SAFARI OPERATORS ASSOCIATION OF ZIMBABWE
versus
ZIMBABWE TOURISM AUTHORITY
and
MINISTER OF ENVIRONMENT AND TOURISM
and
COMMISSIONER GENERAL OF POLICE

HIGH COURT OF ZIMBABWE
PATEL J

Opposed Application

HARARE, 26 March and 21 July 2009

Adv. Zhou, for the applicant
Adv. Takaindisa, for the 1st respondent

PATEL J: The applicant herein is an association that comprises licensed tour and safari operators and represents their interests. The 1st respondent is the Zimbabwe Tourism Authority (the Authority) which is established under the Tourism Act [*Chapter 14:20*] and is primarily responsible for administering that Act.

Towards the end of 2007 the Authority issued Circular No. ZTF/1/2007 addressed to all hunting operators to pay a 2% levy on all trophy fees received by them. The applicant challenges the legality of that directive. It seeks a *declaratur* that its members are not liable to pay any levy or surcharge on trophy fees paid by tourist hunters in designated tourist facilities. It also seeks an order restraining the respondents and their employees from taking any coercive action to enforce the levy.

Initially, in its opposing papers, the Authority questioned the *locus standi* of the applicant as well as the propriety of the declaratory order sought by the applicant. However, at the hearing of this matter, counsel for the Authority did not persist with these ancillary issues. The sole question for determination herein is whether the levying of the 2% surcharge on trophy fees is *intra vires* the Tourism Act and the regulations made thereunder.

Tourism Act and Regulations

Section 2 of the Tourism Act defines a "designated tourist facility" to mean "any service, premises, place or thing which the Minister has declared to be a designated tourist facility in terms of section *thirty-five*". Under section 35 of the Act:

> "The Minister, after consultation with the Board, may by statutory instrument declare that—
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> (a) any service whatsoever provided for tourists; or
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> (b) any premises or place in or on which a service referred to in paragraph (a) is provided, or
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> (c) any premises, place or thing whatsoever which, in the Minister's opinion, affords an amenity to tourists;
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> shall be a designated tourist facility."

The declaration of designated tourist facilities by the Minister was effected through the Tourism (Designated Tourist Facilities) (Declaration and Requirements for Registration) Regulations 1996 (SI 106 of 1996). In terms of section 3 of the Regulations, "the services, premises or places specified in the First Schedule are declared to be designated tourist facilities". Item (c)(ii) of the First Schedule specifically lists as designated tourist facilities:

> "services or facilities provided to tourists by …….. hunting operators".

Section 55 of the Act enables the fixing of levies and surcharges and provides, in its relevant portions, as follows:

> "(1) After consultation with the Minister responsible for finance and the Board, the Minister may make regulations in terms of section *fifty-seven* prescribing levies to be paid by any class of registered tourist facilities or licensed persons.
>
> (2) In prescribing any levy in terms of subsection (1), the Minister—
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> (a) shall prescribe ……;
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> and
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> (b) may—
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> (i) require any person conducting or operating a registered tourist facility to include in the price of any services rendered by him a surcharge at such rate as may be prescribed, and may require him to collect such surcharge;
>
> (ii) fix any other basis on which the levy shall be calculated."

The levy envisaged by section 55 of the Act is prescribed in the Tourism (Designated Tourist Facilities) (General) Regulations 1996 (SI 107 of 1996). Section 18 of the Regulations requires the payment of a levy "in respect of all registered designated tourist facilities". Section 19 stipulates that:

> "The levy shall be at the rate of 2 *per centum* of the gross amount, excluding sales tax or any other tax or duty, charged to that [*sic*] tourist making use of any facility provided at the designated tourist facility concerned."

Section 20(1) makes the operator of every designated tourist facility responsible for the payment and collection of the levy. By virtue of section 20(2):

> "The operator of a designated tourist facility shall add to the charge for accommodating each tourist thereat a surcharge equal to the amount of the levy payable in respect of the tourist concerned."

Payment of Fees for Trophies

According to the applicant, its members charge their clients the stipulated 2% in respect of all services, facilities and amenities provided, including hunting operations. Furthermore, the tourist in question is charged an additional variable amount depending on the size of the animal to be hunted. Where the tourist fails to hunt any animal, he or she is refunded the additional amount paid. If the tourist is successful in hunting the animal, the trophy belongs to him or her exclusively, and the additional amount paid is retained by the hunting operator. In these circumstances, the applicant's position is that the trophy *per se* does not constitute a service or facility provided by the operator.

According to the Authority, the hunting tourist is charged a predetermined refundable fee for the right to hunt a specified animal, which right forms part of the facilities and services offered by the hunting operator. The trophy charge is not separately invoiced but is added to the daily rate charged to form part of the gross amount realised by the operator for hunting and all other services rendered to the tourist. In

short, the hunting services for which trophy fees are charged cannot be separated from the other services provided by the operator.

Whether Trophy Qualifies as Facility

The central question for determination *in casu* is this: Does a hunting trophy constitute a "facility" within the meaning of section 35 of the Tourism Act and Statutory Instrument 106 of 1996 so as to attract the levy and surcharge imposed by section 55 of the Act and Statutory Instrument 107 of 1996?

The word "facility" is defined in *Black's Law Dictionary* (5th ed.) and in *Webster's New Twentieth Century Dictionary* (2nd ed.) to mean:

> "the easiness of access, the means by which something can be more easily done".

It is common cause that hunting operations and safaris are facilities as defined in the legislation. It is also not in doubt that the trophy fee paid by a tourist to a hunting operator is a sum paid to be able to hunt through the hunting facilities provided by the operator. It follows that a hunting operation affords the means by which the tourist is able to access the trophy. On this analysis, the trophy is quite clearly an intrinsic and inseparable part of the hunting services afforded by the operator. It cannot, in ordinary usage, be extricated from the service or facility provided by the operator. To do so would be tantamount to pure artifice.

As I perceive it, access to a trophy by a hunting tourist is analogous to the items provided in so-called mini-bars in hotel rooms. The tourist is charged a fixed rate by the hotel for the use of the room, including the mini-bar, as part of the facilities provided by the hotel. The tourist is at large, should he so desire, to consume items from the mini-bar. If he does, he is then required to pay an additional charge for the specific items that he has consumed. A hunting trophy, in my view, is no different. If the tourist succeeds in hunting an animal, he must pay the additional charge for his trophy which he has acquired solely by dint of the facility provided by the hunting operator.

It follows from the foregoing that a hunting trophy constitutes a "facility" as envisaged in the Tourism Act and its Regulations and is therefore subject to the levy and surcharge imposed thereunder. In the result, the applicant is not entitled to the *declaratur* and interdict that it seeks and this application must be dismissed with costs.

Scanlen & Holderness, applicant's legal practitioners
Gula-Ndebele & Partners, 1st respondent's legal practitioners