Judgment No. SC 66/06
Civil Appeal No. 220/06

SHAMROCK HOLDINGS (PRIVATE) LIMITED t/a INYATHI HUNTERS

v

(1) PARKS AND WILDLIFE AUTHORITY (2) THE MINISTER OF ENVIRONMENT AND TOURISM N.O. (3) DESIRED LIAISON AUCTIONEERS (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
SANDURA JA, ZIYAMBI JA & GWAUNZA JA
HARARE, NOVEMBER 7, 2006 & MARCH 5, 2007

J C Andersen SC, for the appellant

W P Zhangazha, for the first respondent

V C Gijima, for the second respondent

No appearance for the third respondent

ZIYAMBI JA: This is an appeal against a judgment of the High Court. The background facts are set out by the learned judge in the court *a quo* as follows:

"On 18 December 1996 the applicant and the second respondent, hereinafter referred to as 'the Minister', entered into a written agreement, in terms of which the latter granted to the former the exclusive right to conduct hunting safaris, game viewing and photographic safaris, and in pursuance thereof to hunt wild animals in respect of a property described as Unit 3 Matetsi Safari Area. The applicant was in addition granted the right to process, sell or otherwise dispose of the products of animals hunted within the said area. The agreement was to commence on 1 January 1997 and was to endure for a period of ten years thereafter unless terminated earlier.

In granting these rights the Minister was acting in accordance with powers granted to him in terms of s 37 of the Parks and Wildlife Act [*Chapter 20:14*], 'the Act'. Part II of the Act was amended in 2001 by Act 19/2001 to make provision for the Parks and Wildlife Management authority whose functions, which are specified in s 4, include the control, management and maintenance of national parks, botanical reserves and gardens, sanctuaries, safari areas and recreational parks. The Authority thus created is the first respondent herein. For convenience I will refer to it as 'the Authority'.

On 24 February 2006 the Director-General of the Authority advised the applicant by letter that the 'lease agreement' for Unit 3 would be renewed for a further period of five years effective from 1 January 2007. This was followed up by a letter dated 27 February 2006 with conditions upon which the 'lease' would be renewed. The applicant was requested to sign an attached form as proof of acceptance of the offer and the terms attaching thereto. The applicant duly signed the form and returned the same to the Authority. On 1 June 2006 the Authority addressed yet another letter to the applicant. The applicant was advised that Government had decided to rescind the renewal of Matetsi Unit 3 (agreement) and instead would be auctioning the rights in respect to the same. The applicant was advised that it was free to participate in the auction which would be advertised in the local press. On 7 June 2006 the third respondent sent an e-mail message to the applicant, advising it that the auction in respect of Matetsi Unit 3 would take place on 28 June 2006. It is this action on the part of the third respondent that compelled it (the applicant) to launch these proceedings on a certificate of urgency. The relief sought by the applicant is in following terms:

Terms of the order made

That you show cause to this Honourable court why a final order should not be made on the following terms -

1. That the interim order to interdict and refrain the first, second and third respondents, from selling or disposing of in any way of Unit 3 Matetsi Concession Area, pending the expiration of the agreement between the applicant and the second respondent represented by the first respondent, which expires on 1 January 2007, be and is hereby confirmed.

2. That the interim order to interdict the first, second and third respondents, from selling or disposing of in any way Unit 3 Matetsi Concession Area, pending the outcome of the application to compel specific performance of the renewal agreement, between the applicant and the second respondent represented by the first respondent, be and is hereby confirmed.

3. The costs of this application to be borne by the first and second respondents jointly and severally liable, on a legal practitioner and client scale.

Interim Relief Granted

2. Pending the determination of this Urgent Chamber Application in respect of the final order sought, the applicant is granted the following relief.

2.1. That the first, second and third respondents, be and are hereby interdicted and ordered to refrain, from the sale or disposal in any way of Unit 3 Matetsi Concession Area, pending the expiration of the lease agreement between the applicant and the second respondent, represented by the first respondent, which expires on 1 January 2007.

2.2. That the first, second and third respondents be and (are) hereby interdicted and ordered to refrain, from the sale and disposal in any way, of Unit 3 Matetsi Concession Area, pending the outcome of the application to be instituted by the applicant, to compel specific performance of the renewal agreement between the applicant and the second respondent represented by the first respondent.

2.3. The application to compel specific performance by the applicant in terms of paragraph 2.2 of this interim order shall be filed with the Honourable High Court of Zimbabwe, at Harare, within (15) days from the date of the granting of this interim order.

The applicant seeks a temporary interdict against all three respondents that they refrain from selling and or disposing of Unit 3 Matetsi Area. It wishes to launch an application for specific performance against the Authority for the renewal of the agreement for rights to the Unit. The sole issue before me therefore is whether the applicant has satisfied the requirements for a temporary interdict. It is trite that in order to succeed in this application, the applicant must establish the following factors- a *prima facie* right, which may be open to doubt or a clear right (which, in the event, would entitle the applicant to a final interdict), a reasonable apprehension of irreparable harm if the interim relief is not granted and the final relief is granted, that the balance of convenience favours the granting of an interim order and that the applicant has no alternative relief."

The learned judge found that the appellant had not satisfied the criteria for the grant of a temporary interdict.

In the grounds of appeal, issue was taken with the finding of the learned judge that the appellant had not established a *prima facie* right entitling it to

the interdict sought. The appellant contended that it had entered into a new agreement for the lease of the property and that the contract was not lawfully rescinded.

The respondents, on the other hand, argued that the second respondent did not concur in the renewal of the contract, and, in any event, the law does not allow a renewal for a period of more than 10 years.

Mr *Zhangazha* submitted on behalf of the first respondent that the first respondent, being a creature of statute, acts on behalf of the Minister generally. However, when it comes to certain rights like that set out in s 37, the concurrence of the Minister is necessary. He submitted that it never was the appellant's case that concurrence of the Minister had been granted. Indeed the question whether or not the Minister had given his concurrence was not put in issue. Rather, the appellant's case in the High Court was that the concurrence of the Minister was not necessary at law in order for the renewal of the contract to be valid and binding. However, since the need for concurrence is written in the law, the appellant had due notice thereof.

He contended further that the so called letter of renewal was not in compliance with s 37 of the Act since it brought about not a new agreement but a renewal of the old.

On behalf of the second respondent, Mrs *Gijima* submitted that the application was brought to the High Court on a certificate of urgency citing a pending auction of the applicant's rights as contained in "the agreement". That auction had

taken place and the relief sought in the interim order was no longer relevant at the date of the hearing of the appeal. The interdict was no longer necessary and the grant thereof would be a *brutum fulmen* since enforcement thereof was no longer possible.

Secondly, she submitted that the first respondent had acted *ultra vires* its powers in purporting to renew (the lease) and that accordingly the purported renewal was a nullity since the first respondent can only act with the concurrence of the Minister, which concurrence was not given.

Section 37 of the Act (as amended by the Parks and Wild Life Amendment Act, 2001) provides as follows:

> "The Authority with the concurrence of the Minister may –
>
> (a) lease sites in a safari area to such persons and for such purposes as he deems fit;
>
> (b) grant hunting or other rights over or in a safari area to such persons as he deems fit;
>
> subject to such terms and conditions as he may impose:
>
> Provided that –
>
> (a) the period of a lease in terms of paragraph (a) shall not exceed twenty-five years;
>
> (b) the period of hunting or other rights in terms of paragraph (b) shall not exceed ten years;
>
> (c) … ."

It seems clear to me that no agreement in terms of s 37(a) or (b) can be concluded by the Authority without the concurrence of the Minister.

It was not alleged by the appellant that the Minister had given his concurrence to the renewal of the agreement of lease and indeed it was the respondents' case that no agreement was concluded because the Minister's concurrence was not given. This averment was made in the opposing affidavits of the first and second respondents and was not controverted by the appellant, who filed no answering affidavit. The basis of the appellant's case was that the Authority was acting on behalf of the Minister and that concurrence of the Minister was not necessary.

Of course, this stance would be contrary to the express provisions of s 37 of the Act that the Authority's power to grant hunting rights such as the one in this case is subject to the concurrence of the Minister. A prudent person would enquire whether the concurrence of the Minister had been obtained in keeping with the provisions of the Act. The fact that the appellant may have been unaware of the governing legislation does not assist it as ignorance of the law is no excuse. Thus, in the absence of proof of the Minister's concurrence, the court *a quo* correctly found that there was no valid renewal agreement.

The purported renewal would appear to be in conflict with para (b) of the proviso *supra* which prohibits the granting of hunting rights for a period in excess of ten years. A renewal of the old agreement for five years would, it seems to me, amount to an extension of the period of the agreement to ten years. I do not accept the contention by the appellant that this was a new agreement which was to endure for five years. The wording of the letters relied upon by the appellant clearly convey the fact that this was a renewal of the old, rather than a new, lease.

At the hearing before us it appeared to be common cause that the hunting rights sold at the auction was for the period commencing after the expiry of the existing contract on 1 January 2007 and accordingly the issue of breach of that contract was not pursued.

Thus the appellant failed to establish that the auction would:

(a) be carried out in breach of its contract with the second respondent which was to expire on 1 January 2007; and

(b) constitute a breach of the terms of a valid renewed agreement of lease.

Accordingly, no *prima facie* right was established by the appellant which entitled it to the remedy sought in the court *a quo*. The failure to establish a *prima facie* right was fatal to the application and the court *a quo* correctly dismissed it.

We therefore find no merit in the appeal and it is hereby dismissed with costs.

SANDURA JA: I agree.

GWAUNZA JA: I agree.

IEG Musimbe & Partners, appellant's legal practitioners

Chinamasa, Mudimu, Chinogwenya & Dondo, first respondent's legal practitioners

Civil Division of the Attorney-General's Office, second respondent's legal practitioners