IN THE HIGH COURT OF ZAMBIA **2016/HP/ARB 001**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

IN THE MATTER OF: **THE ARBITRATION ACT NUMBER 19 OF 2000**

AND

IN THE MATTER OF: **THE ARBITRATION (COURT PROCEEDINGS) RULES STATUTORY INSTRUMENT No 75 OF 2001**

AND

IN THE MATTER OF: **AN ARBITRATION**

BETWEEN:

AFRICAN LIFE FINANCIAL SERVICES LIMITED **APPLICANT**

AND

SATURNIA REGINA PENSION TRUST FUND REGISTERED TRUSTEES **RESPONDENT**

BEFORE HON. MRS JUSTICE S. KAUNDA NEWA THIS 8th DAY OF FEBRUARY, 2017.

For the Applicant : *Mr C. Sianondo, Malambo & Company*

For the Respondent : *Mr S. Mambwe, Mambwe, Siwila & Lisimba Advocates*

RULING

CASES REFERRED TO:

1. ***London Blackwell Railway Company V Cross 1886 31 D 354 at 369***
2. ***Warner Brothers Pictures Inc V Nelson 1936 3 ALL ER 160***
3. ***Evans Marshall and Co Ltd V Bertola SA and Another 1973 1 ALL ER 992***
4. ***Ndove V National Educational Services Limited 1980 ZR 184***
5. ***Mobil Zambia Limited V Msiska 1983 ZR 86***
6. ***Embassy Supermarket V Union Bank Zambia Limited 2007 ZR 226***
7. ***Robert Mbonani Simeza V Finance Bank Zambia Limited SCZ/18/194/2009***
8. ***Roraima Daka Services Limited V Zambia Postal Services Corporation 2011 VOL 3 ZR 283***
9. ***Amanita Service Station V Amanita Premium Oils Limited SCZ No 39 OF 2016***

LEGISLATION REFERRED TO:

1. ***The Arbitration Act, No 19 of 2000***

This a Ruling on an application made by the Applicant for an order of interim injunction, pending referral of the matter to arbitration. Counsel relied on the affidavit filed in support of the application, the further affidavit in support, as well as the affidavit in reply.

He submitted that as far as the pension issues are concerned, the same are regulated by the Pension Scheme Regulation Act No 28 of 1996, as amended by Act No 27 of 2005. That of interest is Section 5 of the Act. It was stated that the said section stipulates how a trust deed should be, while Section 3a states that a trust deed should provide for the manner of election of the trustees and their term of office.

Further that Section 3c states that a trust deed should provide for the number of trustees, of whom one half shall be appointed by the

members, and the remainder shall be appointed by the sponsoring employers. Further in the submissions Counsel stated that under subsection (d) of Section 3, a trust deed shall contain methods of and grounds for removal of the trustees, while subsection (f) requires that a trust deed shall provide a quorum for a meeting of the Board of Trustees, which is fifty percent of the members.

Section 3 (g) on the other hand provides for the procedure for convening meetings.

Counsel's submission was that the trust deed was exhibited in the affidavit dated 28th October, 2016, and of interest in that deed are clauses 9.93, clause 4.2 and clause 7.5. He stated that clause 9.93 provides that the quorum for any meeting of the board of trustees shall be fifty percent of the total number of trustees, provided that at all times the representation shall be equal between the employer and employee. That where there is unequal representation, the extra member shall not exercise the right to vote during the deliberations.

It was further submitted that clause 4.2 states that by a majority of two thirds, of at least six trustees being present, the trustees may call an extraordinary annual general meeting of the members to consider the change of the Fund Manager and Administrator. Therefore a Fund Manager in the position of the Applicant could only be changed when an extraordinary general meeting was convened, and the members having voted so, at such a meeting. Counsel submitted that the Board of Trustees in its current form

was improperly constituted, and as such it could not make an effective decision, as it could not form a quorum.

He added that it could not even make a decision to remove a Fund Manager, as such is the preserve of the members, who have been asked to do so at an extraordinary general meeting. It was Counsel's further submission that the non-adherence to the Trust Deed was confirmed by exhibit 'MN10b', at page 8 where the Regulator requested the Trustees to rectify the anomaly. That page 9 of 'MN10b' states that one of the Trustees had exceeded their tenure of office.

Counsel's view was that the Trust Deed in its current form had been violated, and such dispute could only be resolved by arbitration. The same went for whether the Applicant could be terminated without an extraordinary general meeting by the members, in view of the fact that the same currently cannot be called due to the board's composition.

Reference was made to clause 3.12 of the Trust Deed which states that the appointment and ratification of the Fund Manager is done by the members. Reliance was placed on the case of ***WARNER BROTHERS PICTURES INC V NELSON 1936 3 ALL ER 160*** which discussed the principle of injunctions vis a vis contracts. That at page 167 it states that where damages are not the more appropriate remedy, and there is the uncontradicted evidence by the Plaintiff as to the difficulty of estimating the damages which they may suffer as

a result of the breach of the contract by the Defendant, an injunction should be granted.

Further reference was made to the case of ***EVANS MARSHALL AND CO LTD V BERTOLA SA AND ANOTHER 1973 1 ALL ER 992*** where the decision in the ***WARNER BROTHERS PICTURES INC*** case was approved. The Court in that case resolved that damages would not be an adequate remedy in that case, any more than they had were held to be in the three cases cited. It was also stated in that case that courts had repeatedly recognized that there could be claims under contract, as in that case, where it would be unjust to confine a Plaintiff to damages for their breach. That great difficulty to estimate the damages is a factor to be taken into account. Further that another factor is the creation of certain areas of damages which cannot be taken into account for a common law case of breach of contract.

Counsel submitted that the ***MARSHALL*** case was approved in the ***RORAIMA DAKA SERVICES LIMITED V ZAMBIA POSTAL SERVICES CORPORATION 2011 VOL 3 ZR 283*** case where the Court held that where there is a serious question to be determined, then an injunction should be granted, and further that where damages would suffice, and the Defendant would be able to pay them, the injunction should not be granted. That it was further stated in that case that as the Plaintiff had not quantified the damages, and the Defendant had not stated that it would be able to pay them, it would be unjust to confine the Plaintiff to damages, if the decision of the arbitration went in the Plaintiff's favour.

That if the Defendant succeeded, and it were found that the injunction ought not to have been granted, the Defendant would adequately be compensated on the Plaintiff's undertaking to make good any damages. It was also stated in that case that as between the Defendant and the Plaintiff, the former would suffer mere inconvenience if the injunction to restrain them was granted, and that the balance of convenience tipped in favour of the Plaintiff.

Based on the above authorities, Counsel submitted that paragraph 36 of the affidavit dated 26th October, 2016 indicates that the damages that the Applicant will suffer cannot be quantified. Further that paragraph 38 of the said affidavit indicates that the Applicant will suffer economic ruin, and the ***RORAIMA*** case therefore applies.

It was also Counsel's submission that the deponent of the affidavit in opposition was ill qualified to do so, as exhibit 'MN10b' of the affidavit dated 26th October, 2016 directs that she had been on the board in excess of her tenure as provided by the trust deed, and in view of the fact that Zambia Sugar her employer had withdrawn her appointment.

Counsel relied on the cases of ***EMBASSY SUPERMARKET V UNION BANK ZAMBIA LIMITED 2007 ZR 226*** and ***CHINIKA SERVICE STATION V AMANITA PREMIUM OILS LIMITED SCZ No 39 OF 2016***, which states that any decision by an unauthorized person is null and void, to the extent of the inconsistency. Counsel concluded by stating that the Applicant had undertaken to pay damages in the

event that the Respondent was inconvenienced, and prayed that the injunction as an interim measure, be granted.

In response Counsel for the Respondent submitted that the factual basis of their opposition to the application was contained in the affidavit in opposition filed on 16th November, 2016, and the further affidavit dated 17th January, 2017, on which they relied. He stated that with regard to the submission that the deponent of the affidavit lacked capacity to swear the affidavit in opposition, it was their submission that exhibits 'DK1' and DK2' in the further affidavit in opposition are the registered deed of appointment and ratification of the trustees registered on 16th June 2016, in the Miscellaneous Registry of the Deeds Registry at the Ministry of Lands respectively.

That exhibit 'DK2' is a letter from the Pensions and Insurance Authority dated 23rd August 2016 acknowledging receipt of the appointment, and that the deed of appointment bears the names Doreen Kabunda, as a continuing trustee. Counsel argued that the document reflects the latest record of the trustees of the Respondent, and it was therefore their submission that in the circumstances, the deponent was competent to swear the affidavit.

The Court was urged to look at the type of relationship that existed between the Applicant and the Respondent, and stated that the affidavits clearly show that the Applicant was a service provider to the Respondent, and not a trustee or a member of the Respondent. In other words the relationship was one of employer and employee. Thus the question for determination in granting the injunction was

whether a service provider could legitimately stop an employer from terminating its' services.

It was added that flowing from this, exhibit 'MH5' in the affidavit in support of the application was a letter dated 3rd November, 2015, written by the Respondent to the Applicant, giving notice of the termination or withdrawal of the property management function from the Applicant.

Counsel stated that the said notice had expired, as the twelve months had elapsed, and the decision to withdraw the property management function had taken effect, in keeping with clause 19 of exhibit 'MH2', which provides for the termination by giving twelve months' notice, which the Respondent had invoked.

That in the circumstances therefore, the action of withdrawing the property management service, had taken effect, and could not be injuncted. It was stated that Counsel's understanding of an injunction was that it can only be granted to stop an action from being taken, and that in this case the act had already happened. Therefore the Applicant had no prospects of success, as the property management function was withdrawn in line with the relevant clause.

In support of the submission that the Applicant had no prospects of success, Counsel relied on the case of ***NDOVE V NATIONAL EDUCATIONAL SERVICES LIMITED 1980 ZR 184*** where the court held that before granting an interlocutory injunction it must be shown that there is a serious dispute between the parties, and the

applicant must show on the material before court that they have real prospects of success at the trial, in this case the arbitration.

He also stated that because the Respondent gave the Applicant the relevant notice to withdraw the property management service, the Applicant's right to relief was not clear. The case of ***MOBIL ZAMBIA LIMITED V MSISKA 1983 ZR 86*** was cited as authority for this submission.

Further in the submissions Counsel stated that there was nothing that this injunction was pending, and it was their understanding that an injunction is granted pending something, and never in a vacuum. It was noted that the application for the injunction was made in October 2016, and since then the arbitration process had never been instituted.

Counsel also stated that there was no application before the court to refer the matter to arbitration. He cited the case of ***TURNKEY PROPERTIES LIMITED V LUSAKA WEST DEVELOPMENT COMPANY LIMITED AND THREE OTHERS 1984 ZR 85*** where it was held that ***"an injunction should not be regarded as a device by which an applicant can get new conditions favourable to himself***, arguing that granting the injunction in a vacuum was akin to using the equitable remedy of an injunction as a sword, rather than as a shield.

Counsel went further to argue that on the material before the Court, there was nothing showing that the injunction had been granted pending something.

Counsel also submitted that it is a rule that the grant of any injunction should be evidenced by demonstration that irreparable injury will be suffered if the injunction is not granted, and that the relief of damages should be considered before an injunction is granted, and to this end the cases of ***MOBIL*** and ***TURNKEY PROPERTIES*** cited above were relied on.

Therefore even if the Applicant at the intended arbitration were to prove that the withdrawal of the property management service was wrongful, the same could be adequately compensated by damages. It was added that this case was not any different from any other ordinary case of breach of contract.

On the reliance on the case of ***WARNER BROTHERS*** by Counsel for the Applicant, it was stated that the said case is distinguishable from the current case, as in that case at page 167, it reflects that the services in respect of which the injunction was granted were admitted to be of a special, unique, extraordinary and intellectual character, which gave them a particular value.

Counsel posed the question that what was so special, unique, extraordinary, and intellectual about property management? It was his view that it is a common service provided by many service providers in ordinary business. He stated that as the ***MARSHALL*** case was submitted as having confirmed the ***WARNER*** case it should equally fell away, as it is also distinguishable from the current case.

As regards the submissions in relation to the ***RORAIMA*** case, the argument by Counsel was that even that case is distinguishable from this case. This was in light of the fact that firstly it is a High Court decision which is only of persuasive, and not binding authority on this court, and because in that case the Applicant went to great lengths to demonstrate the type of investments it had made in pursuance of the contract.

However in the current case the Applicant stated that it has merely invested in its employees, and it was Counsel's submission that such type of investment is not comparable to the investment done in the ***RORAIMA*** case.

He added that in any event the Respondent is a pension fund that has capacity to pay damages. Further that the ***RORAIMA*** case is distinguishable from this case as that case involved a fixed term contract of ten years, and the Respondent sought to curtail it after five years. Thus bearing in mind the amount of investment that had been made by Roraima in anticipation of the ten year contract, the court was persuaded to grant the injunction.

It was Counsel's argument that in the current case there was no such thing, and there was instead a termination clause which the Respondent had followed to the latter.

With regard to the submission that the decisions of the trustees were tainted, as they were done in breach of the trust deed, Counsel stated that the Applicant is not party to the trust deed, and is

therefore not in a position to ground the grant of the injunction on the alleged breach of the trust deed.

His argument was that the competent people to raise a red flag were the parties to the said trust deed, and there was no such evidence to that effect. Counsel told the court that what was before court was a fresh deed of appointment of the same trustees and that the same was acknowledged by the Pensions and Insurance Authority. Thus the Applicant has no locus standi in relation to the trust deed.

Further in the arguments, Counsel submitted that even if the Applicant were to show that there were breaches, which they denied, there would be no relief that would flow to them, as a result of the said breach. He also stated that the record shows that the Applicant had been dealing with the trustees even before coming to Court, and at no time was the incompetence of the trustees raised.

Reference was made to paragraph 9 of the affidavit in opposition where it is stated that the trustees had been paying the Applicant, and if the trustees are incompetent, which was denied, the Applicant had acquiesced to the same. That the Applicant could not raise issue with something that has nothing to do with them.

Counsel's argument was that this was not a proper case where an injunction should be granted, as the law does not permit the said granting. He prayed that the application be denied with costs.

Counsel for the Applicant in reply argued that the argument that the termination had already taken place lacked merit, as there could be no termination, if done in breach of the trust deed. He also

stated that the further affidavit filed by the Applicant shows that a new property manager had not been appointed. Reference was made to clause 4.12 of the Trust Deed which stipulates that the appointment of a Fund Manager, such as the Applicant is ratified by the members.

He further reiterated that removal of a Fund Manager has to be done by the members at an extraordinary general meeting, and this was not done. It was submitted that the Trust Deed is superior to any other agreement, as the same is anchored on statute.

In reply to the submission that the injunction was not pending anything, Counsel's stated that the injunction was pending the decision of the tribunal to be appointed by the parties, pursuant to clause 11 (2) (c), and the court is permitted to grant the interim measure. That the argument that no application had been made to refer the matter to arbitration was incompetent before this court as Section 10 of the Arbitration Act No 10 of 2000, requires such an application to be made where the main matter is before court.

Thus there was no need for such an application. With regard to damages, Counsel stated that they had demonstrated that the Applicant could not been confined to damages going by the authorities relied on. He told the Court that the Applicant is the leading fund manager, spanning twenty four years, and fits in with the cases relied on.

Still relying on the ***RORAIMA*** case, Counsel stated that in that case the agreement was for ten years, and that in this case there are a

number of years, and even though the agreement does not stipulate the duration, the injunction should be granted. He added that in the ***RORAIMA*** case no monetary investment was alluded to, but in this case the Applicant had invested in human resources for the last twenty four years, and the injunction should be granted.

As regards the argument that the Applicant could not raise issue with breach by the trustees, it was submitted that the Trust Deed stipulates how a fund manager can be removed, so the Applicant had a right to raise breaches of the trust deed. That as the Applicant in clause 1 (d) of the Trust Deed is named as the Fund Manager, the Applicant had a right to seek benefit and shelter under the same.

He argued that the payments made to the Applicant were not due to the constitution of the Respondent, but were based on the services rendered. Further that there could be no acquiescence to breach of the Trust Deed.

He denied that the relationship between the Applicant and the Respondent was that of employer and employee. In relation to the issues raised with regard to the deponent of the affidavit, Counsel stated that clause 7.5 of the Trust Deed stipulates how it can be amended, and that to this effect any such amendment has to be approved by the Registrar, employer and the Revenue Authority.

He stated that exhibit 'DK2' was a mere acknowledgment of receipt of the document, and not an approval. The court was invited to examine exhibit 'DK1' and note that the deponent had stated her

occupation as self-employed. For one to be a member they needed to be sponsored by an employer, and Counsel stated that her membership was withdrawn as at 20th August 2016. Therefore she was incompetent as a trustee, or indeed lacks capacity to depose the affidavit in that capacity.

In conclusion Counsel stated that if the Respondent was of the view that the injunction was being abused, they could apply to have it discharged. He reiterated that the injunction be granted, pending the resolution of the matter by way of arbitration.

I have considered the application. The application was brought pursuant to Section 11 of the Arbitration Act No 19 of 2000 which provides that:

"a party may, before or during arbitral proceedings request from a Court an interim measure of protection and, subject to subsections (2) (3) and (4) the Court may grant such measure."

Thus the question that arises is whether there is an arbitration agreement pursuant to which the application has been made? From the submissions of both parties, it is clear that exhibit 'MH2' in clause 24 and exhibit 'MH3' in clause 18 on the affidavit filed in support of the application for interim measure of protection by way of injunction dated 28th October, 2016 executed between the parties, provides that any dispute or difference between the parties arising out of or in connection with the agreement shall unless otherwise agreed between them be referred to arbitration, in accordance with the Arbitration Act No 19 of 2000.

Therefore it is not in contention that the parties agreed that any dispute between them related to the agreements exhibited as 'MH2' and 'MH3' would be resolved by arbitration.

Counsel for the Respondent argued that the application for an injunction has been brought pending nothing, submitting that in their view an injunction is granted pending the determination of something. When one goes to Section 11 of the Arbitration Act No 19 of 2000, pursuant to which the application was brought, they will find that this Court has jurisdiction to grant orders for interim measure of protection before or during the arbitral proceedings.

That being the position of the law, and in view of the fact that the Applicant in paragraph 35 of the affidavit in support of the application states that the dispute between the parties requires to be settled by arbitration, the application is properly before court.

The argument by Counsel for the Respondent that there has been no application that has been made to refer the matter to arbitration cannot stand. I say so in light of the fact that the parties had agreed to settle any disputes arising out of the agreement exhibited as 'MH3' through arbitration, which effectively ousts the jurisdiction of the court.

As rightly submitted by Counsel for the Applicant, an application to refer the matter to arbitration would only have been tenable had the Applicant commenced the main action seeking to enforce its rights under the agreement before this court.

What the court has powers to do where a main matter is not instituted before it, which should ordinarily be determined by arbitration where the parties have so agreed, is to grant interim relief, such as injunctions, as in this case. It is therefore incumbent upon the parties to commence the arbitral proceedings, and not for this court to so order, as there is no action that has been brought before it which ought to go arbitration.

Having said so the next issue that arises for determination is whether Doreen Kabunda the deponent of the affidavit in opposition dated 16th November, 2016 is incompetent to do so in light of the fact that she is no longer as Trustee, her mandate having expired, and her employer Zambia Sugar having withdrawn her appointment? Counsel for the Respondent submitted that exhibits 'DK1' and 'DK2' on the further affidavit in opposition are the registered deed of appointment and retirement of trustees registered on 16th June 2016 in the Miscellaneous Registry at the Ministry of Lands, and an acknowledgement of the receipt of appointment respectively. These documents show that the Doreen Kabunda is a Trustee, and is in fact the Chairperson of the Board of Trustees.

Counsel for the Applicant in arguing that the said Doreen Kabunda was incompetent to depose the affidavit relied on the cases of ***EMBASSY SUPERMARKET V UNION BANK ZAMBIA LIMITED 2007 ZR 226*** and ***CHINIKA SERVICE STATION V AMANITA PREMIUM OILS LIMITED SCZ No 39 OF 2016***.

In the ***EMBASSY SUPERMARKET*** case, it was contended that the Legal Counsel who had signed the memorandum of discharge on behalf of the Respondent, which was a bank in liquidation had no authority to do so, as it is only the liquidator pursuant to Section 289 (3) of the Companies Act, Cap. 388, who had authority.

It was stated in that case that ***"we entirely agree that where a statute places a duty on an individual or officer, no other person shall perform that duty unless it is so provided for under the same law. It is therefore, our well considered view that the defendant cannot rely on a document which was issued without proper authority"***.

The ***CHINIKA SERVICE STATION*** case on the other hand dealt with the propriety of a statutory declaration that was made by the 1st Appellant pursuant to Section 361(4) of the Companies Act, Chapter 388 of the Laws of Zambia, to strike off the company from the register of companies. In my view the ***EMBASSY SUPERMARKET*** case dealt with adherence to statutory provisions granting powers to certain persons to exercise those powers, thereby raising issues of want of authority while the ***CHINIKA SERVICE STATION*** case dealt with the propriety of the use of the section relied upon to strike off a company from the register of companies.

While it can be said that the ***EMBASSY SUPERMARKET*** case and this case are similar as they relate to want of authority to do certain acts, this case is distinguishable as it relates to a person whose

mandate has expired making certain decisions and deposing to the affidavit, which was not the case in the ***EMBASSY SUPERMARKET*** case.

The affidavit in opposition, as well as the further affidavit in opposition show that Doreen Kabunda deposed the two affidavits in her capacity as Chairperson of the Board of Trustees.

Exhibit 'MH1' on the affidavit in reply, is a letter dated 20th August 2015 authored by Zambia Sugar to the Board Secretary of the Respondent advising that Doreen Kabunda had exited that company, and she was no longer their representative as a trustee. Exhibit 'MH5' dated 3rd November, 2015 on the other hand is a letter authored by Doreen Kabunda in her capacity as Chairperson of the Board of Trustees to the Applicant informing it of the decision to withdraw the property management services from it.

The further affidavit in opposition exhibits 'DK1', which is the deed of appointment and retirement of trustees, and filed in the Miscellaneous Registry of the Lands and Deeds Registry on 6th June, 2016. Exhibit 'DK2' on the same affidavit on the other hand is an acknowledgement of receipt by the Pensions and Insurance Authority of the appointment of the new trustees. It is dated 23rd August, 2016.

It can be seen from the above documents that Doreen Kabunda was Chairperson of the Board of Trustees after Zambia Sugar had withdrawn her membership as a Trustee. Therefore the Deed of Appointment and Retirement of Trustees filed at the Ministry of

Lands after her representation had been withdrawn was irregular. This is in light of the fact that the Trust Deed provides that the employer shall sponsor the Trustee.

This observation by Counsel for the Applicant was correct, and he in fact referred the Court to exhibit 'MH10b', on the affidavit in support of the application, an inspection report relating to the Respondent, which observed that Doreen Kabunda had been a trustee for sixteen years, in excess of the tenure of six years, and directed that she step down as a trustee.

Her remaining as a trustee is a matter forming part of the dispute between the parties, and I will not go into those issues, as it would be tantamount to determining the some aspects in contention in the main matter.

Suffice to state that the case of ***ROBERT MBONANI SIMEZA V FINANCE BANK ZAMBIA LIMITED SCZ/18/194/2009*** held that ***"at law anybody can be a witness for a company or indeed any other litigant. He can be such a witness either as a deponent of an affidavit or in oral form. What matters mostly is that he should have personal knowledge of the facts he is testifying on".***

The next question for determination is whether the interim measure of protection by way of injunction should be maintained? The major contention by the Applicant is that the termination of the property management services by the Respondent was done in breach of the Trust Deed, and that if the injunction is not sustained the Applicant

will suffer ruin as it has invested heavily in its human resource, spanning over the years. Further that the Applicant should not be confined to damages, as a remedy, as the damages that will suffered cannot be quantified.

The Respondent on the other hand argued that the case before the court is an ordinary one for the provision of services, which many entities provide, and any breach of the contract can be adequately compensated by damages.

Counsel for the Applicant in arguing that the injunction be maintained relied on the cases of ***WARNER BROTHERS PICTURES INC V NELSON 1936 3 ALL ER 160*** and ***EVANS MARSHALL AND CO LTD V BERTOLA SA AND ANOTHER 1973 1 ALL ER 992*** which he argued were adopted in the ***RORAIMA DAKA SERVICES LIMITED V ZAMBIA POSTAL SERVICES CORPORATION 2011 VOL 3 ZR 283*** case.

The gist of the holdings in those cases was that where damages for breach of contract would result in irreparable injury and damage, an injunction should be granted. This also applies where the damages payable cannot be quantified. Thus the question in this case is whether this is the position with respect to the Applicant? Counsel for the Respondent as already seen argued that is a case for the ordinary provision of services, which many service providers provide.

The contract in dispute between the Applicant and the Respondent was for the provision of property management services. Counsel for

the Applicant did not demonstrate that the services it rendered to the Respondent pursuant to the contract was made between the parties, were of such special, unique, extraordinary and intellectual character, so that to terminate the said services would result in irreparable damage.

What has been stated in paragraph 36 of the affidavit in support of the application is that the termination of the agreement will result in economic ruin, which cannot be quantified and can neither be adequate. Further that the Applicant has invested heavily in human resources over the years. The investment in human resources was not attributed to the contract that the Applicant had with the Respondent, such that it could where possible be a factor to be taken into account when deciding to grant the injunction, contrary to the argument in the ***RORAIMA*** case that in anticipation of the ten year contract, investments had been made. What is on record is that the investment in human resources spans over the years, resulting in the Applicant being a leader in the provision of the services. To me that entails that the Applicant is a service provider to a number of entities requiring that service, apart from the Respondent.

It has been seen that Counsel for the Respondent submitted that in fact the termination was done in keeping with the contract which provides for the giving of twelve months' notice to terminate, and that this what distinguishes this case from the ***RORAIMA*** case. This is so because in that case there was a fixed term contract of ten

years. This matter on the other hand, has no fixed duration, but is liable to termination, which the ***RORAIMA*** case did not have.

I have already stated that the services that the Applicant provided to the Respondent have not been demonstrated as being of special, unique, extraordinary and intellectual character, so that their termination would result in economic ruin to the Applicant. They are property management services which is a service provided to any Pension Fund. Additionally the contract between the parties for provision of those services has a termination clause which the Respondent invoked. There being a termination clause in the contract, it is expected that such an event was likely to occur. I agree with Counsel for the Respondent, that this case is thus distinguishable from the ***RORAIMA*** case, on that basis.

The case of ***LONDON BLACKWELL RAILWAY COMPANY V CROSS* 1886 31 D 354 at 369** held that "***a fundamental principle of injunction law is that an interim injunction should not be granted to restrain actionable wrongs for which damages are the proper or adequate remedy".***

Counsel for the Respondent referred to the cases of ***MOBIL ZAMBIA LIMITED V MSISKA 1983 ZR 86*** and ***TURNKEY PROPERTIES LIMITED V LUSAKA WEST DEVELOPMENT COMPANY LIMITED AND THREE OTHERS 1984 ZR 85,*** as having stated that said principle.

The Applicant and Respondent entered into a contract for the provision of services, in the name of investment and property

management. It was not an employer- employee relationship as argued by the Respondent. However the agreement being contractual in nature means that the general principle that damages should be an adequate remedy for such claims applies, unless the circumstances make it is impossible to estimate them, or the services rendered under the breached contract are of such special, unique, extraordinary and intellectual character, and where a Respondent would not be able to pay them.

The basis of damages being an adequate remedy in the event of breach of contract as opposed to granting injunctions, is premised on the need for mutual trust and confidence between the parties.

Thus where one party to a contract has lost confidence in the other, to force them to remain in that contractual relationship would not be prudent, and that is why such contracts ordinarily have termination clauses. The Respondent in this matter gave the Applicant twelve months' notice to terminate the contract, which was in line with the agreement by the parties. The notice of termination is exhibited as 'MH5' on the affidavit in support of the application and is dated 3rd November, 2016. The application for the injunction was filed on 28th October, 2016.

The ex-parte order of injunction was granted on 17th November, 2016, after the notice period had expired. In short the event sought to be prevented had already occurred and there is nothing to injunct. Contrary to the argument by Counsel for the Respondent that injunctions are only granted to prevent breach, there are

instances were injunctions may be granted to restore certain positions. However the restoration of the Applicant as Property Manager would not be suitable in light of the nature of the contract between the parties.

I accordingly decline to confirm the ex-parte injunction and discharge it with costs to the Respondent.

DATED THE 8TH DAY OF FEBRUARY, 2017.

Kaunda

S. KAUNDA NEWA
HIGH COURT JUDGE