HB 107/17
HC 888/17

MATUPULA HUNTERS (PVT) LTD

Versus

TSHOLOTSHO RURAL DISTRICT COUNCIL

And

LODZI HUNTERS

And

DISTRICT ADMINISTRATOR OF TSHOLOTSHO

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 3 APRIL & 4 MAY 2017

Urgent Chamber Application

J. Sibanda for the applicant
J. Tshuma for the 1st and 2nd respondent
3rd respondent in person

TAKUVA J: The dispute in this matter arises from the need to channel natural resources in an area towards the development of that area. The applicant filed this application seeking the following relief:

"**Terms of final order sought**

(a) The agreement between 1st and 2nd respondents purportedly granting 2nd respondent hunting rights over land leased by applicant from 1st respondent in Tsholotsho North be and is hereby declared to be null and void and of no force or effect.
(b) Any permit issued by 1st respondent to 2nd respondent to hunt elephant on land exclusively leased by applicant in Tsholotsho North pursuant to the said agreement, be and is hereby declared to be null and void and of no legal effect whatsoever.
(c) Respondents pay the costs of this application jointly and severally the one paying to absolve the other on the scale of attorney and client.

Interim order made

(d) Pending the confirmation or discharge of the order, that this order shall have the effect of:

1. Interdicting 1st respondent from issuing to 2nd respondent any hunting permit over the land exclusively leased by applicant from 1st respondent in Tsholotsho North in terms of the agreement.
2. If any permit has been issued by 1st respondent to 2nd respondent prior to the issue of this order, interdicting the 2nd respondent from carrying out any such hunt safaris on the basis of the same."

The facts are as follows. On 7 January 2014, applicant entered into an agreement with 1st respondent in terms of which 1st respondent granted to applicant "sole and exclusive rights to conduct all safaris within the Safari Concession Area" which included "both hunting and photographic safaris". The agreement was to endure for 5 years commencing on 1 January 2014 and terminating on 31st December 2018. In terms of clause 4 of the agreement the 1st respondent obtains annual quotas of animals from the Government which it allocates to applicant and the 2nd respondent to hunt in the Safari Concession Areas. In terms of their agreements with 1st respondent, applicant has exclusive rights to hunt and operate photographic safaris in Tsholotsho North, while 2nd respondent operates similar operations in Tsholotsho South. There has, over the years been a quota which has been the same and 1st respondent has allocated such quota between applicant and 2nd respondent in an agreed ratio.

In February 2015, 1st respondent obtained an additional quota from the Government for the construction of a soccer stadium in Tsholotsho. In September 2016, applicant gathered that 2nd respondent had been seen carrying out hunting safaris in Tsholotsho North, on land applicant has exclusive hunting rights in terms of its agreement with 1st respondent. This prompted applicant to complain in writing on 26 September 2016. First respondent responded to that letter on 12 October 2016 denying that there had been any illegal hunting in Tsholotsho North. The dispute over the additional stadium quota persisted and in the process generated numerous correspondences between applicant and the 1st respondent. On 2 December 2016, 1st respondent wrote to applicant to advise that 2nd respondent would "be conducting a safari hunt in Tsholotsho North Hunting Concession. The hunt will be conducted under the Tsholotsho Stadium quota which permits Lodzi Hunters to hunt in both Tsholotsho North and South Hunting Concession – for stadium elephants" – see annexure I. Applicant was dissatisfied and requested an urgent meeting to iron out all matters pertaining to the 2nd respondent. The meeting was held and was

followed by another one on 9 March 2017 where 1st respondent produced a 5 year contract between 1st and 2nd respondents for the stadium quota authorising 2nd respondent to hunt in both Tsholotsho North and South despite the fact that Tsholotsho North is the exclusive hunting preserve of the applicant in terms of the agreement.

There was no agreement as both 1st and 2nd respondents insisted that the applicant can only participate in the stadium quota if it pays to 2nd respondent (who had exclusive rights to the whole stadium quota) the amount demanded by 2nd respondent. Realising that the enforcement of the contract between 1st and 2nd respondents would render his own contract with 1st respondent nugatory, the applicant filed this application. Applicant argued that 1st and 2nd respondents' conduct would amount to an unlawful cancellation of his exclusivity to hunt in Tsholotsho North. Further, it was also contended that the application to interdict the 2nd respondent from enforcing its contract is urgent in that 2nd respondent has already commenced shooting elephants in an area that excludes everybody else except applicant from hunting. It was also argued that applicant's contract with 1st respondent (annexure A) is valid until 2018 and its hunting safari starts on 28 March 2017. If applicant and 2nd respondent carry out simultaneous hunting, there is likely to be chaos in Tsholotsho North.

Applicant also submitted that there was no other remedy available to it. As regards irreparable harm, it was contended on applicant's behalf that the applicant will suffer financial loss in that once an animal is shot, it will be irreplaceable. It was also submitted that the balance of convenience favours the granting of the interdict.

The application was opposed on the following grounds; Firstly it was submitted that the application lacks urgency in that similar hunts have occurred since 2015. That being the case why would applicant consider the 2017 allocations to be urgent? Secondly, it was argued that applicant does not have an exclusive right to hunt in Tsholotsho North except under CAMPFIRE. This is shown by the preamble to the agreement which shows that quotas relate to the CAMPFIRE projects and not to other quotas issued by the government for the same area. These quotas, including the Tsholotsho Stadium one, cover the whole of Tsholotsho District,

including those areas where other people like applicant have exclusive rights to hunt under CAMPFIRE. Therefore, so the argument went. There is no violation of the applicant's rights warranting the granting of an interdict.

Let me deal with the question of urgency first. I take the view that the matter is self-evidently urgent for the simple reason that despite numerous meetings stretching from 2016, the matter remained unresolved. Various letters were written between the parties in a bid to resolve this dispute to no avail. What is crystal clear however is that the 1st respondent would play hide and seek until 17 March 2017 when it divulged to the applicant that it had granted 2nd respondent exclusive rights to hunt in Tsholotsho North. Quite clearly, the need to act arose from that date. Applicant filed this application within six working days from the 17th March 2017. I do not consider that period to be an inordinate delay warranting an explanation.

The Law

The law as regards what an applicant for an interdict should establish in order to succeed has been set out in many previous cases and is settled. In *Setlogelo* v *Setlogelo* 1914 AD 221, INNES JA (as he then was) said the following at 227:

> "The requisites for the right to claim an interdict is well known; a clear right, injury actually committed or reasonably apprehended, and the absence of similar protection by any other ordinary remedy."

Subsequently, in *Eriksen Motors (Welkom) Ltd* v *Proten Motors, Warrenton & Anor* 1973 (3) SA 685 (A) HOLMES JA, while dealing with temporary interdicts, said the following at 691C-G;

> "The granting of an interim interdict pending an action is an extraordinary remedy within the discretion of the court. Where the right which it is sought to protect is not clear, the court's approach in the matter of an interim interdict was lucidly laid down by INNES JA in *Setlogelo* v *Setlogelo* 1914 AD 221 at 227. In general, the requisites are:
>
> (a) a right which, though *prima facie* established, is open to some doubt;
> (b) a well grounded apprehension of injury;
> (c) the absence of ordinary remedy

> In exercising its discretion the court weighs, *inter alia*, the prejudice to the applicant, if the interdict is withheld, against the prejudice to the respondent if it is granted. This is sometimes called the balance of convenience.
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> The foregoing considerations are not individually decisive, but are interrelated; for example, the stronger the applicant's prospects of success the less his need to rely on prejudice to himself. Conversely, the more the element of 'some doubt,' the greater the need for the other factors to favour him … viewed in that light, the reference to a right which 'though *prima facie* established, is open to some doubt,' is apt, flexible and practical and needs no further elaboration." See also *Charuma Blasting & Earthmoving Services P/L* v *Njainjai & Ors* 2000 (1) ZLR 85 (S); *Airfield Investments (Pvt) Ltd* v *Min of Lands & Ors* 2004 (1 ZLR 511 (S). C. D. Prest SC *The Law and Practice of Interdicts*, Juta & Co 1993 at p 52 described *prima facie* right thus;
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> Interdicts are based upon rights, that is, rights which in terms of the substantive law are sufficient to sustain a cause of action. Such right may arise out of a contract, or a delict; it may be founded in the common law or on some or other statute; it may be a real right or a personal right. The applicant for an interlocutory interdict must show a right which is being infringed or which he apprehends will be infringed and if he does not do so, the application must fail."

As regards how the court decides whether or not to grant a temporary interdict, the same author on page 57 states:

> "The establishment of a *prima facie* right or a *prima facie* case, became the basis according to the traditional approach of the threshold test which had to be satisfied by an applicant in order to succeed in his application for an interim relief."

An applicant must establish a *prima facie* right, as the primary requirement of a *prima facie* case. For example, where he relies upon a right arising out of a contract, he should show on the facts which he places before the court that there existed between him and the respondent a contract and that he is entitled to exercise his rights in connection with that contract. The court's approach therefore in accordance with the threshold test is to consider whether, on the papers before it, the applicant had established a *prima facie* right, or made out a *prima facie* case. The court does so by taking facts set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether having regard to the inherent probabilities, the applicant should on those facts obtain final relief at the trial. The facts

set up by the respondent in contradiction should then be considered. The onus rests upon the applicant to prove such a *prima facie* right – see *Webster* v *Mitchell* 1948 (1) SA 1186 (W).

In casu, the *prima facie* right arises from the memorandum of agreement made and entered into by and between the 1st respondent and the applicant on 7 January 2014, granting the applicant the sole and exclusive rights to conduct all safaris" within the Tsholotsho North Concession area of the Tsholotsho District. This area is also referred to as the Safari Concession Area" in the contract. Both parties are agreed that the applicant has such rights, the point of disagreement is the extent of such rights. The 1st and second respondents, relying on the preamble of the agreement argue that applicant's exclusive rights to hunt in Tsholotsho North are limited to CAMPFIRE projects. The rights do not apply to the special supplementary quota of sixty elephants for the purpose of constructing Tsholotsho Stadium at Tsholotsho Growth Point in Tsholotsho North or to any other special quota that may be issued by the government. Acting on this belief, the 1st respondent has entered into a memorandum of agreement with 2nd respondent granting it the "sole and exclusive rights to hunt elephants under the special project for the construction of Tsholotsho Stadium in the Tsholotsho District …"

Applicant's argument on the other hand is that the contract as it stands does not have a provision restricting its operations in Tsholotsho North to CAMPFIRE projects. It was contended further that to allow 2nd respondent to conduct safaris within applicant's concession would render its agreement nugatory. According to applicant, the ideal position would be to share equally the 2017 stadium quota between the applicant and the 2nd respondent with each operator hunting in its concession.

In my view, the fact that both parties are arguing on the meaning of the contractual provisions means that the applicant has a *prima facie* right. It appears that *prima facie* the agreement between applicant and 1st respondent is silent on how special quotas should affect existing rights held by hunters in a particular area. It also does not, in clear and unambiguous language limit the applicant's right to conduct safaris to CAMPFIRE projects. For purposes of

my decision, the right must be proved not on a balance of probabilities, but *prima facie*. For these reasons, I find that the applicant has a *prima facie* right to protect.

The second requirement is that there should exist a well grounded apprehension of injury. This basically means that there must be, firstly an act of interference committed on the part of the person to be interdicted, or a reasonable apprehension that such an act will be committed. Secondly, there must be irreparable harm if the right is only *prima facie* established. It is trite that the test for reasonable apprehension of injury is an objective one in which the applicant is not required to establish that on a balance of probabilities flowing from the undisputed facts injury will follow. What the applicant must show is that it is reasonabe to apprehend that injury will ensue.

In casu, it is undisputed that these agreements are of a commercial nature in the sense that all parties are in it for financial gain or benefit. It is common cause that despite the existence of an agreement with applicant in respect of safaris for Tsholotsho North, the 1st respondent has entered into another agreement with 2nd respondent (who was supposed to hunt only in Tsholotsho South) to conduct safaris in applicant's concession area namely Tsholotsho North. It is not clear how 1st respondent expects the 2nd respondent and the applicant to operate simultaneously in the same geographical area. What is clear is that on being faced with these facts, a reasonable man might entertain a reasonable apprehension of injury. Accordingly, I so find.

As regards the absence of an ordinary remedy, the courts will not, in general grant an interdict when the applicant can obtain adequate redress by an award of damages. However, the test of the adequacy of damages is not conclusive and the court will generally grant an interdict if:

(i) the respondent is a man of straw;
(ii) the injury is a continuing violation of the applicant's rights;
(iii) the damages will be difficult of assessment especially continuing contractual breaches; and

(iv) if the value of damages award in several years time would be of questionable adequacy because of high inflation and the claimant's inability to obtain pre-judgment interest on the damages. See *Evans Marshall & Co Ltd* v *Bertola* SA [1973] ALL ER 992 (CA) at 1005d – e.

In casu, the claim for damages would not be an adequate alternative remedy in that the injury will certainly be a continuing violation of applicant's rights. Each successive hunt will represent an injury to the applicant. The second reason is that the damages will be difficult of assessment in that the information on the quantity of bull elephants shot or harvested from Tsholotsho North will be difficult for the applicant to obtain.

Finally, the court must decide whether the balance of convenience lies in granting or refusing an interlocutory interdict. C. B. PREST *supra* at p 72-3 states:

> "The court must weigh the prejudice that applicant will suffer if the interim interdict is not granted against the prejudice to the respondent if it is. If there is greater possible prejudice to the respondent; an interim interdict will be refused, if though there is prejudice to the respondent that prejudice is less than that of the applicant, the interdict will be granted subject, if they can be imposed, to conditions which will protect the respondent … The essence of the balance of convenience is to try to assess which of the parties will be least seriously inconvenienced by being compelled to endure what may prove to be a temporary injustice until the just answer can be found at the end of the trial. In assessing whether the balance of convenience lies in granting or refusing interlocutory interdicts, the judge is engaged in weighing the respective risk that injustice may result from his deciding one way rather that the other at a stage when the evidence is incomplete." (my emphasis)

In the present case, while the 2nd respondent can conduct safari hunts in his Tsholotsho South, the applicant will be completely barred from conducting such hunts in Tsholotsho North. The issuing of a contract over the same land where 1st respondent has a contract with applicant gives rise to a serious risk of injustice. As regards prejudice to the 1st respondent, it is unimaginable. Perhaps the delay to complete the stadium might be considered as prejudice to the 1st respondent. However, the bottom line is that 2nd respondent will be able to harvest trophies from Tsholotsho South notwithstanding the interdict. Consequently I find that the 1st and 2nd

respondents will be least seriously inconvenienced by being compelled to endure the hunts until the matter is finalised.

Accordingly, it is ordered that:

Pending the confirmation or discharge of the order, that this order shall have the effect of:

1. Interdicting 1st respondent from issuing to 2nd respondent any hunting permit over the land exclusively leased by applicant from 1st respondent in Tsholotsho North in terms of the agreement.
2. If any permit has been issued by 1st respondent to 2nd respondent prior to the issue of this order, interdicting the 2nd respondent from carrying out any such hunt safaris on the basis of the same.

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