Judgment No. HB 64/13
Case No. HC 175/13
X REF HC 1432/12; 1486/12 & 2366/12

GARIYA SAFARIS (PVT) LTD **APPLICANT**

Versus

TSHOLOTSHO RURAL DISTRICT COUNCIL **1ST RESPONDENT**

And

THEMBA MOYO **2ND RESPONDENT**

IN THE HIGH COURT OF ZIMBABWE
CHEDA AJ
BULAWAYO 29 JANUARY & 21 MARCH 2013

G. Nyoni & Ms H. Dube for the applicant
J. Tshuma for the respondents

Judgment

CHEDA AJ: The applicant is a safari operator in an area demarcated for that purpose by the respondent in Tsholotsho Rural District Council area.

The applicant made an urgent chamber application to this court seeking an order against the respondents in the following terms.

"Terms of the final order sought

That you show cause to this honourable court why a final order should not be made in the following terms:-

a) That the provisional order granted by this court in this matter be confirmed.
b) That the respondents be held to be in contempt of the provisional order granted on the 6th of June 2011 and under case number HC 1486/11 and that each respondent pays the sum of US$5 000 to the Registrar of the High Court, Bulawayo.
c) That it be declared that the applicant has a right to have its agreement with 1st respondent dated 30 March 2006 and which was for 9 years renewable and for a further 9 years.
d) That the respondents in *solidium*, pay costs of suit at an attorney and client scale.

Interim relief granted

Pending return date in this matter, the applicant is granted the following relief:-

1. The respondents be and are hereby ordered to, forthwith, withdraw the tender that they flighted in the Sunday News newspaper covering the period 20 to 26 January 2013 or any newspaper wherein they are calling members of the public to tender or bid for the carrying out of trophy hunting in 1st respondent's Tsholotsho South Concession.
2. That should anything be done pursuant to and based on the said tender, same shall be of no legal force or effect.
3. The respondents be and are hereby ordered to, forthwith and within 24 hours of this order being served on them, surrender the 2013 Hunting Licence and Hunting Quota for the Tsholotsho South Concession to the applicant's legal practitioners at Messrs Moyo and Nyoni Legal Practitioners, Suite 201-2nd Floor Pioneer House, Bulawayo.
4. The respondents be and are hereby ordered to observe and abide by the provisional orders granted under case number HC 1486/11; 1432/12 and HC 2366/12.
5. The respondents are to allow and do all that is within their powers to allow and facilitate the applicant to conduct elephant hunts in the Tsholotsho South Concession until such time as this court will have confirmed or discharged this provisional order."

The applicant was ordered to serve the application on the respondent. The respondent has filed opposing papers to the application.

The founding affidavit of the application was deposed to by Collette Andrew Rajah who claims to be a director of the applicant. He said the applicant has an agreement with the 1st respondent for conducting elephant hunts in Tsholotsho South. He referred to an agreement signed by the parties on 30th March 2006.

He said the renewal of that agreement was the subject of contention between the parties because whereas the 1st respondent contended that the agreement terminated on 28 February 2012, the applicant disputes that.

It is therefore necessary to look into the specific provision in the agreement to establish what the parties provided and intended in it.

The particular part, clause 3, provides as follows:-

"Period of agreement

3. Notwithstanding the date of this agreement which commenced on 1st March 2002 with a duration of nine years and eleven months, terminating on 28th February 2012 and shall be renewable under similar terms."

The applicant says the agreement states that the agreement of the parties "SHALL" be renewed. The change of the word renewable to renewed is a clear attempt by the applicant to mislead. There is a clear difference between the two words. To try to change the words in the applicant's affidavit is simply unacceptable. Even his submission that he got advice from his legal practitioners on that point does not assist. No legal practitioner can change a written word to a different one to assist his or her client.

In their heads of argument on this point his legal practitioners refer to the correct word "renewable" and they say they advised the respondents of their interpretation of the agreement but the "respondents did not do otherwise and applicant continued with its business of hunting unabated through the year 2012." The meaning of the above remains unclear. They contend that the intention of the parties was that the agreement was to continue, and not discontinue.

The respondent on the other hand says it could never have been the intention of the parties to enter into a contract that would exist in perpetuity. It was for that reason that a date of termination was agreed, with a provision that the agreement was renewable, but the applicant never made use of the option to renew as provided in the agreement. I find this interpretation of the agreement by the respondent to be more reasonable than that given by the applicant. The insertion of the word renewable meant that the agreement could be renewed if the parties agreed. It could never have meant that the agreement would be renewed automatically and forever. This thinking is supported by the fact that a termination date had been included in the agreement. There would have been no reason to give a termination date if the parties intended perpetuity of their agreement. Failure to negotiate renewal of the agreement means that the agreement terminated by operation of law.

The applicant made issue of the fact that the respondent permitted the applicant to continue to hunt after the termination date, and argues that this meant that the agreement had not terminated. The respondent on the other hand replied that it had no option but had to do so because the applicant had obtained a provisional order against the applicant restraining it from interfering with the applicant's hunting activities. Such compliance did not mean that there was still a valid agreement.

The record shows that the applicant held on to that provisional order which was issued on the 6th of June 2011 and never moved for its confirmation.

On May 9, 2012, the applicant sought another provisional order to compel the respondent to obey the order issued on the 6th of June 2011.

There is therefore no basis for arguing that the respondent allowed the applicant to continue to hunt because it accepted that the agreement had not terminated.

The applicant also argued that if the respondent believes that it has a right to terminate the agreement it should establish a proven or a declared breach, and produce documentation that it is entitled to terminate. In turn the respondent has produced correspondence which warned the applicant of its intention following applicant's failure to make certain payments for elephant hunts. The agreement provided that certain advance payments, and subsequent payments were to be made, that is, to pay a deposit before hunting an elephant. There were stipulated payment periods, of six months before, and six months after.

The schedule of payments filed by the applicant confirms the failure by the applicant to pay within the agreed periods. It is surprising that the applicant filed this document but without conceding its failure to comply with the agreement. The respondent even points out that the applicant failed to comply even with the provisional order granted to it wherein it was stipulated that:

> "On condition that applicant has deposited 50% of the elephant trophy fee, namely $5 500 prior to each elephant hunt, with the respondent."

The schedule filed by the applicant in January 2012 confirms that the payments were not made in accordance with the above order.

In conclusion, I find that while the issue of the breach is an alternative basis for cancellation, the agreement had terminated due to the failure of the applicant to take advantage of the option to renew it.

What pushed the applicant to approach this court for this application is the fact that the respondent, taking into account that there is no more agreement with the applicant, has since advertised for new clients. The applicant now seeks to interdict the respondent from entering into safari operation contracts with other parties.

I am satisfied that the applicant has no right to interdict the respondent from doing so as the contract between it and the applicant is no longer in existence.

Accordingly, I make the following order.

1. The application is dismissed with costs.

2. The provisional orders granted against the respondents are hereby discharged.
3. The applicant is ordered to pay the respondents costs.

Messrs Moyo & Nyoni Legal Practitioners applicants' legal practitioners
Webb, Low & Barry Legal Practitioners respondents' legal practitioners