REPORTABLE (45)

THE FORESTRY COMMISSION
v
VARDEN SAFARIS (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GARWE JA & BHUNU JA
HARARE, MAY 12, 2016

T. Magwaliba, for the appellant

F. Girach, for the respondent

ZIYAMBI JA:

[1] At the end of the hearing of this appeal we gave the following Order:

> "1. The appeal is allowed with costs.
> 2. The cross appeal is dismissed with costs.
> 3. The judgment of the court *a quo* is set aside and is substituted with the following:-
>
> "The plaintiff's claim is dismissed with costs"
>
> 4. Reasons for this order are to follow in due course"

The following are the reasons.

[2] The respondent sued the appellant in the High Court for damages alleging various breaches of the appellant's obligations in terms of a lease agreement signed by the parties, dated 9 April 2010 and attached to the declaration as 'Annexure B'.

[3] It was alleged in the Declaration that the appellant had leased to the respondent:

> "a 1000 hectare portion of Sikumi Forest known as Site 6 Sikumi Forest in the district of Hwange including the Nkonkoni pan and borehole for the purposes of conducting game viewing, wild life photographic expeditions and accommodation camp and other activities".

The lease was for a period of 10 years commencing 1 April 2010. However, in breach of the lease agreement, the appellant had:

> "indicated it intended to hunt in the photographic area and unilaterally moved the agreed site from area 1 to site demarcated by the word 2 seen on the annexed diagram Annexure D. In furtherance of the breach defendant prevented plaintiff from conducting further activities by posting armed guards to prevent plaintiff from access to site 6 thereby ejecting plaintiff from peaceful occupation thereof …"

[4] The respondent claimed damages incurred in setting up at the premises in the sum of US$160 000 as well as US$2 579 179 being the expected net income over the period of lease.

[5] The appellant, while admitting signature of the lease agreement, pleaded:

> "**Ad paragraph 3**
>
> 2.1 It is admitted that the parties signed Annexure "B" to plaintiff's Declaration. It is however denied that this agreement was in respect of the property claimed. Plaintiff was clearly under a mistake of fact.
>
> 2.1.2 Annexure "B" to the declaration is silent on the property description. An annexure, annexure "A" referred to in the Agreement specifying the leased property was not annexed thereto."

[6] Clause 14 of the contract of lease provides:

> "(a) It is specifically agreed and understood that there shall be no agreement between the parties hereto until this Agreement has been signed by or on behalf of the parties hereto and that on signature hereof as aforesaid this Agreement comprises the whole contract between the parties hereto and no representations made by either of them to the other prior to the execution hereof shall be of any

> force or effect unless recorded herein. No alteration of this Agreement shall be of any force or effect unless recorded in writing executed by the parties hereto".

The learned judge was of the view that extrinsic evidence could be admitted in order to ascertain the terms of the agreement. She said:-

> "The mere fact that the map is not attached to the agreement cannot be fatal. As such, I do not regard the factual evidence adduced, as warranting exclusion in terms of the parole evidence rule because it does not seek to introduce new evidence in conflict with the agreement. In the absence of a finding that the factual evidence seeks to alter the agreement, this is clearly an appropriate case where the court must of necessity look at the factual background in determining the rights of the parties. The parties at all times entered into discussions against the background of a map".

Having heard evidence from the parties, she found that there had been a unilateral mistake for which the appellant was responsible. She therefore ordered the appellant to pay to the respondent:

> "- Costs relating to preliminary construction activity, including costs for transport and hiring of labour, both professional and manual;
>
> - Refund of lease fees paid for 2010 and costs of the trial".

[7] Aggrieved by this decision the appellant has appealed to this court on various grounds the principal ground being that the court erred in finding that a valid lease agreement had been concluded by the parties.

[8] The respondent, also discontented with part of the judgment, cross appealed on grounds that the learned judge had, against the express agreement of the parties that only the issue of liability would be determined by the court, determined the issue of damages without having heard evidence from the parties on the question of damages. The respondent prayed that the matter be remitted to the High Court for a quantification of the damages suffered and that the appellant be ordered to pay the costs of the hearing in the High Court on the issue of liability.

[9] The cross appeal was conceded by the appellant to the extent that it attacked the decision by the court *a quo* to deal with the question of damages when the parties had specifically requested it to determine the question of liability only. However, the prayer that the matter be remitted to the High Court as well as the issue of costs were not conceded.

VALIDITY OF THE AGREEMENT

[10] I turn to determine whether there was a valid lease agreement between the parties.

Mr *Magwaliba* contended that the lease was void on three grounds:

- It was void for non-compliance with statute, namely, s 17 of the Forest Act;
- It was void for failure to identify the property leased; and
- It was void for mistake as to the premises leased.

In my judgment, a finding that the agreement is void for any one of the above reasons, will dispose of the appeal.

Whether the lease was void for non-compliance with statute.

[11] Section 17 of the Forest Act [*Chapter 19:05*] ("the Act") provides:

> **"17 Lease of demarcated forest**
> (1) The Minister may, on the recommendation of the Commission, lease to any person any portion of a demarcated forest.
> (2) The Minister shall pay to the Commission all rents derived from any person who has been permitted in terms of subs (1) to acquire the lease of any portion of a demarcated forest."

The contention advanced by the appellant is that the power to lease a demarcated forest is given by the Act to the Minister. Thus the lease, having been signed by the director of the Forestry Commission, was in breach of s 17(1) of the Act and, therefore, void for illegality since the

Act specifically provides that it is the Minister and not the Commission on whom the discretion as to whether or not any demarcated forest should be leased to any person has been conferred. It is common cause that the lease agreement was signed by the Director of the Commission although with the approval of the Minister. It was submitted that compliance with s 17 can only be effected if the Minister exercises a discretion to lease the land upon the recommendation of the Commission. This course not having been followed, the agreement was concluded contrary to the dictates of the Act.

[12] This point was taken for the first time in the appellant's heads of argument before the court *a quo*. The appellant submitted that as a point of law it could properly be taken for the first time in the heads of argument. The respondents objected to its being raised on the grounds that the raising of the point at that stage would cause prejudice to the respondent. The learned judge did not allow the point to be taken by reason of its not having been pleaded.

[13] I pause to comment on the court's decision on this point. The contention advanced before the court *a quo* was that the agreement having been concluded contrary to the terms of the Act is void. It is a truism that if indeed the agreement is shown to be void, then the nullity took effect from the date of conclusion of the agreement. In other words no lease agreement came into effect. Raising the point before the court would be merely for the purposes of having the lease declared void but, notwithstanding the time of the declaration of nullity by the court, the nullity would have existed *ab initio*. In effect, by raising the point in its heads of argument, the appellant was merely drawing the attention of the court to the possibility that the agreement was void by reason of its contravention of statute. Since the point was raised before judgment was given, I do not see what prejudice would be suffered by the respondent if the matter had

been dealt with by the court at that stage since it was open to the court to invite both parties to make submissions on the issue before making a decision.

[14] It seems to me that where a point of law is sought to be taken for the first time at the end of a trial or hearing at first instance but before judgment is delivered, the court in which the issue is raised should not lightly disallow it. The court must exercise a discretion as to whether or not to allow the taking of the point in question. It has the resources to hear further evidence, if that proves to be necessary. It may, if so requested, amend the pleadings. In short, there are options open, in these circumstances, to a court of first instance which are not always available to an appellate court[1]. In the end, the aim is to do justice between the parties and this cannot be achieved if it is brought, albeit belatedly, to the attention of the court that an agreement is contrary to statute and the court simply turns a blind eye to that fact because it was not raised in the pleadings.

[15] Turning to the determination of the point at issue, the preamble to the lease agreement states that the appellant was "charged with the control and exercise (of) the rights of ownership, other than the right of alienation", in respect of the Sikumi Forest a portion of which it purported to lease to the respondent. As will appear below, the appellant is empowered to do so by s 16(b) of the Act as read with s 15 thereof.

> **"15 Control and management of demarcated forests**
> (1) Subject to subsection (2), the Commission shall have the control and management of—
> (*a*) demarcated forests; and
> (*b*) all land expropriated in terms of section *forty*; and
> (*c*) any other State land designated by the Minister for the purposes of this paragraph.
> (2) The Commission shall have the control and management of any demarcated forest which is part of the Rhodes Estates only in so far as

[1] See for example, Muskwe v Nyajena SC17/12

such demarcated forest has been leased to the Commission and only in so far as such control and management is consistent with the lease.

16 Property of Commission

The Commission—

(*a*) shall own—

(i) all immovable property designated by the Minister in terms of subsection (1) of section *fourteen* and any other immovable property the ownership of which is acquired by the Commission; and

(ii) all movable assets transferred to the Commission in terms of section *thirteen* and all other movable property the ownership of which is acquired by the Commission; and

(iii any forest produce obtained from a demarcated forest or other land referred to in paragraph (*b*) or (*c*) of section *fifteen* which is not immovable property; and

(*b*) may exercise, subject to subsection (2) of section *fifteen*, the rights of ownership, other than the right of alienation of ownership, in respect of any demarcated forest or other land referred to in paragraph (*b*) or (*c*) of section *fifteen."* (My emphasis)

If the appellant acted in terms of s 16 (b), as it seems clear that it did, the lease was not executed in contravention of the Act.

Whether the lease agreement was void for failure to identify the property leased

[16] The only description of the property contained in the lease appears in the preamble thereto which states as follows:

"PREAMBLE

A WHEREAS SIKUMI Forest in the District of HWANGE is a demarcated Forest (thereinafter referred to as "the Forest").

B AND WHEREAS the Commission is charged with the control and exercise of the rights of ownership, other than the right of alienation, in respect thereof.

C AND WHEREAS the Commission has agreed to grant the Company the non-exclusive right to enter that portion of the Forest marked "A" on the

> map hereto annexed, in extent approximately 1000 hectares (thereinafter referred to as the lease area) for the purpose of conducting game viewing, wildlife photographic expeditions and accommodation, camp or other activities approved by the Forestry Commission."

NOW THEREFORE THESE PRESENT WITNESSETH THAT THE PARTIES HERETO HAVE ENTERED INTO AND CONCLUDED THE FOLLOWING AGREEMENT, THAT IS TO SAY:

1. AGREEMENT

> That the Commission hereby records that the Agreement shall be deemed to have commenced from the 1st day of April 2010, (hereinafter referred to as "the commencement date") and that with effect from the commencement date the Commission has entered into this Agreement in terms of which it grants to the company the rights set out in Preamble C hereof, subject to the terms and conditions set out herein." (My emphasis).

That the map referred to in Preamble C was not annexed, is common cause. That notwithstanding, the respondent and the appellant proceeded to sign the agreement.

[17] Thus, according to the terms of the agreement signed by the parties, what was leased was a portion of Sikumi Forest measuring 1000 hectares. The agreement does not state which portion. The map was meant to show the portion leased. Since it was not attached, neither the identity of the map nor that of the leased property is known. The respondent did not apply for rectification of the lease to include a description of the property leased. It opted to cancel the agreement.

[18] It is trite that an essential requirement for a valid lease is that the property leased must be identified or identifiable. A lease which does not identify the leased property is void for

vagueness.[2] The evidence admitted by the court *a quo* did not clarify the issue. It served only to reinforce the argument by the appellant that not only was the property leased not identified but also that there was no consensus between the parties as to the property leased.

[19] The evidence revealed that it is common cause that the property tendered for by the respondent was described as Sikumi Area 2 measuring 1000 hectares. The letter of tender written by the respondent states as follows:

> "We are writing in support of our tender for either area (1) Sikumi Jwapi or area (2) Sikumi Kennedy to operate Photographic Safaris"[3].

In the invitation to tender, the two areas to be leased by the appellant were described as:

> "Sikumi Area 1 Jwapi: consists of 2500ha of land…Area is located on the north western part of Sikumi forest.
>
> Sikumi Area (2) next to Kennedy siding: Area is located along the Bulawayo-Victoria Falls railway and can be accessed through railway or through forest roads requiring 4x4 vehicles. Area is 1000ha in extent".

It is to be noted that there is no mention, either in the letter of tender or in the invitation to tender, of "Site 6 Sikumi Forest" or of the "Nkonkoni pan and borehole". The Sikumi forest is some 50 000 hectares in extent. As can be seen from the appellant's letter advising the respondent of the success of its tender, the respondent received what it tendered for - Sikumi Area 2. The letter states:

> "Re: Bid for Sikumi Area 2- Kennedy
>
> We write to inform you that your bid to lease a portion of Sikumi forest was successful".

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[2] Business Law in Zimbabwe by R. H. Christie at p273; Kerr Sale and Lease 249-250; Principles of the Law of Sale & Lease 3rd ed. By G. Bradfield & K. Lehmann at p 138.

[3] Record p61

Indeed, it was the evidence of the respondent's director, Mrs Varden, that she was familiar with the two areas offered for tender and would have been very happy if the respondent was awarded the tender for the lease of either of them. According to her, she was "very excited" when she was advised that the respondent had won the tender. How the same area could, as the respondent's Mr Nel advised the court, have become so unsuitable for the respondent's purposes that it had to be changed, still remains a mystery which has not been explained on the record.

[20] When the draft agreement was sent to the respondent for signature, it would appear that the property to be leased was not clearly identified prompting the respondent to raise, in item 5 of an email to the appellant dated March 4, 2010[4], the following query:

> "5. The map supplied and from a look at the area on the ground, the size and boundary of the area seem to be different. Will the boundaries be fully clarified before signing and paying?"

Significantly, the first line of this email reads:

"This is in regards (*sic*) to Sikumi Forrest (*sic*) lease site 6."

But, as already shown, the area tendered for, and won by the respondent, was Sikumi Area 2 - Kennedy. In response to that email, the appellant advised, in a letter headed:

"Re: Comments on Lease agreement: Sikumi-Kennedy:-

> "Item 5. The map supplied had a few errors as indicated during the meeting. However the Forestry/Wildlife Ecologist, the Station Manager and Forester (Sikumi) will show you the boundaries in the forest. Grid references will also be provided. The boundaries to be signposted and we will try as much as possible to use identifiable physical features such as roads/fireguards where appropriate."

[4] Record p84

[21] Before the boundaries were shown to the respondent, and the area clarified, the parties signed the agreement. Thereafter, the respondent helped itself to a portion of the Sikumi forest which is generally used for hunting (and includes the Nkonkoni pan) and which was never mentioned or identified either in the tender document or in the agreement. It proceeded to establish the boundaries by using a Google earth application and began to set up its operations there. By way of explanation for the respondent's actions in this regard, Mrs Varden claims to have spoken, by telephone, to a certain forestry officer - an officer not recommended by the appellant in its letter[5] - and to have received telephonic directions from that officer as to the situation of the boundaries of the property leased. She and the other directors of the respondent expressed surprise when, at a later date, the appellants' employees were seen to be working on that portion of the forest in preparation for a hunt.

[22] Quite clearly no agreement was shown to have been reached on the identity of the property. The respondent did not occupy Sikumi Area 2 - Kennedy which is the property it tendered for. Its explanation for its failure to do so is that the site was changed, by the appellant, in a verbal communication with one of its officers. This allegation not only runs contrary to the probabilities of the matter but is not supported by the other evidence on record.

However, what is more important, and what constitutes the decisive factor in this matter is that the lease agreement pleaded does not identify the property leased and is, for this reason, void.

[23] Accordingly, the court erred in finding that a valid agreement of lease had been concluded between the parties.

[5] Supra para [20]

GARWE JA: I agree

BHUNU JA: I agree

Dube, Manikai & Hwacha, appellant's legal practitioners

Honey & Blanckenberg, respondent's legal practitioners