Judgment No. S.C. 17/99
Civil Appeal No. 175/98

TOUCH AFRICA SAFARIS (PRIVATE) LIMITED vs

(1) LALAPANSI SAFARIS (PRIVATE) LIMITED

(2) J JOUBERT & SONS (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
GUBBAY CJ, EBRAHIM JA & MUCHECHETERE JA
HARARE, FEBRUARY 11 & MARCH 2, 1999

J C Andersen SC, for the appellant

A P de Bourbon SC, for the respondents

GUBBAY CJ: This is an appeal against the judgment of the High Court in which it: (i) in case number HC 182/98, dismissed with costs an application by the appellant for an order for specific performance of a joint venture agreement entered into with the first respondent in respect of a hunting concession in the Mukwichi/Chewore South Safari Areas; and (ii) in case number HC 183/98, discharged with costs a provisional order interdicting the first respondent from alienating any animals or the right to hunt any animals on the aforementioned safari concession area pending finalisation of the matter in case number HC 182/98.

Of the respondents cited by the appellant, Kevin Thomas ("Thomas"), a professional hunter, and Hurungwe Rural District Council ("the Council") did not file opposing affidavits in the first application, the latter party specifically advising by letter that it did not oppose the relief sought. And Aurelia Farms (Private) Limited filed no opposing affidavit in the second application and had not threatened to conduct, or conducted, any safari operations on the concession.

The dispute between the appellant and the first respondent arose over the grant of a hunting concession by the Council in the name of the first respondent for:-

> "permission to the safari operator to hunt animals specified in the Local Authority Annual hunting quota for a period of four years, running from the 1st day of January 1998 to the 31st day of December 2001 in Mukwichi/Chewore South Safari Areas … The renewal of this agreement each year (to) be in writing before the 31st December of each hunting year."

Plainly if the appellant failed to establish the existence of the joint venture agreement, it was not entitled to the relief it sought under either application. But if it succeeded in discharging such burden, there still remained for determination whether it was appropriate to order specific performance against the first respondent; and whether, in respect of the second application, the interim interdict granted pursuant to the provisional order of 21 January 1998 should be confirmed.

In dismissing the first application and in consequence the second, the court *a quo* held that:

(a) no binding agreement had been entered into because the document signed on 15 March 1997 had not been prepared by the legal practitioners acting for the parties;

(b) the joint venture was intended to be operated under the name "Mashambazhou Safaris" and since it could not be the agreement fell away;

(c) the subsequent negotiations conducted for the purchase by the appellant of a portion of the respondent's shareholding reflected that the parties never intended to be bound by the document of 15 March 1997.

Mr *Andersen*, who appeared on behalf of the appellant, attacked each of these findings. I did not understand Mr *de Bourbon*, for the respondents, to offer anything but token support for the first two, which after all were mutually inconsistent.

The document of 15 March 1997 was headed "Memorandum of Agreement". It was signed by the parties and by Thomas. It did not contain any provision making it conditional upon its being prepared or approved by a legal practitioner. The fact that at a meeting held on 2 December 1996 the parties had indicated that their proposals would be submitted to legal practitioners to draw up a binding agreement, did not prevent them from reaching an agreement at a later stage without doing so. Indeed, the first respondent admitted that on 15 March 1997 a binding agreement was concluded. The defence raised was that the agreement of 15 March 1997 subsequently "fell away" or was abandoned by the appellant.

I accept, as well, the submission that the second finding was not justified. While the parties intended to operate the joint venture under the trade name "Mashambazhou Safaris", there was nothing in the agreement, correspondence or minutes of their meetings to the effect that it was a condition precedent to the operation of the joint venture that such name be used. It was not claimed by the first respondent that the name attracted any particular goodwill or that there was any reason why the parties could not have operated the concession under a different trade name or under the first respondent's own name. The brochure, prepared by the appellant's director and general manager, Darryl Collett ("Collett"), in September 1997, specifically mentioned that the joint venture of 15 March 1997 was to be marketed under the names of both the appellant and the first respondent. And the later negotiations for the sale of shares without the use of the name Mashambazhou Safaris demonstrated that it was not material to the operation of the concession.

Nor do I consider that the court *a quo* was correct in holding that by conducting negotiations for the acquisition by the appellant of a portion of the respondent's shareholding, the parties were to be taken to have abandoned the agreement of 15 March 1997. The letters written by the appellant's legal practitioners on 22 September 1997, 17 October 1997 and 10 November 1997 made it clear that as far as the appellant was concerned it relied on the "existing" joint venture agreement until it was replaced. For instance, it was stated in the second of these letters that:-

> "Our clients desire to pursue the finalisation of a further agreement with your clients to amend the existing joint venture agreement, as they contributed a

> great deal to the venture including marketing the entire quota of the hunting concession."

The response to these letters was not that the agreement of 15 March 1997 had been replaced by the negotiations for the acquisition of shares, but that Collett had advised that the appellant was no longer interested in any joint venture and was "pulling out of the whole exercise". An allegation that was firmly and promptly disputed.

Moreover, it was highly improbable that the appellant would have been prepared to sacrifice the substantial rights it had obtained under the agreement of 15 March 1997 and the considerable effort and financial expenditure it had been put to, unless and until a new agreement had been entered into to replace the earlier one. See *Acacia Mines Ltd v Boshoff* 1958 (4) SA 330 (A) at 336 D-E; Christie, *The Law of Contract in South Africa*, 3 ed at 39.

Accepting, therefore, that on 15 March 1997 the parties, with Thomas, entered into a valid joint venture agreement to conduct the hunting concession in question, it seems to me that the real issue for determination was, and remains, whether the withdrawal of Thomas from the agreement had the effect of bringing to an end the contractual relationship between the appellant and the first respondent.

Pertinent to such determination are the following events which were either common cause or conclusively established:

(1) On 2 December 1996 a meeting was held at Mjingwe Ranch, West Nicholson, between the respective directors of the appellant and the first respondent, and Thomas. The formation of a joint venture to

operate a hunting concession won by the first respondent on State Land V was discussed. It was appreciated that the first respondent lacked the necessary marketing and managerial skills to conduct a safari operation. On the other hand, the appellant had such expertise, which it was willing to impart.

(2) On 4 December 1996 it was formally agreed that the appellant was to market and promote the first respondent's hunting concession on State Land V for 1997 and for the duration of the lease period.

(3) On 2 March 1997 a meeting was held at Deka between the directors of the appellant and the first respondent, with Thomas. It was agreed that in view of possible and pending expansion opportunities the relationship of the parties should be formulated in a joint venture agreement. Present at the meeting was an American, Russ Smith, with whom the appellant had negotiated the setting-up of an office in the United States of America and who was to represent the appellant's interests. Thereafter, on 11 March 1997 the appellant provided the first respondent with the sum of $1 500, being the cost of obtaining from the Council the necessary tender documents in respect of the Mukwichi/Chewore South Safari Areas concession.

(4) On 15 March 1997 the joint venture agreement was signed by the three parties. It provided that the partnership was to be known as Mashambazhou Safaris, with the appellant's and the first respondent's share of profits and losses set at 45% and Thomas' at 10%. The

agreement was terminable by mutual consent and upon thirty days' notice of a breach given to the defaulting partner.

(5) The next day representatives of both the appellant and the first respondent, together with Thomas, met the Hurungwe councillors at the Victoria Falls. The expenses of the meeting, amounting to over $10 000, were borne by the appellant. At this meeting written joint venture proposals for tendering for the Mukwichi/Chewore South Safari concession were presented to the councillors. The document, headed "Lalapansi Safaris/Touch Africa Safaris", referred to the establishment of an office in Montana, United States of America, under the directorship of Russ Smith.

(6) Between 16 and 19 March 1997 the appellant and the first respondent prepared the tender documents. As it was ascertained that another operator was using the name Mashambazhou Safaris, it was agreed that the tender should be submitted in the name of the first respondent, which would offer to sell the appellant and Thomas a portion of its shareholding. A declaration of intent was signed by a representative of the appellant and the first respondent. It provided that the appellant would purchase 45% of the shares in the first respondent, that the latter would retain not less than 45% of the total shares and that Thomas be offered the purchase of shares not exceeding 10%.

(7) The tender documents, completed in the name of the first respondent, were submitted to the Council. The covering letter listed "Darryl Collett" as a director of the first respondent, and referred to

"an office in the United States", which was the office of Russ Smith set-up by the appellant. The tender documents reflected:

(a) the tour operator's safari licence number as TR/H/196, which was the appellant's number (at the time of tendering the first respondent was not a registered safari operator and would not have been able to tender on its own);

(b) Collett as a principal participant;

(c) Thomas as a professional hunter;

(d) Mjingwe Ranch, owned by Collett and from where the appellant operated, as another game concession area;

(e) previous concessions as being Swallowfort Ranch, Tamba Ranch and Mjingwe Ranch, all of which were concessions where hunting had taken place by the appellant and not by the first respondent (although it was stated that the first respondent was conducting hunts there).

Clearly the tender was submitted on behalf of the joint venture as stated at the meeting on 16 March 1997.

(8) On 15 June 1997 Collett, with three directors of the first respondent, travelled to Karoi to meet with the Hurungwe councillors, having been advised that the concession had been awarded to the first respondent in

terms of the tender document. At the meeting the first respondent's share certificates were presented and placed on record, as was the appellant's safari operator's licence. The appellant paid for the accommodation at the Karoi Hotel in an amount of $1 660.

(9) At the very latest sometime in June 1997, Thomas made it known that he was no longer interested in purchasing shares in the first respondent. Put differently, that he was withdrawing from the joint venture agreement of 15 March 1997. There is nothing in the correspondence or the affidavits to suggest that either the appellant or the first respondent raised any objection; or, indeed, that either regarded such withdrawal by Thomas as dissolving the agreement or the existence of the contractual relationship between them.

(10) On 18 June 1997 the first respondent sent a facsimile to the appellant informing that it was prepared to sell to it 49% of its shareholding at $10 per share together with a payment of $600 000. This was contrary to the value of the shares agreed to in the signed declaration of intent. Thereafter, letters passed between the legal practitioners acting for the parties without any resolution of the issue.

(11) On or about 28 July 1997 a meeting took place between the appellant and the first respondent, at which the former gave a breakdown of the hunts booked to date and the deposits held. The first respondent was also informed of an imminent visit by Russ Smith and of his intention to meet with the parties.

(12) Over the period 10 and 11 August 1997 discussions were held between the parties. Russ Smith informed them of the progress he had made in establishing the joint venture office in the United States of America. The funding of the office was discussed in detail as well as other matters concerning advertising, brochure printing and the securing of booths. Drafts of advertisements were displayed by Russ Smith to the directors of the first respondent, showing the logos of both the first respondent and the appellant. The brochure was discussed and it was indicated that the logos of both parties would be displayed on the cover. It was also made clear that Russ Smith had accepted deposit cheques in respect of forthcoming hunts.

(13) On 4 September 1997 the first respondent informed the appellant that it had sold ten buffalo hunts to the second respondent.

(14) Four days later the first respondent was advised that Russ Smith had sold the last elephant hunt for US$850 per day.

(15) On 24 September 1997 the first respondent received the completed brochure for perusal. After some discussion it was accepted as the final draft. It was then sent to the United States of America for printing. The brochure had on the cover the names of both the appellant and the first respondent. The first page gave the following information:-

> "Touch Africa Safaris has successfully negotiated a joint venture agreement with Lalapansi Safaris, one of Zimbabwe's most successful indigenous safari operators. The joint venture

> successfully tendered for the Chewore Mukwichi big game safari area."

And:-

> "In short Touch Africa Safaris and Lalapansi Safaris believe that our expansions, developments and joint venture partnership have all been in keeping with our clients' aspirations in mind and we anticipate another great year in 1998."

The penultimate page is headed "Touch Africa/Lalapansi Safaris General Information". On the left-hand side of the page is a map of Zimbabwe depicting the localities of Mukwichi/Chewore and Mjingwe, below which is written:-

> "Mjingwe is the home of Touch Africa Safaris. It is situated in the game rich southern lowveld region of Zimbabwe. It is a three-and-a-half hour drive from Bulawayo International Airport.
>
> Chewore/Mukwichi big game hunting concession, in Northern Zimbabwe, is approximately a three hour drive from Kariba".

(16) On 25 September 1997 the concession agreement between the first respondent and the Council was signed. The second paragraph of the agreement refers to the appellant's safari operator's licence.

(17) On 19 January 1998 the appellant lodged its application with the High Court.

It was against this factual background that Mr *Andersen* advanced the argument that after it became known that Thomas was withdrawing from the joint venture, the appellant and the first respondent, by their conduct, must be taken to have

agreed to be bound by the terms of that agreement. *Per contra*, Mr *de Bourbon* contended that the partnership agreement came to an end with Thomas' renunciation and was not resuscitated by the remaining parties on the same terms. Instead they proceeded to negotiate the conclusion of another agreement but this proved unsuccessful.

It is, I believe, an established principle that any change in membership of a partnership destroys the identity of the firm. See *Executors of Paterson v Webster, Steel & Co and Ors* (1881) 1 SC 350 at 355; *Divine Gates & Co v African Clothing Factory* 1930 CPD 238 at 240; *Goldberg v Di Meo* 1960 (3) SA 136 (N) at 145 F-H; *Kirsh Industrials Ltd v Vosloo & Lindeque* 1982 (3) SA 479 (N) at 482 *in fine* - 483C. (But see LAWSA Vol 19 (Reissue) para 319 (d) note 14). However, if the remaining partners agree to continue the business of the partnership, a new partnership is created. See *Executor of Paterson supra*; *Essakow v Gundelfinger and Anor* 1928 TPD 308; *Divine Gates & Co supra*; *Stewart, Scott Kennedy v Mazongororo Syringes (Pvt Ltd* 1996 (2) ZLR 565 (S) at 571 A-C. The reconstituted firm will be a new partnership, yet will carry on precisely the same business as the old partnership.

In this matter there was no new partner to be admitted; nor was there the complication of the liabilities of the old firm and damage to the partnership caused by Thomas' withdrawal; the position of creditors was unaffected. Everything suggests that no opposition was voiced against Thomas' decision.

I am of the view, therefore, that it was legally permissible, upon Thomas' withdrawal, for the appellant and the first respondent to continue in a new partner relationship on the terms set out in the partnership agreement of 15 March 1997. It is, of course, an issue of fact whether they did so or not, with the *onus* of proof upon the appellant.

Mr *de Bourbon* submitted that the grant of a 10% share in the profits and losses to Thomas made it impossible for the appellant and the first respondent to implement the terms of the agreement in a partner relationship. I do not agree. The agreement of 15 March 1997 envisaged that the appellant and the first respondent would have an equal share. And this remained achievable by each acquiring one-half of Thomas' stated share.

On 15 June 1997, by which time the probabilities are that Thomas had announced his withdrawal, the appellant and the first respondent met with the Hurungwe councillors at Karoi and were advised that the first respondent, as per tender, was to be awarded the concession. The safari operator's licence number supplied to the councillors was that of the appellant. It was the appellant who met the cost of accommodation. The following month, on 28 July 1997, a meeting took place between the appellant and the first respondent at which the appellant listed a breakdown of the hunts it had booked and the deposits paid to it. The first respondent was also informed of the imminent visit of Russ Smith. In other words, Russ Smith, who was the appellant's contact in the United States of America, was still very much in the picture insofar as the hunting concession in the Mukwichi/Chewore South Safari Areas was concerned. A meeting with him was held two weeks later.

He advised on the progress made in establishing a joint venture office in Montana. The funding of this office was discussed and drafts of advertisements bearing the logos of both the appellant and the first respondent were exhibited. The intended brochure was also discussed. All this occurred without any demur from the first respondent. Then, on 8 September 1997, the first respondent was informed that Russ Smith had sold the last elephant hunt. That he had done so was significant, for at no time did Russ Smith enter into a contract to market animals solely on behalf of the first respondent. On 24 September 1997 the draft brochure was accepted by the first respondent. It reflected an existing association with the appellant. And the next day when it signed the concession agreement the first respondent did not advise that it would not be operating under the appellant's safari licence.

It is also noteworthy that as late as 21 October 1997 the first respondent's legal practitioners did not raise the contention that a joint venture agreement never existed between the appellant and the first respondent after Thomas' withdrawal; only that on the previous day Collett had advised the first respondent that:-

> "he was no longer interested in any joint venture with them and that they were pulling out of the whole exercise." (Emphasis added).

The effect of this scenario is to persuade me that the appellant was able to show on a balance of probabilities that the parties reconstituted a partnership when Thomas withdrew from the joint venture. I have already found that this association continued and was not abandoned by the negotiations for the acquisition of a portion of the first respondent's shareholding.

It now falls to consider whether specific performance of the joint venture agreement should be ordered.

Certainly, as was held in *Robson v Theron* 1978 (1) SA 841 (A) at 849 E-G, a partner may sue a co-partner during the existence of the partnership for specific performance under the partnership agreement. And if a case is made out, such relief will be granted subject only to the court's discretion.

Since the court *a quo* held that there was no contractual relationship between the appellant and the first respondent, the exercise of its discretion to order specific performance did not arise. Consequently this Court, on its findings, has an unfettered discretion in the matter.

In that regard it should be borne in mind that it is not for the wronged partner to prove that there are no impediments to specific performance. In the absence of evidence, it is to be assumed that the partner in breach is in a position to perform the obligations he has undertaken. The *onus* is on him to prove otherwise. See *Tamarillo (Pty) Ltd v B N Aitken (Pty) Ltd* 1982 (1) SA 398 (A) at 442 *in fine* - 443B.

The first respondent failed to direct any evidence at the avoidance of a decree of specific performance. It raised no facts or circumstances upon which to ask this Court to exercise its discretion against the grant of the order. In the circumstances there is no reason to deny the appellant the relief it sought.

Accordingly, I would allow this part of the appeal with costs. The order of the court below dismissing the application in case number HC 182/98 with costs is set aside. Substituted therefor is the following:

"1. A decree of specific performance be and is hereby granted in favour of the applicant against the first respondent in respect of the terms of the agreement dated 15 March 1997.

2. The first respondent is to pay the costs of the application."

Finally, I turn to consider whether the provisional order granted on 21 January 1998 interdicting the first respondent from alienating any animals or the right to hunt any animals on the Mukwichi/Chewore South Safari concession area, other than in terms of the joint venture agreement between it and the appellant, should have been confirmed.

The order was aimed at the action taken by the first respondent in selling to the second respondent the right to market a hunt of the ten buffalo during the 1998 season. At the time of the grant of the provisional order the hunt had not taken place. It has now.

The facts giving rise to the claim for the interdict were not in dispute, and are referred to earlier in this judgment. What they reveal was that having been informed by the second respondent in its letter of 22 October 1997 that it was not prepared to forego marketing the hunt of the ten buffalo, the appellant delayed for three months before applying for an interim interdict. The reason given for that delay was not convincing. It did not suffice to merely explain that the second respondent

had been warned that action would be taken to obtain an interdict; and then fail to move with the necessary expedition. In the circumstances, I have some sympathy for the second respondent's contention that although the appellant knew that it had acquired the ten buffalo and was determined to market and sell them to clients, its failure to proceed until 19 January 1998 effectively estopped it from obtaining relief.

Be this as it may, I am not prepared to dismiss this part of the appeal on that ground alone. I consider, also, that the appellant did not meet the essential requirement of showing that the breach by the first respondent in dealing with the second respondent, left it with no adequate alternative remedy other than the one it pursued. See *Tribac (Pvt) Ltd v Tobacco Marketing Board* 1996 (2) ZLR 52 (S) at 56D.

Since the agreement between the first and second respondents related solely to the 1998 hunting season, and there was no suggestion that the breach by the first respondent of its obligations under the joint venture agreement went beyond the sale of the ten buffalo, it is my view that a claim for damages against the partner, the first respondent, is an appropriate alternative remedy.

The grant of the decree of specific performance so far as the unexpired period of the concession is concerned, should deter the first respondent from any further breach. It cannot be contended, therefore, that there exists any reasonable apprehension of a future infringement.

In the result, I would dismiss with costs the appeal against the discharge of the provisional order.

EBRAHIM JA: I agree.

MUCHECHETERE JA: I agree.

Coghlan & Welsh, appellant's legal practitioners

Webb, Low & Barry, first respondent's legal practitioners

Calderwood, Bryce Hendrie & Partners, second respondent's legal practitioners