

SUSCADEN INVESTMENT (PRIVATE) LIMITED  
versus  
PARKS AND WILDLIFE MANAGEMENT AUTHORITY  
and  
MINISTER OF ENVIRONMENT, CLIMATE CHANGE,  
TOURISM & HOSPITALITY INDUSTRY  
and  
BIG FIVE SAFARIS (PRIVATE) LIMITED  
and  
CIVIL AVIATION AUTHORITY OF ZIMBABWE  
and  
TAFIKA ZAMBEZI (PRIVATE) LIMITED  
and  
ZAMBEZI CROCODILES (PRIVATE) LIMITED

HIGH COURT OF HARARE  
CHITAPI J  
HARARE, 18, 19 September & 25 October 2023

### **Urgent Chamber Application**

*E Matinenga*, for the applicant  
*K Kachambwa*, for 1<sup>st</sup> respondent  
*I Ahmed*, for 3<sup>rd</sup> respondent  
*N M Phiri*, for 4<sup>th</sup> respondent

**CHITAPIJ:** The applicant is Suscaden Investments (Private Limited a duly incorporated company in accordance with the laws of Zimbabwe. The first respondent is Parks and Wildlife Management Authority, a statutory body incorporated in terms of the Parks and Wildlife Act [*Chapter 20:14*] “Act”. Its functions are set out in s 4 of the Act. The Authority *inter-alia* controls, manages and maintains *inter-alia* national parks, sanctuaries, recreational parks and provides facilities for visitors. The second respondent is The Minister of Environment Climate Change, Tourism and Hospitality Industry. The Minister administers the Act. The Minister did not file any opposing papers in this application. The third respondent is Big Five Safaris (Private) Limited, a duly incorporated company in accordance with the laws of Zimbabwe. The fourth respondent is

The Civil Aviation Authority of Zimbabwe, a statutory body incorporated in terms of s 4 of the Civil Aviation Act [*Chapter 13:16*] “Act”. Its many functions are set out in s 5 of the Act and for purposes of this application it licences aerodromes. The 5<sup>th</sup> respondent is Tafika Zambezi (Private) Limited a duly incorporated company according to the laws of Zimbabwe. It operates a fishing camp and a lodge within Sape National Parks area by agreement with the first respondent. The fifth respondent did not file opposing papers. The sixth respondent is Zambezi Crocodiles (Private) Limited a duly incorporated company according to the laws of Zimbabwe. Its main line of business which it carries out in along the shorelines of Kariba Dam in the Chewore North National Parks area involves the collection of crocodile’s eggs. The fifth respondent did not file opposing papers to this application.

The applicant filed this urgent application for a *mandamas* seeking a provisional order in the following wording.

#### **TERMS OF FINAL ORDER SOUGHT**

That you show cause to this Honourable Court why a final order should not be made in the following terms:

1. The respondent shall not interfere with the applicant’s occupation and business operations at Chewore Zambezi Campsite until the resolution of the parties’ dispute by arbitration.
2. Respondents shall pay the costs of suit.

#### **INTERIM RELIEF SOUGHT**

That pending the determination of this matter, the applicant is granted the following relief:

1. The respondents or anybody acting for or on behalf of respondents be and are hereby interdicted from interfering in any way the applicant’s occupation of and operations at Chewore Zambezi Campsite

Only the first, third and fourth respondent opposed the application. They all raised a preliminary objection that the application is not urgent and should be struck off the roll of urgent matters with costs. The brief background to the dispute amongst the parties is gleaned from the relief sought in the provisional order. The dispute centres on the licencing of Chewore landing

strip. The applicant prays that an interim order be granted in its favour in terms of which the first respondent must direct the fourth respondent to offer the licencing of the Chewore landing strip to the applicant within seven (7) days of the order being granted as well as consequential relief as set out in para 3-2 and 3-3 of the interim relief sought.

The applicant and the first and second respondents executed a joint venture agreement on 17 February 2010 which is essentially a lease agreement. In terms thereof and in so far as the agreement relates to this application and briefly stated, the applicant is entitled to and occupies and carries out its business activities in an area described as Kapisinhenga Development Area, being land owned or managed by the first respondent, the distinction between owning and managing being inconsequential. In carrying out its business activities which in the main involves the operation of a tourism facility, the applicant requires the use of a landing strip for aeroplanes to land when they ferry tourists and *inter alia* evacuate medical emergency cases to hospital. The landing strip in issue herein is according to the applicant central to the dispute. The landing strip is said to be located some three kilometres from the applicant's campsite and lodge and thus it is convenient for the applicant's uses by reason of the small distance between the campsite and the aircraft landing strip.

The dispute between the parties has a litigation history which it is not necessary to detail for purposes of this judgment. Suffice that the cases are said to be case numbers HC 1820/14; HC 3107/18; HC 6592/22 and HC 6806/22. The applicant in listing the cases then stated that the cases are already on record and asked that the papers in those cases be read as incorporated in its current application and ended there. I must at once and by slight digression comment that this common practice of seeking that pleadings in another case are incorporated in the current case without further ado constitutes bad or poor pleading. Whilst it is convenient to a party seeking to rely on other pending or decided relevant cases for its claim or defence as the case may be, it should not be left to the judge or court to retrieve the record from the archives and be expected to open it and determine what the case was about and the result and relevance of that case to the current case. It is the responsibility of the party seeking an incorporation of the pleadings in the cases sought to be relied upon to outline briefly what the cases are about, the decision reached if a decision was given or if not, how the case was resolved or for example if *lis pendem* at what stage that case is and the relevance of the case to the proceedings before the court. It is placing an onerous and

arduous a duty on the court or judge to read through a record of proceedings referred to in full and make out what the case is about and to then relate to its relevance. It is the duty of the applicant to crisply plead its case. Where a litigant just dumps a list of case records and seeks their incorporation in the current proceeding without further ado said, then the court or judge is in my view entitled to ignore the reference as improperly pleaded or irrelevant as the relevance will not have been pleaded

Reverting to the current proceedings, I will accept that parties have been or are in the court for one or more disputes and this they are in disagreement. The applicant averred that the problem started when the first respondent purported to cancel the joint venture agreement by letter dated 22 November 2013 before its maturity or term which was due in 2021. The basis of the cancellation was in that letter given as a mistake on the part of the first respondent in that the area covered in the agreement belonged to third respondent and that the applicant ought not to have been granted the user rights given in the joint venture agreement. The interest of the third respondent can therefore be appreciated in this application in that the first respondent based its cancellation of the joint venture agreement aforesaid upon the fact that the land covered in the said agreement was already subject of existing user rights granted to the third respondent.

The cancellation aforesaid resulted in litigations including application HC 1820/14 wherein a provisional order was granted by this court interdicting the first respondent from interfering with the applicants operations at Chewore Zambezi campsite. There followed futile attempts between the applicant and the first respondent to settle the matter. The applicant averred that the dispute culminated in the applicant and the first respondent entering into a deed of settlement dated 8 September 2017 in terms of which the parties *inter-alia* compromised the litigations between them as at the date of the agreement. A new lease agreement was subsequently executed by the parties. The first respondent thereafter filed case number HC 3107/18 seeking the setting aside of the lease agreement and the consequential eviction of the applicant. The application was subsequently withdrawn by the first respondent. The applicant was offered an alternative site which offer it turned down because according to the applicant it had sunk in excess of USD \$1million in the business already in operation. The first respondent then gave notice to the applicant to vacate the site and allegedly denied access to the national park in which the disputed site is located. The

applicant avers that it then obtained an interdicts in case number HC 6806/22 suffering the first respondent to stop inhibiting the applicant's business activities.

The applicant averred that prior interdict granted by the court demonstrate a determined conduct of the first respondent to take the law into its own hands and force the applicant to abandon the site. On the crisp issue before the court which concerns use and landing lights to Chewore landing strip and the urgency of the application, the applicant averred that the fourth respondent in a bid to further frustrate the applicant and circumvent the interdict granted by the court has deprived the applicant of the use of the Chewore aircraft landing strip which is only three (3km) from the applicant's camping site and lies within the area on lease to the applicant by the first respondent. The applicant averred that it has had use of the landing strip since 2009 and that both the first and third respondent have always been aware of the strategic importance of the use of the aircraft to the applicant's business operations. The airstrip is now closed. The applicant did not specify the exact date of the closure.

In relation to the consequences of the closure. The applicant stated as follows in para 46 of the founding affidavit.

"46. As a result of the closure of the landing strip facilitated by the first respondent in collusion with the third respondent, the applicant now has to fly its guests into the Chakwenya landing strip, a two hour boat journey upstream from the applicant's lodge and campsite and ferry such guests up and down the Zambezi River at considerable inconvenience to such guests and considerable expense and loss caused to the applicants both in terms of direct running costs and loss of business from clients who prefer to fly directly to a lodge or campsite as opposed to being subjected to a lengthy time consuming unnecessary journey."

The applicant prepared a schedule Annexure Q to the founding affidavit of costs of landings at Chikwenya and averred that the additional costs of using that airstrip are \$606-20 per group of eight clients as opposed to the use of Chewore airstrip. The applicant also attached a scheduled Annexure R to its founding affidavit, income from bookings in 2022 and compared them with the 2023 bookings. The income figures were listed as US\$179 439 in 2022 compared to US\$57 854.50 in 2023. The schedule of bookings income is for the period May –November. The amount of US \$57 854.50 covers for the period May to August 2023. There are no recorded bookings for September, October and November. I do not deal with the variances for purposes of this judgment. In para 49 of the founding affidavit the applicant stated:

“49. Annexures Q and R demonstrate extreme urgency of bringing this matter before this Honourable court in that the applicant is suffering ongoing severe prejudice as a result of the closure of the Chewore landing strip.”

The applicant then gave a narrative of the history of the Chewore landing strip being that the airstrip was rehabilitated by the fifth respondent in 2004. The fifth respondent was then granted a licence by the fourth respondent to operate the airstrip and the airstrip was operated without method problems. The applicant states in para 50.4 of the founding affidavit:

“50.4. In or about August 2022 the first respondent without subscribing any dissatisfaction as to the way in which the fifth respondent was administering the airstrip or any other logical reason or notice to affected parts such as the applicant facilitated a situation in which the administration of the landing strip be handed over to the third respondent in pursuance of the agenda of the third respondent in collusion with the first respondent.”

The applicant averred that the handover of the operation of the landing strip to the third respondent was intended to interfere with the operations of the applicant. It averred that the airstrip was outside the third respondent’s area of lease and that the third respondent had never used the airstrip which was in any event located in the applicant’s leased area. The applicant generally complained about the handling of the licence issue by the first respondent and in particular that the first respondent had issued a no objection to the issue of the licence to a sister company of the third respondent. I do not intend to go into details of that as this judgment does not concern a review of any alleged irregularity in the issue of the licence. It is however common cause that the fourth respondent closed the airstrip to use for safety concerns. The applicant wrote a letter annexure W to the founding affidavit to the first respondent on 2 May, 2023 complaining that the third respondent had failed to maintain the airstrip hence its closure by the fourth respondent. For reasons given therein, the applicant suggested that the first respondent should confirm its agreement to an arrangement whereby the applicant, fifth respondent and another party, the Browns could rehabilitate the airstrip. On 14 July 2023, the applicant and fifth and sixth respondents prepared a petition annexure X to the founding affidavit directed at the first respondent for the following relief as expressed in the petition:

“In the circumstances the undersigned hereby petition the Director General of the Parks and Wildlife Management Authority to urgently instruct the CAAZ to transfer the administration of the aforesaid airstrip back to the management of the Authority so as to enable the undersigned business

to resume normal business activities to the benefit of both such businesses and the tourism industry and conservation effort in Zimbabwe.”

Upon the administration of the landing strip being transferred back to the Authority the signatories to this petition undertake to undertake such maintenance and repairs to the landing strip at their own cost to a standard acceptable to the CAAZ to facilitate the re-opening of the landing airstrip.”

Notwithstanding the petition, the applicant has subsequently made a turnaround in its papers as averred in para 60 of the founding affidavit where it then states that it has changed its mind about the first respondent taking control of the licencing of the landing strip because it allegedly supports the unlawful agenda of the third respondent. The applicant then seeks that the first respondent be compelled by the court to offer the licencing of the Chewore landing strip to the applicant. I do not find it necessary at this juncture to comment on the propriety of the order sought and the competency of the court to issue such an order.

The first, third and fourth respondents raised a preliminary point of urgency and argued that the application be struck off the roll with costs as it did not merit an urgent hearing. Mr Kachambwa for the first respondent submitted in addition that there was a material non-joint of the current licensee because the relief sought would impact on the issued current licence holder. The applicant’s counsel Mr *Matinenga* expressed surprised that there was a licence holder outside of the parties to this application. Mr *Matinenga* also submitted that the non citation of an interested party does not define urgency because it is the circumstances of the matter which are considered to determine whether the matter be listed as urgent. Counsel referred to my judgment in the case, *Pascoe v Ministry of Lands and Rural Resettlement & Others* HH 11/17 which the issue of urgency of an applicants was extremely discussed. The submission makes sense. It is any event that joinder misjoinder or non joinder does not render an application being dismissed on that basis since joinder can be ordered at any stage the proceedings on application by any of the parties or by the court itself. The court can also decide the matter as against the parties before it to the extent that it can do so on the papers filed. Rule 32 (11) of the High Court Rules 2021 is instructive in that regard.

It is convenient to start with the opposition of the fourth respondent in its objection to urgency. The fourth respondent averred that the urgency in this case was self-created by the applicant. It averred that in relation to Chewose North landing strip which is subject of focus in this application, the applicant had filed its own application for the aedrome licence on 9 September

2022. The applicant did not make this material disclosure in the founding affidavit. In the answering affidavit it did not address why there was non-disclosure and only stated that its application could not be entertained without a supporting letter from the first respondent. The fact of the matter remains in my view that the applicant made an application which it did not withdraw. The defective nature of the application does not detract from the fact that it had a pending licence. This fact was not disclosed. It is a legal requirement that a party which brings an urgent application before the court, be it *ex parte* or on notice should disclose all material facts bearing on the matter and the relief sought to the court. I cannot do any better than relate to the apt dicta of MATHONSI J (as then he was) in the case *Elvis Basira v Vimbai Mamemo* HB 46/18 where the learned judge, clearly noted that the utmost good faith should be observed in urgent application and that all material facts should be disclosed which have a bearing on the outcome of the case. The learned judge stated on page 1 of the cyclostyled judgment:

“ ..... This court always discourages urgent applications whether *ex parte* or not which are characterized by material non-disclosures. See *Graspeak Investments (Pvt) Ltd v Delta Corporation (Pvt) Ltd and Another* 2001(2) ZLR 537 (H) at 535 C-) *Moyo & Another v Haasbro Properties (Pvt) Ltd & Anor* 2010 (2) ZLR 194 (H) at 197 A-B”

In considering whether a matter is urgent or not the court or judge follows up the paper or trail of events. Where on the trail there is a break, it must be explained. Where an event in the trail has been omitted, such event must at least be disclosed and the reason for its exclusion given. In my view the applicant failed to mention a material event in the paper trail being an event that would impact directly on the relief which the applicant seeks. I hold the view that where there is a break which is material in the paper trail which is not disclosed or explained the judge or court is entitled to and would be justified to refuse to hear an application on the urgent roll as there is little scope in urgent applications for a resolution of disputed facts in considering whether or not a *prima facie* case warranting the grant of a provisional order sought has been established on the paper. It impacts badly on the *bona fides* of the applicant to bring this urgent application on the urgent basis for an order to be offered a licence to operate Chewore lauding strip yet failing to disclose that it had already applied for the same licence. For the reason of the material non-disclosure I would as I do refuse to hear the application on the urgent applications roll and strike it off the roll.

The third respondents also raised other facts to support the contention that the application is not urgent. These related to the issue of when the need to act arose with the third respondent

averring that the need to act arose as early back as September 2022 when the airstrip was closed and that the applicant should have sought relief at around that period. I will not dwell on this ground in view of the view I have taken of the matter.

The court must as a general rule be loathe to deal with matter brought on the urgent rule where the trail of facts is not seamless. Where material non disclosures are made in the urgent application, the court in my view should invariably strike the matter off the roll of urgent hearings and the applicant then pursues if the applicant is so advised, the matter on the ordinary roll where the applicant can then explain any anomalies in the answering affidavit which is not filed as of right in urgent application or apply to file additional affidavits or lead evidence these being available options to deal with the non-disclosures subject to the directions of the court.

The other issue on which Mr *Matinenga* has taken objection or reservation to is the fourth respondent's assertion that the airstrip is already under licence to a company called Safari Air Services. Whilst the issue can be argued, the fact cannot be overlooked that a licence already exists and the urgency of the matter takes a different complexion because the existing newly issued licence would have to be set aside before the relief sought by the applicant may be considered. The factual scenario has altered significantly. The applicant ought in this regard to have seriously considered whether or not to proceed with the application on the urgent roll in the light of the licencing status of the airfield in question. It is however entirely up to a partly to decide how best to protect or defend its rights.

The issue of costs remains to be addressed. The court as noted are loathe deal with to applications brought on an urgent basis were material none disclosures are made as this impacts on the *bona fides* of the application. Costs are however in on the discretion of the court. In the exercise of the courts discretion I am inclined to order the applicant to pay wasted costs. This is the general approach of the court in cases where the court makes a finding that the applicant has failed to disclose a material fact as stated by MATHONSI J in the Basera case (*supra*). The costs order is a mark of disapproval by the court on -the conduct of applicants who deliberately do not disclose material facts in urgent applications. Having a court dealt with on the urgent roll is an indulgence which the court does not lightly give because the applicant's case when heard in the urgent basis gives the applicant a preferential advantages over other litigants who also want their

cases speedily determined. The least that the applicant can do is to be open with all facts relevant to its case and the relief it seeks.

I determine therefore the objection as follows:

**IT IS ORDERED THAT:**

1. Application not urgent
2. Application is struck off the roll of urgent applications with cost.

*Coghlam Welth & Guest*, applicant's legal practitioners

*Mhishi – Nkomo*, first respondent's legal practitioners

*Almed and Ziyambi Legal Practitioners*, third respondent's legal practitioners

*Muvingi Mugadza Legal Practitioners*, fourth respondent's legal practitioners