SUSCADEN INVESTMENTS (PRIVATE) LIMITED
versus
PARKS AND WILDLIFE MANAGEMENT AUTHORITY
and
THE MINISTER OF ENVIRONMENT, WATER AND NATURAL RESOURCES

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 11, 12 & 14 October 2022

Urgent Chamber Application - Interdict

Mr *E Matinenga*, for the applicant
Mr *K Kachambwa,* for the 1st respondent
Mr *D Jaricha,* for the 2nd respondent

MUSITHU J:

On 10 October 2022, the applicant filed this urgent chamber application in which it seeks interim relief that is set out in the draft provisional order as follows:

> "TERMS OF FINAL ORDER SOUGHT:
> That you show cause to the Honourable Court why a final order should not be made on the following terms:-
> 1. (a) That 1st and 2nd Respondents together with anybody acting for and on behalf of the Respondents be and are hereby interdicted from interfering in any way, directly or indirectly with the Applicant's occupation, business operations and rights based on the Deed of Settlement and Lease Agreement entered into between the parties on the 8th of September 2017 and further interdicted from in anyway of being obstructive or altering the manner in which business has been conducted between the parties during the currency of the Deed of Settlement and Lease Agreement between the parties.
> (b) The 1st Respondent pay the Applicants costs of suit on the higher scale.
>
> INTERIM RELIEF GRANTED
> 2. That pending the grant of an Order in terms of paragraph 1 above,
> (a) The Applicants employees and agents shall be permitted to conduct activities at the Chewore lodge and campsite and surrounding areas in terms of paragraph 6.1 of the Lease Agreement.
> (b) Applicant's legal practitioners be and are hereby given leave to serve the Provisional Order on the Respondents.
> (c) 1st Respondent pay costs of suit."

The application was opposed by the first respondent, with the second responding opting to abide by the decision of the court. Accordingly, any reference to the respondent hereafter shall mean the first respondent.

BRIEF BACKGROUND

The applicant and the respondent entered into a deed of settlement and a twenty five year lease agreement on 8 September 2017. In terms of that lease agreement, the applicant leased from the respondent a portion of the respondent's estate in Chewore Safari Area approximately three square kilometres in extent located in the vicinity of the confluence of the Zambezi and Chewore Rivers, and with effect from 1 January 2022, an additional 40 square kilometre portion of land within the Chewore Safari area adjacent to the aforesaid three square kilometres of land. On 16 March 2022, the respondent wrote to the applicant giving it six months' notice to vacate the leased area, failing which legal action would be taken.

The applicant objected to the proposed termination of the lease asserting its rights of occupation under the said lease agreement. According to the applicant, the respondent reacted by barring the applicant's clients from entering the leased area, prompting the applicant to approach this court on an urgent basis under HC 6592/22. The application was placed before MANGOTA J who on 5 October 2022 granted the following order by consent:

> "IT IS HEREBY ORDERED BY CONSENT THAT:
> 1. The 1st Respondent shall allow access to the Chewore Lodge and Campsite to the Applicant, its tourists, employees and agents subject to the provisions of the Parks and Wildlife Act and subsidiary Regulations.
> 2. Each party to bear its own costs."

On 6 October 2022, the respondent through its corporate secretary, wrote a letter to the applicant's legal practitioners which reads in part as follows:

> **"RE: SUSCADEN INVESTMENTS (PRIVATE) LIMITED v PARKS AND WILDLIFE MANAGEMENT AUTHORITY AND THE MINISTER OF ENVIRONMENT, WATER AND NATURAL RESOURCES**
>
> We refer to the above matter and specifically the Judgment of MANGOTA J dated 5th of October 2022.
>
> We note with great concern that the said order has not only been misconstrued, but is being abused at the leisure of your client. For the avoidance of doubt, the order provides that:
> ……..
> In light of the above, kindly advise your client and anyone who wants to access Chewore Lodge and Campsite that such access is subject to the Parks and Wildlife and Subsidiary Regulations. The Authority remains with the discretion of issuing permits. It is imperative that the Authority's personnel on the ground be allowed to function in terms of the law. The order must not be misconstrued and/or abused.

> In light of the above and the fact that your client has been misconstruing and/or abusing the order, please be advised that going forward any and all applications for any permit and/or permission (including fishing permits, boat use permits etc) must be addressed, in writing, to the Authority prior to accessing the Chewore Lodge and Campsite."

The applicant's legal practitioners responded to the letter through their letter of 10 October 2022. It reads in part as follows:

> "We acknowledge receipt of your letter of the 6th October 2022, the content of which is surprising in the circumstances to say the least.
> It is, with respect, Parks who are disrespecting the High Court Order and who appear to have deliberately misconstrued the purpose, intent and spirit of the order granted.
> …….
> You allege that the Order "is being abused at the leisure of our client" but fail to set out any specific ways in which you allege abuse is taking place nor examples of such abuse or what form it may have taken. Owing to the fact that the Authority placed armed guards at the premises, it was not possible for Suscaden to carry out its lawful activities, such as boating and fishing, which it is entitled to carry out in terms of valid and enforceable and duly executed agreements with the Authority but, for the record, no such activities were carried out after the Court Order was granted and in the light of the fact that no such activities could be conducted, the Chewore Lodge and Campsite was cleared of visiting tourists within a very short time frame.
> ……
> Please confirm that, in the circumstances, within three days of the date of this letter, that you have withdrawn the requirement that our client is required to apply for all relevant permits in writing and that you will allow our client to continue with its business activities unimpeded by the Authority and acquire such permits as may be required in the usual manner, as has been the case in the past, pending the finalisation of properly instituted litigation instituted by the Authority to secure the cancellation of the Deed of Settlement and Lease Agreement with our client failing which we will be compelled to take this matter back to the courts for a further interdict and declaratory order pending such litigation"

The applicant claims that what prompted its approach to this court on an urgent basis was the deployment by the respondent, of two armed officers to the lodge to prevent the applicant's guests from undertaking any activities in violation of clause 6.1 of the lease agreement. The applicant was forced to cancel some bookings that had been made by clients in advance, as well as to refund those guests who had taken up their bookings, but were prevented from undertaking activities for which they had paid. It also had to make alternative arrangements for lodging and transport for those guests who had already arrived. The imminent prejudice to the applicant could only be arrested through an order of this court.

In its notice of opposition, the applicant raised two preliminary points, which are that the certificate of urgency was defective and that the relief sought was incompetent. Counsel made their submissions in respect of both points, but it is ultimately in respect of the second that this matter will be resolved. Mr *Kachambwa* for the respondent submitted that the deed of settlement and the lease agreement were subject to the law. The applicant could not seek relief

that permitted it to sidestep a peremptory provision of a statute. According to counsel, the applicant sought to avoid the permit requirement through para 2(a) of the interim relief sought. It was for that reason the respondent had through its letter of 6 October 2022, reminded the applicant of the wording of the order by MANGOTA J. The procurement of a permit was a mandatory requirement under the law.

In response, Mr *Matinenga* submitted that there was nothing irregular about the wording of para 2(a). It was not inconsistent with the order by MANGOTA J. At any rate, the applicant had always complied with the permit requirement in line with clause 6.1 of the lease agreement. Clause 6.1 of the lease agreement states as follows:

> "The leased area may be used by the Lessee at its own cost for the purpose of operating the existing camp site and director's lodge, establishing a 24 bed safari lodge, conducting Fishing Safaris, Boating Safaris along the Zambezi River between red Cliffs to G Camp (provided that no fishing shall be conducted directly in front of other lessee's camps), together with Walking Safaris, Photographic Safaris and related not consumptive activities together with such other tourism related activities as may be incidental thereto or approved by the Director General of the Authority from time to time"

Having heard counsels' submissions, it occurred to the court that dispute between the parties was centred on the interpretation of para 1 of the order by MANGOTA J as read with clause 6.1 of the lease agreement. On its part, the applicant did not dispute that there were activities which ordinarily required the procurement of a permit before they were undertaken. These permits were issued to visitors at points of entry, together with gate passes. The permit was therefore a precondition for one to enter the park in order to enjoy such amenities as were on offer. One would be issued with the permit upon paying the requisite fee charged for the particular activity they sought to partake in.

Counsel were agreed that the permit requirement did not envisage the making of an application to some office, which application would then have to be processed by the respondent's officials in the absence of the applicant. The envisaged application was made right at the point of entry and this is how business had been conducted over the years. Mr *Kachambwa* submitted that the respondent intended to introduce a new procedure which would require the applicant's clients to complete certain forms at the points of entry. That additional requirement was however never communicated or implemented since the applicant approached this court before further consultations were made with the respondent. Mr *Kachambwa* submitted that the respondent would have no misgivings with the interim relief sought if para

2(a) was amended to incorporate the requirement of obtaining a permit as a precondition for entering the park. Mr *Matinenga* proposed the following amendment to para 2(a):

> (a) "The Applicants' employees, agents and clients shall be permitted to conduct activities at the Chewore lodge and campsite and surrounding areas in terms of paragraph 6.1 of the Lease Agreement, and in terms of the usual permit(s) granted and issued by the 1st Respondent's functionaries at the various entry points to the park".

The underlined part represents the additions that were made to para 2(a) of the interim relief sought. Mr *Kachambwa* acknowledged that the amendment addressed the respondent's concerns. Having agreed on the wording of that contentious part of the provisional order, the next issue that arose was for the parties to decide whether the court should simply grant a final order by consent, so as to dispense with the need for the parties to approach the court again for the confirmation of what was essentially a provisional order by consent. I granted the parties a ten minute adjournment to allow them to discuss this issue, as well as to agree on the wording of the final order.

When the hearing resumed, Mr *Kachambwa* advised the court that he was constrained from agreeing to the granting of the order by consent as he did not have full instructions from client. He suggested that the court could proceed to determine the matter and make a ruling. I asked counsel to explain if there was really a dispute that required the court to make a ruling on since the parties had agreed in principle that what was at stake was the issue of the permits, which the applicant had all but acceded to even in its own papers. Mr *Kachambwa* initially suggested that the matter be postponed to another date to allow him to take further instructions from his client. That proposal was shot down by Mr *Matinenga* who pointed to the untenable situation on the ground and the losses that the applicant continued to incur as a result of the respondent's refusal to allow the applicant's guests to undertake any activities on the leased premises.

Mr *Matinenga's* frustrations were understandable. When the parties first appeared before me on 11 October 2022, I had pointed out to them that from my reading of the papers, the dispute boiled down to the interpretation of clause 1 of the order by MANGOTA J and para 6.1 of the lease agreement. The parties therefore needed to discuss and agree on the acceptable *modus operandi* concerning the procurement and usage of the permits in dispute. At the same hearing, the respondent applied for a postponement of the matter to enable it to file its opposing papers. At the hearing of the matter on the 12 October 2022, it was clear to me that the parties had not discussed the matter as had been directed by the court the previous day. They came

braced for arguments. The latest request for a postponement by Mr *Kachambwa* was therefore clearly unjustifiable. He ought to have taken further instructions earlier since the same issue had arisen at the first hearing. Having taken further instructions from his instructing attorneys who were present in the gallery, Mr *Kachambwa* submitted that the court could proceed to make a ruling based on the submissions that had already been made by the parties. The parties had already addressed the court on both preliminary points. The merits could be determined on the papers since they were essentially tied to the preliminary points.

The court was satisfied that the matter was urgent and that the submission on the alleged deficiencies in the certificate of urgency, which were based on the fact that the certificate merely regurgitated certain paragraphs of the founding affidavit, was meritless. The certificate of urgency is not the sole determinant of the urgency of a matter. Rule 60 (6) provides that where an urgent chamber application is accompanied by a certificate of urgency, "the registrar shall immediately submit it to the duty judge, handling urgent applications who shall consider the papers forthwith". In my view, the consideration of the papers forthwith by the judge is not just confined to the certificate of urgency. One must consider the entirety of the circumstances of the matter in determining the question of urgency. More importantly it is in the founding affidavit that the urgency of the matter is clearly demonstrated in the context of the cause of action and the background facts. The judge's consideration of urgency cannot therefore be confined to the certificate of urgency. The point was meritless.

Counsel agreed in their submissions that the dispute between the parties had been narrowed to the issue of the permits. Counsel also agreed that the applicant had over the years adhered to the legal requirement concerning the procurement of permits in line with clause 1.6 of the lease agreement. From my reading of the papers, it is clear to me that the respondent's officials did interfere with the applicant's operations within the period following the granting of the consent order by MANGOTA J. The aforementioned correspondence between the respondent and the applicant clearly points to some fall out which may have led to interference with the applicant's business operations. In view of the positions that both counsel had taken concerning the sole issue for determination, I see no reason to deny the applicant the interim relief that it seeks and whose wording had been agreed to.

Accordingly, the following interim relief is hereby granted:

"TERMS OF FINAL ORDER SOUGHT:

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

1. (a) That 1st and 2nd Respondents together with anybody acting for and on behalf of the Respondents be and are hereby interdicted from interfering in any way, directly or indirectly with the Applicant's occupation, business operations and rights based on the Deed of Settlement and Lease Agreement entered into between the parties on the 8th of September 2017 and further interdicted from in anyway of being obstructive or altering the manner in which business has been conducted between the parties during the currency of the Deed of Settlement and Lease Agreement between the parties.

(b) The 1st Respondent pay the Applicants costs of suit on the higher scale.

INTERIM RELIEF GRANTED

2. That pending the grant of an Order in terms of paragraph 1 above,

(a) The Applicants' employees, agents and clients shall be permitted to conduct activities at the Chewore lodge and campsite and surrounding areas in terms of paragraph 6.1 of the Lease Agreement, and in terms of the usual permit(s) granted and issued by the 1st Respondent's functionaries at the various entry points to the park.

(b) Applicant's legal practitioners be and are hereby given leave to serve the Provisional Order on the Respondents."

Coghlan Welsh & Guest, applicant's legal practitioners
Mhishi Nkomo Legal Practice, first respondent's legal practitioners
Civil Division of the Attorney General's Office, second respondent's legal practitioners