

JOHN SIMON RODGER & OTHERS  
versus  
FRIK MULLER & OTHERS

HIGH COURT OF ZIMBABWE  
PATEL J

**Opposed Application**

HARARE, 2 July 2009 and 26 January 2010

*Mrs. J.B. Wood*, for the applicants  
*Adv. A.P. de Bourbon*, for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents  
*Adv. R.M. Fitches* for the 4<sup>th</sup> respondent

PATEL J: The 1<sup>st</sup> and 2<sup>nd</sup> applicants are directors of the 3<sup>rd</sup> applicant, which operates safari activities in the Zambezi Valley Area. The 1<sup>st</sup> and 2<sup>nd</sup> respondents are directors of the 3<sup>rd</sup> respondent, which is also a safari operator. The 4<sup>th</sup> respondent is the National Parks and Wildlife Management Authority (the Authority) responsible for managing all safari operations in Zimbabwe.

Background

The applicants were granted two written concessions to operate hunting safaris in the Rifa Safari Area for a period of 10 years expiring on the 31<sup>st</sup> of December 2007. Before this date, on the 18<sup>th</sup> of October 2007, the Authority conducted an auction for a new 5 year concession in respect of the applicants' concession area. At that auction, the applicants were prevented from bidding for the concession because they had failed to furnish the requisite bank guarantee.

According to the 1<sup>st</sup> applicant, he then approached the 1<sup>st</sup> respondent who undertook to bid on behalf of the applicants after exhausting the respondents' own bidding limit. The 1<sup>st</sup> respondent won the final bid for the sum of \$750 billion. The 1<sup>st</sup> applicant then thanked him and was congratulated by all present for having retained the concession. Subsequently, on the 20<sup>th</sup> of October 2007, the respondents reneged on their arrangement and sought to retain the concession for themselves.

The respondents deny the applicants averments. They contend that all bidders at the auction were fully aware of the bank guarantee stipulation, as was clearly stated in the Authority's prospectus, and that there was no arrangement between the parties prior to the auction. They did subsequently discuss the possibility of sub-letting part of the

concession area to the applicants but nothing concrete materialised thereafter. They further aver that, if their concession agreement with the Authority were to be cancelled, they would suffer irreparable harm.

The Authority avers that the application is fatally defective in that it does not cite the Minister of Environment and Tourism (the Minister) as required by the Parks and Wildlife Act [*Chapter 20:14*]. Moreover, the Act stipulates a maximum period of 10 years for hunting concessions and, therefore, the Applicants cannot be granted any further extension.

On the 19<sup>th</sup> of February 2008, the applicants filed an urgent application to assert their rights and, on the 22<sup>nd</sup> of February, they were granted a Provisional Order interdicting the respondents from evicting the applicants from the Rifa Safari Area and from interfering with the Applicants' operations in that area. They now seek a Final Order confirming the above relief and further interdicting the respondents from exercising any rights in the applicants' concession area pending the determination of Case No. HC 891/08. In that case, the applicants seek the setting aside of the written concession granted by the Authority to the respondents in November 2007. The concession agreement was signed by the Minister on the 10<sup>th</sup> of January 2008.

#### Preliminary Issues

At the hearing of this matter, counsel for the applicants submitted that the respondents were in contempt for having acted contrary to the requirements of the Provisional Order and were therefore barred from being heard. Counsel for the respondents countered this submission on the basis that they had appealed against the Provisional Order and that the respondents were therefore not in contempt. For the reasons handed down at the hearing, I ruled that in the circumstances of the case the effect of the Provisional Order was not purely interlocutory but fairly definitive in terms of the future conduct of all the parties concerned. It therefore did not preclude the respondents from appealing against it without the leave of this Court. Accordingly, the respondents were not in contempt and were entitled to be heard in these proceedings.

#### Issues for Determination

The issues for determination herein, as I perceive them and as concurred by counsel, are as follows:

1. Whether the non-citation of the Minister as a party to these proceedings is fatally defective.
2. Whether Chapter 20:14 precludes the grant of hunting concessions to any safari operator beyond the period of 10 years.
3. Whether there was a clear agreement between the applicants and the respondents whereby the 1<sup>st</sup> respondent was to bid on behalf of the applicants at the auction.
4. Whether the agreement between the applicants and the respondents, if any, was legally binding and enforceable as against the Authority.
5. Whether the balance of convenience favours the grant or refusal of the relief sought by the applicants.

#### Non-citation of Minister

It is submitted by *Mrs. Wood* for the applicants that the non-citation of the Minister in these proceedings is not fatal for two reasons. Firstly, she relies upon Rule 87(1) of the High Court Rules 1971, which stipulates that non-joinder of a party does not preclude the determination of the issues in dispute. Secondly, she argues that the applicants are not presently seeking the grant of any concession from the Minister and that, in any event, the Minister is simply required to concur with the grant of a concession by the Authority in respect of a specific area and is not concerned with the identity of the grantee.

As regards the non-joinder and misjoinder of parties, Rule 87(1) provides as follows:

“No cause or matter shall be defeated by reason of the misjoinder or nonjoinder of any party and the court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter.”

Section 37 of Chapter 20:14 empowers the grant of leases and hunting rights in safari areas 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 it 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) a grant of hunting or other rights in terms of paragraph (b) shall not prohibit persons from entering into the safari area concerned for purposes other than those for which the rights have been granted.”

While I accept that the non-joinder of a party is not necessarily and invariably fatal to the continuance or determination of any matter, it is trite that Rule 87(1) does not absolve a litigant of the obligation to cite all relevant parties. The discretion of the Court in this regard must be exercised so as to ensure that all persons who might be affected by its determination of the issues in dispute be afforded the opportunity to be heard before that determination is actually made.

Turning to section 37(b) of the Act, it is abundantly clear that the concurrence of the Minister is an essential statutory *sine qua non* to the grant of any hunting rights in a safari area. Although it is the Authority that actually administers and grants such hunting rights, it can only do so “with the concurrence of the Minister” and “subject to such terms and conditions as he may impose”. This is clearly recognised not only in the concession granted to the 1<sup>st</sup> applicant in 2003 but is also explicitly declared in the preamble to the concession agreement concluded with the 3<sup>rd</sup> respondent in 2007. In short, the Minister’s direct and personal involvement in the approval of any hunting concession cannot be obviated.

By the same token, where the Minister has already approved the grant of hunting rights, he must of necessity be concerned with any dispute concerning the exercise or non-exercise of such rights. In the instant case, the applicants seek an order interdicting their eviction from the Rifa Safari Area and any interference with their operations in that area as well as an order interdicting the respondents from exercising any rights in the same concession area. In essence, the relief that they seek impinges upon rights previously conferred upon the 1<sup>st</sup> applicant in 2003 and those granted to the 3<sup>rd</sup> respondent in 2007. In both instances, the determination of this Court will impact upon and interfere with decisions already taken by the Minister. In my view, he is undoubtedly a highly relevant party to these proceedings with a very direct interest in the outcome and determination thereof.

It follows that the failure to cite the Minister in this matter is fatal and that the application should be dismissed simply on that preliminary basis. However, given the

possibility that my conclusion in this regard is incorrect, I shall proceed to consider and determine the merits of this case.

#### Maximum Period of Hunting Concessions

At the hearing of this matter, *Adv. de Bourbon* did not persist with this point but *Adv. Fitches* reiterated the Authority's stance that the applicants were precluded by section 37 of the Act from being granted any hunting concession beyond the limit of 10 years.

Proviso (b) to section 37 stipulates that "the period of hunting or other rights in terms of paragraph (b) shall not exceed ten years". What this clearly means is that any single hunting concession granted under the section cannot exceed the period of 10 years. It may at any one time be granted for the maximum period of 10 years or for any shorter period. However, the provision does not, in my view, preclude the grant of a further concession to a prior holder who has held one or more concessions amounting to 10 years, so long as the new concession does not exceed the maximum period prescribed.

It follows that the Authority's contention in this regard cannot be sustained and that the applicants are therefore not barred from being granted further hunting rights under the Act.

#### Agency Agreement between the Parties

The affidavit evidence filed by the parties is markedly conflicting as to what precisely transpired during the bidding process at the auction held in October 2007. Nevertheless, the applicants' version of events is strongly supported by the affidavits deposed to by several independent individuals who were present on the day. These corroborating affidavits (by Messrs. Evans, Jolliffe, Fundira, Townsend, Dziya and Duckworth) confirm, firstly, that the 1<sup>st</sup> applicant and the 1<sup>st</sup> respondent had concluded some arrangement for the latter to bid on behalf of the former and, secondly, that the 1<sup>st</sup> applicant was congratulated by those present for having retained his concession.

Having regard to the foregoing evidence, the applicants' version in this respect is more credible than that of the respondents. Accordingly, on a balance of probabilities, it is reasonably clear that there was an agreement between the parties the effect of which was that the 1<sup>st</sup> respondent would act as agent for the applicants in the bidding process at the auction.

Whether Agreement Legally Binding and Enforceable

In terms of the prospectus governing the auction conducted in October 2007, the conditions for participation which are presently pertinent were as follows. Firstly, only citizens or representatives of wholly owned Zimbabwean companies with no relevant criminal records would be permitted to bid. Secondly, all current hunting concession holders “with the exception of the current concession lessee” (viz. the 1<sup>st</sup> applicant) were not allowed to participate. Thirdly, bidders were required to submit proof of funds by way of a bank guarantee to be furnished to the Authority two hours before the auction; prospective bidders who failed to do so would not be allowed to bid. Fourthly, the Authority reserved to itself the right to vet all bidders.

It is also necessary to consider the concession conditions of sale set out in the prospectus. These conditions directed all participants to obtain auction participation forms on payment of the prescribed fee and to pay a refundable participation deposit of \$20 million. At the conclusion of the auction, “the highest accepted bidder will be declared the purchaser, subject to the reserve price [and] further vetting” and immediate payment of a surety deposit of \$5 billion followed by payment for the concession itself within 14 days.

Although the registration status of the 3<sup>rd</sup> applicant was questioned by *Adv. de Bourbon*, by dint of a typographical error in the founding affidavit, I am satisfied that the 3<sup>rd</sup> applicant is not a South African entity but a company registered in terms of the laws of Zimbabwe. What is more relevant *in casu* is the applicants’ contention that they were assured by the Authority that they would not be required to provide any bank guarantee in order to be able to bid at the auction. Apart from this bald assertion, there is no documentation to support this contention. Moreover, the above-cited conditions for participation make it clear that all prospective bidders, including the 1<sup>st</sup> applicant *qua* current concession holder, were obliged to provide the requisite bank guarantee, failing which they would not be allowed to bid at the auction. Equally significantly, the applicants have proffered no evidence whatsoever that they paid the stipulated auction participation deposit.

Notwithstanding these deficiencies, *Mrs. Wood* submits that the 1<sup>st</sup> respondent was duly qualified to bid not only for himself but also as agent for the 1<sup>st</sup> applicant. Since there was nothing to prevent the 1<sup>st</sup> respondent from bidding or participating as

an agent, it is his status rather than that of the 1<sup>st</sup> applicant which must be considered for present purposes.

As already indicated, the Authority reserved the right to vet all bidders before the auction in order to ensure, *inter alia*, that they were citizens or representatives of local companies and that they had no criminal record for any of the offences specified. More importantly, at the end of the auction, even the successful bidder was subject to further vetting to ascertain his suitability as a hunting concession holder before the concession could be granted.

These vetting requirements clearly demonstrate that the identity and attributes not only of the winning bidder but also of the grantee are crucial to the selection of the concession holder. The appointment of an agent to bid on behalf of the prospective grantee would clearly subvert and negate the vetting and selection process since it is the agent rather than his principal who would have been subjected to full scrutiny. Although the bidding agent might be a local citizen and otherwise suitably qualified, his principal might well be a foreigner or even a convicted fraudster or perpetrator of parks and wildlife offences.

I am fortified in this view by having regard to the terms and conditions incorporated in the concession agreements *in casu*. Clause 23 of the 1<sup>st</sup> applicant's expired concession agreement is virtually identical to clause 23 of the 3<sup>rd</sup> respondent's current agreement. This latter clause recognises that "the right to operate on the Concession has been given to the right holder and to no other person solely in consideration of the right holder's successful bid of the right to hunt". It then stipulates that, in the case of a corporate right holder, no shares may be issued or transferred and no new director may be appointed without the Authority's prior written approval. Additionally, the clause prohibits in absolute terms any cession or assignment of any right or obligation under the agreement or of the right holder's annual quota of animals. It also prohibits any sublease or sub-occupation or any hypothecation or encumbrance of the concession without the prior written consent of the Authority. All of this reaffirms the critical significance of the grantee's identity and the fact that the rights conferred and obligations imposed under the concession are personal and peculiar to the grantee.

Taking all of the foregoing into account, I am of the firm opinion that any agency agreement of the nature presently under review would operate to circumvent the Authority's vetting requirements and the clear objective behind those requirements.

Any such arrangement, even if it were not contrived as a deliberate subterfuge, cannot be utilised to dilute the obvious privity of contract envisaged between the successful bidder-cum-grantee on the one hand and the Minister and the Authority on the other.

It follows that the agency agreement *in casu*, whatever its legal implications and consequences as between the applicants and the respondents, is not legally binding on the Authority and cannot be enforced as against it. It also follows that the applicants have failed to establish the infraction of any clear right entitling them to the interdictory relief that they seek.

### Balance of Convenience

The above conclusion renders it unnecessary for me to consider the final issue relating to the balance of convenience as between the parties. However, for the sake of completeness, I deem it appropriate to dispose of this aspect as well.

As regards the applicants, the withdrawal of the hunting concession has obviously entailed the loss of profit and will necessitate the removal of their assets from the concession area. However, their losses are not irreparable and could be redressed by a claim for damages in respect of lost profits and future hunting rights. Moreover, in terms of clause 14 of the 1<sup>st</sup> applicant's concession agreement, he was given ample time to remove his improvements and is entitled to compensation from the Authority in respect of those improvements that are retained *in situ* by agreement.

Insofar as concerns the respondents, almost two years have elapsed since the 3<sup>rd</sup> respondent was granted its hunting concession. If this subsisting concession agreement were to be cancelled or temporarily suspended, the respondents would incur huge losses in terms of moneys already expended on the auction and concession area and the withdrawal of firm contracts with foreign clients amounting to US\$350,000. Moreover, the practical effect of the final order sought by the applicants would be to suspend all operations in the concession area until the action in Case No. HC 891/08 is finalised. As is apparent from questions put to counsel, the time frame for the final determination of that matter is presently uncertain.

As for the Authority, the suspension of hunting operations in the Rifa Safari Area will result in the substantial loss of revenue by way of hunting fees payable under the subsisting concession agreement. Any such suspension will also involve a diminution in other income generated from foreign and local tourists within the concession area.

All in all, I am abundantly satisfied that the balance of convenience does not favour the applicants. The granting of the relief sought in this matter would cause greater harm and inconvenience to the respondents and the Authority than the harm and inconvenience that the refusal of that relief would cause to the applicants.

Disposition

I have found that there was an agreement between the applicants and the respondents whereby the 1<sup>st</sup> respondent was to bid as agent for the applicants at the auction conducted on behalf of the Authority in October 2007. However, in my view, this agreement is not legally binding and enforceable as against the Authority and the applicants have therefore failed to establish any clear right apropos the relief that they seek. In any event, even if it were to be shown that some right of the applicants has been infringed, the balance of convenience clearly favours the refusal of the order sought by the applicants.

In the result, the application is dismissed with costs.

*Venturas & Partners*, applicants' legal practitioners

*Costa & Madzonga*, 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents' legal practitioners

*Chinamasa, Mudimu, Chinogwenya & Dondo*, 4<sup>th</sup> respondent's legal practitioners