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

HIGH COURT OF ZIMBABWE
KATIYO J
HARARE, 15 June 2023 and 20 November 2023

Opposed Application

Adv *Matinenga***,** for the applicant
Adv *Kachambwa***,** for the respondent

KATIYO J: The applicant petitioned this court for an order confirming a provisional order in the following terms: -

IT IS ORDERED THAT:

1. The provisional order issued by this Honourable Court on 17 October 2022 be and is hereby confirmed.

2. First and second 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 parties on 8 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.

3. The first respondent pays the applicants costs of suit on a higher scale.

The following was the provisional order granted

TERMS DE FINAL ORDER SOUGHT

That you show cause to this Honourable Court why a final order should not be made in the following terms;
First and third 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 applicants occupation, business operations and rights based on the Deed of Settlement and lease Agreement entered into between the parties on 8 September 2017 and further interdicted from in any way of being obstructive or altering the manner in which business has been conducted between parties during the currency of the Deed of Settlement and Lease Agreement between the parties.
(b) The first respondent pays the applicants costs of suit on the higher scale.

INTERIM RELIEF GRANTED

That pending the grant of an order in terms of para 1 above

a) The applicants' employees, agents and clients shall be permitted to conduct the Chewore lodge and campsite and surrounding areas in terms of paragraph Lease Agreement, and in terms of the usual permit(s) granted and issued by 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 order on the respondents.
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 kilometers 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 kilometer portion of land within the Chewore Safari area adjacent to the aforesaid three-square kilometers 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 first 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."

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. In response the applicants stated as follows:

"We acknowledge receipt of your letter of 6 October 2022, the content of which is surprising in the circumstances to say the least. It is, with respect, Parks who is 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."

Following this letter, the applicants approached this court on urgent basis and the matter was placed before my brother MUSITHU J who granted a provisional order as stated. The applicant now seeks the confirmation of the said order. The first respondent is opposed to the confirmation and wants the order discharged. My brother MUSITHU J gave a full judgment on the matter. The Learned Judge after going through the papers and hearing counsels granted the interim relief.

The first respondent is opposed to the final order sought arguing that the relief being sought is incompetent. The relief is too wide for want of clarity. Also averred that this court cannot interfere with a lawful process. It is the first respondent's contention that the applicant was supposed to approach this court on review than a mandamus interdict. On the other hand, the applicant is of the view that her rights are being infringed upon by the requirement that the application for permits which was previously done at the entry points remain so contrary to the new requirement of application in writing. Argued that the lease should be adhered to. Truly speaking the only issue before this court is whether or not the new requirement amounts to a material violation of the lease agreement.

This court will not reiterate on what my brother MUSITHU J stated in the judgment HH 715/22. His observation that the two parties were simply supposed to sit down and agree is totally in order. This litigation is unnecessary if at all. A lease agreement cannot supersede a statute.

Clause 28 of the lease

28 "The Lessee shall conduct its activities in compliance with any laws and regulations in force from time to time. The Lessee shall be deemed to be conversant with and adhere to provisions

of the Parks and Wild Life. Act [*Chapter 20:14*] and the Parks and Wildlife (General Regulations and any other applicable laws of Zimbabwe."

What is clear is that regulations should be followed from time to time and those responsible authorities are supposed to supervise. What this clause in the agreement means is that whilst adhering to the lease 16 is a requirement that laws should be followed. This court is not encouraged to interfere with administrative authority decisions unless exercised in such a way as to exhibit gross unreasonableness and bias. In the absence of the above the decision should not be interfered with. In this case the permits were issued at the entry points and now has to be an application in writing. Can it be interpreted to mean a breach of the lease agreement.

A clear right

The authorities state that in order for an interdict to be granted, the applicant must show a clear right, or even a right which though *prima facie* established, is open to some doubt. In this instance, the applicant argues there is in fact a clear right. *Setlogelo* v *Setlogelo,* 1914 AD221 at 227 *Northern Farming (Private) Limited* v *Vegra Merchants, Econet (Private) Limited* v *Minister of Information, Posts and Telecommunications* 1997 (1) ZLR 342(H)

The requirement of an interdict was clearly set out in the above

The respondent argues that this interdict cannot be granted against a statutory function. He states as follows:

1. A prohibitory interdict exists only to stop or prevent unlawful action.

The applicant in this case does not seek to interdict any unlawful action. It seeks to interdict the first respondent from performing its statutory duties as set out in the Parks and Wild Life Act [*Chapter 20:14*] and the Parks and Wild Life (General) Regulations, 1990. A court of Law cannot interdict statutory duties. It also cannot interdict conduct that is lawful see *Airfield Investments (Pt) Ltd* v *Minister Of Lands & Ors* 2004 (1) ZLR 511 (S) at 518B-H and *Mayor Logistics (Pvt) t/a* v *Zimbabwe Revenue Authority* CCZ 7 2014

MALABA DCJ**,** as he then was, at 8 - 9 where he held as follows: "The applicant seeks an order suspending the statutory obligation to pay the amount of the tax. It was assessed to be liable to pay to the fiscus, pending the hearing and finalization of the appeal in the Fiscal Appeal Court. It is in the heads of argument that the applicant reveals that the relief sought is an interim interdict. There is need to have regard to the substance and not the form of the relief.

It is axiomatic that the interdict is for the protection of an existing right. There has to be proof of the existence of a *prima facie* right. It is also unquestionable that the *prima facie* right is protected from unlawful conduct which is about to infringe it. An interdict cannot be granted against past invasions of a right nor can there be an interdict against Lawful conduct.

THE FINAL INTERDICT SOUGHT

The requirements of a final interdict are trite. A party needs to prove the following:

- a clear right,
- an injury actually committed or reasonably apprehended; and
- the absence of similar protection by any other remedy

See Charuma Blasting & Earthmoving Services (Pvt) Ltd v *Njainjai & Ors 2000 (1) ZLR 85 (SC) at 89E - G*

A CLEAR RIGHT

The applicant argues that it has a clear right granted by the Lease Agreement and Deed of Settlement to conduct activities, including fishing and boating, in the leased area without the need for permits. The applicant further asserts that the issue of requiring a permit to undertake these activities was never a requirement but was only introduced by the first respondent to frustrate and impede the applicant's business.

The applicant alleges as follows on the issue of a clear right granted by the Lease Agreement and Deed of Settlement to conduct activities:

> "The first respondent's actions are unprecedented in that in the past five years it has never required the applicant or its guests to apply for permits to undertake activities on the leased area. Moreover para 6.1. of the lease agreement authorised the applicant to conduct various activities on the leased area, amongst which are activities that the first respondent is preventing

the applicant and the applicant's guests from undertaking"
See p 2 of the record para 10 of the Court Application. The same is restated at p 9 para 19 of the applicant's Founding Affidavit:
"In actual fact, in terms of paragraph 6 of the Lease Agreement between the parties, Annexure G hereto, Applicant is permitted to run fishing and boating activities."

The above narrative is continued in the Answering Affidavit where the applicant alleges as follows at p 86 of the record para 11(b):

> "The issue of permits was raised for the first time pursuant to a 13 year relationship between the applicant and the first respondent in a letter addressed to Coghlan Welsh and Guest by the first respondent dated the 6th October 2022. In the context, this can only be read in a way that this is a requirement introduced targeting applicant as opposed to a newly introduced general requirement for all those seeking access to national parks."

A respondent denies targeting the applicant on this new requirement. The respondent maintains that para 28 of the lease agreement is quite clear as to what the requirements are. It says as required by law from time to time. The effect of a final interdict in this case is to bar the authorities from effecting any changes even if the need arises. Confirming the final order in this case may amount to overturn some statutory requirements. The superior courts are not there to easily interfere with administrative authority. As reiterated above this can only be in circumstances which perceive gross bias and irregularities. Section 68 of the Administrative Justice Act is clear on that. I have not seen in this case where the point of departure is because all what the applicant is being asked to do is to apply in writing rather than at the point of entry. It may be inconvenient to do so but that is the authority in existence. This requirement cannot be said to be unreasonable. The natural principle of justice is that you comply with the law first then complain. If you complain in defiance of the law, you risk dirty hands tail. In this case I do not understand where the applicant difficulty is. All she needs to do is to comply and seek audience next. This is a statutory function which this court can not impede on. In conclusion I tend to agree with the first respondent that no clear right has been demonstrated to warrant a final interdict. If it was a review application probably it could have been better. Am therefore coming to the conclusion that the provisional order as granted by my bother judge on the 22 October 2022 cannot be confirmed. Therefore, after reading the papers filed before me and hearing

counsels

IT IS ORDERED AS follows: -

(a) The provisional order as granted by this court on 22 October 2022 HH 715/22 be and is hereby discharged

(b) The applicants to pay costs of the suit.

Coghlan, Welsh & Guest, applicant's legal practitioner
Mhishi Nkomo Legal Practice, first respondent's legal practitioners