GARIYA SAFARIS (PVT) LTD

Versus

TSHOLOTSHO RURAL DISTRICT COUNCIL

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 5 NOVEMBER 2012 & 21 FEBRUARY 2013

G. Nyoni, for the applicant
J Tshuma, for the respondent

Judgment

NDOU J: The applicant sought and obtained a provisional order to interdict the respondent from interfering with its contractual rights, i.e. carrying out elephant hunts, on condition that the applicant fulfilled its contractual obligations to the respondent. The respondent had filed opposing papers, and in turn the applicant has filed an answering affidavit. This application raises one major issue i.e. whether in 2011, the respondent had a right to announce the new and higher charges for elephant trophies subject matter of the agreement between the parties. Put in another way, what trophy fees should applicant pay in order to hunt elephants on the respondent's land (for 2011 hunting season).

The facts which are germane to this issue are virtually common cause. On 30 March 2006 the parties entered into a written contract. The respondent, under the contract, gave the applicant the right to conduct hunting safaris for elephants and other species on land under control of the respondent. The dispute between the parties relates to prices for elephant trophies, and not for any other species. The terms of the contract were that the applicant would pay trophy fees to the respondent, 50% of such fees would be paid 30 days prior to an elephant hunt, and the other 50%, 30 days after a successful hunt – Clause 4(a) and (b). In respect of elephants, the amounts payable in trophy fees would be "pegged on the National Parks recommended rates" – Clause 4(e).

The applicant's servants, agents and invitees would enter the land through the offices of the respondent and would be required to acquire written permits for any hunts. The applicant would, each year, be entitled to hunt elephant and other species in such numbers as would be advised by National Parks through the latter's quota list and the latter would have the right to determine the charges – Clause 7.

In March 2011, following a stakeholders meeting attended by the applicant's representative, and the deponent to its founding affidavit, the respondent set new trophy fees

in respect of elephants to prevail in the year 2011. The applicant disputed liability to pay these charges and as a result filed the current application. The terms of the contract between the parties does not spell out the exact trophy prices payable by the applicant for the duration of the contract. Clause 4, *supra*, simply lays down a method of determining the trophy fees that will be payable by the applicant, rather than the exact amount.

According to the above-mentioned terms of the contract the parties left the trophy fees to be determined on the basis of some pre-arranged method. It is also evident that the National Parks recommended rates would guide the parties in settling upon the trophies fees to be paid by the applicant. The parties also agreed that National Parks would have the right to determine not only annual quotas in respect of each year, but also the charges. Pursuant to clauses 4 and 7 of the contract, the parties met every year to determine the trophy fees that would be payable by the applicant for the year. The respondent has shown in its papers that there were meetings held in the year 2006, 2008 and 2009. The applicant has not denied that such meetings were held to set the trophy fees for each year. What the applicant has disputed is that there was a variation of the fees during these years. It is beyond dispute that annual meetings were held to deliberate on the issue of trophy fees each year. This was in terms of the contract. Therefore the March 2011 meeting (of the revision of the trophy fees) was not a new event, but continuation of an established course of dealing between the parties. The applicant did make representations at the first meeting in March 2011, after which the respondent gave the applicant and other representatives a chance to make further representations. The meeting was adjourned for this purpose. When the meeting resumed the applicant did not avail itself of the second chance. The other stakeholders made representations. The respondent then made and conveyed to the applicant, its decision. The respondent, therefore, did not take its decision unilaterally but acted after affording the applicant a chance to be heard. Other hunters are paying the respondent as per this decision. An annexure filed by the applicant on page 18 of its papers clearly shows that the price of the elephant was deleted and substituted in longhand under the title “Elephant male – above 60lb $11 000,00”. The date is 2005. So in 2005 the price of the elephant trophy was variable depending on the weight. In its papers the applicant concedes that there have been trophy price reviews from 2005 and the last review shown is 2008. A letter authored by an official of National Parks also advises the stakeholders to negotiate the price of the elephant trophy depending on weight. The applicant’s case seems to be that the National Parks recommended prices as set in 2006 be applied slavishly and without variation. This is not the correct position. A close look of Clause 4 and 7 of the agreement as well as the course of dealings between the parties evinces that the National Parks recommended rates would be just that, recommended rates. Such rates would be used as a guide when setting the fees for each year. It is trite that when interpreting a contract, words should be given their natural meaning or the meaning most commonly understood in relation to the subject matter and circumstances and reasonable construction is preferred to one that is unreasonable. *S* v *Masivira* 1990 (1) ZLR 373 (H); *S* v *Robinson* 1975 (4) SA 438 (RA) and *Cape Provincial Administration* v *Clifford Harris (Pty) Ltd* 1997 (1) SA 439 (SCA). The natural meaning of the words employed by the parties in Clause 4

of the agreement is that the prices to be set would be guided by National Parks prices, which, in terms of Clause 7 and indeed, in terms of established custom and practice in the hunting industry is that National Parks were at liberty to set prices annually. The intention of the parties was that National Parks recommended rates as set annually would guide the parties in setting the trophy fees annually.

Accordingly, the application is without merit and the provisional order granted by the court on 6 June 2011 be and is hereby discharged with costs.

Moyo & Nyoni, applicant's legal practitioners
Webb, *Low & Barry*, respondent's legal practitioners