VARDEN SAFARIS (PRIVATE) LIMITED
versus
THE FORESTRY COMMISSION

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 2 & 3 February, 29, 31 March, 1 April &
8 July 2015

Trial Cause

F Girach, for the plaintiff
T Magwaliba, for the defendant

TSANGA J: This is a trial matter in which the plaintiff (Varden Safaris) alleges breach of a lease agreement by the defendant (the Forestry Commission) in that the latter prevented it from carrying on operations on its leased site by conducting hunting operations on a site it had already leased for photographic safaris. The defendant on the other hand, insists that the plaintiff was mistaken regarding the leased site, which it says was at all times a hunting site. Their stance is that the plaintiff occupied the wrong site because it did not take the necessary steps as directed by defendant to be shown the exact boundaries of the leased site. The parties agreed at the commencement of the trial that the court should determine the question of liability first. The issue of quantum of damages would follow in light of any findings on liability.

THE FACTS

The facts on which the parties are in agreement are as follows: An advert was placed by the defendant sometime in November 2009 calling for tenders in respect of certain sites in Hwange area that were available for lease. The plaintiff's Directors responded to the advert and submitted their tender. It was plaintiff's intention to use the land for wild life photographic safaris, game viewing and to run an accommodation camp among its primary activities. Their tender was successful. A lease agreement was formally signed on April 2010.

In terms of the lease agreement the plaintiff leased from the defendant, a 1000 hectare portion of forest in the district of Hwange.

It is however the exact portion leased which became the subject of a dispute leading to the cancellation of the lease at the instance of the plaintiff on the grounds of breach on the part of the defendant. According to the plaintiff's witness the area indicated on the map seemed larger than the 1000 ha that had been agreed to be leased and hence the boundaries needed clarification. However according to plaintiff's witnesses there was never any doubt about the actual area – only the extent of its boundaries.

At a preliminary meeting held on 1 March with the winning bidders, it is not disputed that a map was circulated. It is not disputed that the defendant's officers indicated that the map had errors but it is now in dispute what exactly those errors were. The plaintiff was told that it would be given another map. After the agreement was signed, it was subsequently given another map which in reality though was the very same map that it had been given at the meeting on the 1st of March 2010.

After the plaintiff took occupation of the site which was in early July 2010, and had commenced its work, it came across labourers pumping water into a water pan who informed plaintiff's representative that there would be a forth coming hunt in the very area. It was upon enquiry as to the confusion since the area had been leased as a photographic site, that it emerged from the defendant that the site was a hunting site. It was in consequence of what it regarded as a breach of the lease that the plaintiff cancelled the lease by letter in September 2010 and thereafter demanded payment of damages which it says that the defendant refused to pay.

The defendant in its plea admitted to signing the agreement but denied that the agreement was in respect of the property claimed. It pleaded mistake of fact on the part of the plaintiff in respect to the property leased. It also pointed out that the Annexure A, being the map to the agreement was in fact not attached. It averred that the initial map supplied to the plaintiff prior to the signing of the agreement had errors which defendant communicated and plaintiff accepted. It was also averred that the mistake arose from the plaintiff's own disregard of the tender process by unilaterally identifying a certain property which is not a leasable area. In the alternative to mistake of fact, the defendant also pleaded that the agreement signed was void for vagueness. It was also defendant's position that no one from its office had specifically shown the plaintiff the site when it moved on to it.

THE EVIDENCE

Plaintiff's evidence

Mr James Gilchrest Varden one of the directors of the plaintiff company, was the first to evidence. He explained that he has been in business since 1997 although Varden Safaris specifically started its operations in 2006. A key point of his evidence was that his company engages in non-consumptive safaris basically walking and photographic safaris and private guiding safaris. They are not into hunting. With regards to the dispute in question, he stated that the plaintiff through its Directors, being himself and his wife, responded to an advert in the Herald newspaper that had been placed by the defendant. His company was looking for a permanent base on the boundary of the national park but with access into the park for horses and guests. An area with a water hole was also a pre requisite for horses, guests and staff, as was easy access to the airport.

The tender advertised was for Sikumi Jwapi and Sikumi Siding. However, he explained that after submitting their tender for these two areas, they had been advised telephonically by Mr Maruzane, the then Acting Deputy General Manager of the defendant, that the site had changed. His evidence was that instructions were given also telephonically, by Mr Maruzane, as to where the new site was located. The plaintiff's Directors were asked to go and see the new site to see if they were still interested. This they proceeded to do on the 22nd of December 2009. His evidence was that his wife phoned to confirm the location whilst standing next to the borehole at the site and was told they were at the right spot. His evidence was also that subsequent to this visit in December, they were granted permission to use the area until 10 January 2010 as they had a horse riding agent coming from the UK. They wanted to conduct a familiarisation tour on what they would essentially be doing at the site in anticipation of a successful tender.

He further testified that they had thereafter received notification from the defendant that they had been successful and that they were to attend at the Forestry Commission's offices on the 1st of March 2010. This meeting was also attended by other potential lease holders who had responded to the advert for different sites. A lease document had been given at this initial meeting as well as a map. His evidence was that at this initial meeting none of the potential lessees signed the leases since at that time other particulars were yet to be provided. The map was given to them by a Mr Tembo who is a conservator of Foresters and who was also part of the meeting. The map, according to Mr Varden, tied in exactly with the

area they had been described and which they had visited. Mr Varden further stated that they were given until March 3 to respond if they were interested. Significantly, he stated that a letter had written to the defendant on the 4th of March confirming that plaintiff would be taking up the lease and raising a few concerns for clarification. This letter was submitted in evidence. Among queries raised which he mentioned was whether they would be providing their own water pump for the borehole having seen a borehole with no pump at the time of the visit. They were told they would.

They paid a security deposit on March 7 of US$2500.00 and Mrs Varden, the witness's wife, signed two copies of the lease agreement on the 9th of April. Subsequent to that plaintiff also started paying off the lease fee at the end of May. An amount of US$5000.00 was paid towards this end in May giving a total payment of US$7 500.00. Although the annual lease fee was $10 000.00 his explanation was that only US$7 500.00 was paid in proportion to the lease being the remainder of that year as opposed to the whole year.

Mr Varden explained however that there was no map that was attached to the lease agreement as provided for in paragraph "C" of the preamble to the lease agreement when it was signed. He stated that the absence of the map did not concern him as they had been given a preliminary map on the 1st of March and in any event they had visited the area and confirmed it as correct.

Following payment and on receipt of an email on May 28 urging them to take occupation of their site, he said they had then proceeded with concrete action for occupation. This involved contacting Mr Nel, a consultant for the project to buy equipment, piping and materials. It was his evidence that Mr Nel and Mrs Varden went to the site to start preparations. Since they were no structures on site the plan was to start by building stables for the 12 horses and to build a dining area. The plan was also to put up tents in the initial instance before later building brick and thatch structures. Preliminary work also involved clearing the area of grass and bushes but not trees. In this regard, casuals were employed to clear the area. It was his evidence that it was when these operations were commencing that Mr Nel had found men pumping water into the water hole. They were from *Ngamo Safaris* a subsidiary arm of the defendant that is involved in hunting. They had explained that this was forthcoming sable hunt in the area. Upon being informed of this, they had immediately contacted the defendant in Harare and a meeting was held on the 7th of July. It was Mr Varden's evidence that upon enquiring about the hunting that was to take place, defendant's

officials apologised for what they termed a mistake in giving them a sable hunting site and offered the plaintiff an alternative site to carry out their operations. Plaintiff's standpoint was that the area they were at, Sikumi 6, was financially viable because it had access to water. They therefore rejected the alternative sites. He said he proposed that plaintiff temporarily move out of the site and return after the hunt was over. The proposal was however refused by *Ngamo Safaris* when they were approached on the basis that they receive guests for hunting at very short notice and that this was essentially a hunting area.

In cross examination, Mr Varden agreed that the lease agreement did not identify the 1000 ha they were leasing although his standpoint was that the area was known to the parties since they had sought verification. He also agreed that full plans for the constructions to be done at the site had not yet been done and hence they had not yet been approved since at the time there was nothing to approve. He also agreed that it was the plaintiff who had cancelled the lease agreement on the advice of its lawyers following the dispute over the leased area. He also agreed that the advert did not include the specific location of the leased area although it indicated the lease area in general terms. He further conceded that he had raised queries in a letter to the Forestry Commission following the lease agreement on certain discrepancies between the preliminary map supplied and certain features on the ground which did not tally. He had specifically asked for boundaries to be clarified. It was not denied that the written response from the Forestry commission regarding the boundaries was that there were to be clarified on the ground by the Forester responsible for that area. He conceded that this was never done. His explanation for this omission was that they had already been told previously where the area was by Mr Maruzane so as far as they were concerned they were in the right place. He also did not deny that previously the area they were at was a hunting area. His position though was that it had now been offered to the plaintiff as a photographic area.

Given that the site they were at was not the same as the site advertised, and that the alternative sites offered, which they had rejected as unsuitable, were within the advertised site, he was questioned why they had placed a bid for a completely unsuitable site. His response was that the site had been changed and that the changed site which they had accepted was more suitable.

Second to give evidence was Mr Dennis Herman Nel, the builder who was contracted by the plaintiff in June 2010 to set up the camp. His evidence was to the effect that the area on the map was transposed to Google earth in order to identify the various features. His work was to clear and peg out stables for horses in the initial instance, and to establish a site for 6

tents. He said he had gone to the site with Mrs Varden and had established a fly camp or a mobile tent. He had employed 8 casuals. They had dug out areas for poles and had cut thatch. He also said he had instructions to go and visit the forester. He met with the forester, a Mr Nkomo after about 4-6 days at Dete office. He said they discussed where he was to put up the sign for the camp and was told to put it at the entrance to the pan. He said in their discussions they had not used a map as they both knew the area. He said they had discussed the fire breaks and had been told that a Mr Selebe would come from Bulawayo to show him the fire breaks. He said they also discussed the routing of the water at the pan and said it was clear they were talking of the same area.

He stated that he returned to Harare where he had sourced poles for the stables, a diesel engine and water pipes and it was upon coming back to the site that he had found a diesel engine pumping water from the borehole into the pan and two labourers from *Ngamo Safaris* rejuvenating the hide. He was advised that there would be a hunting safari in three weeks' time. He said he had contacted Mr Maruzane who had given him the telephone number of the forester in Bulawayo. The forester had confirmed that there would indeed be a forth coming hunt. A meeting was subsequently held at the Forestry Commission attended by the Forestry Commission officials, himself and Mr and Mrs Varden. He said the officials explained that there had been an internal miscommunication regarding the availability of site 6 which they were in occupation. He said the conservationist was adamant that the hunt proceeds as they had already been paid for it. It was Mr Nel's evidence that the defendant categorically accepted their error and that someone from head office had not informed the hunting section that the land had been given over for photographic safaris. He emphasised that no one at the meeting ever said that they had occupied the wrong piece of land.

He confirmed that two sites had been offered had been deemed unsuitable by Varden Safaris for their proposed operation. He also confirmed that Varden's proposal was to vacate site and allow for the hunt to take place and then return to carry on with their operations. He also stated that he had gone back to the site after the meeting and had learnt that the Forestry Commission had been put to terms regarding the removal of the pump after *Ngamo Safaris* had refused to vacate. He said he had explained to the *Ngamo Safaris'* workers that they needed to remove their pump. As they had no transport, he had given them a lift with their pump to their offices. A day or two after that he said that 6 armed men in green uniforms in the company of Mr Nkomo, the forester, and a Mr Dumi Ndlovu, head of forestry security had come and said they were replacing the pump. He said he had also been told not to

interfere with the pump. He also said that he had shown them the lease agreement and the map and that they had agreed that they were at the right place and that head office would need to sort out the matter. The armed man remained but Mr Ndlovu and Mr Nkomo left. A map was subsequently given which showed the place where the plaintiff was supposed to have been. Mr Nel stated that there is no water pan in this area and no hide and essentially no feature on which to build a camp since all there is forest. Furthermore, he said to get to the place would require driving through a hunting area. He emphasised that people who take part photographic safaris despise hunting. He said Mr Ndlovu had later phoned to say he had been advised to prevent him from coming to the site.

In cross examination he agreed that no officer had shown him boundaries but like the first witness maintained that these had already been established by the map that had they had been given. He was challenged about his evidence that he had met with Mr Nkomo in Dete about 6 days after getting to the site on the basis that this was a recent fabrication since he had testified before in an affidavit for an urgent application on this matter and had never mentioned the meeting. What is of relevance is that the meeting if it did take place, was not at the site. He was emphatic that the cause of the dispute was not in any event about the boundaries but about the sable hunting. He also indicated as part of his evidence that a 7 tonne truck had been used to ferry the building materials to the building site and that when they left they had taken the materials to Mchibi.

The plaintiff's last witness was Mrs Janine Varden a co-director do Varden Safaris with her husband. Her evidence corroborated that of the first witness James Varden regarding the location of the site upon having been advised by Mr Maruzane from Forestry Commission that the site had changed. She emphasised that the identifying features she had mentioned in confirming the site were the borehole and a wild life pan, a large acacia tree which had a hide platform in the tree, and the tree line. She also confirmed that Forestry Commission had later indicated that they had made a mistake - the mistake being what she described as the allocation of a site actually used for hunting. She confirmed the offer of alternative sites which they deemed unsuitable and also confirmed that they had put forward an alternative proposal to let the hunt ride and to return thereafter. She stated that they never got any response from Forestry commissions and that was the basis of their resuming their operations.

Defendant's evidence

Mr Dzidzai Maruzane gave evidence for the defendant and was its only witness. He confirmed that he last worked in 2011 for the Forestry Commission in the capacity of Acting Deputy General Manager responsible for conservation and extension. His evidence was that the foresters on the ground within the Forestry Commission are the ones who identify areas to lease out or alternatively people approach the commission asking to lease. Following an approach by the conservator, the deputy general manager would approach the general manager. He also explained that there is an internal tender committee which advertises and adjudicates on would be lessees and awards the tenders to the winning bidders. The Board then refers the winning tenders for approval by the Minister.

His point was that he did not have any direct dealings with the tenderers between advert and submission of the forms and the final tender. He did however agree that he had dealt with Mrs Varden but denied that the lease area had been changed on the basis that the process of leasing follows a very rigid process. He maintained that there was no way he could have unilaterally altered the lease area as he had no power to do so. He however confirmed the evidence by the plaintiff's witnesses that a map had been circulated at the original meeting held on the 1st of March but hastened to add that there were errors on that map relating to the area marked 6 on the basis that the shaded area on that map should have been to the right when on the map it was distinctly to the left. He also said that shaded area was 2500 and not 1000ha.

He further denied having authorised a temporary camp in January 2010 on the basis that the tender process was still in progress and that he did not have power to authorise anyone. He emphasised that even the board chairman could not do that. On the issue of the map which he had notified the Vardens as being ready for collection following the signing of the agreement, being the same one that had been circulated on the 1st of March, he stated that he could not recall but that if it was the same map then clearly it would not have been describing the correct area. He also said that areas in the Forest are clearly zoned, and in hunting areas there is hunting only and that there are no photographic safaris. He also said they had not promised Varden Safaris an area with a water.

Mr Maruzane could not recall many of the events that had taken place at the time. He could not recall speaking to Mr Nel from the site. He doubted that he could have discussed issues to do with Mr Varden with a third party. He also denied apologising for internal miscommunication at the meeting and said if he apologised it was in relation to the map which had shown the wrong area. His explanation was that the map given to Varden Safaris

had been produced by the *Geographic information Systems (GIS)* responsible for map production. He however could not recall whether the map had been produced on the instructions of the tender board, his office or the chief conservator.

In cross examination Mr Maruzane was asked if the advert informed the bidder of the actual tender area and he conceded that it did not. He also agreed that for a person to know the area they had tendered for, they would need a map although he also added that they would need to consult the people on the ground. He also agreed that since the map did not reflect correct area the diligent thing would have been to withdraw the map but that this was not done.

THE LEGAL SUBMISSIONS AND ARGUMENTS

Mr *Girach,* who represented the plaintiff distilled two issues for resolution from the facts, namely:

1) Whether or not there was any mistake of fact in relation to the area that was to form the subject matter of the lease;
2) Whether or not the agreement is void for vagueness.

He also argued that since an agreement was signed, the onus rests on the defendant to show that there was a mistake of fact in relation to the area forming the subject matter of the lease, and that the agreement is void for vagueness.

Mr *Magwaliba* who represented the defendant argues that there was an incomplete agreement based on mistake of fact in respect of the actual area that was being leased. He further argues that the parole evidence rule operates against the plaintiff and the evidence led by it to controvert the terms of the written agreement which it relies upon. He draws on clause 14 of the agreement which he says embodies the entire contractual document between the parties. It reads as follows:

> "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."

It is the defendant's argument that leading evidence in respect of the conduct of the parties subsequent to the agreement violates the above clause. (See *Union Government* v *Vianni Ferro–Concrete Pipes (Pty) Ltd* 1941 AD 43 at p 47 cited in support of contention).

Mr *Magwaliba*'s contention is that there being a written agreement, the plaintiff is precluded from relying on any other agreement for his case.

It is also argued that the plaintiff pleaded and attached the entire contract to the declaration and that the defendant specifically pleaded that the contract was void for vagueness. He maintains that the agreement is void for vagueness because the leased area was not identified in the lease agreement. Moreover his position is that the absence of any written documentation pertaining to the changed location, bolsters defendant's insistence that there was no change of site. Also it is argued that throughout its correspondence with the plaintiff, the defendant consistently referred to Sikumi Kennedy and not to Sikumi Site 6.

Another legal point raised by Mr *Magwaliba* on defendant's behalf is that the lease agreement violates a statute in that the Minister's role in terms of s 17 (1) Forest Act [*Chapter 19:05*] is not to approve leases as he did in this matter but that he ought to have been the lessor. The relevant section states that:

> "The Minister may, on the recommendation of the Commission lease to any person any portion of a demarcated forest".

He states that the contract is void because Mrs Duwa the General Manager who signed the contract ought not to have signed. As such his argument is that a contract which is in violation of a statute is unlawful and cannot be enforced.

In relation to the above legal points raised on behalf of the defendant, Mr *Girach* maintains that although a point of law can indeed be raised at any time, if it was not specifically pleaded then raising it at this juncture in closing submissions can only be done where there is no prejudice to the other party. He cites the case of *Muchakata* v *Netherburn Mine* 1996 (1) ZLR 153 (SC) as well as the Supreme Court case of *Muskwe* v *Nyajina* SC 17-12 for his position. He further objects to the issues of parole evidence as well as the Minister's supposed authority being raised at all at this point on the basis that the plaintiff is no longer able to deal with the point since evidence is closed. Moreover as he points out these issue were never put the plaintiffs in cross examination, and that neither were they it put to the defendant's witness.

Regarding the argument on the exclusion of parole evidence, his standpoint is that since the agreement was drafted by the defendant the *contra preferentum* rule should apply in the construction of the contract. This is to the effect that in construing contracts any ambiguity must work against the party or draughtsperson who provided the wording. He also argues that the issue of the agreement being a nullity can also not be raised at this point since

the defendant elected not to call any of the parties who signed the agreement on its behalf and neither was the issue put to the Mr Maruzane in his evidence in chief. The failure to attach the map he maintains is a mere omission rather than an "alteration or a representation" as the agreement has not been altered in any way.

In summary his position is that this is not a case where clause 14 ought to come in since both parties knew what they were signing and exactly what map was being referred to. His stance is that the failure to attach the map is merely an administrative oversight and that it would be unjust and improper for the defendant to escape from the agreement based on its own oversight. He further argues that courts generally lean in favour of validity of a contract. (*Cameron* v *Gibb* 1996 (3) SA 675; *Nedbank* v *Abstein Distributors (Pvt) Ltd* 1989 (3) SA 750). Mr Girach further calls for the court to adopt a commercially sensible approach citing in his support the following cases: *Society of Lloyd's* v *Robinson & Another* [1999] 1 WLR 756 (HL).

Whilst not detracting from the reality that points of law can be raised at any time, I am in full agreement with the sentiments expressed by Mathonsi J expressed in the case of *Jane Mutasa* v *Telecel International & Anor* HH 331-14 regarding the use of ambush as a strategy. This is with regard to issues that should in reality have been properly pleaded and canvassed to their logical conclusion being left to be dealt with in closing submissions or in the case of opposed applications in the heads of arguments. Albeit his observations were in relation to an opposed application, there are equally apt *mutatis mutandis* with respect to failing to plead issues for trial. He chided as follows:

> "It is not only improper but also wrong, utterly absurd and completely unacceptable to purposely avoid presenting evidence in affidavits which would put the other party on guard and enable that party to respond to such evidence in its opposing affidavit, in the forlorn hope of influencing the court by placing it in arguments. It is an undesirable ambush. …… The allegations should have been put in the founding affidavit to accord the respondents to respond to them and generally to put the respondents on guard as to what they faced. Heads of argument are not evidence and counsel cannot be allowed to lead evidence from the bar.…. When allegations are contained only in heads of argument and not in evidence submitted on behalf of a party in the form of affidavits deposed to by witnesses, the court will simply ignore such evidence or allegations as I intend to do in this matter: *Kanyanda v Muzhawidza* 1992 (1) ZLR 229 (SC) 231 C The logic of that position is pretty obvious. It is that the party against whom such allegations are made is entitled to rebut them".

In the disposition of this matter, since much of the evidence by both plaintiff and defendant related to the factual circumstances of the agreement, I will therefore deal with the issue of whether the evidence defendant seeks to exclude is properly before this court. I will then deal the issue of whether there was any mistake in relation to the area to be leased and

whether the agreement was void for vagueness. These are the issues necessary for decisions. The issue of the Minister signing was not part of the dispute ventilated in court.

ANALYSIS AND DISPOSITION

Whether the exclusionary clause is a bar to the evidence in question

The purpose of reducing agreements to writing is indeed to preclude disputes about the terms of the agreement. However, the key issue in deciding whether the oral evidence led by the plaintiff ought to be excluded by virtue of the parole evidence rule depends first and foremost on whether the oral evidence in any way supplements the agreement in a manner which is in conflict and inconsistent with the terms of the written agreement or whether it is purely factual in explaining the agreement.

For example, in the English case of *Prenn v Simmonds* [1971] 3 All ER 237at p 239 the court had to decide whether the factual background and pre contract negotiations could be looked at by the court as an aid to construction. It was stated by the House of Lords in that case that factual evidence can be allowed to establish the background of an agreement. As was articulated by Lord Wilberforce in particular:

> "In order for the agreement of 6th July to be understood, it must be placed in its context. The time has long passed when agreements even those under seal, were isolated from the matrix of facts in which they were set and interpreted purely on internal linguistic considerations. There is no need to appeal here to any modern anti literal, tendencies, for Lord Blackburn's well known judgment in *River Wear Comrs v Adamson*[1] provides ample warrant for the a liberal approach. We must, as he said, inquire beyond the language and see what the circumstances were with reference to which the words were used, and he object appearing from these circumstances, which the person using them had in view. Moreover, at any rate since 1859 (*MacDonald v Longbottom*[2]) it has been clear enough that evidence of mutually known facts may be admitted to identify the meaning of a descriptive term."

The evidence led by the plaintiff is indeed of factual nature and relates to the factual grounding of the lease process and the lease object. Clause "C" of the preamble the agreement reads as follows:

> "And whereas the Commission has agreed to grant the Company the non-exclusive right to enter that portion of the Forest "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, wild life photographic expeditions and accommodation camp or other activities approved by the Forestry Commission".

[1] (1877) 2 App Cas 743 at 763, [1874-80] All ER Rep 1 at 11
[2] (1860) 1 E & E 977, [1843-60] All ER Rep 1050

Although the map was not attached to this agreement, it is common cause that prior to the signing of the agreement a map was provided albeit it was said to have errors. It is also not disputed that a map purporting to the final map was also supplied to the plaintiff by the defendant albeit this was after the signing of the agreement. Mr Maruzane clearly emailed the plaintiff advising them that the map was "ready". That the map said to contain errors at the first meeting was the same one provided the second time round is not the point. 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.

Whether there was a mistake common to both parties which voids the agreement

The issue in this regard is whether the parties contracted in the mistaken belief as to the actual piece of land that was the subject matter of the lease. The effect of an error relating to the subject matter of the lease would be to void the agreement if indeed the error was common to both parties. Neither would be liable for performance or payment. However, if the mistake was one sided then the party seeking to void the contract can only do so if the error was not of his making. As explained in the Supreme Court case of *Agribank* v *Machingaifa & Anor* 2008 (1) ZLR 244 (S) at p 254 D-F:

> "….. a party to a contract relying on an error of judgment, who can go further and show that at the time of the contract he was labouring under some misapprehension, may escape liability under the contract. The onus however is not easy to discharge. Unless the mistaken party can prove that the other party knew of his mistake, or that as a reasonable man he ought to have known of it, or that he caused it, the onus of showing that the mistake was a reasonable one justifying release from the contractual bond will not be easy to discharge,. However material the mistake, the mistaken party will not be able to escape from the contract if the mistake was due to his own fault. This principle will apply whether or not his fault lies in not carrying out the reasonably necessary investigations before committing himself to the contract and in fact in any circumstances in which the mistake is due to his own carelessness or inattention, for he cannot claim that his error is *iustus.*"

The defendant's position is that the parties were never *ad idem* regarding the actual site whilst the plaintiff maintains that at all times the parties were talking about the same location. The plaintiff insists that it had a valid and unambiguous agreement at all times

which was breached by the defendant. Of material significance in resolution this issue is ultimately who communicated what to whom. Materially the plaintiff answered a bid. It is therefore worth reproducing the text of the bid to assess what it communicated regarding how the lease site was to be identified.

The tender advert read as follows:

> **Tenders invited for lease of photographic areas**
>
> Tenders are invited from registered companies for lease of the photographic areas in the gazetted forests in Matebeland North province i.e. Fuller, Pandamasuie, and Sikhumi. ***Details of the actual lease areas, map numbers, references and main attractions for each site are in the tender form obtainable at a non-refundable fee of US $100***. (My emphasis)
>
> Chief conservator of Forests OR The Assistant Accountant
> Forestry Commission Forestry Commission Head
> 2nd Floor Forestry Commission Building office, 1 Orange Grove
> Fife Avenue, Bulawayo Drive Highlands, Harare
> telephone 772 24/5 telephone 498 436 -9
>
> Completed forms should be submitted in a sealed envelope and clearly marked "photographic lease areas", by 10:00 hrs on the 19th of November, 2009 to: The internal Tender Committee Chairman, Forestry Commission Building, Five Avenue, and Bulawayo.

The form detailing the areas to be leased described the two areas tendered for by the plaintiff as follows:

> "Sikumi Area 1 Jwapi: Consist of 2500 ha of land bound on the north west by the road to Dete, stretching eastwards towards Ganda Lodge. Area is located on the North western of Sikumi forest.
>
> Attractions: Area is located ±15 km from Hwange national park. It has access to pristine teak woodlands which are habitat to a range of wild animals. There is a developed lodge in the area. There are game water points at which game animals (including buffalos and elephants) can be viewed".

The second area that the plaintiff bid for, Sikumi Area 2 next to Kennedy Siding was described as follows:

> "Area is located along the Bulawayo – Victoria Falls Railway and can be accessed through railway or through forest roads requiring 4 x 4 vehicles. Area is 1000 ha in extent.
>
> Attractions: Area is located adjacent to Hwange National Park and is nestled within a very high potential photographic tourism area. A wide range of tours can be organised both in the lease area and into Hwange National Park".

The key point from the above reproductions is that the defendant is the one who knew the area. The defendant communicated the information regarding its intention to lease in the

initial and invited tenders. Its communication influenced behaviour in the sense of people or entities responding to the advert. Materially the advert was categorical that **"actual lease areas, map numbers, references and main attractions for each site"** would be availed with the tender form. This however was not the case as none of that was provided with the tender form.

I therefore tend to favour the plaintiff's evidence that the location of the area was sourced in the initial instance from verbal communication and that the preliminary identification was indeed conducted by the plaintiff's directors in December 2009 prior to the award of the tender in March 2010. At the time of the initial meeting following the winning of the tender, the plaintiff's directors had clearly been to the site. It is understandable that having expressed an interest in the tender the plaintiff's would have wanted to know where the area was. I therefore also lean in favour of Mrs Varden's evidence that she did liaise with Mr Maruzane regarding the preliminary visit to the lease site. To further bolster this view is the fact that if the lease site was yet to be identified to the plaintiff, then this is what would have been communicated to them at the meeting of the 1st of March 2010. The defendant therefore being notably the party with the necessary information on the actual location of the lease site was undoubtedly also the party upon whom the avoidance of any error lay. It is the party which advertised for a photographic area and which knew which was a photographic area and which was a hunting area. It thus had the onus of communicating the same clearly and unambiguously as that would have avoided any mistake in the initial instance. Defendant stated clearly in its advert that it would provide the details with the application form. It did not. The allocation of risk is therefore largely with the defendant.

The defendant cannot in my view seek to avoid the agreement on the basis of a mistake when clearly from the wording of the bid, it must bear responsibility for any lack of clarity regarding the leased area since it did not provide the necessary details right at the outset in the manner indicated in the advert. When it did provide a preliminary map at the meeting of the 1st of March it had an error. When it did provide a final map that was part of the agreement it still had errors.

The defendant argue that there was a mistake as evidenced by the fact that they were at all times talking at cross purposes with the plaintiff regarding the lease area. In its correspondence it refers to Sikumi - Kennedy whereas the plaintiff refers to Sikumi Forest Lease site 6. I would agree with the plaintiff that it made absolutely no sense to issue out a map whose error related to the site if that site was not correct. Parties must at the very least

have been talking of the same site even if there may have been variations to be effected to the map. I also lean in favour of the plaintiff's witnesses when they say that at the meeting of July 7 what was apologised for was the failure to communicate internally by the defendant regarding the lease site.

The defendant also argues that evidence of communicating at cross purposes also emerges from the letter written by Mrs Varden on the 4th of March to Mr Banga and Mr Maruzane in which, against the drop of it having been pointed out that at the meeting of the 1st of March that the map provided had errors, she too confirmed this with regard to her question in that letter. This was couched as follows:

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

In response to this query among others, Mr Maruzane replied to this email on the 9th of March as follows:

> "Item 5: the map supplied had a few errors as indicated during the meeting. However the Forestry / wild life 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 sign posted and we will try as much as possible to use identifiable physical features such as roads/fire guards where appropriate".

The defendant's position is therefore that there was miscommunication regarding the area which could have been avoided if the plaintiff's directors had actioned accordingly in seeking a demarcation of the boundaries from the individuals referred to in the response to the query raised by Mrs Varden.

The issue at the end of the day is whether the defendant should be allowed to avoid breach penalties that clearly arise as a result of their own failure to attach a map and provide all the necessary information regarding the site that would have prevented the confusion in the first place. The error in my view was not common to both parties. It was an error on the defendant's part. The contract was a business arrangement - an area where certainty and predictability is an utmost necessity. The plaintiff's incurred costs and losses as a result of defendant's mistake in failing to action accordingly on the steps that would have avoided the error. Significantly plaintiff has already rescinded from the contract and wants damages.

But while the error was not common to both parties, it certainly cannot be said that the plaintiffs were entirely careful in this case. Although I come to the conclusion that the contract cannot be voided by the defendant as the mistake was due to its own carelessness

and lack of attention to detail, I do think it is reasonable for this court given the factual averments to also assign portion of the blame for the consequences of the mistake on the plaintiff. The plaintiff was advised by email on the 9th of March to take active steps to have the boundaries confirmed on the ground. This would have no doubt at this early stage before they had expended even a cent on the security deposit or on materials, have clarified beyond doubt the lease site. The plaintiff went on the ground almost two months later after this was intimated yet none of this was done. This was particularly vital for them to do given that up to this point the actual identification of the site on the ground had been done by themselves without the physical presence of both the plaintiff and defendant's representatives being on the ground at the same time. The initial visit to the site was carried out by one party to the agreement relying on features that they said had been described to them. Thereafter there were given a map at the initial meeting which was said at the outset to have errors. They too confirmed in writing that the features on the ground and the map were at variance. They then got the same map which they knew to have errors on the 28th of May. There can be no greater reason for an astute business person to have required absolute certainty of the site and its boundaries. One would have thought that the reasonable thing to do would have been take very active steps to ensure that they had the proper demarcation of the leased site. Clearly access to the water pan may have become the primary focus in fixating to the site without taking the process of properly demarcating the site to its logical conclusion as had been suggested. It is also important to note that it is not that the plaintiff was entirely ignorant that the site was a hunting one. Mr Varden's evidence is clear that he thought that the sight was no longer for hunting and had been deliberately turned into a photographic area. For a company whose evidence was categorical that it regards hunting with a certain revulsion, again one would think that all the more reason for it to have taken active steps to ensure with certainty that this was not a hunting area, given all the signs that were there.

Therefore whilst I do find that the defendant bears the burden of risk allocation because it had the duty to provide all the requisite details relating to the site and that it did cause plaintiff's to suffer loss, the plaintiff to bears some responsibility not for the mistake but for the losses it subsequently suffered. Blameworthiness is not entirely absent on their part.

Rescission has already been opted for by the plaintiff. The plaintiff were offered an alternative site which they rejected as unsuitable. They therefore rejected the possibility of reformation of the contract in a way which would have allowed them to continue. There can

be no liability for loss of expected net income for the reasons that I have given that the plaintiff was not blame free and did not take the necessary measures that would have fully protected it from loss in demarcating the site.

The losses they suffered relate to the costs for preliminary construction activity, transport and hiring of labour, both professional and manual, exclusive of materials that remain in their possession. Costs also include what they had paid as lease fees and legal fees. Parties agreed that actual quantum of damages would be worked out once the issue of liability had been determined.

Accordingly, the plaintiff's claim for damages succeeds in part as follows:

a) Costs relating to preliminary construction activity, including costs for transport and cost for hiring of labour, both professional and manual.
b) Refund of lease fees paid for 2010.
c) Costs of this trial.

Honey and Blanckenberg, Plaintiff's legal practitioners
Dube, Manikai & Hwacha, defendant's legal practitioners