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**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
PROBATE CAUSE NUMBER 5420 OF 2017**

**IN THE MATTER OF THE DECEASED ESTATE OF ELARD SADIMBA
ALUMANDO (DECEASED)**

BETWEEN:

DIANA TEMBO ALUMANDO

PLAINTIFF

AND

ALUMANDO SADIMBA

DEFENDANT

**OLD MUTUAL LIFE ASSURANCE
(MW) LIMITED**

INTERESTED PARTY

CORAM: JUSTICE M.A. TEMBO

Kambale, Counsel for the plaintiff
Domasi, Counsel for the defendant
Chibwe, Counsel for the Interested Party
Mpasu, Official Court interpreter

ORDER

This is the order of this Court on the interested party's application that part of the order obtained by the plaintiff and the defendant herein that the interested party pay out, to some beneficiaries of the deceased estate herein, part of the pension benefits due to the deceased person herein be set aside for being irregular.

The deceased herein died on 10th June 2016. The plaintiff is the widow of the deceased and the defendant is the deceased's father.

The plaintiff and the defendant obtained letters of administration with regard to the deceased estate herein. They later applied to this Court and obtained an order, part of which, required the interested party to pay out certain sums to some of the beneficiaries that are facing hardship in this matter pending the final order of this Court on the distribution of the deceased estate.

The plaintiff and the defendant informed this Court, at the time they obtained the impugned order, that the interested party was ready to pay out the pension benefits herein but was only waiting for the proportions in which the deceased estate was to be distributed to the beneficiaries herein.

The order distributing the estate has been delayed due to matters arising out of the dispute between the plaintiff and defendant as administrators of the deceased estate.

The interested party is a pension fund administrator and holds pension benefits for the benefit of the deceased herein arising from deposits made by the deceased and his employer into the said fund.

The interested party contends that the order obtained by the plaintiff and the defendant in respect of the pension benefits herein was erroneously made.

The interested party filed a sworn statement, through its Claims Manager, indicating the basis for seeking to set aside the impugned order of this Court.

The Claims Manager stated that the interested party administers the pension scheme for Dream-Community of St Egidio. He then stated that the deceased was a member of the said pension scheme by virtue of being an employee of Dream.

He stated that the deceased herein was entitled to a certain accumulated sum of money by 1st February 2018.

He then noted that on 11th January 2018, this Court made an order directing the interested party to pay out part of the benefits held by the interested party to some of the beneficiaries herein.

He then stated that at the time this Court was asked to make the order herein it was not made aware of the following

1. That the pension entitlements of a deceased member of a fund do not form part of that deceased member's estate.
2. Benefits payable out of the fund on a member's death can only be paid out as directed in the nomination by a member of the fund or on such proportions which the trustee of the fund decides where the said nomination is not available.

He then stated that had this Court been made aware of the foregoing it would not have made the impugned order herein. The interested party then asked that the order be set aside.

The parties then submitted their arguments on the instant application.

The interested party submitted first. It correctly submitted that a person who is not a party but is affected by an order may apply to set aside or vary the said order.

It referred to Order 23 rule 8 of the Courts (High Court) (Civil Procedure) Rules which provide that a person who is not a party but who is directly affected by a judgment or order may apply to have the judgment or order set aside or varied.

The interested party then submitted that pension benefits are solely regulated under the Pensions Act, 2010.

It pointed out that the Pensions Act governs how pensions benefits may be administered and paid by fund trustees.

It referred to section 70 of the Pensions Act which provides that

- (1) A member of a pension fund may give the trustee a written nomination directing the trustee to pay the fund member's benefits on his death to all or any of the following –
 - (a) the member's widow or widower, as the case may be;
 - (b) the member's child; or
 - (c) the member's close relation.
- (2) A nomination shall set out the amount or proportion of the benefits to be paid to each of the persons specified.
- (3) A member may amend a nomination by written notice to the trustee in line with the fund rules.
- (4) A member may revoke a nomination by written notice to the trustee.
- (5) A nomination shall be revoked by the divorce or later marriage of the member.
- (6) A nomination and a revocation of a nomination shall be signed by the member, but if the member is unable to sign his name, his thumb impression may be affixed in the presence of-

- (a) a trustee of the fund;
 - (b) if the trustee is a corporate trustee a director or officer of the trustee; or
 - (c) a person prescribed by Registrar's directives for purposes of this section.
- (7) If the thumbprint of the member is so affixed, the nomination or revocation shall be deemed to be signed by the member.
- (8) The trustee shall not accept a nomination or revocation of a nomination if it appears to the trustee that the nomination or revocation was not made voluntarily.

It then referred to section 71 of the Pensions Act which provides that

- (1) If a member's nomination to the trustee of a pension fund is current at the death of the member, then, subject to this section, benefits payable out of the fund on the member's death shall be paid as directed in the nomination.
- (2) The trustee shall not pay the death benefits in accordance with the nomination if it appears to the trustee that the nomination was not made voluntarily.
- (3) If, in relation to all or part of the benefits payable on the death of a member of a pension fund-
 - (a) the member does not have a nomination current at the time of his death; or
 - (b) the nomination is invalid; or
 - (c) under sub-section 70 (8), the trustee has not accepted the nomination from the member,

then, subject to this Act, and notwithstanding any other law to the contrary, those benefits, or that part of those benefits, shall be paid, in such proportions as the trustee determines, to a person or persons determined by the trustee of the fund, being a person or persons who, the trustee is satisfied, was or were financially dependent on the member at the time of his death.

- (4) If a person to whom benefit are to be paid under this section, other than a surviving spouse of the member, is under the age of eighteen years, the amount of the benefit shall be held by the trustee in a separate trust for the person, to be paid to him when he turns eighteen years and the following shall apply in that case-
 - (a) the amount shall not be part of the fund assets of the pension fund, but may be invested and applied together with those fund assets;
 - (b) the trustee may at any time pay to the parent or guardian of the person any amount from the capital or income of the trustee as the trustee thinks appropriate for the maintenance, education or welfare of the person;
 - (c) the trustee shall not be bound to see to the application of the amounts paid under paragraph (b).

It also referred to section 72 of the Pensions Act which provides that

- (1) Where an employee dies, his entitlements under the life insurance policy maintained under section 15 shall be paid to the deceased member's account.

- (2) The trustee shall apply the amount paid under subsection (1) of this section in accordance with the requirements of section 71.

The interested party then submitted that pension or death benefits are not part of the estate of the deceased member of the pension fund.

It contended that the Pensions Act differentiates pension benefits from other property belonging to a member of a pension fund that has withdrawn due to death. It added that the Pensions Act excludes the pension benefits from being included as part of the estate of such a member. It referred to section 73 of the Pensions Act which provides that

- (1) Except as provided by this Act-
 - (a) amounts paid as contribution to a pension fund in respect of a member;
 - (b) a member's entitlement to benefits in a pension fund; and
 - (c) amounts paid out of a pension fund by way of benefits in respect of a member,shall not be liable to be attached, sequestered or levied upon for or in respect of any debt or claim whatsoever.
- (2) Except as provided by this Act, a member's entitlement to benefits in a pension fund is not part of his estate.

It further referred to section 85 of the Pensions Act which provides that

The Estates Duty Act and any other written law relating to deceased estates, shall not apply to a member's entitlement to benefits in a pension fund.

The interested party then contended that the pension benefits of the deceased herein do not form part of his deceased estate.

Furthermore, that the principles for distribution of testate or intestate property under the Deceased Estate (Wills, Inheritance and Protection) Act or any other law relating to deceased estates do not apply to the pension or death benefits as the case may be.

The interested party contended that it has demonstrated that pension benefits ordered by this Court to be paid out are not part of the deceased estate before this Court and that this fact was not brought to the attention of this Court at the time the order was sought.

The interested party then submitted that this is a proper case in which this Court should set aside the impugned order herein.

The plaintiff and the defendant took a contrary view and oppose the instant application. They submitted as follows.

They referred to section 3 (1) of the Deceased Estate (Wills, Inheritance and Protection) Act defines institutional money as follows

“institutional money” means money –

- (a) held on a deposit or current account with a bank or a financial or similar institution;
- (b) due under any policy of insurance or assurance;
- (c) due under provisions of any provident fund or similar provision for employees;
- (d) by way of gratuity, pension, terminal benefits, leave pay or otherwise under the terms of employment of the deceased;
- (e) received by any public officer, other than the Administrator General, or received by a bank or a financial or similar institution, as representing the property of a person domiciled in Malawi who has died outside Malawi;
- (f) held by way of treasury bills or other government bonds;
- (g) due under a court order;
- (h) due under the Workers’ Compensation Act; or
- (i) held in or with such other institution as the Minister may prescribe by an order published in the Gazette;

The next referred to section 63 (1) of the Deceased Estate (Wills, Inheritance and Protection) Act which provides that

Where upon the death of a person, institutional money is payable to the executor or administrator or to members of the immediate family or to dependants of that person or to any person, such institutional money shall be dealt with in accordance with this section.

They further referred to section 63 (6) of the Deceased Estate (Wills, Inheritance and Protection) Act provides that

Where institutional money is due under a contract of employment, a policy of insurance or assurance, a provident fund, the employer, insurer or administrator of a provident fund shall, if it appears that the institutional money is not disposed of by a valid will, refer the matter to court, setting out the facts as known according to available information and shall request the court to certify the beneficiaries and their shares and the creditors of the

deceased, and the certificate of the court shall be authority for the employer, insurer or administrator of a provident fund to make payments to the beneficiaries and the creditors.

They also referred to section 20 of the Deceased Estate (Wills, Inheritance and Protection) Act which provides that

Subject to this section, the High Court shall have jurisdiction in all matters relating to the probate and the administration of estates of deceased persons, with power to grant probates of wills and letters of administration to the estates of deceased persons and to alter or revoke such grants.

They also referred to section 73(1) of the Deceased Estate (Wills, Inheritance and Protection) Act which provides that on the application in the prescribed manner by an interested person, a court shall have jurisdiction, where there is a dispute, in relation to a deceased person's estate (h) to decide any other matter in dispute which the court considers to be competent for its jurisdiction.

They then submitted that it is quite clear from the law above that the benefits being held by the interested party form part of institutional money and should be dealt with according to Section 63 (6) of the Deceased Estate (Wills, Inheritance and Protection) Act.

They contended that this Court has jurisdiction to decide any issues under section 73 of the Deceased Estate (Wills, Inheritance and Protection) Act, including making interim advances to the certified beneficiaries.

They submitted that the beneficiaries under the estate of the deceased herein were already certified and agreed upon when applying for letters of administration and these are the same beneficiaries who will be entitled to benefit when this Court makes its determination.

They submitted further that, if this Court has jurisdiction to decide any other matter which it considers competent, what would prevent it from making interim advances to provide for vulnerable beneficiaries like children and minor dependents of the deceased?

The plaintiff and the defendant observed that section 63 of the Deceased Estate (Wills, Inheritance and Protection) Act provides among other things that the certificate of the court shall be authority for the employer, insurer or administrator of a provident fund to make payments to the beneficiaries.

And, they therefore do not see why the interested party should not act on this Court's order.

They submitted further that, by not releasing the money, the deceased's children have been denied school fees, guards have not been paid and this can lead to reducing in value of the estate.

They therefore prayed that the interested party's application be dismissed with costs.

The plaintiff and the defendant then submitted that assuming that there is a conflict between the Pensions Act and the Deceased Estate (Wills, Inheritance and Protection) Act, which we deny, they submit as follows.

That the Pensions Act 2010 came into force in April 2011. And that, on the other hand, the Deceased Estate (Wills, Inheritance and Protection) Act came into force in August 2011.

They submitted that according to section 15 of the General Interpretations Act, where one written law amends another written law, the amending written law shall, so far as it is consistent with the tenor thereof, and unless a contrary intention appears, be construed as one with the amended written law.

They then referred to the English case of *Vauxhall Estates Ltd v Liverpool Corporation* [1932] 1 K.B. where the court stated as follows at page 746

If it is once admitted that Parliament, in spite of those words of the sub-section has power by a later Act expressly to repeal or expressly to amend the provisions of the sub-section and to introduce provisions inconsistent with them, I am unable to understand why Parliament should not have power impliedly to repeal or impliedly to amend these provisions by the mere enactment of provisions completely inconsistent with them.

They also referred to the case of *Street Estates, Limited v Minister of Health* [1934] 1 K.B. at page 389, where the Court stated that

I asked counsel what meaning he attached to those words, and he said they meant nothing, because the Act of 1919 had said that nothing inconsistent with it shall have any effect. That appears to me absolutely contrary to the constitutional provision that parliament can alter an Act which it has previously passed. It can do so by repealing the previous Act, and I gather counsel admits that, if it does that, it does not matter that the Act of 1919 has said that Act shall have no effect. But it can also do it another way, namely, by enacting a provision clearly inconsistent with the previous Act; without going through them, four pages of MAXWELL ON THE INTERPRETATION OF STATUTES are devoted to cases in which without using the word "repeal" Parliament has repealed a previous provision by enacting a provision by enacting a provision inconsistent with it. In those circumstances, it seems to me impossible to say that these words...have no effect.

And at page 390 where Maugham L.J. went on to state as follows

It seems to me, in the first instance, plain that the legislature is unable, according to our constitution, to bind itself as to the form of subsequent legislation; it is impossible for Parliament to say that in a subsequent Act of Parliament dealing with this subject matter shall there never be an implied repeal. If Parliament chooses in a subsequent Act to make it plain that the earlier statute is being to some extent repealed, effect must be given to that intention just because it is the will of the Legislature.

They then referred to the Kenyan case of *Nzioka & 2 others v Tiomin Kenya Ltd*, Mombasa civil case no. 97 of 2001, where Hayanga J. had this to say

The EMC Act being a more recent Act must be construed as repealing the old Act where there is inconsistency....where the provision of one statute are so inconsistent with the provisions of a similar but later one, which does not expressly repeal the earlier Act, the courts admit an implied repeal.

The plaintiff and the defendant then submitted that as they have stated above, and while they disagree that there is a conflict between the Deceased Estate (Wills, Inheritance and Protection) Act and the Pensions Act, the Pensions Act 2010 came into force in April 2011 whereas the Deceased Estate (Wills, Inheritance and Protection) Act came into force in August 2011.

They pointed out that the Deceased Estate (Wills, Inheritance and Protection) Act made clear provisions on institutional money which include employee benefits and pensions. And that any perceived inconsistency between the two Acts should therefore be construed in favour of the Deceased Estate (Wills, Inheritance and Protection) Act.

They submitted therefore that the money being held by the interested party is institutional money and this Court has jurisdiction over the same under section 63 of the Deceased Estate (Wills, Inheritance and Protection) Act.

They added that the impugned Order of this Court is like a certificate envisaged under section 63 of the Deceased Estate (Wills, Inheritance and Protection) Act and should be obeyed by the interested party.

The plaintiff and the defendant added that even if it was assumed that they agreed with the interested party, the sums ordered by this Court to be paid out by the interested party should be taken as an advance payment covered under section 71 of the Pensions Act.

They pointed out that this Court will note that under section 71 (4)(b) of the Pensions Act, a trustee of a fund may at any time pay to the parent or guardian a sum he thinks fit for the education and welfare of the person. And that the person is defined there.

They pointed out that the impugned order herein indicates that the sums paid out in paragraph 1 of the same are an advance payment for school fees for the deceased's children and dependents and for upkeep of his minor child. They contended that surely those payments are covered under section 71 of the Pensions Act.

They added that the money ordered to be paid out should not be labelled different just because it has been ordered under a different Act and not the Pensions Act. They added further, that it is actually the duty of the interested party to do what this Court ordered by the impugned order and that otherwise it is common knowledge that the beneficiaries herein are suffering great hardship.

They therefore prayed that the interested party's application should be dismissed and considering the hardship its failure to pay has caused to the beneficiaries, the interested party should be given 24 hours to comply with the impugned Order of this Court.

In reply, the interested party agreed that the Deceased Estate (Wills, Inheritance and Protection) Act indeed provides for institutional money to include pension benefits as submitted by the plaintiff and the defendant.

It however pointed out that there is no conflict between the Pensions Act and the Deceased Estate (Wills, Inheritance and Protection) Act. And that in fact, the Deceased Estate (Wills, Inheritance and Protection) Act recognizes the position that pensions and death benefits do not form part of the deceased estate.

The interested party referred to section 2 (2) of the Deceased Estate (Wills, Inheritance and Protection) Act on application of the said Act, which is in the following terms

This Act shall not apply to any benefit or other entitlement of a deceased person occurring out of a pension fund unless that benefit or entitlement was already payable or had accrued at the time of the deceased's death.

The interested party contended that the Deceased Estate (Wills, Inheritance and Protection) Act will apply to pension benefits only if the same accrued or were payable at the time of the death of the deceased. It contended that this is not the case in this matter. And that, the pension benefits in this matter are excluded.

The interested party insisted that the application of the Deceased Estate (Wills, Inheritance and Protection) Act to pension benefits as institutional money must be understood in the context of section 2 (2) of the Deceased Estate (Wills, Inheritance and Protection) Act.

The interested party submitted that it had also considered section 64 (1) (e) of the Pensions Act which provides on when benefits are payable as follows

Subject to this Act, benefits in respect of a member of a pension fund shall be payable out of the fund only if, on application, the trustee is satisfied that the member has died.

The interested party contended that section 64 (1)(e) of the Pensions Act has nothing to do with its argument in this matter.

It then contended that section 63 (1) of the Deceased Estate (Wills, Inheritance and Protection) Act recognizes what the Pensions Act is saying on pensions and death benefits.

This Court observes that it made the order herein in exercise of its powers under the Deceased Estate (Wills, Inheritance and Protection) Act on the application of the plaintiff and the defendant.

This Court has carefully reflected on the argument made by the interested party and agrees that by virtue of section 2 (2) of the Deceased Estate (Wills, Inheritance and Protection) Act, the Deceased Estate (Wills, Inheritance and Protection) Act does not apply to any benefit occurring out of a pension fund unless the benefit was already payable or had accrued at the time of the deceased's death.

This Court has concluded that section 2 (2) of the Deceased Estate (Wills, Inheritance and Protection) Act is a clear provision that excludes application of the Deceased Estate (Wills, Inheritance and Protection) Act from applying to pension fund benefits or entitlements.

However, the only time the Deceased Estate (Wills, Inheritance and Protection) Act will apply to pension benefits or entitlements is in a case where the said benefits were already payable, that is due for payment out, as prescribed under the Pensions Act and the member of the pension fund dies before he gets paid what was already due to him or her.

That position is in synch with the relevant provisions of the Pensions Act as follows. Section 73 (2) Pensions Act is specific that a member's entitlement in a pension fund is not part of that member's estate.

Section 85 of the Pensions Act states the same position that other laws on deceased estates shall not apply to a member's entitlement to benefits in a pension fund as the same are subject to administration under the Pensions Act.

Contrary to the argument by the plaintiff and the defendant, the interested party is right that in that case, section 64 (1) (e) of the Pensions Act which indicates that death is one of the reasons for payment out of pension benefits cannot in the circumstances be contended to bring pension benefits under section 63 of the Deceased Estate (Wills, Inheritance and Protection) Act as institutional money.

As submitted by the interested party, the deceased's benefits under the pension fund herein were not already payable and had not accrued by the date of his death. As such, the Deceased Estate (Wills, Inheritance and Protection) Act is not applicable to the benefits herein. This Court could therefore not properly have made the order that it was asked to make by the plaintiff and the defendant herein.

The interested party is therefore right in submitting that, contrary to the ascertains by the plaintiff and the defendant, there is no conflict between the Pensions Act and the Deceased Estate (Wills, Inheritance and Protection) Act on the facts of the present matter.

There is therefore no room on the facts of this matter for arguing, as the plaintiff and the defendant did, that the Deceased Estate (Wills, Inheritance and Protection) Act impliedly repeals the Pensions Act. The two Acts are in proper synchrony.

Had it been the case that the deceased's pension benefits were already payable at the time of his death as prescribed under the Pensions Act then the said benefits would have properly been part of his estate as institutional money as contended by the plaintiff and the defendant. In that case, section 63 (1) and (6) of the Deceased Estate (Wills, Inheritance and Protection) Act would have applied. However, that is not the case in this matter.

Consequently, this Court cannot say more on that point in terms of the interplay between the Pensions Act and the Deceased Estate (Wills, Inheritance and Protection) Act.

This Court further agrees with the interested party that in the case at hand, on the death of a member of the pension fund, his personal legal representative can apply for the payment out of the pension benefits in terms of section 64 (2) of the Pensions Act. The administrator of the deceased estate must therefore apply for payment out of pension benefits.

It is not clear whether the administrators of the deceased estate as legal personal representatives of the deceased in the present matter applied for payment out of the benefits herein by the pension fund.

In the event that there is no such application, it is envisaged that the benefits may not be paid out. However, when the pension fund is notified of the death of a deceased, which is inevitable in the employment set up, this Court would envisage that the pension fund administrator would be proactive to sensitize and notify the deceased's dependents of the need for such an application by a legal personal representative of the deceased. The administrator would then proceed under section 71 of the Pensions Act to make the payment out.

Otherwise we would end up with a situation that we have in this matter where the deceased died in June 2016 and up to now his legal personal representatives had not been advised on the need to apply for the payment out forcing them to resort to irregular measures due to the hardships faced by the deceased's dependents.

This Court is not aware if the deceased made nominations in this matter for distribution of his benefits by the interested party under section 71 (1) of the Pensions Act.

This Court has not been advised by the interested party why the interested party has not paid out the benefits, if such nominations are there.

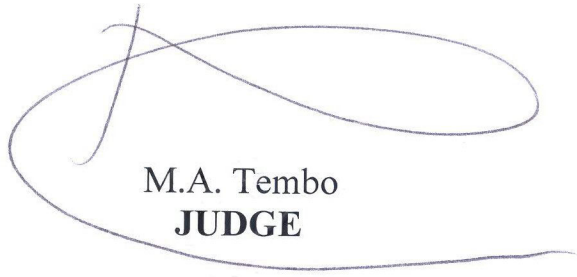
It is clear that it is now imperative barring any legal impediments that the interested party must act accordingly and exercise its powers, upon application for payment out by the personal representative of the deceased who is now the Administrator General.

Contrary to the contention by the plaintiff and the defendant, the payments that this Court ordered to be made by the interested party for the benefit of the deceased's children can therefore only be properly made by the interested party upon the deceased's death in line with section 71 (4) (b) of the Pensions Act and on application by the deceased legal personal representative under section 64 (2) of the Pensions Act, and not by order of this Court under the Deceased Estate (Wills, Inheritance and Protection) Act.

In view of the foregoing, the application by the interested party succeeds and that part of the order of this Court in question is set aside for having been irregularly obtained by the then administrators of the deceased estate herein.

Costs on this application shall be borne by the estate.

Made in chambers at Blantyre this 10th April 2018.



M.A. Tembo
JUDGE