

NYAMPALA SAFARIS (Z) LIMITED, BAOBAB SAFARIS (Z) LIMITED, NYUMBU SAFARIS (Z) LIMITED, EXCLUSIVE SAFARIS (Z) LIMITED, BUSANGA TRAILS (Z) LIMITED v ZAMBIA WILDLIFE AUTHORITY, ZAMBIA NATIONAL TENDER BOARD, ATTORNEY GENERAL, LUANGWA CROCODILE AND SAFARI LIMITED, SOFRAM AND SAFARIS LIMITED, LEOPARD RIDGE SAFARIS LIMITED, SWANEPOEL & SCANDROL SAFARIS LIMITED (2004) Z.R. 49 (S.C.)

SUPREME COURT

SAKALA, C.J., MAMBILIMA AND SILOMBA JJS

5TH NOVEMBER, 2003, AND 26TH MARCH, 2004

(SCZ JUDGMENT No. 6 OF 2004)

Flynote

Administrative Law – Judicial Review – Concerned not with merits- concerned with the decision making process itself.

Headnote

This is an appeal against the judgment of the High Court dismissing the appellants application for judicial review of the decision on the 1st, 2nd and 3rd respondents made on 29th November, 2002, awarding tenders for Safari Hunting Concessions without availing the appellants an option to renew their leases, following upon the expiry of the said leases and without evaluating the appellants tenders. There is also cross-appeal by the respondents in which they contend that the judgment ought to be varied as stated in the notice of cross-appeal.

Held:

1. In terms of Section 5(1) (j) of the Zambia Wildlife Act No. 12 of 1998, the power or authority to grant Hunting Concessions, is vested in the Zambia Wildlife Authority (ZAWA).

2. In terms of Section 7 of the Zambia National Tender Board Act Cap. 394, the Zambia National Tender Board is empowered to regulate control and approve the procurement of goods and services for the Government and parastatal bodies.

No Government department or parastatal can award a contract, depending on the value of the contract, without the bid for the 49 contract being processed and approved by the Zambia National Tender Board and authority entering into the contract being granted by the Zambia National Tender Board.

3. That the remedy of judicial review is concerned not with the merits of the decision, but the decision making process itself.

4. The purpose of judicial review is to ensure that the individual is given fair treatment by the authority, to which he has been subject and that it is not part of that purpose to substitute the opinion of the Judiciary or of the individual Judges for that of the authority constituted by law to decide the matter in question.

5. The decision is unreasonable in the Wednesbury sense if it is a decision which no person or body of persons properly directing itself on the relevant law and acting reasonably, could reasonably have reached.

Cases referred to:

1. Associated Provincial Picture House Ltd v Wednesbury Corporation [1948] 1 KB, 223.

Mr. C. K. Banda, SC, of Messrs Chifumu Banda and Associates, for the Appellants.

Mr. B.S. Sitali, Legal Counsel for the 1st Respondent

Mr. C. Hakasenke of Messrs Hakasenke and Company for the 2nd Respondent No appearance for the 3rd Respondent.

Mr. W. Mubanga of Messrs Permanent Chambers for the 4th and 5th Respondents.

Mr. W Kabimba of Messrs W. M. Kabimba & Company for the 6th and 7th Respondents.

JUDGEMENT

SAKALA, C.J. delivered Judgment of the Court.

This is an appeal against the judgment of the High Court dismissing the appellants application for Judicial Review of the decision of the 1st and 2nd and the 3rd respondents made on 28th November, 2002, awarding tenders for Safari Hunting Concessions without availing the appellants an option to renew their leases, following upon the expiry of the said leases and without evaluating the appellants' tenders. There is also a cross-appeal by the respondents in which they contend that the judgment ought to be varied on the four grounds as stated in the notice of the cross –appeal. 50

For convenience, the appellants will be referred to as the 1st, the 2nd, the 3rd and the 4th and the 5th applicants, while the respondents will be referred to as the 1st to the 7th respondents, which they were in the court below. The salient facts and the sequence of events leading to the appeal and the cross-appeal are not in dispute. They are contained in the various affidavits deposed to on behalf of the applicants and on behalf of the respondents.

These facts are that, by various and separate lease agreements dated 16th April, 1996, the 1st respondent, then known as the National Parks and Wildlife Service, through the Wildlife Conservation Revolving Fund, granted to each of the applicants, separately, exclusive commercial hunting right within each of the respective separate Game Management Areas of Zambia for a period of 5 years. All the applicants duly complied with a clause in the respective lease agreements that required each applicant to submit to the respondents Annual Performance Review for each year and the Final Report prior to the expiry of each of the separate lease agreements in the year 2001. Each of the lease agreements had an option for each of the applicants to renew the term of the lease for a further period of five years. It was common cause that none of the applicants had their respective lease agreement renewed at the expiry of the five year period.

On 19th January, 2001, the former President of the Republic of Zambia, in his speech delivered at the official opening of the 5th Session of the 8th National Assembly, announced that the Government had with immediate effect, banned Safari Hunting and the issuance of Hunting Concessions.

However, in December, 2001, the Zambia Wildlife Authority (ZAWA), the successor entity to the National Parks and Wildlife Service, invited offers for the grant of Hunting Concessions in all hunting blocks in the country, inclusive of the hunting blocks, which has been offered to the applicants under the

lease agreements of 1996. All the applicants responded to the advertisement and submitted offers for consideration for the award of the advertised hunting blocks.

On 28th November, 2002, the Board of the 2nd respondent held an extraordinary Board meeting chaired by the Minister of Finance and National Planning. Several Ministers were present as members, while other Ministers and officials were in attendance. The meeting approved tenders for the granting of Hunting Concessions in Game Management 51 Areas. The tenders for all the five applicants were unsuccessful.

By an *ex parte* summons, the applicants commenced these proceedings by applying for leave to apply for Judicial Review of the decision of the 1st, the 2nd and 3rd respondent made on 28th November, 2002. In the application, among others, the applicants claimed for:

1. An order of certiorari to remove into the High Court for the purpose of quashing the decision of the Ministerial Committee represented by the 3rd the 1st and the 2nd respondents whereby they decided, on 28th November, 2002, to grant tenders without availing your applicants the option to renew their leases and without evaluating their tenders.
2. Further or in the alternative, a declaration that the decision here above is void and of no effect as it was *ultra vires*, unfair and unreasonable and contrary to the rules of natural justice.

The grounds on which the reliefs were sought were that:

1. The decision of the Committee of Ministers and the 1st and the 2nd respondents made on 28th November, 2002, was *ultra vires* the provisions of Act No. 12 of the 1998 of the Laws of Zambia.
2. The decision referred to above was unreasonable and contrary to the rules of natural justice.

The application was supported by affidavits deposed to on behalf of the applicants. On 3rd December, 2002 the applicants, obtained leave to apply for judicial review. Subsequently, the applicants filed a notice of motion accompanied by affidavits. The respondents too filed affidavits in opposition. The applicants' case, as pleaded, was that inspite of their complying with the clause under the lease agreements that required the submission of the Annual Performance Review of each year and the Final Performance Report prior to the expiry of the respective lease agreements; the respondents did not allow them to exercise the option to renew the terms of the lease for a further period of 5 years as provided in the lease agreements. It was contended that the performance of the applicants has been

excellent to the extent that each one of them had been awarded a certificate of outstanding distinction by the 1st respondent and the Ministry of Tourism on 4th May, 2000. It was also contended that notwithstanding the achievement, they were never given an option to renew their respective lease agreements; but instead the hunting blocks 52 were separately allocated to others. The respondent's position was that, as a consequence of the ban on Safari Hunting and issuance of Hunting Concessions, the lease agreements entered into by the parties, released them from their respective obligations thereunder and that since the agreements were frustrated; the option to renew the agreements was of no consequence; that by responding to the tender for the awarding of Hunting Concessions, the applicants acquiesced in the re-allocation of the concerned hunting blocks and are therefore estopped from claiming the concerned hunting blocks; that all the applicants' offers were subjected to the evaluation criteria; and only those offers which satisfied the minimum criteria were subjected to further evaluation; and that it was not true, as alleged by the applicants, that the applicants were not evaluated in the tender process.

According to the respondents, the tender document was very clear. It stipulated the various criteria to be met by the applicants and showed three stages in the evaluation process, namely; the preliminary evaluation done to check on which of the applicants met the minimum requirements stipulated in the tender document. Those who did not meet the said minimum requirements as stipulated in the tender document were disqualified at the stage of evaluation; those of the applicants that met the minimum requirements proceeded to the next and important stage of evaluation; which was the technical evaluation in which each applicant was assessed and scored on what they stated in the tender documents on the technical points of how they would manage the area applied for and what they intended to do for the area and how they would do it. At this stage, the 1st, the 2nd and the 3rd high scoring applicants were selected to proceed to the next and last stage; and the third stage was the financial evaluation in which three high scoring applicant's bids on the financial aspect were opened and the financial assessment done and added to the technical score and the bid then awarded to the highest scoring of the three.

The respondents contended that all the applicants for the hunting concessions, including the applicants herein, were evaluated at the preliminary evaluation stage, and the 2nd, the 4th and the 5th, applicants herein, were disqualified at the stage of preliminary evaluation because they did not meet the minimum requirements as stipulated in the tender document, while the 1st and the 3rd applicants went to the next stage at which they were beaten on the technical score and were not among the three recommended for the third and last stage. It was the position of the respondents that it is not true that the applicants herein were not 53 evaluated as they were evaluated and they fell on merit at various stages of the evaluation process.

The hearing of the Motion was preceded by the hearing of two preliminary issues. After the court heard the arguments on the two preliminary issues, it reserved its ruling but subsequently, the court decided to hear the whole motion before delivering the ruling on the two preliminary issues.

Thus, in the end, the rulings on the preliminary issues became part of the judgment in the motion now the subject of this appeal.

In our view, the separation of the hearing, on for the preliminary issues and for the motion, was unnecessary and as it turned out a waste of time leading to delay. Unless a preliminary issue is raised before the close of pleadings, it is neater to hear it together with the main cause of action, while making the ruling become part of the judgment in the motion.

The first preliminary issue raised that the first and fifth applicants, having responded to and submitted bids for Safari Hunting Concessions under the advertised tender by the first respondents, were now estopped from replying on and enforcing a clause of the lease agreement dated 16th April, 1996, which provided for "Option to renew the lease agreement".

The learned Judge considered the arguments on this first preliminary issue raised for and on behalf of the 1st, the 6th and the 7th respondents, and concluded on this first preliminary issue that in so far as the 6th and the 7th respondents were concerned, their arguments on estoppel could not stand as they had no locus standi in the matter in relation to the agreements. Their arguments were dismissed. We agree with the position taken by the trial Judge. The 6th and the 7th respondents were not party to the agreements of the 16th of April, 1996. They were total strangers to those agreements. Their arguments on estoppel based on a clause in the agreements were not well taken and were without merit. In relation to whether the 1st applicant was estopped from relying on the lease agreement of 16th April, 1996, entered with the first respondent, the learned Judge observed that the agreement did not state when the option to renew was to be exercised, but only that the applicant could exercise the option after the respondents had consulted with the local communities in whose area the Safari hunting operation was conducted. The learned Judge further observed that the issue of estoppel in the instant case depending on whether there was, at the material time, in force, the lease agreement in question.

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On the undisputed affidavit evidence, the learned Judge found that the lease agreement was at the material time not operational following upon the Presidential banning order of Safari Hunting and that the lease agreement had also expired by then. According to the learned Judge, had the lease agreement been still operational, one would have expected the first applicant to have been alive to the fact that they had an accrued right to exercise the option to renew the lease agreement when it expired or when they saw the advertisement inviting applications for tenders.

The applicants did not apply for renewal, but instead lodged applications in response to the advisement. The learned Judge pointed out that it would not be unreasonable to conclude that the reason the first applicant did not at all exercise its rights of option to renew the lease agreement was because of the realization, on its part, that there was no such agreement any longer; it having been frustrated as a result of the Presidential banning order and because at the time the banning order was lifted, the lease

agreement had long expired and therefore, no longer operational and not capable of enforcement. The learned Judge concluded by finding that the applicants were estopped from invoking a clause in the lease agreement giving them the option to renew the lease agreement as the same was no longer capable of being enforced as it was no longer in existence because it has been frustrated and/or had expired. We agree with the trial Judge's reasoning in dismissing the first preliminary issue in respect of the first applicant on the issue of option to renew.

The second preliminary issue was based on a clause in the lease agreement which provided for resolution of disputes between the parties through mediation or arbitration before any form of litigation in a court of law. The learned Judge considered the clause. On the reasoning that there was no lease agreement in force at the time the dispute arose, the court refused to refer the matter to arbitration and to stay proceedings as provided in the expired and/or frustrated lease agreement. We also agree with the conclusion of the learned Judge on the second preliminary issue. After disposing off the two preliminary issues, the learned Judge proceeded to address himself to the substantive claims for an order of certiorari or in the alternative a declaration.

The learned Judge first reflected on the basic principles underlying the Judicial Review process by considering the scope of the remedy. The learned Judge referred to a number of decided cases and authorities 55 in the reflection. We are satisfied that there is no dispute on the principles governing Judicial Review.

In dealing with the issue of evaluating the applicant's tenders, the learned Judge quoted extensively from an affidavit in opposition by one Sikanyika, the Board Secretary of the second respondent. The learned Judge expressed surprise that the first applicant was claiming that its bid was not evaluated by the second respondent, when in its own affidavit, it had stated that the second respondent sat on 9th March, 2002, to consider Hunting Concessions and the applicants were advised that certain documents were missing and were required to submit the same, which they did. On the evidence, the court found as a fact that the applicants' tenders including that of the first applicant were evaluated. We agree with this finding. In dealing with the alternative claim for a declaration that the decision allegedly made by the Ministerial Committee represented by the 3rd respondent was null and void and of no effect as it was ultra vires, unfair and unreasonable and contrary to rule of natural justice, the learned Judge considered the evidence of both parties as it was ultra vires, unfair and unreasonable and contrary to rules of natural justice, the learned Judge considered the evidence of both parties on the specific question of whether the decision was made by the Ministerial Committee as claimed by the applicants or made by the Zambia Wildlife Authority as contended by the respondents. The learned Judge first recapped and summarized the basic principles underlying the process of Judicial Review and identified the two issues for determination as follows:-

(i) who had the legal authority or power (jurisdiction) to grant Hunting Concessions to hunting outfitters? and

(ii) who awarded (or exercised the power or authority to award) the Hunting Concessions in this case?

These questions, on the facts, were in our view, correctly identified. In dealing with the first issue of the legal authority to grant Hunting Concessions, the learned Judge found that in terms of Section 5(1) (j) of the Zambia Wildlife Act No 12 of 1998, the power or authority to grant Hunting Concessions is vested in the Zambia Wildlife Authority (ZAWA) whose composition is set out in Section 2 of Act No. 13 of 2001. In law, we totally agree with this finding. On the second question, namely; who awarded or exercised the power or authority to award the Hunting Concessions, the learned Judge found that from evidence on record, it was Zambia National Tender Board, the 2nd respondent, who granted the Hunting Concessions. Having so found, the learned Judge asked a follow up question of whether the Zambia National Tender Board, the 2nd respondent, had power or authority (jurisdiction) to award the Hunting Concessions. 56.

After examining the provisions of Section 5(2) of the Act that empowers ZAWA to delegate its authority, the learned Judge found that ZAWA did not delegate its authority to the 2nd respondent or to the Ministry of Tourism. The learned Judge, however, found that at its 39th Meeting of the Members held on 31st December, 2002, ZAWA ratified the award of Hunting Concessions as communicated to successful bidders by the Permanent Secretary, Ministry of Tourism, Environment and Natural Resources.

The learned Judge concluded that on the totality of the evidence on record, he was left in no doubt that by awarding the Hunting Concessions to the bidders, the Zambia National Tender Board acted within the provision of the Act in its capacity as agents for ZAWA and that the Board duly complied with the requirements of the rules of natural justice by affording the bidders the opportunity of a fair hearing through the process of evaluating the tenders for all the applicants.

The court declined to grant the order of certiorari and dismissed the application for Judicial Review. The court awarded costs to the 1st, the 2nd and the 3rd respondent only. The court ordered, using unprocedural expression, that the 4th to the 7th respondents bear their own legal costs as, in the court's opinion, it was not necessary for these respondents to have joined themselves to the action.

We have deliberately delved into the facts and the sequence of events leading to this appeal in order to give a clear picture of the issues for determination. The appeal was based on five grounds. These are:-

1. that the learned trial judge erred and grossly misdirected himself in law and in fact to hold that the Zambia National Tender Board in evaluating tender bids and granting concessions acted as agents of the Zambia Wildlife Authority, the 1st respondent herein;

2. that the learned trial Judge was wrong at law and on the facts to find that the Zambia National Tender Board acted within the provisions of the Zambia Wildlife Act No. 12 of 1998, in awarding Hunting Concessions to the bidders;

3. that the trial court erred and gravely misdirected itself for holding that the Zambia Wildlife Authority at its meeting of 31st 57 December, 2002, ratified the illegal granting of Hunting Concessions to the bidders when there was in existence as at 3rd December, 2002, a stay of execution of the Tender Board decision awarding hunting concessions.

4. that the court below erred and misdirected itself in law and fact in its finding that the appellants had no option to renew the leases on the premise that the said leases were allegedly frustrated;

5. that the trial court was wrong to award costs to the defendants when the defence of RATIFICATION upon which they won the case was of recent manufacture, long after the action began and in defiance of the order to stay made when leave was granted.

Laborious written heads of arguments were filed on behalf of all the parties. We also received detailed oral arguments and submissions.

The respondents filed, four grounds in support of the cross-appeal. These grounds are:

1. that Zambia National Tender Board (ZNTB) did not in actual fact award the Hunting Concessions to the successful bidders contrary to the finding of the learned trial Judge, in that the awards of the Hunting Concessions were done by the Zambia Wildlife Authority (ZAWA), the rightful body or authority the ZNTB having merely approved ZAWA's recommendation and granted ZAWA the requisite authority to award the Hunting Concessions to the successful bidders in accordance with the provisions of the Zambia National Tender Board Act, Cap. 394.

2. that ZAWA did not in actual fact RATIFY the alleged decision of ZNTB to award Hunting Concessions to the successful bidders as found by the learned trial Judge as the awards of the Hunting Concessions were done by ZAWA itself and what ZAWA RATIFIED was the communication of the awards to the successful bidders by the Permanent Secretary in the Ministry of Tourism, Environment and Natural Resources.

3. that the agency relationship in the sense held by the learned trial Judge that ZNTB awarded the Hunting Concessions to the successful bidders as agents for and on behalf of ZAWA does not arise as

ZNTB did not in fact award the Hunting Concessions to 58 the successful bidders as required by the provisions of the Zambia National Tender Board Act, Cap. 394, and

4. that the legal costs of the 4th to the 7th respondents should also be borne by the appellants contrary to the learned trial Judge's order that the 4th to the 7th respondents bears their own legal costs as in his opinion it was not necessary for the 4th to the 7th respondents to join themselves to the action (Anazii Kabo Wokha) when in actual fact the said respondents had an interest in the subject matter of the action and were going to be affected by the outcome of the action and the 4th to the 7th respondent's joinder to these proceedings was meant to avoid a multiplicity of actions and save costs.

The arguments in support of the cross-appeal were combined with the arguments in response to the appeal.

The first ground of appeal, as we see it, is the crux of the whole appeal. The appeal succeeds or fails depending on the view we take of this ground. Our discussion of arguments in ground one will also cover the other grounds. The summary of the written and oral submissions on behalf of the applicants on this first ground, as argued by Mr. Banda, is that the major question to have been determined by the court, was as to who was the competent authority, to grant the Hunting Concessions. It was the competent authority, to grant the Hunting Concessions. It was conceded that the court properly found that ZAWA was the competent authority to grant Hunting Concessions; but that in this case, the Zambia National Tender Board ended up granting the Concessions, instead of simply screening and processing the bids and authorizing ZAWA to enter into contracts with those the Zambia National Tender Board had recommended and that the learned Judge properly found that there was no delegation of this statutory function by ZAWA to Zambia National Tender Board. It was, thus, submitted that if ZAWA did not delegate the power to grant Hunting Concessions to the Zambia National Tender Board, the question of agency relationship could not arise and that in the absence of any delegation, there could not be any agency relationship. It was further submitted on this first ground that the Zambia National Tender Board, in the process of performing their own functions under the own applicable statute, erroneously decided to cross the demarcation line, thereby usurping ZAWA's authority and function and granted the Hunting Concessions. Before responding to arguments on ground one, Mr. Hakasenke, now deceased (May his soul rest in peace), first explained that all the respondents were relying on the 59 written heads of argument in response to the appeal and in arguing the cross-appeal. Responding to the arguments, on the first ground, Mr. Hakasenke pointed out that the learned Judge correctly noted the law on Judicial Review. He submitted that the learned trial Judge, correctly found that, the authority to grant Hunting Concessions lies with the Zambia Wildlife Authority under Section 5 of Act No. 12 of 1998. But Mr. Hakasenke contended that the learned Judge seriously misdirected himself in answering the questions as to who made the decision to award or grant the Hunting Concessions when he found that the decision was made by the Zambia National Tender Board. According to Mr. Hakaseke, it is clear from the records and from the evidence that Zambia Wildlife itself awarded the Hunting Concessions and not the Zambia National Tender Board.

Mr. Hakasenke argued that the learned trial Judge misdirected himself in finding that the Zambia National Tender Board awarded the Hunting Concessions because he totally misunderstood the tender process and the evidence before him. Mr. Hakasenke pointed out that according to the evidence of DW 1, the Zambia National Tender Board only granted approval and authority to ZAWA to award contracts for Hunting Concessions. Mr. Hakasenke explained that the procedure is that a Parastatal body or a Ministry seeking approval, evaluates the Tenders and submits recommendations to the Zambia National Tender Board for approval or for authority to go ahead. Counsel pointed out that in this case, DW 1 testified that ZAWA applied, through their line Ministry. The Tender Board advertised and sent the responses to ZAWA for them to evaluate and after the evaluation, ZAWA sent their recommendations to the Tender Board for approval and subsequently approved and granted ZAWA authority to award the Hunting Concessions. The approval and authority was communicated through the line Ministry, whose Permanent Secretary communicated the approval directly to the successful bidders.

Mr. Hakasenke's contention was that the grant of Hunting Concessions was nevertheless done by ZAWA. Mr. Hakasenke contended that the court, having erroneously found that the Zambia National Tender Board granted the Hunting Concessions, posed the question: whether the Zambia National Tender Board had power or authority or jurisdiction to award Hunting Concessions? According to Mr. Hakasenke, this was the beginning of the misdirection. Thus, in answering this question, according to Mr. Hakasenke, the learned Judge, proceeded, wrongly, to consider ZAWA's power to delegate its authority under the Act.

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We take note that the court rightly found that from the evidence, no authority or power was granted or delegated to either the Ministry of Tourism or the Zambia National Tender Board by ZAWA. However, the court found that ZAWA ratified the award of Hunting Concessions as communicated to the successful bidders by the Permanent Secretary, Ministry of Tourism, Environment and Natural Resources, at its 39th Meeting of Members held on 31st December, 2002. After examining the definition of the word ratification, the learned Judge concluded as follows:-

"There is evidence on record that the Zambia National Tender Board does act and advertise tenders for hunting concessions on behalf of the Zambia Wildlife Authority and that in this particular case, the Board acted as agents for and on behalf of ZAWA in advertising and awarding the hunting concessions to the various bidders. It is therefore, the view of this court that, on the totality of the evidence, I am left in no doubt that by awarding the hunting concessions to the bidders, the Zambia National Tender Board acted within the provisions of the Zambia Wildlife Act No. 12 of 1998, as the said Board so acted in its capacity as the AGENTS for and on behalf of the Zambia Wildlife Authority in whom the power to award concessions is legally vested by the said Act. I also find as a fact that the said Board duly complied with the requirements of the rules of natural justice by affording the bidders the opportunity of a fair hearing through the process of evaluating the tenders for all of the applicants."

On this basis, the court declined to grant the application for Judicial Review. The contention by Mr. Hakasenke was that the learned Judge misunderstood the tender process and the evidence before him. In this connection, Mr. Hakasenke referred us to the specific evidence of DW 1, Ms. Elsie Sikanyika. We

have examined the evidence of DW 1. This witness, a lawyer and Board Secretary of the Zambia National Tender Board, testified as to the tender process. According to her evidence, when tenders are received from Government Ministries, or Parastatals, the Board advertises them. When bids are received, they are sent to the relevant Ministry or Parastatals to evaluate. In this particular case, they sent the bids to ZAWA. After evaluation by ZAWA, the bids were sent back to the Board for approval. Then the successful bidders were communicated to the Permanent Secretary, Ministry of Tourism.

The witness explained that in this particular case, the Board sat on 28th November, 2002, to approve the recommended bids. The successful 61 bids were communicated to the Permanent Secretary of Tourism. In cross-examination, the witness explained that the Board has power to approve the tender process, while ZAWA has power to grant the Hunting Concessions.

Mr. Hakasenke explained that on 28th November, 2002, the Zambia National Tender Board met. The minutes show that the Director General of ZAWA was requesting the Board for authority to award Hunting Concessions. Mr. Hakasenke submitted that at no time was the Zambia National Tender Board requested to award the Hunting Concessions. He contended that what was granted by the Zambia National Tender Board was authority to ZAWA to award Hunting Concessions. Mr. Hakasenke explained that the communication by the Board Secretary of the Zambia National Tender Board to the Permanent Secretary, Ministry of Tourism, Environment and Natural Resources, was not that the Board had awarded Hunting Concessions. But the Zambia National Tender Board had approved and granted authority to ZAWA to award hunting concessions. It was submitted that the learned trial Judge misunderstood this tender process because of the question he undertook to answer as to who made the decision between the Committee of Ministers and the Zambia National Tender Board. According to Counsel, the learned trial Judge did not appreciate the meaning of the evidence of DW 1 and did not also understand the minutes of the Zambia National Tender Board Meeting of the 28th of November, 2002. Further, that he did not check the meaning of the communication from the Secretary of the Zambia National Tender Board to the Permanent Secretary, Ministry of Tourism, Environment and Natural Resources.

Mr. Hakasenke contended that had the learned trial judge considered all this evidence, he would have rightly and inevitably found that the decision to award Hunting Concessions was made by ZAWA; that ZAWA had merely sought authority from the Zambia National Tender Board; and that what the Zambia National Tender Board granted was not contracts, but merely granted authority to ZAWA on the recommended bids for ZAWA to award Hunting Concessions. Mr. Hakasenke indicated at the end of his arguments on ground one that his submissions were also the basis of the cross-appeal. He concluded on ground one by saying that he supported the refusal to grant certiorari, but not for the reasoning which the learned trial court used in arriving at its decision; contending that the reasoning and the holding that supports the finding of agency and ratification should also be varied. He urged us to dismiss the appeal and allow the cross-appeal 62 on the basis of the submissions on ground one.

We have very critically and anxiously addressed our minds to the spirited arguments and submission on ground one. We have also carefully examined the documentary and oral evidence on record and the

judgment of the learned trial judge. As we pointed out earlier, the salient facts are not in dispute. Equally, the principles governing applications for Judicial Review are not in dispute. It is also important at this stage to observe that the parties are all agreed that in terms of the Zambia Wildlife Act No. 12 of 1998, the legal authority, power or jurisdiction to grant or award contracts for Hunting Concessions rests in the Zambia Wildlife Authority. (See Section 5 (1) of the Act. Equally, in terms of the law there can be no dispute that the Zambia National Tender Board is empowered to regulate, control and approve the procurement of goods and services for the Government and Parastatal bodies (See Section 7 of Cap. 394). In terms of the law, therefore, we are satisfied that the relationship between Zambia Wildlife Authority and Zambia National Tender Board is statutory and no Government department or Parastatal can award a contract, (of course depending on the value of the contract) without the bid for the contract being processed and approved by the Zambia National Tender Board and authority entering into that contract being granted by the Zambia National Tender Board. We take note of the other arguments and submissions raised by Mr. Hakasenke in his written and oral submissions. For instance, he alluded to the case of the applicants as argued before the learned Judge being as mainly that the decision to award Hunting Concessions was made by a Ministerial Committee; and that the issue of agency was not before the learned judge and therefore cannot be raised as a ground of appeal as it was not pleaded.

The main issue in this appeal was, as correctly, identified by the learned trial judge. This is that: who awarded or exercised the power or authority to award the Hunting Concessions in this case? As rightly found by the learned trial Judge, the power or authority to grant Hunting Concessions in this case is by law vested in the Zambia Wildlife Authority (ZAWA). Having so found, the learned Judge proceeded to deal with the question of who awarded or exercised the power or authority to award the Hunting Concessions in this case. According to him, the answer was to be sifted from the evidence on record. He was right to that extent. He then said evidence on record is to the effect that it is the Zambia National Tender Board (the 2nd Respondents) that granted the Hunting Concessions. Thereafter, he quoted at great length part of the Minutes of the Extraordinary Board Meeting of the Zambia National Tender Board (2nd respondent) as 63 supporting his finding that the 2nd respondent granted the Hunting Concessions. On the oral and documentary evidence on record, we are satisfied that the learned Judge misapprehended the evidence and misunderstood the tender processes.

As a result of all this, he ventured into undertook the unpleaded voyage of agency and ratification. He definitely missed the direction by delving into matters which were not pleaded. The Extraordinary Board Meeting of the Board Members of the Zambia National Tender Board held on 28th November, 2002, only approved applications for Hunting Concessions. Part of the minutes of the meeting reads as follows:

“The Director-General, Zambia National Tender Board, sought authority on behalf of the Controlling Officer, Ministry of Tourism, Environment and Natural Resources, to award safari hunting concessions in Zambia’s Prime, Secondary and Under-stocked Game Management Areas.

The request for authority to award safari hunting concessions was last presented to the Board on 8th November, 2002.

DECIDED

1. That the authority for the award of contracts for safari hunting concessions in Zambia's prime, secondary and under-stocked game management areas be and hereby granted as follows:...."

From these minutes, it cannot be argued or contended that the Zambia National Tender Board granted the Hunting Concessions. The question of acting as agents of ZAWA did not therefore arise. The confusion, as we see it, arose from the fact that the approved authority which was communicated to the Permanent Secretary, Ministry of Tourism, was communicated directly to the successful bidders by the Permanent Secretary herself. This is confirmed by what transpired at the Meeting of the Members of ZAWA who purported, wrongly, to ratify the "award of Hunting Concessions as communicated to successful bidders by the Permanent Secretary Ministry of Tourism, Environment and Natural Resources"

From our discussions of the submission on ground one, it follows that the learned trial Judge fell into serious error when he held that the Zambia National Tender Board acted as agents of ZAWA in evaluating tender bids and granting Concessions. 64

The arguments and submissions on ground one of appeal also apply to ground one of the cross-appeal. Thus, we hold that Zambia National Tender Board (ZNTB) did not in actual and in law, award the Hunting Concessions to the successful bidders contrary to the finding of the learned trial Judge. The awards of the Hunting Concessions were done by the Zambia Wildlife Authority (ZAWA), the rightful body or authority. The ZNTB merely approved ZAWA's recommendations and granted ZAWA the requisite authority to award the Hunting Concessions to the successful bidders in accordance with the provisions of the Zambia National Tender Board Act, CAP. 394. The net result is that both grounds one of the appeal and the cross-appeal are successful. The discussions and conclusions on ground one to the effect that Zambia National Tender Board did not award hunting concessions and did not act as Agents of ZAWA resolve ground two in relation to the finding that ZNTB acted within the provisions of the Zambia Wildlife Act No. 12 of 1998. This finding was a misdirection on the part of the learned trial Judge.

As regards ground three, we agree that the court misdirected itself in holding that ZAWA ratified the illegal granting of Hunting Concessions to the bidders. However, ZAWA did not in actual fact RATIFY the alleged decision of ZNTB to award Hunting Concessions to the successful bidders as found by the learned trial Judge as the awards of the Hunting Concessions were done by ZAWA itself and what ZAWA purported to ratify was the communication of the awards to the successful bidders by the Permanent Secretary in the Ministry of Tourism, Environment and Natural Resources. We hasten to add that even if there was a stay of execution at the time ZAWA ratified the communication to the successful bidders,

the purported act, though in disobedience of the lower court's order, was, in view of our findings, remote and not fatal to the whole tender process. Ground two of the cross appeal therefore succeeds.

Ground four of appeal related to the issue of option to renew the leases. We considered this issue when dealing with the ruling on the preliminary issue. We agreed with the trial Judge that the lease agreements having been affected by the ban, there was nothing to renew. This ground cannot therefore succeed.

Ground five related to the award of costs to the respondents. The gist of the submission on this ground was that the trial Judge should not have awarded costs to the respondents because they won the case on the 65 manufactured evidence of ratification. We take that the 4th to the 7th respondent were not awarded costs which is also the ground for the cross-appeal. The issue of ratification, in our view, was discussed totally out of context by the trial Judge. It was never raised as a defence. For our part, we see no reason why the other respondents were denied costs. We agree with Mr. Mubanga that costs should have been awarded as they had been properly joined. Ground five also fails.

Before concluding this appeal, it is necessary to briefly allude to the principles of Judicial Review. The application was for Judicial Review of the decision of the 1st, the 2nd and the 3rd respondents made on the 28th November, 2002, awarding tenders for Hunting Concessions allegedly without availing the applicants an option to renew the leases following upon their expiry and without evaluating the applicant tenders.

As rightly summarized by the learned Judge, the basic principles underlying the process of Judicial Review are that:

- (a) that the remedy of Judicial Review is concerned, not with the merits of the decision, but with the decision –making process itself.
- (b) that it is important to remember that in every case, the purpose of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subject and that it is not part of that purpose substitute the opinion of the judiciary or of the individual Judges for that of the authority constituted by law to decide the matter in question; and
- (c) that a decision of an inferior court or a public authority may be quashed (by an order of certiorari) where that court or authority acted:-

- (i) without jurisdiction; or
- (ii) exceeded its jurisdiction; or
- (iii) failed to comply with the rules of natural justice where those rules are applicable; or
- (iv) where there is an error of law on the face of the record; or
- (v) the decision is unreasonable in the Wednesbury sense (1), namely, that it was a decision which no person or body of persons properly directing itself on the relevant law and acting reasonably, could, reasonably have reached.

We have considered the decision-making process of awarding Hunting Concessions. On the evidence on record, we cannot say that the applicants were not given fair treatment. The question that caused some 66 anxiety in our minds was whether the decision, on the facts not in dispute, was unreasonable in Wednesbury Sense (1) namely: that it was a decision which no person or body of person properly directing itself on the relevant law and acting reasonably, could reasonably have reached. On the facts not in dispute, the Zambia National Tender Board advertised tender from ZAWA. They received the bids which they passed to ZAWA who evaluated them and made recommendations to Zambia National Tender Board who subsequently granted authority for the awarding of Hunting Concessions. On the evidence, it is common cause that the Permanent Secretary of the Ministry of Tourism is the one who communicated directly with the successful bidders instead of ZAWA. However, the fact that the contracts for the Hunting Concessions were between ZAWA and the successful bidders was common cause. In our view, the fact that the communication only of the successful bids to the bidders was done by another body other than ZAWA cannot make the decision unreasonable in the Wednesbury Sense (1).

In conclusion, we agree with the advocates of the respondents that the learned trial Judge arrived at the correct conclusion of refusing to grant the application for Judicial Review but for wrong reasons.

For reasons stated in our judgment, the appeal is dismissed with costs. The cross-appeal is allowed with costs and the trial court's judgment is varied as per our finding in this judgment. The costs will be subject to taxation in default of agreement. We award no costs to the 3rd respondent, as they did not appear.

Appeal dismissed and cross appeal allowed. 67

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MICHAEL CHILUFYA SATA MP v ZAMBIA BOTTLERS LIMITED

Supreme Court

Lewanika, DCJ, Sakala, Mambilima, JJS

19th March, 2002 and 19th February, 2003

(SCZ Judgement No. 1 of 2003)