

COUR DE JUSTICE



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TRIBUNAL DE JUSTICE



**IN THE FIRST INSTANCE DIVISION OF THE COURT OF JUSTICE OF THE
COMMON MARKET FOR EASTERN AND SOUTHERN AFRICA
AT KHARTOUM, SUDAN**

**TAXATION CAUSE NO. 1 OF 2018
(RE-TAXATION)**

Arising from

TAXATION APPEAL NO. 1 OF 2019

MALAWI MOBILE LIMITEDAPPLICANT

VERSUS

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

CORAM:

Hon. Nyambura L. Mbatia – Taxing Master

Hon. Philippe H. Ruboneza – Assistant Taxing Master

Counsel for the Applicant: Mr David Kanyenda

Counsel for the Respondent: Mr Gabriel Masuku

Mr. Sepo Nalumino

RULING

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Background

1. This fresh taxation arises out of an Appeal that was filed by Malawi Mobile Limited ('the Applicant'), against the Ruling of the Taxing Master and Assistant Taxing Master (hereinafter referred to as 'the Taxation Ruling') dated 30 January 2019. That Taxation had arisen from Reference No. 1 of 2017 being Malawi Mobile Limited vs the Common Market for Eastern and Southern Africa (COMESA) ('the Respondent'). The Notice of Motion for Taxation of Costs filed by Malawi Mobile Limited is dated 10 September 2018.
2. Dissatisfied with the Ruling of the Taxing Master and Assistant Taxing Master (hereinafter referred to as 'the Taxing Officers'), Malawi Mobile Limited filed an Appeal in accordance with Rule 80 of the COMESA Court of Justice Rules of Procedure (2016). Pursuant to Rule 80(2), the Honourable Principal Judge nominated Honourable Mr. Justice Bernard Georges to preside over the said Appeal. The Honourable Presiding Judge delivered his Ruling (hereinafter referred to as 'the Appeal Ruling') on 03 September 2019.
3. The Presiding Judge issued Orders, *inter alia*, allowing the appeal and ordering that the Bill of Costs lodged by the Appellant for taxation be remitted back to the Registrar for taxation afresh in the presence of a representative of the Respondent.
4. Subsequently, both Parties did file submissions in support of their claims or in reply. They cited several authorities and produced various documents in support of their case. The Taxing Officers did note, however, that much of the submissions filed consisted of analysing the Ruling of Honourable Presiding Judge as opposed to canvassing the Bill of Costs afresh. Counsel for both Parties did appear before the Taxing Officers on 19 October 2019 for oral submissions.

TAXATION CAUSE NO. 10F 2018 (RE-TAXATION)

NLM

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5. We have read and internalised the Appeal Ruling and we believe we have understood what we did right and where we may have erred in our Taxation. We are particularly alive to what His Lordship stated at Paragraph 74 and which we hold to be the bedrock upon which our fresh taxation will be anchored:

'1. The clear and overarching intent of the Rule (Rule 79) 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.'*

We are grateful to His Lordship for delivering such a detailed and clear Ruling that will serve as a good road map, not just for this Taxation, but for all future taxations before this Court.

6. We have further taken into account both the written and oral submissions as well as the authorities cited by all Counsel. In conducting the fresh taxation, we have opted to go straight into the Bill of Costs and where necessary, we will refer to the Appeal Ruling.

7. From the outset, we find that it is not in dispute that the Respondent did settle the Bill of Costs, inclusive of Value Added Tax (VAT), pursuant to the Taxation Ruling of 30 January 2019.

The Bill of Costs

Status of Fee Earner

8. The Bill of Costs begins with a brief summary of the facts leading up to the Taxation. Under Item 2, the Applicant has set out the Status of Fee Earner.

TAXATION CAUSE NO. 10F 2018 (RE-TAXATION)

NLM

PR

The claim is that the Applicant was represented by Counsel David Kanyenda, Counsel of more than 14 years' experience whose hourly rate is fixed at US\$300.00. This was also the rate that was agreed between the Applicant and Counsel.

9. Counsel for the Respondent submitted that the hourly rate of US\$300 was extremely high and that Schedule II is not anchored on hourly rates. He referred to the observations of the Appellate Judge on page 18, paragraph 89 where the Honourable Judge stated that, *"I hold that rule 79 neither supports a claim for charges or remuneration of counsel based on an attorney client agreement."* Counsel concluded by submitting that the agreement between attorney and his client is a private agreement which cannot be imported into taxation.

Determination on Hourly Rate

10. The Appellate Presiding Judge did find that Counsel's charges are recoverable costs and further that the drafters of Rule 79 intended that fair and appropriate fees of Counsel charged and paid in a matter be recoverable (Paragraph 81-85). The claim for a fixed hourly rate is therefore recoverable and the only issue for determination by the Taxing Officers is the rate thereof.

11. We have considered submissions by both Counsel on this issue and, taking into account the experience of Counsel, the complexity of the matters that were in issue in the Reference and the two Applications for which costs were granted, we tax the hourly rate at **US\$250 per hour**.

The Detailed Bill of Costs

12. The Bill of Costs is divided into five parts as follows:

Part A – Preparation

TAXATION CAUSE NO. 1 OF 2018 (RE-TAXATION)

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Part B – General Care and Conduct

Part C – Court Attendance Inclusive Travelling and Waiting Time; Brief
and Instruction Fees

Part D - Taxation

Part E – Disbursements.

13. However, Counsel Kanyenda, in his submissions in support of the fresh taxation as well as in his oral submissions, did request that the claim for Brief and Instruction Fees be moved to Part A. The Bill of Costs therefore now comprises of:

Part A – Brief and Instruction Fees and Preparation

Part B – General Care and Conduct

Part C – Court Attendances Inclusive Travelling and Waiting Time

Part D - Taxation

Part E – Disbursements.

Part A – Brief and Instruction Fees and Preparation

(i) Brief and Instruction Fees

14. The Applicant claims US\$40,000 being fixed brief and instruction fees agreed between Counsel and the Applicant. The amount payable should be assessed by looking at the whole case, its complexity, the amount claimed and the workload that Counsel put in.

15. According to Counsel Kanyenda, the value of the initial claim by Malawi Mobile Limited is US\$66Million. He further submitted that the issues canvassed in both Applications were complex and novel and therefore the sum claimed of US\$40,000 was fair and reasonable.

TAXATION CAUSE NO. 10F 2018 (RE-TAXATION)

NLM

PR

16. On this issue, Counsel Masuku submitted that it is not true that the Bill involved a claim for US\$66 million. On the contrary, 'what gave rise to the Bill was an award of 2/3 costs for two interlocutory matters (emphasis his) relating to jurisdiction and two judges' curricula vitae which hearings were very short and brief.' He further contended that \$40,000 brief fee is exorbitant and unreasonable and that Schedule II does not make provision for a brief fee.

Determination on Brief and Instruction Fees

17. We refer to Paragraph 98 of the Appeal Ruling wherein the Presiding Judge found that indeed brief fee is recoverable. We further find that, in determining the amount payable, we cannot divorce the two applications for which the costs were awarded from the original claim (Reference) in this matter. As Counsel Kanyenda submitted, the success or collapse of the interlocutory applications was linked to the success or failure of the initial claim.

18. We hold that, although the two applications for which costs were awarded were interlocutory in nature, they were complex applications with very far reaching implications. They were not as straightforward as Counsel for the Respondent made them out to be. They called for serious preparatory work and research. In our view, canvassing the main Reference would take up 50% of the brief fee charged being US\$20,000. For each of the Applications, we allocate US\$10,000. Having found that we cannot de-link the Reference and Amended Reference from the two Applications for which costs were awarded, we grant the Applicant Brief and Instruction Fee as follows:

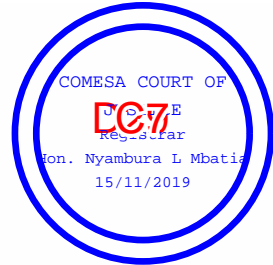
- a) Reference and Amended Reference - US\$10,000 (being 50% of US\$20,000);
- b) Preliminary Objection to Jurisdiction Application - US\$6,666.67 being 2/3 of the costs incurred in defending the same; and
- c) Application for Production of CVs - US\$10,000.

TAXATION CAUSE NO. 1 OF 2018 (RE-TAXATION)

NLM

PR

Total Brief and Instruction Fees awarded is US\$26,666.67.



(ii) Preparation

19. The Applicant claims a total of US\$10,800 being 36 hours of work at the rate of US\$300 per hour made up as hereunder:

I. The Client

30 Hours spent taking of instructions from the Applicant's Directors and providing audience to them on diverse dates; and

II. Other Parties

06 Hours spent electronically corresponding with the Court, the Respondent and the Respondent's lawyers from August 2017.

Determination on Preparation

20. We take note of the Respondent's Counsel's contention that no time-sheets were produced to support time-based claims. We also do take judicial notice of the fact that it is neither the norm nor the practice, for Counsel to record every moment spent taking instructions, giving audience to clients or sending electronic correspondence to various parties. That is not to say that time was not spent carrying out the said activities. We therefore award US\$6500 made up as hereunder:

I. The Client - we assess time spent as 20 Hours multiply by US\$250 = US\$5000; and

II. Other Parties - we grant 06 Hours as claimed hence 06 X US\$250 = US\$1500.

Total awarded for preparation US\$6,500.00.

TAXATION CAUSE NO. 1 OF 2018 (RE-TAXATION)

NLM

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(iii) **Documents Prepared**

21. Under this heading, the Applicant claims an amount of US\$37,500. Counsel Kanyenda did, however, concede that items number iii and V being the Motion for Suspension of two Judges and the submissions in support thereof respectively, were not recoverable costs.

22. Counsel Masuku for the Respondent contended that the Taxing Matter is bound by Schedule II and the COMESA Court of Justice Rules of Procedure, 2016 which are still valid.

Determination on Documents Prepared

23. In arriving at a decision for this part of the Bill, we are guided by Paragraph 85 of the Appellate Ruling where the Court stated that '*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*'. We will factor these two elements, that is, the cost of drawing a document and the time spent by Counsel in awarding for each item. We will therefore be guided by both Schedule II and the Hourly Rate as determined under Paragraph 10.

N o	Items	Time Claimed	Time Deemed Reasonable	Award
I.	Reference	18 hours	12hours	12x US\$250 =US\$3000
II.	Special Power of Attorney	2 hours	30 min	US\$125
III.	<i>Inter Parte</i> Notion of Motion for Suspension of 2 Judges	12 hours	Nil	0
IV.	Applicant's Response to Preliminary Objection	14 hours	3 hours	US\$750
V.	Submissions support of <i>Inter Parte</i> Notion of Motion for Suspension of 2 Judges and Stay of Revision Proceedings	15 hours	Nil	0

TAXATION CAUSE NO. 1 OF 2018 (RE-TAXATION)

NLM

PR

VI.	Amended Reference	2 hours	2hours	US\$500
VII.	Amended <i>Inter Parte</i> Notice of Motion for Suspension of 2 Judges and Stay of Revision Proceedings	2 hours	Nil	0
VIII.	Affidavits of service of the court process on the 2 Judges	6 hours	2 hours	US\$500
IX.	<i>Inter Parte</i> Notice of Motion for Production of C.Vs of 2 Judges	8 hours	3	US\$750
X.	Affidavit in Response to Respondent's Notice of Motion for Production of C.Vs	3 hours	1	US\$250
XI.	Heads of Arguments	30hours	3hours	US\$750
XII.	Applicant's Reply to Respondent's Heads of Arguments	5	3 hours	US\$750
XIII.	List of Authorities	3	2 hours	US\$500
XIV.	Counsel's Undertaking	2	30 min	US\$125
XV.	Assessment Bundle	This is covered under Preparation		Nil
	Subtotal	US\$8,000.00		

Total for Documents Prepared = US\$8,000.00.

(iv) Documents Perused

24. The Applicant claims a sum US\$17,700 for the time spent perusing documents.

Determination on Documents Perused

25. For this part, we are guided by Paragraphs 81-90 of the Appeal Ruling as well as the amount we have granted as the Hourly Rate (US\$250).

N o	Items	Time Claimed	Time Deemed Reasonable	Award
I.	COMESA Official Gazette Vol 20 n° 1	3 hours	30min	US\$125
II.	Response by 1 st and 2 nd Respondents to Applicant's Reference	6 hours	2 hours	US\$500

TAXATION CAUSE NO. 10F 2018 (RE-TAXATION)

NLM

PR

III.	Response by 1 st and 2 nd Respondents <i>Inter Partes</i> Notion of Motion for Suspension of 2 Judges and Stay of Revision Proceedings	6 hours	Nil	0
IV.	Rules of Procedure for the Election of the Judges of CCJ (2005)	6 hours	2 hours	US\$500
V.	Report of the 34 th Meeting of the Council of Ministers	6 hours	1 hour	US\$250
VI.	Final Communique of the 12 th Summit of COMESA	6 hours	1 hour	US\$250
VII.	Skeleton Arguments	6 hours	2 hours	US\$500
VIII.	Response or Defence to Amended Statement of Facts in Reference made by the Applicant under Art 26 of the Treaty and Art 17(2) of the Treaty	8 hours	2 hours	US\$500
IX.	Report on 35 th Meeting of COMESA Council of Ministers	5 hours	1 hour	US\$250
X.	Respondent's Replication for Production of C.Vs of the 2 Judges	4 hours	1 hour	US\$250
XI.	Respondent's Heads of Argument	3 hours	2 hours	US\$500
XII.	Ruling of FID dated 4 th August 2018	2 hours	2 hours	US\$500
XIII.	Ruling of FID dated 12 th August 2018	3 hours	2 hours	US\$500
XIV.	C.Vs of the 2 Judges	3 hours	1 hour	US\$250
XV.	Letter dated on 5 th August 2018	30 min	30 min	US\$125
	Sub total			US\$5,000

Total for documents perused - US\$5,000.00.

(v) Research

26. The Applicant claims a total of US\$48,600 being time spent doing research on the facts and the law involved and perusing cases cited in the 'defendant's' submissions.

TAXATION CAUSE NO. 10F 2018 (RE-TAXATION)

NLM

PR

Determination on Research

27. We have assessed each claim item by item and granted what we consider to be fair and reasonable. In doing so, we have taken into account what we consider to be the importance of the documents and the amount of time that it may have taken to go through each. We are also guided by the Appeal Ruling at Paragraph 84. We note, however, that some of the authorities cited have been duplicated and those that have been duplicated we have left out.

	Document	Time Claimed	Time Deemed Reasonable	Amount allowed
Treaties				
I.	Vienna Convention on the Law of Treaties, 1969	3 hours	1 hour	US\$125
II.	COMESA Treaty	3 hours	2 hours	US\$500
Rules				
III.	Rules of Procedure for Election of the Judges of CCJ, 2005	3 hours	1 hour	US\$250
IV.	COMESA Court of Justice Rules of Procedure, 2016	3 hours	2 hours	US\$500
Cases: COMESA Court of Justice				
V.	Polytol Paints and Adhesives Manufactures Company Limited v The Republic of Mauritius CCJ Reference No. 1 of 2012	3 hours	2 hours	US\$500
VI.	Malawi Mobile Ltd vs The Government of the Republic of Malawi and MACRA (CCJ Ref. No. 1 of 2015	3 hours	2 hours	US\$500
VII.	4 American Cases	3 hours each	30 min each	US\$500
VIII.	1 Australian Case	No time given	30 min	US\$125
IX.	22 English Cases	3 hours each	30 min each	US\$2,750
X.	6 Indian Cases	3 hours each	30 min each	US\$750
XI.	1 Malawian Case	3 hours	30 min	US\$125
XII.	2 Nigerian Cases	3 hours each	30 min each	US\$250

TAXATION CAUSE NO. 1 OF 2018 (RE-TAXATION)

NLM

PR

XIII.	2 South African Cases	3 hours each	30 min each	US\$250
XIV.	9 Books & Journal Articles	3 hours each	2hours for all	US\$500
	Total			US\$7,625

Total for documents prepared and perused and for research: US\$20,625

Part B – General Care and Conduct

28. Under the heading of ‘General Care and Conduct’, Counsel for the Applicant has maintained that this is a recoverable item and that the only issue was the applicable rate. Counsel further submitted that although the Court had the discretion to determine the rate, it would have to be informed by the same factors of novelty, complexity, seniority of counsel and so forth. The Applicant had claimed 90% of the amount awarded in Part A as the amount payable for General Care and Conduct but in his submissions during the re-taxation, Counsel was of the view it should be upwards of 45% at least.

29. It was submitted for the Respondent that General Care and Conduct is not part of the Rules of Procedure of this Court and therefore, such a claim has no legal basis. Counsel for the Respondent urged the Court to reverse the Award for General Care and Conduct that was awarded in the initial taxation.

Determination on General Care and Conduct

30. We have taken into account the Appeal Ruling as well as submissions by all Counsel on this issue. There is no doubt that the issues that were canvassed in the matter before Court (Ref. No. 1 of 2017) involved fundamental questions on the interpretation of the COMESA Treaty. A lot of time and effort must have gone into preparing the pleadings, supporting documents and other process. We find that claims for General Care and Conduct are a common

feature in Common Law jurisdictions as we stated before. The Appellate Court found at Paragraph 81 that *'Rule 79(1) is nothing other than a broad categorisation of what costs are recoverable'*. It is therefore not to be expected that each and every recoverable cost would be laid out under the Rules.

31. Given that the COMESA Court of Justice is a Regional Court, different parties appearing before it will import certain elements of the practice in their national courts to this Court. The jurisprudence of this Court is, therefore, invariably a *mélange* of different legal systems particularly Common Law and Civil Law. It would be too rigid an approach if the Court declined a claim such as this one merely because it is not expressly provided for in our Rules. The Applicant has submitted that General Care and Conduct is a recoverable cost in Malawi's legal system. When Counsel for the Applicant prepared for the case, he did so with the diligence expected of Counsel practicing in the Republic of Malawi. We therefore see no reason not to allow this prayer.

32. As regards the rate applicable, we are of the view that a rate of 40% of the amount awarded under Part A would be fair and just. The total costs awarded under Part A were as follows:

a) Brief and Instruction Fees	- US\$26,666.67
b) Preparation (Client & Other Parties)	- US\$6,500.00
c) Documents prepared	- US\$8,000.00
d) Documents perused	- US\$5,000.00
e) Research	- US\$7,625.00
TOTAL - US\$53,791.67 X 40 % =	US\$21,516.67

We consequently award US\$21,516.67 for General Care and Conduct.

Awarded for Professional Fees: US\$53,791.67 + US\$ 21,516.67

TOTAL US\$75,308.34

TAXATION CAUSE NO. 1 OF 2018 (RE-TAXATION)

NLM

PR

PART C - Court Attendances Inclusive Travelling and Waiting Time

33. Under this part, the Applicant claims a sum of US\$ 253, 200 US\$ being 844 hours spent attending the Court for hearings and filing in Khartoum, Sudan, Lusaka, Zambia and Nairobi, Kenya including the waiting time thereof. Counsel for the Applicant did concede that, as the Appellate Judge had observed under Paragraph 99, *'travelling and waiting time (cannot) be claimed on the basis of the same chargeable hourly rate that is claimed for work of a legal nature.'* He, however, maintained that these costs are recoverable.

34. Counsel for the Respondent submitted that the onus of proving these claims rest on the shoulders of the Applicant who needed to produce supporting evidence, vouchers, receipts, documents and time sheets to prove and justify that it was entitled to what it was claiming.

Determination on Court Attendances Inclusive Travelling and Waiting Time

35. We start with claims under this heading that are related to the *Inter Partes* Notice of Motion for Suspension of two Judges and the Stay of Revision. It is our considered view that no costs are recoverable in respect of these two applications since these were not related to the two Applications in respect of which costs were granted. Counsel Kanyenda did, in his Oral Submissions, concede as much. However, with respect to the Reference and the Amended Reference, since these are intrinsically linked to the two Applications in respect of which costs were granted, we shall award 50% of expenses incurred which is what we consider to be fair and reasonable. For the avoidance of doubt, those claims that we have not included in the Tables below are those that were disallowed.

36. In arriving at a decision concerning Court Attendances, we have used the Hourly Rate of US\$250 as decided under Paragraph 10 above. For waiting time

charge, we have been guided by Schedule II as has been decided by the Presiding Judge in the Appellate Ruling at Paragraph 91(d) that: "Schedule II allows US\$50.00 per half hour waiting on the Court". Therefore, for waiting time charge, we tax the rate at US\$ 50 per half hour.

Item	Particulars services	Spent Time	Time Awarded	Award
i	Filing and service of the Reference and Inter parties Notice of Motion for suspension of Judge President Chibesakunda and Judge El Bashir and for stay of revision proceedings at Khartoum and Lusaka 28 July 2017 to 16 August 2017	144 hours	Reduced to 12 hours as reasonable time for filing and service of the Reference and 5 hours waiting time	US\$3,000 US\$500
ii	Attending hearing of Application on Jurisdiction and delivery of the Ruling from 03 - 15 January 2018 in Nairobi	108 hours	Reduced to 12 hours for attending the Court session and 5 hours waiting time	US\$3,000 US\$500
iii	Filing and service of the Notification, Amended Reference and Inter parties Notice of Motion for suspension of Judge President Chibesakunda and Judge El Bashir and for Stay of Revision Proceedings at Khartoum and Lusaka 20 January 2018 to 03 February 2018	112 hours	Reduced to 10 hours as reasonable time for filing and service of the Notification and the Amended Reference and 4 hours waiting time	US\$2,500 US\$400
iv	Attending Court for hearing of the Notice of Motion for Production of C.Vs in Lusaka from 14 July to 15 August 2018 in Lusaka	240 hours	Reduced to 20 hours for attendance and 6 hours waiting time	US\$6,000 US\$600
v	Filing and Service of Taxation Bill of Costs in Khartoum and Lusaka from 19 August to 19 September 2018	240 hours	Reduced to 20 hours for attendance and 6 hours waiting time	US\$6,000 US\$600
	Subtotal			US\$23,100

Subtotal for Part C - US\$23,100.00

TAXATION CAUSE NO. 10F 2018 (RE-TAXATION)

PART D – Taxation

37. The Applicant claims US\$18,000 being 60 hours spent preparing the Bill of Costs for taxation and attending for taxation.

Determination on Taxation

38. In our view 60 hours is too long to have spent preparing the Bill and attending court. We do, however, acknowledge that the Bill must have taken a considerable amount of time to prepare given the number of supporting documents that needed to be collated and filed.

39. We award 6 hours for preparation and 3 hours for attending court, making a total of 9 hours. We therefore award US\$2,250.00 being 9 hours multiplied by US\$250 per hour.

Subtotal awarded for Part D – US\$2,250.00.

PART E - Disbursements

(a) Air tickets and Accommodation

40. The Applicant claims a sum of US\$70, 947.69 spent on air tickets, accommodation and other related expenses.

Determination on Air tickets and Accommodation

41. We have taken into account arguments by both sides. We also reiterate as stated elsewhere in this Ruling that, any claim related to the Reference and Amended Reference cannot be de-linked from the two applications for which costs were granted. However, for any claim that is related to either the Reference or the Amended Reference, we have awarded costs at 50% of the amount claimed. This is what we consider to be a fair apportionment.

TAXATION CAUSE NO. 10F 2018 (RE-TAXATION)

PLM

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42. For this part of the Bill, we are guided by the Appeal Ruling at Paragraph 91(e) where the Presiding Judge observed that: *'for disbursements, claims will usually be supported by receipts and that the Taxing Master will first assess whether the claim was necessarily incurred in the proceedings and whether the sum is reasonable or inflated.'*

43. The following table indicates the amount charged by the Applicant on the one hand, and the decision of the Taxing Master on the other for accommodation, travel and other related expenses. The Court has considered the exchange rate at the time the expenses were incurred as follows: 1US\$ =R14.8, KES101, SDG25 and ZMW9.98.

Recoverable Costs on Preliminary Point of Lack of Jurisdiction

N ^o	Payer	Date	Narrative	Observations	Amount Claimed	Amount in USD
01	KANYENDA	3/1/2018- 15/01/2018	Blantyre to JHB & JBH to Blantyre	Recoverable	R4,994.29	US\$337.4
02	NAKA	06/01/2018 - 09/01/2018	JHB to NBO & NBO to JHB	Recoverable	R14,000	US\$946
03	KANYENDA	06/01/2018 - 13/01/2018	JHB to NBO & NBO to JHB	Recoverable	R14,000	US\$946
04	TSAPERAS	10/01/2018 - 13/01/2018	JHB to NBO & NBO to JHB	Recoverable	R14,000	US\$946
05	NAKA	06/01/18	Paid at Four Points for accommodation	Recoverable	US\$1,597.23	US\$1,597.23
06	TSAPERAS Done by	08-09/1/18	Paid at Four	Recoverable	US\$297.29	US\$297.29

	Naka		Points on 09 January 2018			
07	TSAPERAS	10-13/1/18	Accommodation at Four Points	Recoverable	US\$417.99	US\$ 417.99
08	TSAPERAS	6-9/01/18	Accommodation at Four Points	Recoverable	US\$466.41	US\$ 466.41
09	KANYENDA	13-15/1/18	Payment at the Capital on Bath on 15 January 2018	Recoverable	US\$67.5	US\$67.5
10	TSAPERAS	11-13/1/18	Payment at Four Points	Recoverable	KES2,350.00	US\$23.7
11	TSAPERAS	12/1/18	Payment at TRIBE Hotel	Recoverable	KES13,700.00	US\$135.6
12	TSAPERAS	11-13/1/18	Payment at Four Points for accommodation	Recoverable	US\$460.31	US\$460.31
13	KANYENDA	3/01/18	Payment at the Capital on Bath	Recoverable	R3,650	US\$246.6
14	KANYENDA	4/01/18	Payment at Capital on Bath	Recoverable	R4,840	US\$327
TOTAL						US\$ 7,215.03
Preliminary Point on Lack of Jurisdiction						2/3 of total costs as per court order =
						US\$4,810.02
Recoverable Costs on Application for Production of CV's						

TAXATION CAUSE NO. 10F 2018 (RE-TAXATION)

01	KANYENDA	14/07/2018 15/08/2018	Blantyre to JHB and JHB to Blantyre	Recoverable	R4,994.29	US\$337.4
02	KANYENDA	09/09/2018 14/09/2018	JHB to KRT and KRT to JHB	Recoverable.	R16,166	US\$1,092
03	KANYENDA	04/07/2018 07/07/2018	Blantyre to JHB and JHB to Blantyre	Recoverable	R4,994.29	US\$337.4
04	KANYENDA	4- 5/07/2018	Accommod ation and breakfast at the Capital on Bath	Recoverable	R3,810	US\$257.4
05	KANYENDA TSAPERAS	31/7/2018- 13/8/2018	Payment for tickets	Recoverable	R8,659.36	US\$585
06	KANYENDA	18- 19/08/18	Blantyre to JHB and from JHB to Blantyre	Recoverable	R6,381.68	US\$431
07	KANYENDA	10/10/17	Payment at Capital on Bath	Recoverable	R1,210	US\$81.8
08	TSAPERAS	10/10/17	Payment at Radisson Blu	Recoverable	ZMW 9,324.92	US\$934.3
09	KANYENDA	08/10/17 10/10/17	JHB to LUS LUS to JHB	Recoverable	R8,983.29	US\$606.97
10	KANYENDA	04/10/17 11/10/17	Blantyre to JHB JHB to Blantyre	Recoverable	R4,994.29	US\$337.4
TOTALS Application for Production of CV's						<u>US\$5,000.7</u>
Costs Recoverable at 50%						
					Amount in USD	

TAXATION CAUSE NO. 1 OF 2018 (RE-TAXATION)

19

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01	TSAPERAS	31/07/2018 - 13/08/2018	Payment for the stay at Radisson Blu Hotel	US\$4,994.73	US\$4,994.73
02	KANYENDA	14, 18 and 19/02/2018	Accommodations and services at Capital on Bath	R2,380	US\$160.81
03	KANYENDA	15/02/2018 18/02/2018	JHB to NBO NBO to JHB	R16,690.29	US\$1,128
04	KANYENDA	14/02/2018 21/02/2018	Blantyre to JHB and from JHB to Blantyre	R9669.29	US\$653.33
05	TSAPERAS	14/02/2018 21/02/2018	Blantyre to JHB and from JHB to Blantyre	R9669.29	US\$653.33
06	KANYENDA	18/02/2018 19/02/2018	Accommodation at the Capital on Bath	R1,190	US\$80.41
07	TSAPERAS	30/01/2018 and 05/02/2018	Payment at Taj Pamodzi	ZMW4,224.98 R6,423.40 US\$904.00 US\$100.00 US\$60.00	US\$423.34 US\$434 US\$904.00 US\$100.00 US\$60.00
08	TSAPERAS	30/01/2018	Payment receipt from Taj Pamodzi	ZMW4,599.65	US\$460.9
09	TSAPERAS	24/01/2018	Accommodation at Corinthia	SDG 1,632.21	US\$65.3
10	TSAPERAS	24-25/01/2018	Accommodation and services at Corinthia	US\$ 360.48	US\$ 360.48
11	TSAPERAS	24-25/01/2018	Accommodation and services at	US\$ 746.70	US\$ 746.70

TAXATION CAUSE NO. 10F 2018 (RE-TAXATION)

NLM

PR

			Corinthia		
12	KANYENDA	30/01/2018	Bed & Breakfast at The Capital on Bath	R1,190	US\$80.41
13	KANYENDA TSAPERAS	23/01/2018 26/01/2018	Tickets related to these 2 trips	R 31,266.58	US\$2113
14	KANYENDA	19/01/2018 19/01/2018 25/01/2018	Accommodation at The Capital on Bath	R6,050 R3,630 R7,450	US\$409 US\$245.3 US\$503.4
15	KANYENDA	19/01/2018	Payment at the Capital on Bath	R2,420	US\$163.5
16	KANYENDA TSAPERAS	22/01/2018	Visas	SDG1,400	US\$56
17	TSAPERAS	28/11/2017 29/11/2017	JHB to LUS LUS to JHB	R7,499.00	US\$506.7
18	TSAPERAS	8-10/10/17	Accommodation and services at Radisson Blu	US\$ 975.41	US\$ 975.41
19	TSAPERAS	8-10/8/17	Payment at Corinthia	US\$ 1,170.43	US\$1,170.43
20	KANYENDA	15/08/17	Accommodation at Capital on Bath	R1,190.00	US\$80.41
21	KANYENDA	11/08/17	Accommodation as Capital on Bath	R2,380.00	US\$160.8
22	TSAPERAS	13-15/8/17	Accommodation and services at	US\$ 996.04	US\$ 996.04

TAXATION CAUSE NO. 1 OF 2018 (RE-TAXATION)

NLM

PR

			Radisson Blu		
23	KANYENDA	28/07/17 to 02/08/17	Services at the Capital on Bath	R13,090.00	US\$884.5
24	KANYENDA TSAPERAS	8-9/08/17 and 11/8/17	JHB to KRT KRT to JHB	R15,077.29 R15,077.29	US\$1,018.73 US\$1,018.73
25	KANYENDA TSAPERAS	13/8/17 15/8/17	JHB to LUS LUS to JHB	R8,983.29 R8,983.29	US\$607 US\$607
26	KANYENDA	16/8/17	JHB to Blantyre	R4,994.29	US\$337.45
27	KANYENDA	28/07/17	Payment at the Capital on Bath	R7,140.00	US\$482.43
28	KANYENDA TSAPERAS	02/08/17	Visas	SDG1,400	US\$56
TOTAL - US\$23,697.57 X 50% = US\$11,848.80					

(b) Translation of Documents

44. The Applicant claims a sum of US\$58, 652.63 for documents translated in the proceedings. The Court has analysed each item claimed. The table below shows the amount allocated for this heading as well those that were rejected.

N	DATE of invoice	AMOUNT (US\$)	OBSERVATIONS / Amount allowed
1	04/08/2018	2,025	US\$2,025 awarded at 100 %
2	27/07/2018	14,567.26	US\$14,567.26 awarded at 2/3 as it is on the jurisdiction issue = US\$9,711.50
3	27/02/2018	9,463. 92	Not recoverable as it is related to Submissions for Suspension of Election of Judges
4	30/05/2018	9,215.29	US\$9,215.29 awarded at 100 %
5	15/11/20 8	6,223.97	Not recoverable - related to Submissions for Suspension of the Election of Judges
6	26/10/2018	1,478.33	Not recoverable - out scope
7	25/10/2018	15,700.42	Not recoverable - out scope
		Subtotal	US\$20, 951.79

TAXATION CAUSE NO. 1OF 2018 (RE-TAXATION)

NLM

PR

(c) Sundry Expenses

45. The Applicant claims an amount of US\$5,000 being sundry expenses such as photocopying, telephone expenses, emails and transport. We allow all this amount given that it is obvious that in order to prosecute the matter as a whole, the Applicant did incur various sundry expenses.

Subtotal for Part E - Disbursements:

a) Air tickets and Accommodation	- US\$ 21,659.50
b) Translation	- US\$20,951.80
c) Sundry Expenses	- US\$5,000.00
<u>TOTAL</u>	<u>US\$47, 611.30</u>

Expenses for the Fresh Taxation

46. Before we delve into the final issue of Value Added Tax, there is an issue of the costs of fresh taxation which we must address. Both Counsel did file written submissions in support of the fresh taxation. They also attended before the Taxing Officers as indicated elsewhere in this Ruling.

47. The court session lasted approximately three hours. We award the Applicant costs for the fresh Taxation as follows:

- a) Preparation - US\$250 X 2 hours - US\$500
- b) Travel Costs – since no air ticket was produced, we have based our award on a recent reservation for an Economy Class Ticket made by the Court - US\$543;
- c) Accommodation and Subsistence – US\$250 X 2 days = US\$500;
- d) Court Attendance – US\$250 X 3 hours = US\$750;
- e) Waiting Time – US\$100 X 1 hour = US\$100;

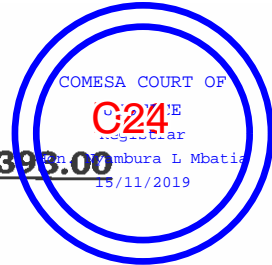
TAXATION CAUSE NO. 10F 2018 (RE-TAXATION)

NLM

PR

Total

US\$2396.00



Value Added Tax (VAT) Claim

48. The Applicant claims an amount of US\$ 109, 484.15 being 16.5 % VAT applicable in the Republic of Malawi arising from incurred professional fees and disbursements. The Applicant has contended that COMESA is not completely immune from paying taxes, duties and levies. The onus was therefore on it (COMESA) to demonstrate to the Court that they do not pay VAT.

49. The Respondent's Counsel urged the Court to strike off the claim for VAT because COMESA is exempt from paying Value Added Tax in all Member States as per Article 4 of Legal Notice No 2 of 1983 (the Agreement on Privileges and Immunities) which states that: "*the Common Market, its income, assets and other property shall be exempt from all direct taxes, except that the Common Market shall not claim exemption from taxes or duties which are, in fact, no more than charges for public utility services*". The production of this document, which the Court had initially declined, was allowed after due consideration of the prevailing circumstances from the time the matter was referred back to the Taxing Master for re-taxation. We stand by that decision.

50. Based on that Agreement, Counsel for the Respondent implored the Court to reverse the 16.5 VAT which COMESA has been adjudged to pay in the previous Taxation Ruling.

Determination on VAT claim.

51. The issue to determine is whether COMESA is exempt from paying Value Added Tax (VAT). The legal instrument cited by the Respondent, the Agreement on Privileges and Immunities, is just that – an agreement. It is meant to guide Member States in their dealings with COMESA in so far as taxes and other

TAXATION CAUSE NO. 1 OF 2018 (RE-TAXATION)

NLM

PR

24

C24

levies are concerned. Unfortunately, the mere existence of the legal instrument does not, of itself, prevent a COMESA Member State from levying taxes. It is upon each of the Member States to adhere the letter and spirit of the legal instrument. In the instant case, the party that is claiming exemption is COMESA and not Malawi Mobile Limited. Malawi Mobile limited is under an obligation to comply with the law applicable in the Republic of Malawi and one of those laws is the requirement for payment of 16.5% VAT. If COMESA alleges it is exempt, that is a matter between it, and the Government of the Republic of Malawi, not between it and Malawi Mobile Limited or between Malawi Mobile Limited and the Government of the Republic of Malawi.

52. In Reference No. 1B/2000 – Application No. 1D/2000 – the Eastern and Southern African Development Bank (PTA Bank) and Dr. Michael Gondwe (Applicants) versus Martin Ogang (Respondent), the COMESA Court of Justice (Korsa, Nyankiye, Kalaile, Sakala and Ogoola LJJs), stated as follows at page 5 of their Ruling:

'It is a well-known principle of law that an international organization cannot confer on itself, privileges and immunities to be granted to it by its member states. The organization may set out the privileges and immunities that it considers necessary, which can only be given the force of law in the territories of its Member States by the Member States themselves.....That the Board of Governors of the PTA Bank has itself, the right to confer privileges and immunities on the Bank, which has the force of law in the Member States, is, therefore, a fallacy.....They (privileges and immunities), can only be given the force of law in the COMESA Member States if the Member States themselves provide for it in their national laws.'

53. Going by the above precedent from our very own Court, it is clear that the Agreement on Privileges and Immunities would confer exemption from taxes and levies only if, and where, COMESA Member States give this legal instrument the force of law (emphasis ours). No evidence was tendered before

TAXATION CAUSE NO. 1 OF 2018 (RE-TAXATION)

NLM

PR

us by the Respondent to show that indeed, the Government of the Republic of Malawi has given the Agreement the force of law. As stated, the mere existence of a legal instrument does not prove that it is automatically enforced.

54. In our considered view, if the Respondent alleges that it is exempt from paying VAT, it is upon it to make a request to the concerned Government not to recover VAT from the Applicant (Malawi Mobile Limited) or, in the alternative, to claim a refund of VAT from the concerned said Government once the same is paid. The onus does not lie with Malawi Mobile Limited. Since we delivered our first Ruling in January 2019 granting the Applicant a certain amount on the claim for VAT, the Respondent has not tendered any evidence to show that it has engaged the Government of the Republic of Malawi with a view to getting a refund.

55. In conclusion, the Respondent has failed to prove that it is not liable to pay VAT and we therefore find that VAT is recoverable at 16.5% as claimed.

Summary of Award

	Heading	Award	Totals
1.	Professional Fees		
	Brief and Instruction Fees	US\$26,666.67	
	Preparation	US\$6,500.00	
	Documents Prepared	US\$8,000.00	
	Documents Perused	US\$5,000.00	
	Research	US\$7,625.00	
	Total	US\$53,791.67	
	General Care and Conduct – 40% of US\$53,791.67	US\$21,516.67	
	Costs Awarded for the Initial Taxation	US\$2,250.00	

	Costs Awarded for Fresh Taxation	US\$2393.00	
	Total Awarded for Professional Fees: US\$53,791.67 + US\$ 21,516.67 + US\$2,250.00 + US\$2393.00		US\$79,951.34
	Court Attendances Inclusive Travelling and Waiting Time	US\$23,100.00	US\$23,100.00
	Disbursements		
	Air tickets and Accommodation	US\$ 21,659.50	
	Translation	US\$20,951.80	
	Sundry Expenses	US\$ 5,000.00	
	Total		US\$47,611.30
	Total		US\$150,662.64
	Add 16.5% VAT	US\$24,859.34	US\$24,859.34
	TOTAL		US\$175,522.00
	LESS PAID on 01/03/ 2019		US\$39,977.34
	LESS PAID on 18/04/2019		US\$6,596.26
	GRAND TOTAL		US\$128,948.40

56. In the end, we award the Applicant a total of 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.

57. The Respondent shall pay the taxed amount within sixty (60) days of the date hereof failure to which interest shall thereafter accrue at the commercial bank rates prevailing in the Republic of Malawi until payment in full.

It is so ordered.

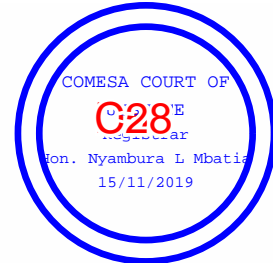
TAXATION CAUSE NO. 1 OF 2018 (RE-TAXATION)

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DATED and DELIVERED at Lusaka, Zambia

This ^{15th} day of ^{November} 2019



.....^{Nyambura}.....

HON. NYAMBURA L. MBATIA - TAXING MASTER

.....^{Philippe H. Ruboneza}.....

HON. PHILIPPE H. RUBONEZA – ASSISTANT TAXING MASTER

TAXATION CAUSE NO. 1 OF 2018 (RE-TAXATION)

28

C28