PARKS AND WILDLIFE MANAGEMENT AUTHORITY
and
MINISTER OF ENVIRONMENT, CLIMATE CHANGE TOURISM AND HOSPITALITY
versus
SUSCADEN INVESTMENTS (PRIVATE) LIMITED
and
BIG FIVE SAFARIS (PRIVATE) LIMITED
and
PARKS AND WILDLIFE MANAGEMENT AUTHORITY

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE; 21 March 2025

Opposed Court Application

K Kachambwa, for the applicants
TR Mafukidze, for the 1st respondent
TL Mapuranga, for the 2nd respondent

CHITAPI J: The parties in this application are as follows: The first applicant is Parks and Wildlife Management Authority, a statutory corporate body established in terms of the Parks and Wildlife Management Act *[Chapter 20:14]*. The second applicant is the minister of Environment; Climate Change, Tourism and Hospitality Management. The second applicant is assigned by the President the administration of the Parks and Wild Life Management Act. The first respondent is Suscaden Investments (Pvt) Ltd a duly registered Zimbabwe company. The second respondent is Big Five Safaris (Pvt) Ltd and like the first respondent is a duly registered Zimbabwe company. The first and second respondent companies carry out *inter alia* safari business in Chewore North Safari Area. They do so under authorities which are in dispute and have led the applicants to approach this court seeking declaratory and ancillary relief as follows:

> "IT IS HEREBY ORDERED THAT:
> (a) The lease agreement entered into between the first applicant and the first respondent in 2017 be and is hereby deducted null and *void ab initio*
> (b) The first respondent be and is hereby interdicted from carrying out or conducting fishing, game seasoning or photographic safaris in the whole of the Chewore North Safari area.
> (c) The first respondent be and is hereby ordered to vacate the area it occupies in the Chewore North Safari Area.

(d) The first respondent be and is thereby ordered to vacate the area it occupies in Chewore North Area whom ninety days of granting of this order.
(e) Should the first respondent fail to vacate as required in para 3 above the sheriff or his agents be and are hereby ordered to evict the first respondent from the area it occupies in Chewore North Safari Area.
(f) Each party to bear its own costs.''

The first prayer on the draft order is inarticulately settled. The applicant should be specific in identifying the lease agreement in issue, it should not leave it to the court to look for the details or indeed to look for the agreement itself from the applicants' papers. The applicant is lucky however in that the agreement identification is not an issue between the applicants and the respondents. It is common cause that the applicants seek a declaration of nullity of the lease agreement entered into or signed on 8 September 2017 between the first applicant and the first respondent agreement. That agreement is the subject of this application. The lease agreement was signed by The Director General Fulton Upenyu Mangwanya on behalf of the first applicant (the Authority) and by Learnard Nyamutsamba on behalf of the first respondent.

In the pre amble to the agreement it is recorded that:

> "**WHEREAS** the parties have agreed that the authority will lease to the lessee the area presently occupied by the lessee and grant to the lessee the right to occupy and utilize an additional portion of land as set out in this Memorandum of Agreement"

WHEREAS in terms of the Act, the signature of the Minister of Environment, Water and Climate signifying concurrence to this lease is a condition precedent to the validity of this agreement"

Note is therefore taken that the agreement was intended to lease to the lessee the area it was in occupation of as at the date of signing the lease agreement as well as an additional portion thereof. The existing leased area was described in clause 3 of the agreement

> ".....as the existing project site occupied by the former Joint Venture being a portion of Parks estate in Chewore Safari Area approximately (3) square kilometers in extent located in the vicinity of the confluence of the Zambezi and Chewore Rivers, tally described as follows: .....

The boundaries and GPs co-ordination of the area where then set out in detail. There is no need to repeat them as they are not in dispute. The background facts of the matter are not in dispute or not seriously so.

In relation is the lease of the additional area of forty (40) square kilometres, its grant effective date was 1 January 2022 in terms of clause to ten (10) of the agreement. The area concerned, and its co-ordinates was described fully in the same clause. I again do not repeat

the detail thereof as there is no dispute concerning the area description and co-ordinates. The dispute raised was whether the area was available for lease to the first respondent, it being alleged that the area was already by the date of the agreement leased to the second respondent.

In relation to the period of the agreement which is one of the issues in dispute in this application, the agreement provided in clause 8 therefore as follows:

> "8-**PERIOD**
> This agreement shall come into effect on the date of signature by the parties and if not signed on the same date it shall come to effect on the date of last signature and shall continue and endure for a period of twenty-five (25) years ending on 31 December 2042"

Clause 9 provided for annual rental of US$10000-00 for the period 1 January 2018 to 31 December 2021. The rental was to be increased to US$15000-00 per annum from 1 January 2022 when the additional forty square kilometres piece of land would be availed to the lessee. Further increments were provided thereof to the end of the tenure of the agreement including negotiating the rental for the last ten (10) years.

The agreement provided for the signature of the first applicant as lessor, the signature of the lessor's board chairman, the first respondent as lessee, the Permanent Secretary of the relevant second respondent ministry and lastly the signature of the second applicant (Minister). Significantly, on the signature portion for the second applicant, the agreement provided that the Minister had concur. The signature portion is prefaced by the following.

> "THIS CONCURED TO BY THE MINISTER OF ENVIRONMENT, WATER AND CLIMATE AT HARARE THIS .....Day of 2017
> .....
> OPPAH C.Z MUCHINGURI-KASHIRI
> THE HONOURABLE MINISTER OF ENVIRONMENT WATER AND CLIMATE"

The first applicant attached a copy of the agreement to its founding affidavits. The copy of the agreement did not bear the signature of the Minister or the second applicant. The first applicant averred that the agreement had a background. The background to the agreement was that it followed upon a deed of settlement entered into between the first applicant and the first respondent following the termination of a Joint Venture Agreement between the first applicant and another company called Chewore Confluence (Pvt) Ltd. There had been litigation amongst the Joint Venture Partners the details of which are not material to the determination of the issues which arise in this application. It suffices however to record that the second respondent was not party to nor was it made party to the litigations or to the deed of settlement which was the pre-cursor to the agreement in dispute herein. The second respondent had however registered its interest in the ongoing disputes between the first applicant and the Joint Venture Partner'. It

had applied to be joined in the proceedings including filing an application under HC3107/18 seeking the cancellation of the same agreement the subject of this application on the basis that it covered an area which was under an existing lease agreement which the second respondent had with the applicant and was said to be valid until 2036. That litigation was withdrawn to allow for a harmonious resolution of the dispute which would include the first applicant, the first and second respondents. The applicant averred that subsequently it reached settlement with the first respondent to the exclusion of the second respondent, yet the second respondent had an interest in the disputed area and had litigated on it. Efforts to resolve the dispute failed according to the applicant. The applicant averred that the first respondent was not forthcoming in attempts to resolve the dispute. Such attempts involved *inter alia* an offer to the first respondent of an alternative site within Mana Pools, but the first respondent held on to the agreement herein which it considered to be valid and binding and that it did not infringe the rights of the second respondent. The applicant averred that it then gave notice to the first respondent to vacate the three (3) square kilometer area of land occupied by the first respondent as it fell within the area already leased to the second respondent. The second respondent remains in occupation. This informs the consequential relief of eviction of the first respondent should a declaration of nullity of the agreement be issued in this application

The applicant averred in para (s) 32-35 of the founding affidavit as follows:

> "32. The first applicant and the first respondent agreed and accepted that the existence and enforceability of the deed of settlement was dependent upon the sequiring of a martially acceptable and binding base agreement between the authority and Suscaden duly approved by the Minister through her signature
> 33. The intention was that after the first applicant and first respondent had negotiated and signed the deed of settlement and lease agreement, the documents would then be taken to the Minister for her concurrence and signature.
> 34. It would be earlier for the Minister to consider all the documents together and if satisfied give consent and concurrence through her signature. The lease agreement made provision for the Minister's signature. However, the Minister never signed the lease agreement. Her concurrence was not obtained.
> 35. The first respondent in proceedings before this court has never attached a lease agreement signed by the Minister **HC 3107/18; HC 6592/22 and HC 6806/22**. It has only attached the lease agreement that was signed by the first applicant and the first respondent see also letter dated 16 July 2021 were (sic) the first respondent attached the lease agreement not signed by the Minister Annexure 9 B"

Annexure 9 (b) is the Agreement whose nullity is sought. Its highlights have been covered. Thus, the first ground advanced by the applicant for seeking the declaration of nullity of the agreement as I have discussed it was that the Minister did not give concurrence or approval of the agreement consequently rendering the agreement a nullity in the absence of her consent. The applicant pleaded a further ground for seeking the declaration of nullity of the

agreement. The applicant pleaded in the alternative that in any event the agreement had a life span that exceeded the maximum period of twenty (25) years provided for by s 37 of the Act. As already noted the agreement was signed on 8 September 2018 and it provided that it would end on 31 December 2042. The applicant contended that the agreement exceeded the statutory limit by three and half months rendering it invalid for that reason.

In relation to the second applicant's position. The incumbent Minister Ngobizitha Mangaliso Ndlovu filed an affidavit in which he aligned with and adopted the first applicant's averments. He did so after "diligent enquiry as to the veracity of such facts and by accessing the records of the first applicant and that of the facts. The deponent Minister was not the incumbent Minister alleged to have concurred to the disputed agreement. The incumbent as already noted, was Oppah C.Z Muchinguri Kashiri. The then incumbent Minister also deposed to a supporting affidavit. She denied that she is the one who signed the agreement attached as annexure E by the first respondent in approving affidavit. For clarity Minister Muchinguri Kashiri stated as follows in para 5-7 of her filed supporting affidavit"

> "5. I did not sign Annexure E attached to the first respondent opposing affidavit. I did not concur to the awarding to the first respondent of any lease agreement over Chewore North Safari Area.
> 6. In any event. I would never have signed an agreement without inserting the date of signature because the failure to do so would amount to a dereliction of my statutory duty as a Minister.
> 7. The date of signing was important because it signified the commencement of the lease and it would determine the period of the lease. The period of the lease is a statutory requirement and should not exceed 25 years."

The applicants' case was basically as I have attempted to set it out.

The first respondent vehemently opposed the application on both points *in limine* and on the merits. In relation to the points *in limine* it was in the affidavits largely directed as the second respondent. The contention was that even assuming but without conceding that the second respondents rights to the disputed area had been infringed, the second respondent was time barred from seeking the courts protection since its claimed hunting concession agreement as shown in annexure 1 A to the founding affidavits being the agreement entered into between the first applicant and the second respondent had prescribed. It was further averred that a deed of settlement entered into between the applicant and the respondent dated 8 September 2017 had resolved the dispute of the first respondent's occupancy of the disputed area and that the second respondent had no legal interest in the settlement as it had no rights to protect.

The issue of prescription was not pursued at the hearing. It is not necessary to therefore waste time on it save to take note as I have done that it was raised in the supporting affidavit.

The issue would not have been capable of disposal on the affidavits without evidence being formally led or agreed facts being settled lease of agreement filed for determination as a trial within a trial as a or hearing within a hearing so to speak. It is settled law that the proof of the defence of prescription is an evidential matter since the person invoking prescription must set out and establish facts on which he or she relies on for the defence. See Mackleod v Kweyiva 2013 (b) SA 1 (SCA); Elizabeth Chazambwa v Minister of Local Government Public Works and National Housing SC 64/22. The issue of prescription was not formally abandoned but constructively abandoned since no submissions were made by counsel on prescription at the hearing.

The first respondent's opposing affidavits was detailed and answered the equally detailed founding affidavit. The detail pertained to historical facts not entirely relevant to the issues for determination. The historical extrapolation showed that there were disputes over the same area in dispute herein which culminated in several court cases. These cases are not directly relevant as either *facta probanda* or *facta probantia* in relation to the issues to be determined.

On the issue of the disputed validity of the lease agreement in question for want of Ministerial or the second applicants' consent, the first respondent averred that the Minister had signed the agreement. The first respondent admitted that the deed of settlement required that the lease agreement to be issued had to be signed by the Minister. It then averred that outside of the intentions of the parties as shown in the lease agreement, the first respondent could not be held responsible for or control the way in which the first applicant conducts its business activities particularly in relation to documents prepared by the first applicant. The first respondent whilst persisting that the Minister signed the lease agreement did not apart from saying it is not responsible for how the first applicant executes its business aver any other grounds for being steadfast in its bold assertion that the Minister signed the agreement.

The first respondent admitted that it had in fact produced a partially signed agreement without the Minister and Permanent Secretary's signature. The deponent to the first respondent affidavits William Terence Kelly stated in para 39 thereof:

> "39 Ad para 35
> With respect whether as not the first respondent attached a partially signed lease agreement to prior proceedings is irrelevant. The issue is as to whether or not the Minister actually signed the lease agreement Annexure E"

This assertion is different to understand in logic. The applicants' contention was that the Minister did not sign the agreement. It also averred that in prior proceedings the first

respondent did not in its affidavit(s) produce or rely on the agreement which bears the Ministers signature. The first respondent instead relied on the agreement produced herein by the first respondent. To then state that previous depositions by the same party in relation to the identification of the same agreement is not of moment yet the same party has produced a differently signed cannot be irrelevant especially when regard is had to the fact that this court may refer to its own records.

In the case of *Netone Cellular (Private) Limited and Reward Kanga v Econet Wireless (Private) Limited and Zimbabwe Revenue Authority* SC 47/18. GOWORA JA repeated the well-known principle that the court may refer to its records as follows at p 8 of the cyclostyled judgment.

> "After the hearing this court was furnished with the record of proceeding in the matter between the second appellant and the first appellant under case number HC 11003/16. The record contains a letter of termination of the second applicant employment on notice dated 12 October 2016 and the proceedings seek to challenge the letter of termination. In *Mhungu Mtindi* 1986 (2) ZLR 171 (SC) at 173 A – B MCNALLY JA, said,
>
> "It seems to be from the judgement in which the learned judge a *quo* granted summary judgment that she made reference to the papers in case number HC 3406/84. In doing so he was undoubtedly right. In general, the court is always entitled to make reference to its own records and proceedings and to take note of their contents- Halsbury 4 ed vol 17 para 102; Boyce N.O V Bloem and Ors 1960 (3) SA 853 (T); Shell Zimbabwe (Pvt) Ltd v Web 1981 ZIR 498 (HS) at 503-4 (this case was upset on appeal but not on this point). The position is a fortori when the defence involves a reference to the previous proceeding as this one does"

In respect of this aspect of the matter the first respondent had in para 35 of the founding affidavit stated as follows:

> " 35 The first respondent in proceeding before the court has never attached a lease agreement signed by the Minister see HC 3107/18; HC 6592/22 and HC 6806/22. It has only attached the Lease Agreement that was signed by the first Applicant and the first Respondent only. See also letter dated 16 July 2021 where the first Respondent attached the lease Agreement not signed by the Minister. Annexure 9B"

It is to this averment that the first respondent answered that it is neither here nor there that what the first respondent presented as the agreement executed by the parties which is not signed by the Minister is inconsequential because the court must only be detaineed by the agreement now produced by the same first respondent albeit the signatures are now different in that the agreement now produced purports to have been signed by both the Minister and the Permanent Secretary. The first respondent did not help the situation by not giving an explanation as to why it produced differently signed agreements on oath before this court and in previous proceedings in relation to the same subject matter. The first respondent blew hot and cold instead of taking a position. To have said its neither here nor that the first respondent

produced differently signed agreements in previous proceedings and relied on them for relief or defence as the case maybe was to shoot itself in the foot. The court is justified to draw adverse inferences against the first respondent in such circumstances.

The first respondent did not give any further grounds to advance its stance that the Minister signed the agreement other than to allege barely that the Minister signed. It also did not explain or give reasons why the court should accept that the agreement attached to the opposing affidavit was signed by the Minister in view of the Minister denial in her affidavit.

It seemed to me therefore on this point that the evidence at hand was that the respondent in previous proceedings on oath before this same court uttered and placed reliance on an agreement which did not bear the signature of the Minister. In *casu* the applicant relies on and has uttered a differently signed agreement purporting that the Minister signed the agreement albeit the Minister's signature was not endorsed therein. The date of the Ministers' signature is of essence or great moment by virtue of the fact that the lease agreement has a time limit determined from the date of the signature of the Minister. The Ministers signature renders the agreement to be *perfecta*. The Minister adverted to the essence of the missing date in denying that she signed the agreement. The fact that the applicant approbated and reprobates or takes inconsistent positions in different legal proceeding bearing on the same documents is a factor to be considered together with any other factors which maybe properly considered in assessing the *bona fides* and veracity of the applicants defence to the claim herein.

At the hearing of the matter the respondents' counsel contended that there were material disputes of fact which made it necessary for the court to refer the matter for trial. Counsel for the applicant did not agree and contended that the matter could be disposed of on the filed affidavits. In relation to the approach of the court to disputations of fact in affidavits filed in application proceedings, the applicants' counsel summed the position in para 35 of the heads of argument as follows:

> "35 The first respondent raises the issue of dispute of facts in a superficial manner. The Supreme Court held that where a respondent intends to show a dispute of fact it is not sufficient for such respondent to resort to bare denials of the applicants' material averments as if he were filing a plea to a plaintiff's particulars of claim in a filed action. The respondents' affidavits must at least identify and disclose that there are material issues in which there is a bona fide dispute of fact capable of being properly decided only after viva voce evidennce has been heard. See Van Niekerk v Van Niekerk 1999 (1) ZLR (S) at 429"

The above submission is correct. A disputed fact can only be placed in dispute by another contrary fact. It was not so herein because the first respondent simply stated that the Minister signed and that her denial was a falsity.

The first respondent counsel submitted that it had subpoenaed a witness to deal with the disputed fact of whether of not the Minister signed the disputed agreement. I allowed the first respondent to lead oral evidence and for the applicant to also do so if advised. Parties were allowed to lead evidence on strictly on the issue of the signing of the agreement. I directed that parties should if intending to lead evidence file summaries of evidence. The first respondent did so and was the only one that led evidence. The applicants and second respondents elected to stand by their affidavits as filed in support of the application in the case of the applicants and in opposing the application in the case of the second respondent.

The first respondent called George Manyumwa as its witness. He had a prepared an affidavit and adopted the contents as his evidence. In brief he deposed that he was employed by the first applicant between 2016 and October 2021 as the Deputy Director General Commercial Services. He was responsible for agreements of a commercial nature. In relation to the signing of the lease agreement between the applicants and lessees he outlined the procedure in para 2 of his affidavits as follows:

> " 2 I was responsible for all agreements of commercial nature. The procedure for securing the Ministers' signature was as follows:
> 2.1 the board would take a resolution to enter a lease agreement
> 2.2 The parties would sign the agreement first, with The Director General and the Board Chairman signing on behalf of Parks and the signing would be done at the Parks Offices
> 2.3 The Registrar of Parks would then send the agreement to the Ministers' office for signing.
> 2.4 The permanent secretary would sign the lease agreement and give it to the Minister to sign. When the Minister and the Permanent Secretary had signed the lease, it would be sent to back to the Registrar of Parks. The Registrar would give the signed lease to the Business Development Manager who would bring it to my office.
> 2.5 We would then notify the lessee that the lease had been signed and once the lessee paid the first year's rental we would give them a copy of the lease"

From the above it can be seen that the witness was not involved with the processing and procuring of the signatures of the Permanent Secretary and the Minister. The movement of the agreement after signature by the lessee and the first applicant rested with or was vested in the Registrar of the first applicant who also did not oversee the signing of the agreement outside of the first applicant's offices.

In relation to the agreement in issue attached to the first respondents' opposing affidavits and purportedly signed by the Minister, she deposed that he was involved in negotiations between the first applicant and the first respondent which culminated in a deed of settlement and consequently the disputed lease agreement significantly he deposed to the fact that part of the land offered to the first respondent, being a 40 kilometer stretch of land within the Chewore North area was lease to the second respondent and that it would be offered to the

first respondent upon the expiry of the lease agreement held by the second respondent. The offer was intended to "compensate Suscaden for the lesser it had sustained by being unable to develop the site in terms of the joint venture agreement which it had not been able to do due to the claims by Big Five and the litigations between the parties.

I will leave my comment in reserve over what appears to be a current arrangement where a lease agreement would be given to a lessee as "compensation"

Be that as it may, the witness deposed that with respect to the disputed agreement, it was signed by the first applicant and the first respondent before its further processing was taken over by the Registrar. The witness was approached on 13 September, 2017 by the first respondents' representative Leonard Nyamutsamba who was following up on the signed agreement. On that date the agreement had not been signed by the Minister. He deposed that he subsequently attended on Nyamutsamba on 10 October 2017 and on that date, he had in possession the lease agreement signed by the Minister from the Development Manager. The witness did not give Nyamutsamba the full agreement because rental had not been paid. The full lease agreement would be released after payment thereof. He plucked off some pages of the agreement and gave Nyamutsamba the remaining pages which included the first pages bearing the parties names and the one bearing the signatures of all signatories including the Minister. He then endorsed and signed on the top page "copy original to be given after payment." He did not explain the logic behind such a bizarre way of handling official documents. He deposed that he authorized the Legal Manager to release the original agreement which the Minister signed to Nyamutsamba.

The witness did not add anything more to his affidavit. He was cross examined. The witness was asked to give a basis for holding that the Minister signed the agreement. He gave an honest answer that he did not see either the Permanent secretary or the Minister sign the agreement and that he could not contest the Minister denial that she did not sign the agreement. The answer is honest because the witness neither took the agreements for signing by the Minister nor did he witness the Minister signing the agreement. The witness could not reconcile the agreement which did not bear the Minister signature with the one which the witness said was signed by the Minister. The witness stated that the only agreement he was aware of was the one signed by the Minster and he had crossed it over. The court asked him why he would cross over official agreements and he answered, "we used to do that."

The witness was referred to the three signed versions of the same agreements by the applicant's counsel. The first version was one not signed by both the Permanent Secretary and

the Minister but was signed by the first applicants Director General and co-signed by its Board Chairman and by the first respondent. The witness admitted that the first version was indeed different from the one which he spoke to as having been signed by the Minister. The first version showed that the three signatories I have referred to all signed the agreement on 8 September 2017. This agreement appears on page 130-131 of the consolidated record.

The second version of the agreements which appears on pages 246 -247 shows that the Director General of the first applicant signed the agreement on 11 September 2017 thus differing from the first version wherein he signed on 8 September 2017 and the Permanent Secretary signed on 4 October 2017. On the Minister's portion, the purported signature of the Minister appears therein but no date is endorsed. The portions for the date are blank. This is the agreement which the first respondent relies on as the copy of the agreement which the Minister signed.

The third version which was shown to the witness for comment was the one which the witness relied upon and produced pages 1 which lists the parties to the agreements as the first applicant and the first respondent. It is this page which bears the witnesses date stamp of 10 October 2017 and an endorsed "copy" made by the witness. It has the endorsement "original to be produced after payment."

Also produced were pages 17 and 18 being the signature pages. The signing patterns would be expected to be the same if the agreement produced by the first respondent is the same as that produced by the witness and crossed over and endorsed "copy." The witness when asked to reconcile the agreement averred that the only agreement, he knew of was the one whose pages he produced and endorsed copy".

The court examined the agreements using the naked eye. In noted differences in the manner of signing and endorsements. Whereas the one attached to the first respondents opposing affidavit has faint imprints on the signatures of the witness to the Director Generals' signature one Rumbidzai Mutetwa, the signatures on the one produced by the witness has bold lettering. Again, on the portion for the signature of the second witness "Doris Tom" who was witness for the Director General, the one produced by the first respondent differs from the one produced by the witness because the one produced by the witness has three names printed for "DORIS TOM." There is a third name printed as the first name of three. It is not very clear what this third name is as it is not very legible. The next notable difference is that whilst the agreement produced by the first respondent shows the name of the first witness to the signature of the first applicants' Board Chairman as "CHUMA FAINOS" and signature "Chuma" the signature of the same witness on the one produced by the testifying witness shows the name of

the witness as "CHUMA FN". The next notable difference is that on the agreement produced by the first respondent, the Permanent Secretary purportedly signed it on 4 October 2017 on the signature pages. On the pages produced by the witness, the Permanent Secretary signed the agreements on 10 October 2017. The witness as already indicated advised the court that he could not comment on other agreements except the one which he produced. The anomalies were not explained by either the witness nor by the first respondent. What is clear therefore was that the testimony of the witness on the agreements was that he confused the matter for the first applicant because the witness then produced the signature portion of the agreement which materially differed from the one produced by the first respondent.

In fairness to the witness, his demeanor was good. However, whilst I noted earlier that he was honest in his testimony generally, he was less so in relation to the issue of signatures by the Minister. He however, did not assist with his evidence on the issue of signatures of the signatories and inconsistent dates. The effect of his producing signature pages which materially different produced from the signatures appearing on the agreement produced by the first respondent was to discredit the authenticity of the signatures and to give credence to the Minister denial that she signed the agreement. The serious doubts cast on the authenticity and unreliability of the testimony of the first respondent and of the witness places the first respondent between a rock and a hard place because the first respondents' star witness who purported to have dealt with the agreement and their movements produced a copy of the signature page which differs from that produced by the first respondent without explanation of the discrepancies.

In the circumstances of this case, the following are proven facts;

(a) That the first respondent has not in previous proceedings produced or referred to an agreement signed by the Minister and in fact has not until in the current proceedings produced the agreement its purport to have been signed by the Minister.

(b) That there are differing versions of the agreement signature wise and the first respondent's failure to address in evidence the inconsistency in names of signatories and signatures and dates of signatures of witnesses and principal signatories in the agreement produced by the first respondent and the one whose signature page was produced by the witness Manyumwa.

(c) That there was no evidence that the Minister actually signed the agreement. In fact the witness Manyumwa was not in charge of the movement of the copies of the

agreement after signature by the parties or from the first applicants' offices to the offices of the Minister.

(d) There are conflicting dates vis-à-vis the alleged date of signature by the Permanent Secretary on the agreement produced by the first respondent and that whose signature pages were produced by the witness.

(e) The absence of any attempt to identify the Minister's usual signature for comparison with the disputed signature. In this regard the submission by the first respondents' counsel that the onus shifted to the Minister to prove that the signature on the agreement was nor hers does not hold moreso in the light of the fact that the agreement(s) placed before the court contest each other in authenticity. The question remains, "which then is the authentic agreement of the three?" The onus to do this was on the first respondent which relies on the inconsistent agreements to establish that the Minister signed the agreement(s) despite the Minister's denial. There was therefore no evidence led to satisfy the court on a balance of probabilities that the Minister signed the agreement in question despite her denial. There was no evidence led to suggest that the Minister at any other time took a contrary position regarding her denial of the signature. The first and second applicants must be taken to have proved on a balance of probabilities that the second applicant did not sign the agreement.

The next point to consider is the effect of the finding that the Minister did not sign the agreement. The deed of settlement which culminated in the consummation of the disputed lease agreement recognized that the lease agreement had to be compliant with s 37 of the Parks and Wildlife Act [*Chapter 20:14*]. Clause 8 of the Deed of Settlement recognized that fact. Significantly, the disputed base agreement in its preamble provided as follows:

> "WHEREAS in terms of the Act, the signature of the Minister of Environment, Water and Climate signifying concurrence to this lease is a condition precedent to the validity of the agreement."

The issue simple really. In the absence of evidence that the Minister signed the agreement or that she ever accepted the agreement explicitly or tacitly, the matter ends there. No issues like issue estopped can be raised against the Minister. The fact that the first applicant acted on the agreement and/or collected rentals and treated the agreement as valid to all intents and purposes does not validate the agreement because the validation is not the prerogative of the first respondent but that of the second respondent, the Minister.

The Deed of Settlement itself provided in clause 1 as follows:

> "It is recorded that the existence and enforceability of this deed is dependent upon the signing of a mutually acceptable and binding lease agreement between the Authority and Suscaden duly approved by the Minister."

The effect of the courts finding that the Minister did not sign the lease agreement as asserted by her has the unfortunate but inevitable consequence that the Deed of Settlement itself lacks validation as its coming into existence was dependent upon the coming into effect of a valid lease agreement. It was not contended or shown that the Minister was part of the deed of settlement or its negotiation.

To just complete the picture, the parties herein do not contest the provisions of s 37(1)(a) of the Parks and Wildlife on the requirement for the Minister to concur to the grant of any lease agreement. The provision reads as follows:

> **"37 Lease of sites and grant of hunting rights in safari area**
> The Authority with the concurrence of the Minister may
> (a) Lease sites in a safari area to such persons and for such purposes as it deems fit,"

Absence of concurrence by the Minister, the lease agreement issued would not be perfecta and would in fact be invalid. The Minister cannot be bound to the invalid lease agreement. The second issue is related to the first issue. It was submitted that the lease agreement exceeds the mandatory maximum period for which a lease agreement may be granted. Proviso (a) to s 37 supra provides that:

"(a) the period of lease in terms of para (a) shall not exceed 25 years"

The issue of the duration of the lease agreement only becomes of moment in the event that the agreement itself is found to be valid. A finding of its invalidity has been on account of the want of Ministerial concurrence. The issue of the tenure of the lease agreement is therefore academic. The lease being invalid means that there is no lease agreement before the court on which the court consider it terms. In the case *Air Duct Fabricators (Pvt) Ltd v AM Machado and Sons (Pvt) Ltd* HH 54/16 the court made a distinction between mandatory and directory provisions of a statute and the consequences of noncompliance. As stated by CHIGUMBA J in the same judgment:

"…Failure to comply with a mandatory course of action invalidates the thing done whereas failure to comply with a directive is not fatal. It may result in some sanction being imposed. See *Associated Newspapers Private Limited v Minister of Information and Publicity and 2 Ors* SC 111/04 p 25, *Association of Independent Journalists and 2 Ors v The Minister of State for Information and Publicity in the Presidents' Office and 2 Ors* SC 136/02/ p 115. *Doctor Daniel Shumba and Anor v The Zimbabwe Electoral Commission and Anor* SC 11/08;

Zeellco Cellular (Private) Limited v *Posts and Telecommunications Trading as Netone* SC 11/08 pp 20-23."

The requirement for the Minister's concurrence to be obtained as a condition for the validity of the lease agreement is mandatory. That said, the agreement is *void ab initio*. The dicta of Lord Denining in the case *Macfoy* v *United Africa Co Ltd* [1961]3 All ER 1169 PC at 1172 then applies. His Lordship stated:

"…If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without much ado, though it is convenient to have the court declare it to be so…you cannot put something on nothing and expect it to stay there, it will collapse.

The court is mindful of the need for it to answer all issues raised by the parties. In the case of *Aratas Gwaradzimba* v *CJ Petron and Company (Propriectary) Limited* GARWE JA (as then he was) noted that there was an exception to the principle that all issues raised by the parties should be traversed by the court and determined. In para 23 of the judgment the learned judge stated:

> "23 The position is well settled that a court must not make a determination on only one of the issues raised by the parties and say nothing about other equally important issues raised, "unless the issue so determined can put the whole matter to rest"- *Longman Zimbabwe (Pvt) Ltd v Midzi & Ors* 2008(1) ZLR 198 203 D."

I am of the view that the issue of the tenure of the agreement can only arise upon a valid agreement which is not the case herein.

An interesting issue arose from the papers wherein the first respondent averred that the applicants could not seek a declaration but a self-review. It was averred that the appropriate procedure should have been for the applicants to seek a review. I do not find it necessary to be dragged into this jurisprudence. It suffices in my view that as the Minister who is the second applicant was not a party to the lease agreement, the issue of a self-review if it exists and/or is part of our law would not apply in her case because there is nothing which she did for which she wants a self-review. It was proper for the Minister to seek the declaration as she did. Thus, whilst argument could be raised on the point against the first applicant and I do not say that the issue would hold, there are two applicants and their relationship with the agreement differs. The Minister was not party to the agreement as her acquiescence was not proved to be present and her position that she did not sign the agreement entitled her to seek a declaration of nullity of the lease agreement.

The applicants also pray for an interdict to shop the first respondent from carrying out operations purportedly granted to it under the invalid lease agreement. There is no reason to deny this relief because the first respondent's continued operations would be inconsistent with the declaration of nullity of the agreement. Further, to the interdict the applicants pray for an order of the ejectment of the first respondent from the disputed area. In the absence of the first respondent having lease rights over the area, there is no legal basis for it to resist ejection from the area. It must vacate the area. The period of ninety days given to the first respondent to vacate the area is generous because the first respondent never acquired a valid right to occupy the premises.

I should record that the second respondent opposed the application and participated in the hearing. It stood by its papers and its counsel was present throughout albeit he advised that the second respondent would abide the decision of the court. The attitude of the second respondent was understandable in view of the position taken by the applicants and first respondents counsel that the real issue at play was whether the Minister signed the lease agreement in dispute.

The last issue pertains to costs. The applicants prayed that each party bears its own costs, were it not for that the first respondent would in my discretion not have been granted costs. Costs are in the discretion of the courts and the general principle observed by the court is that in the absence of compelling reasons costs follow the event. However, the event in this matter is that save for the Minister and the second respondent, the first applicant and the first respondent executed and consummated an invalid agreement. Neither of them is deserving of an order of costs in their favour. The following order disposes of this matter-

IT ORDERED THAT

1. Judgment for the applicants.

2a. The lease agreement entered into between the first applicant and the first respondent dated 8 September 2017 be and is hereby declared null and *void ab initio*

b. The first respondent be and is hereby interdicted from carrying out or conducting fishing, game viewing or photographic safaris in the whole of the Chewore North Safari area.

c. The first respondent be and thereby ordered to vacate the area it occupies in the Chewore North Safari Area as described in the agreement in para 2(a) above.

d. The first respondent be and is thereby ordered to vacate the said area within ninety days of the granting of this order.

e. Should the first respondent fail to vacate as ordered above the Sheriff be and is thereby ordered to evict the first respondent from the area it occupies by virtue of the agreement in paragraph 2(a).
f. Each party to bear its own costs.''

Mhishi Nkomo Legal Practitioners, applicants' legal practitioners
Coghlan Welsh Guest, first respondents' legal practitioners
Ahmed and Ziyambi, second respondents' legal practitioners