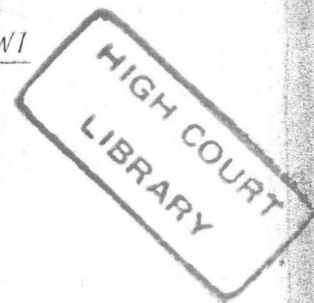


IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 52 OF 1992



BETWEEN:

PHYLLIS NTABA

1ST PLAINTIFF

ZIONE NTABA, PILILA NTABA,
UZAYANI NTABA, and SUNGENI
NTABA (infants suing by their
next friend, the 1st Plaintiff

2ND PLAINTIFFS

and

THE TRUSTEES OF THE COMMERCIAL
BANK OF MALAWI PENSION FUND

1ST DEFENDANTS

THE PERSONAL REPRESENTATIVES OF
THE ESTATE OF GEORGE JUSTICE
MAURICE NTABA (DECEASED)

2ND DEFENDANTS

Coram:

The Hon. The Chief Justice
Msisha of counsel for the plaintiffs
Sauti Phiri of counsel for the 1st defendants
Chirambo)
Chikopa) of counsel for the Administrators
Kalimbuka Gama, Court Clerk.

RULING

This is an application by summons seeking an Order for monies due under the Commercial Bank Pension Fund. The deceased, George Justice Maurice Ntaba, was a member of the Pension Fund established by the Commercial Bank of Malawi. The funds which accrued at his death were in the hands of the Commercial Bank of Malawi as Trustees of the Pension Fund they operate. Those funds were paid over to the Executors of the deceased.



This application seeks an order to declare whether the trust funds from the Commercial Bank of Malawi, which were in the hands of the trustees of the fund, should have been paid over to the Executors of the Estate of late George Justice Maurice Ntaba. And secondly, the application seeks an order to declare that the said funds were erroneously paid over to the said Executors and that the funds should be repaid to the Trustees who should deal with the funds according to the Constitution and Rules of the fund and for the benefit of the plaintiffs.

All the parties are agreed that the funds exist and that they were paid over to the Executors. They further agree that the funds should not have been paid over to the Executors because they do not form part of the general estate of the deceased.

Under the Rules and Constitution of the Commercial Bank of Malawi Pension Fund clause 3(6) of those rules directs that the funds are vested in the Trustees of the Pension Scheme and clause 25 directs the manner in which the funds payable out of the Pension Fund shall be dealt with by the Trustees where a deceased member has left a widow and children.

Mr Sauti Phiri, who appeared for the Trustees, has stated that the funds were erroneously paid over to the Executors and that when the Trustees discovered the mistake an equivalent amount of money was paid over to the beneficiaries. The Administrator General, who is a co-executor, while conceding that the funds do not form part of the general estate of the deceased, has held on to the funds because he was waiting for a Court Order to direct which of the two documents was more effective namely the Pension Fund Constitution & Rules and the affidavit executed by the deceased known as **PN 2** in these proceedings. He informed this Court that the co-executors had different views on the issue and that the fact that there are two counsel appearing for the executors explains the difference of opinion that exists. The Administrator General further informed the court that his view has always been that should the Court order a refund he would raise no objections. Mr Chikopa also has a similar line of argument although he himself contended that in view of **PN 2** the Trustees were entitled to transfer the funds to the Executors. In my view, although there wasn't much argument on it, **PN 2** does not affect the status of the funds under the Pension Scheme, and it is doubtful whether the deceased, again there was no full argument on this, was entitled to make **PN 2**


directing how the funds should be dealt with. In my judgment, when the deceased became a member of the Pension Scheme he accepted the terms and conditions on which the funds, accrued after his death, would be dealt with and whether he was entitled to digress from those rules remains a moot point.

Duties of Trustees are imperative and the law requires strict compliance with the terms and instruments which create the trust. The standard required is that of *exacta diligentia* and failure to comply with it may render the trustees liable for breach of trust. It is the duty of the trustees to deal with the pension fund as directed by clause 25(4) of the Pension Scheme. Indeed one of the duties of a trustee on becoming a trustee is to preserve property subject always to the power of investment. I am satisfied that the trustees were not entitled under the Rules and Consitution of the Pension Scheme to pay over the funds to the Executors. The Executors were advised that the funds they had received from Commercial Bank of Malawi were trust funds and that they formed no part of the deceased estate. The Executors were made aware of this fact on 19th of December, 1991 but inspite of that knowledge the Administrator General, who is a co-executor, continued to hold on to the funds. I am satisfied and I find that had the Administrator General sought legal advice and had he done so it would have been apparent to him that the funds had been transferred to him in breach of trust. He never did that and in my view these proceedings have been necessitated by his refusal to handover the money to the trustees.

As I have already indicated earlier in this Ruling when the trustees discovered the error they had made they acted promptly and paid to the beneficiaries a similar amount. The holding of these funds by the Administrator General has deprived the beneficiaries of the oppourtunity to earn some interest on those funds. Accordingly, it is ordered that those funds which accrued in the pension scheme on the death of the deceased, should not have been paid to the executors because they form no part of the deceased estate.

It is further ordered that the funds which the Administrator General is still holding which came from the trustees of the pension fund, should be paid back to the trustees of the pension scheme with interest to run from the 19th of December 1991. The rate of interest will be determined later. The Administrator General, because of his delay in refunding the money inspite of his knowledge of the true nature and status of it, will personally bear costs occasioned by this application.

*Made in Chambers this 31st day of March, 1992 at
Blanyre.*

A handwritten signature in black ink, appearing to read 'R.A. Banda', with a stylized flourish at the end.

R.A. Banda
CHIEF JUSTICE