Court on this issue.

43. In summing up his submissions, Counsel made the following further remarks:

    a. The Appellant had submitted the fairest Bill of Costs possible. It had been rewarded by the award of an unreasonable sum. Substantial justice is sought in Rule 3. This means Appellant must be awarded fair compensation.

    b. The Respondent had not lodged an appeal against Part B of the Bill of Costs and therefore the award of 30% of the award in Part A should be sustained.

    c. In some respects, the Taxing Master had departed from Schedule II. That should have been her approach throughout the whole taxation.

    d. In awarding only 3 hours in Part D, the Taxing Master had been arbitrary and capricious.

    e. Rule 79(3) and Schedule II should sustain each other. Because there were gaps in the Schedule as compared with the Rule, the Rule should prevail.

    f. The words 'shall take into account' in Rule 79(3) give the Taxing Master a discretion. The Taxing Master is not bound to award sums set out in Schedule II. She only needs to consider them in making an award.

g. The Court was invited to hearken to the statement in Rule 79(4) and seek to amend Schedule II to ensure that future claims for costs could be fairly taxed by more reasonable sums awarded.

Respondent's Submissions on Appeal

44. In response to the Appellant, Mr Masuku took issue with the submissions of Mr Kanyenda.

45. Counsel submitted that the matter was guided by the 2016 Rules and fell squarely within Part IV of the Rules. The Rules set out *inter alia* how costs are supposed to be assembled and processed. The Court in the *Government of the Republic of Malawi v Malawi Mobile Limited* (Appeal No 1 of 2016) had made it clear that the Rules were to be applied in preference to others.

46. According to Counsel, the words 'necessarily incurred' in Rule 79(1)(b) were the important ones. Further, Rule 79(3) asks the Registrar to take Schedule II into account when taxing a Bill of Costs. There is no distinction made between different kinds of costs in Rule 79. Yet, there are different kinds of costs in practice. Generally, costs awarded are party/party costs. That was the rule in *YB and F Transport Limited v Supersonic Motors Limited* (Zambian S C Case 3/2000). The Court there said:

'The general principle is that costs should follow the event; in other words, a successful party should normally not be deprived of his costs, unless the successful party did something wrong in the action or in the conduct of it'.

47. Costs normally follow the event. In some rare cases punitive costs on the attorney/client scale could be awarded where the behaviour of a party merited sanctioning. However, this was an exceptional occurrence and was to be used sparingly and in exceptional circumstances. Counsel cited the Zimbabwe High Court case of *Crief Investments (PVT) Ltd & Anor v Grand Home Centre (PVT) Ltd & Ors* 12/12 6113/16 & 8895/12, which laid down some rules in that respect which the Court was urged to accept as persuasive, including:

'In order for a litigant to successfully claim costs on the attorney-client scale which is punitive he/she must show that the other party's behaviour and attitude deserved to be punished.'

48. Counsel urged the Court to consider the words 'for the purpose of the proceedings' in Rule 79(1)(b) and the obligation in Rule 79(3) to take into account the scale in Schedule II. That schedule was one based on party/party costs. Recoverable Counsel's fees were therefore embedded in Schedule II. To deviate from that would be no different from awarding costs on a punitive, higher, scale which was neither appropriate nor in the design of Rule 79.

49. The case of *Fullerton v Matsqui* (1992) 19 BCAC 284, dealt with party/party costs. These are by way of indemnity, not punishment. They are damages to compensate a successful litigant for the expenses the litigation has brought.

50. The Zambian Supreme Court case of *Kuta Chambers v Concillia Sibulo* (30/2012) was cited as the *locus classicus* in the matter. This was authority for the proposition that only essential fees reasonably incurred and disbursements were recoverable. It held, inter alia:

'The party and party costs, that is to say all the costs necessary to enable the adverse party to conduct or defend the litigation, excluding luxuries, will generally be awarded to the successful party. We must also stress that the effect of this is to give the successful litigant a full indemnity for all costs reasonably incurred by him in relation to the action, except Advocate and client costs, where these are applicable. We hasten to add that where the court awards costs to a party to litigation, such party will only be entitled to the actual costs he incurred and no more.'

51. The authority was on all fours with Rule 79(1)(b) and (3).

52. It followed that the Registrar was obliged to be guided by Schedule II. The words 'take into account' meant that she was obliged to consider the schedule. She had to use it as a point of reference. Faced with an item in the Bill of Costs covered in Schedule II, she would have to apply the schedule. Taking a claim for a letter of demand as an example, the Registrar had no choice but to allow the item as per the scale in Schedule II because the item appeared there.

53. No provision was made in Schedule II for gaps. If the claim was based in Rule 97(1)(b) but was not covered in a Schedule II item, it would have to be awarded upon proof of the item, and upon the Taxing Master being satisfied that it was reasonable. If, on the other hand, the claim was covered in both Rule 79(1)(b) and Schedule II (such as instructions) and the claim was based on an hourly rate, the Taxing Master had no discretion but to award a sum based on the Schedule II scale and not on the higher claim. This would obtain until the schedule was revised in accordance with Rule 79(4). She had no discretion. If the drafters of the Rule had intended otherwise, they would have imbedded a discretion, such as a minimum and maximum, within the schedule.

54. Counsel pointed to the case of *Premchand Raichand Ltd & Anor v Quarry Services of East Africa Ltd & Ors (No 3)* (1972) EA 162, cited by the Appellant and agreed that fairness should be the paramount consideration in the taxation of a Bill of Costs. Because the Bill had been fairly taxed, the Court was urged not to interfere.

55. Insofar as specific claims were concerned, Counsel made the following submissions:

    a. Schedule II makes no provision for travelling and subsistence expenses. Yet, it is normal that Counsel would have to travel for the case. Counsel conceded that these would be recoverable costs.

b. There was no item in Schedule II for General Care and Conduct. Consequently, no sum should have been awarded under that head.

c. The award of VAT on the costs awarded was not proper as the Respondent was exempt from payment of taxes. A ruling of the COMESA Council had clarified the matter.

56. Counsel addressed the submissions of Mr Kanyenda for the Appellant that he was not properly before the Taxing Master at the taxation hearing on account of the fact that he had not made any response to the motion filed by the Appellant. In Mr Masuku's view, the Respondent had not withdrawn from the case, so it was still properly before the Taxing Master. Further, the Rules were not clear as to the procedure to be followed for the submission of a Bill of Costs for taxation or for responding thereto. A Rule 41 notice was but one way of approaching the matter. In any event, Rule 3 sought an overarching fairness in approach and Rule 80 required the opposing party to be heard at taxation.

57. With regard to the hearing of the appeal and the fact that no cross-appeal had been lodged, despite the Registrar's invitation to the Respondent to do so, Mr Masuku was of the view that he was not appealing against anything, but simply responding to matters on which he felt the Taxing Master had erred.

The Law

58. In deciding this matter, it is necessary first to consider the applicable law.

59. Both parties are agreed that, insofar as the Rules are relevant, Rule 79 and Schedule II are the basic instruments guiding the exercise of the taxation of a Bill of Costs. Insofar as these Rules are applicable, their relevant parts, with underlining supplied, are:

'*1. Without prejudice to Rule 78, the following shall be regarded as recoverable costs:*

(a) Sums payable to witnesses and experts under Rule 57; and

(b) Expenses necessarily incurred by the parties for the purpose of the proceedings, in particular the travel and subsistence expenses and the remuneration of Counsel.

....

3. In taxing such bill of costs, the Registrar shall take into account the legal practitioner's costs in contentious matters stipulated in Schedule II hereto.

...'

60. The important words in the Rules are those underlined.

61. Guidance can also be found from authorities cited by the parties. In particular, the *Premchand* case sets out some universal considerations in the matter of costs. Among these are:

    a. That a successful litigant ought to be fairly reimbursed for the costs he had to incur;

    b. That costs be not allowed to rise to such levels as to confine access to justice to the wealthy;

    c. That there is no mathematical formula to be used by the Taxing Master to arrive at a precise figure. Each case has to be decided on its own merits and circumstances;

    d. That the Taxing Master has discretion in the matter of taxation, but he must exercise the discretion judicially, not whimsically;

    e. That the Court will only interfere when the award of the Taxing Master is so high or so low as to amount to an injustice.

62. I adopt these statements as reasonable and useful. They are good common-sense rules which serve as a useful guide in the taxation of Bills of Costs. I propose to follow them so far as applicable in the determination of this appeal in general and in interpreting the rules guiding the taxation of the Bill of Costs herein in particular.

63. The overarching duty of a Taxing Master in taxing a Bill of Costs is to be fair. So too, the primary duty of this Court on appeal from a taxation is to see to it that the award of costs is fair. The Rules seek nothing less.

The Issues

64. As I see the issues to be resolved, these are – apart from specific claims, which will stand to be resolved on the basis of evidence of these having been incurred and being reasonable – the following:

    a. Can a successful party who has been awarded costs claim these – in the absence of a clear direction from the Court that costs are awarded on a punitive scale – on an attorney/client scale, or must costs be taxed as a rule on a party/party basis?

    b. Do the words in Rule 79(1) '*expenses necessarily incurred by the parties for the purpose of the proceedings, in particular the travel and subsistence expenses and the remuneration of Counsel*' mean that, upon proof of these expenses and upon a determination that they were necessarily incurred, the Taxing Master is obliged to award them, irrespective of any other considerations?

    c. Are the words in Rule 79(3) '*legal practitioner's costs in contentious matters*' in Rule 79(3) the same as '*remuneration of Counsel*' and, in either case, is the

Taxing Master bound to award these on the Schedule II scale or does he or she have a discretion in the matter?

65. Interpretation of the wording of Rule 79 is not without difficulty. Sub rule (1) appears to be a statement that a successful litigant can, upon proof of the expense having been incurred and being necessary for the matter, recover this *in toto*. These expenses include travel and subsistence as well as remuneration of Counsel. There can be few other interpretations of the clear words of the Rule. On that interpretation it would follow that there is no discretion to award anything other than that which is produced and supported by evidence as having been incurred.

66. Confusion arises, as it arose at the taxation determination here, by the apparent qualification in sub rule (3). There is an imperative there with regard to legal practitioners' costs. The Registrar is obliged to take Schedule II into account. This raises a further issue for consideration, namely, whether the words 'take into account' imperatively bind the Registrar to award these sums or whether he or she still has a residual discretion in the matter? Given the fact that a number of scale charges in Schedule II are extremely low, and a clear disincentive to filing a matter before the Court if applied strictly to a successful party awarded costs, this is not a hypothetical question, but one with real consequences. From a reading of their ruling, it is clear that this question is one over which the Registrar and Assistant Registrar agonised.

Consideration of Preliminary Issues

67. Before considering the merits of the appeal, I must consider the issues raised as to the presence of the Respondent's Counsel at the taxation and the Respondent's appeal before this Court. Both these were issues raised by the Appellant.

68. Firstly, as concerns the presence of Counsel the taxation of the Bill of Costs, I note that this was filed under cover of a Notice of Motion under Rule 41. There is nothing wrong with this procedure, but I am not of the view that it was the only procedure to be followed. It would have been entirely appropriate for the Appellant to have submitted the Bill to be taxed in terms of Rule 79(2) itself, without a supporting motion, but under cover of a simple letter or other application.

69. The Respondent cannot be faulted for having appeared at the taxation and made representations thereat. This is the procedure followed in some of the jurisdictions of COMESA Member States. In any event, Rule 80(1) requires that the opposing party be heard during the taxation process. Mr Kanyenda concedes that the Taxing Master and Assistant Taxing Master could have arrived at the same conclusion they did even if they had not heard Mr Masuku.

70. I rule that there was no error in Mr Masuku being present at the taxation and making representations thereat. It was entirely proper in accordance with the Rules that the

Respondent should have been present. No injustice has been caused to the Appellant by his presence.

71. Secondly, Mr Kanyenda submits that the Respondent has not filed a cross-appeal against the taxation and therefore it is incompetent to urge the Court to reject the award for General Care and Conduct, as well as VAT on the costs awarded.

72. Here, Mr Kanyenda is on stronger ground. It is clear that, despite reminders by the Registrar, no cross-appeal was filed by the Respondent. In view of my findings and directions below, the matter does not arise for consideration, but in order to guide future such appeals, I find with the Appellant on this issue. Mr Masuku has valiantly tried to argue that he is not actually appealing against the two awards but merely responding to the appeal. That is true as far as it goes. However, an appeal against the taxation of a Bill of Costs operates in the same way as any other appeal to the Court. If no appeal is brought against an item taxed in favour of a party, that item must be taken to be beyond dispute. A party appealing against other taxed items must be able to presume that the appeal will be restricted to those items appealed against only.

Consideration of Principal Issues

73. I am indebted to both Counsel for their in-depth research and full submissions on the relevant law. I mean no disrespect to them if I do not, in this ruling, spend more time analysing these. I am likewise indebted to the Registrar and Assistant Registrar for their comprehensive ruling on the taxation and their consideration of the law as they found it.

74. In my view, we do not need to go much beyond the words of Rule 79 to determine this matter. The clear and overarching intent of the Rule is that a party awarded costs can recover from the other party the following:

- Sums paid to witnesses and experts
- Expenses – so long as deemed necessary by the Taxing Master – incurred for the proceedings in which costs were awarded, including, but not limited to -
    - Travel
    - Subsistence
    - Counsel's remuneration.

75. That much is clear.

76. The words 'necessarily incurred' invite a threshold determination. While sums paid to witnesses and experts (being unqualified in the Rule) are deemed to have cleared the threshold, the other heads must first clear it. The Taxing Master must decide, in

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respect of each of these heads claimed, whether it was necessarily incurred. If it was, it must be considered. If not, it must be rejected summarily.

77. The issue is whether the words 'necessarily incurred' also give the Taxing Master, having accepted them for consideration as having been necessarily incurred, a discretion to allow, reject or amend claims made for travel, subsistence and Counsel's remuneration. Mr Kanyenda, if I understand his argument correctly, is not opposed to accepting that there is a discretion, so long as this is exercised on the basis of the claim as made.

78. I do not think there can be any doubt that the Taxing Master has a discretion in taxing every item in a Bill of Costs. That is the whole purpose of the exercise. The Taxing Master is the bulwark against inflated claims for costs. His or her duty is to ensure that costs awarded are fairly claimed and that sums awarded are fair.

79. With regard to the first issue set out above, the Appellant claims Counsel's remuneration on the basis of attorney/client's fees actually agreed upon and charged. These are based on a brief fee of US$40,000.00 and an hourly rate of US$300.00 for the remainder of the claim. The costs awarded by the Court were not awarded on a punitive scale. Counsel for the Appellant, however, claimed costs on the basis of his agreed fee package with the client. The detailed Bill sets out in detail in most areas each hour charged for preparation, reading authorities, perusing documents, drawing pleadings, travelling, waiting time and the like.

80. Mr Kanyenda argues that this was both the proper method of claiming the costs and the method contemplated by the use of the words 'remuneration of Counsel' in Rule 79(1). The Taxing Master and Assistant Taxing Master demurred and felt that that method used by Mr Kanyenda was akin to attorney/client costs and not party/party costs. They therefore approached the matter by reference to Rule 79(3) and, feeling bound by the imperative 'shall take into account' there, applied the Schedule II scale where appropriate and, where not, used their discretion to make a discretionary lump sum award.

81. I am of the view that both interpretations are incomplete. A reading of Rule 79 leads me to conclude that Rule 79(1) is nothing other than a broad categorisation of what costs are recoverable, namely witness and expert fees, and costs and disbursements necessarily incurred in the prosecution or defence of a matter before the Court. Costs always include an element of Counsel's charges. The use of the words 'in particular the travel and subsistence expenses and the remuneration of Counsel' are illustrative only, the essential part of the Rule being 'expenses necessarily incurred by the parties for the purpose of the proceedings'. It is easy to see why travel and subsistence expenses would be included as a separate item. This is because in most cases, the Court being a regional court, parties and Counsel would be required to travel to the location of the Court and remain there during the hearing of a matter. Likewise, the use of the phrase 'remuneration of Counsel' is included to make it clear that Counsel's charges are recoverable costs.

82. The question that remains is, on what scale should Counsel's charges be determined? In order to reconcile these divergent views, it is necessary to examine the relationship, if any, between the words 'remuneration of Counsel' in Rule 79(1) and 'legal practioner's costs' in Rule 79(3), and the meaning of the phrase 'shall take into account' in sub rule (3).

83. It is clear that the drafters of Rule 79 intended that fair and appropriate fees of Counsel charged and paid in a matter should be recoverable. The use of the word 'remuneration' in lieu of any other word must be given effect to. They clearly indicate that the recoverable costs under that head have as their basis the fees paid to Counsel. Any other interpretation will do violence to the clear words used.

84. However, Counsel cannot have an open discretion to charge unreasonable fees and – perhaps in collusion with the client (not that this is my interpretation of the fee structure here) – enter into a scheme the purpose of which is to penalise the losing party by inflating fees. Nor is the Taxing Master bound by the scale charges in Schedule II where these are clearly too low and may lead to a disincentive to future litigants using the services of the Court. This is where the Registrar's duty under Rule 79(2) comes in. The Registrar, called upon to tax a disputed Bill of Costs, will ensure that the Rules are adhered to and the fees and charges recoverable are fair.

85. In my view, this was the intention – however unfortunately phrased – of the drafters of the Rules behind the reference in sub rule (3) to Schedule II. I find that the phrase 'legal practitioner's costs' there is not the same as 'remuneration of Counsel' in sub rule (1), but that legal practitioner's costs are a part of Counsel's remuneration. This must be the reason why the same phrase was not used in the two sub rules. Remuneration of Counsel has a wider scope than legal practitioners' costs, the latter being included in the former. Thus, for instance, drawing a document is a legal cost, recoverable on the Schedule II scale, but the time spent by Counsel in doing so is part of the remuneration of Counsel, over and above the legal cost.

86. In my view, sub rule (3) is both a reminder that costs are generally taxed on a party/party basis and that Schedule II is the framework for these charges in respect of the specific items there listed but no more.

87. The Registrar is bound by the use of the imperative 'shall' to consider Schedule II when taxing a Bill of Costs. However, that imperative is diluted by the words 'take into account' which follow. All the Rule asks of the Taxing Master is to take the rates in the schedule into account. It does not order – as is the case in taxing of Bills of Costs in many Courts – the granting of the party/party charges to the exclusion of anything else. This is so because, to so hold, would be to reinterpret the words 'remuneration of Counsel' in sub rule (1) to mean 'scale costs as per Schedule II'.

88. At the same time, the words in sub rule (3) cannot be ignored altogether. In taxing a Bill of Costs, the Registrar is bound to consider the scale charges in Schedule II in the exercise of his or her discretion as to sums to award for the fees of Counsel in respect of each item of these fees where a corresponding charge is given in Schedule

II. The Registrar is not bound to grant the scale charge, nor is he or she bound to ignore it. The sub rule only asks he or she to consider the charge in determining what would be an appropriate award against a similar claim in the Bill to be taxed.

89. I hold that Rule 79 neither supports a claim for charges or remuneration of Counsel based on an attorney/client agreement, nor obliges Counsel's charges to be based or taxed strictly on the Schedule II rates. The only way to reconcile sub rules (1) and (3) of Rule 79 is to tax a Bill of Costs in such a manner as to assess the charges of Counsel therein claimed (whatever their appellation) paying attention to, but not being bound by, the scale charged in Schedule II. If Counsel, as here, draws up a Bill on the basis of a chargeable hourly rate and a calculation of hours charged, the Taxing Master will use this as a base against which to assess each item claimed, considering in each case the scale charge in Schedule II – where there is concordance between the item claimed and an item in the Schedule – but not being bound by the scale. Where the scale is felt to be appropriate, the Taxing Master may award that scale charge; where it is not, the Taxing Master may award a discretionary sum between the Schedule II scale and the sum actually claimed in the Bill.

90. In fact, this is the approach taken by the Registrar and Assistant Registrar. In their ruling at paragraph 28, they say, correctly, 'A question that needs to be answered at this point is whether the Taxing Master is bound to follow Schedule II to the letter' and, having considered the words 'shall take into account' in Rule 79(3), 'This choice of words, in our opinion, gives the Taxing Master the discretion to tax bills as they deem fair and just but, in doing so, they should at all times, be guided by Schedule II.' Where they erred was to feel themselves bound in some respects by the Schedule II scale and to make awards on that scale even if this was clearly low.

Determination

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 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 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.

Result

92. As the outset, I must recognise that in most respects the Registrar and Assistant Registrar followed the procedures and guidelines set out immediately before. I am satisfied that where they exercised a discretion they did so judicially. The table at paragraph 46 of their ruling is a good example of the fairness of their approach. Where they felt that a reasonable sum should be awarded rather than being strictly bound by time charges, they modified the claim. An example of this is at paragraph 39 of their ruling. However, I am of the view that the Registrar and Assistant Registrar, especially in considering the items in paragraph 40 and the table following, were too bound by Schedule II charges. This is evident, to give one example, in the award of US$13.33, for the Appellant's response to the Preliminary Objection.

93. From the foregoing determination of the procedure to be adopted in taxing a Bill of Costs and the law to be considered and applied in the process, it follows that in my view the Registrar and Assistant Registrar erred when they felt themselves at all times to be guided by Schedule II in respect of items there to be found and in their finding that the fee arrangement could not form the 'basis for calculating party-and-party costs.'

94. I have therefore concluded that, on the basis of authorities cited earlier in this ruling, this is a proper case for the Court to interfere with the taxation by the Registrar and Assistant Registrar.

95. I have given long and anxious consideration as to whether I should proceed, on the basis of the determination above, to tax the Bill myself. I have decided not to and to remit the matter to the Registrar and Assistant Registrar to tax in accordance with the guidelines above. I have felt this to be the better option, because it will allow a complete canvassing of the claims and a fresh consideration of each of them, including some complained of by the Appellant as not having been considered, in light of my directions as to the effect of Schedule II. At the same time, both Counsel

will have an opportunity to make proper submissions on any items they feel were ignored or glossed over. Finally, the claim for VAT will have an opportunity to be canvased in full in light of the status of the Respondent as an entity exempt from taxes.

96. Having decided to remit the matter to the Registrar and Assistant Registrar it would not be appropriate to give them directions – other than the broad ones set out above. However, it would be remiss of me if I were not to mention a few matters which I consider to be important in preparing and taxing Bills.

97. First, while breakdowns of costs are always desirable, it is not possible sometimes to do otherwise than claim a lump sum. In these cases, the Taxing Master can do nothing other than assess the claim and award a fair sum for the claim.

98. Second, a claim for a brief fee is normal in big money cases such as this one. The Taxing Master must assess the claim for such a fee against the whole case, its complexity, the amount claimed and the workload which Counsel will have to take on to get the litigation process under way.

99. Thirdly, and finally, it is not a good practice for travelling and waiting time to be claimed on the basis of the same chargeable hourly rate that is claimed for work of a legal nature. A distinction must be made between legal work, on the one hand, and travelling and waiting on the other hand.

100. In the final analysis, I allow the appeal, set aside the taxation and order that the Bill of Costs submitted by the Appellant be taxed afresh by the Registrar.

101. This ruling attaches no blame to the Registrar and Assistant Registrar who were faced with a poorly drafted Rule and no guidance from prior authorities as to the interpretation of Rule 79. It is, further, unsurprising that Registrars will seek to ground taxation on schedule charges, since this is the usual way in which party/party costs are taxed in municipal courts.

Directions

102. Counsel are urged in future cases when preparing Bills of Costs to follow the language of items in Schedule II in respect of the items claimed and therein set out, even if they claim a higher sum in respect of some such items. This will allow for easy comparison of claims when taxing the Bill.

103. I have been requested by Mr Kanyenda to ask the Court to consider directing a revision of Schedule II. The consideration of this appeal has raised substantial issues for consideration by the Court in respect of costs. The uneasy relationship between Rule 79 and Schedule II needs to be considered afresh and a clear decision made by the Court as to whether it is preferable to continue to allow remuneration of Counsel to be recovered as costs, or whether to allow only set charges to be recoverable for fixed items, including a

daily or half-daily set charge for appearances, or minimum and maximum sums for some items, leaving the Taxing Master a discretion what to award within these parameters.

104. In either event, the drafting of Rule 79 requires reworking for the sake of clarity. In any event, having considered some of the charges in Schedule II, I am of the view that they are a disincentive to litigants coming to the Court as the complexity of the matters which are referred to the Court on the one hand and the low level of recoverable costs in Schedule II on the other may lead to litigants thinking twice before investing in litigation before the Court. I therefore have no hesitation in acceding to the request of Mr Kanyenda to ask that the Court take up the challenge of reviewing both the language of Rule 79 as to what recoverable costs are intended to be covered, and the rates of Schedule II charges. As has been stated, the Court is given, in Rule 79(4), the specific power to revise Schedule II.

Costs

105. This is a novel matter and the first substantive consideration the Court has had to make of the language of Rule 79 as well as on the procedures and guidelines which have to be followed upon taxation of a Bill of Costs. It is a matter which will benefit future litigants before the Court as well as future Taxing Masters. For these reasons, I am not minded to award costs of this matter. There will be no order as to costs.

Summary of Findings and Orders

106. The appeal is allowed.

107. The Bill of Costs lodged by the Appellant for taxation is remitted to the Registrar for taxation afresh in the presence of a representative of the Respondent.

108. There is no order as to costs.

109. The Court is urged to review Rule 79 and Schedule II at an early opportunity.

DONE at **VICTORIA, SEYCHELLES** this 3rd day of September 2019.

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HON. MR. JUSTICE BERNARD GEORGES

PRESIDING JUDGE