IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM

MISC. CIVIL CAUSE NO.35 OF 1998

IN THE MATTER OF AN APPLICATION BY WENGERT WINDROSE SAFARI (T) LIMITED FOR ORDERS OF CERTIORARI & MANDAMUS

BETWEEN

WENGERT WINDROSE SAFARI (T) LIMITED.. APPLICANT

AND

1. THE DIRECTOR OF WILDLIFE..... 1ST RESPONDENT
2. THE MINISTER FOR NATURAL RESOURCES AND TOURISM..... 2ND RESPONDENT
3. THE ATTORNEY GENERAL..... 3RD RESPONDENT

JUDGEMENT

KALEGEYA, J:

Aggrieved by the 1st Respondent's action of withdrawing two hunting blocks from his licence the Applicant decided to assail that decision by way of an application for Certiorari and Mandamus seeking for the following reliefs;

> "a) An order of Certiorari to remove into the High Court and quash the 1st Respondent's decision dated 15th May 1998 and 1st June 1998 in which the First and Second Respondents, respectively, decided not to allocate to the Applicant the hunting blocks known as Muhesi Game Reserve and Kizigo Game Reserve (East)
> b) An order of Certiorari to remove into the High Court the First Respondent's decision to make allocations to other person(s) of the hunting blocks known as Muhesi Game Reserve

and Kizigo Game Reserve(East)

c) an order of Mandamus to compel the First Respondent to re-allocate the Muhesi Game Reserve and Kizigo Game Reserve (East hunting blocks to the Applicant".

The Applicant attacks the 1st Respondent's action for, failure of natural justice, in that he was not afforded chance of being heard and no prior reasons for withdrawal of the blocks were assigned; Abuse of powers, in that the 1st Respondent did not consider that the deadline for payment of fees was 30th April and not the unilateral deadline of 27th April which was a public holiday as per **"CONSENSUS BETWEEN THE MINISTER OF TOURISM, NATURAL RESOURCES AND ENVIRONMENT, THE WILDLIFE DIVISION, ON ONE PART, AND TANZANIA HUNTING OPERATORS ASSOCIATION (TAHOA) ON THE OTHER PART** (Applicant is a member of TAHOA); not taking into account relevant matters, in that the 1st Respondent did not consider a relevant fact that "for viable management of a hunting company, a minimum of five hunting blocks is necessary"; and unreasonableness, first, the decision was based on false representations including that an ~~that, no~~ invoice was served on him when it was not, that he had refused to receive fasmile at home when he has no such facility, and secondly, that conditions set made it impossible for Applicant to pay as the fax message was received on 27th which was not a deadline and it was a holiday, and that 1st Respondent refused to receive payment on 29th while the deadline was 30th April, 1998.

Messrs Nshala and Lutema Advocates, represented the Applicant while Mr Kamba, Senior State Attorney, represented the Respondents.

The following matters are undisputed. The Applicant is a limited liability company carrying on, among other things, wild life hunting business in Tanzania. During the hunting season of 1997/98 the Applicant had been allocated five hunting blocks - Lake Natron Game controlled Area (North), Mayowosi Game Reserve (South), Muhesi Game Reserve, Kizigo Game Reserve (East) and Kizigo Game Reserve (Central). On 6/4/98 vide letter Ref. GD/T.80/81/89 the First Respondent informed the Applicant that three of his blocks - Muhesi Game Reserve, Kizigo Game Reserve Central and Kizigo Game Reserve East - were under-utilized, quota-wise, in that the 40% mark was not struck, for only 14%, 33% and 16% respectively had been attained. On 9th April 1998 the Applicant by letter, corrected the 1st Respondent by saying that the percentages cited were not true and rectified by stating instead 22.5%, 49% and 23% respectively. On 25th April, 1998, by letter Ref. GD/T.80/66/129 the 1st Respondent admitted the error accepting the figures stated (save for the first of which only 21% was accepted) by Applicant as being the correct ones. In the same letter however the First Respondent required the Applicant to top-up to 40% for the two under-utilised blocks by 27th April, 1998. 25th April, 1998 was a Saturday while 27th April was a public holiday. Applicant's prayer to pay the top up fee on 29th April, 1998, was refused allegedly for being time barred.

On 15th May, 1998, the 1st Respondent vide letter Ref. No.GD/T.80/79/112, re-allocated only three hunting blocks to Applicant.

- Lake Natron Game Controlled Area (North), Mayowosi Game Reserve (South) and Kizigo Game Reserve (Central).

On 19th May, 1998, the Applicant appealed to the 2nd Respondent against the non-allocation of the two other blocks, which appeal was declared to being without merit ~~by~~ vide letter Ref. GD/T.80/66/139. Doors of that avenue closed Applicant came to court. The application is supported by two affidavits of Applicant's Managing Director, Franz Joseph Wingert-one filed together with the Application while the other one (supplementary) was filed in reply to counter-affidavit by Respondents. The two affidavits are supplemented by an affidavit of Eddy Moshi, an Administrative Manager of the Applicant. On the other hand, the Respondent's Counter-affidavit was sworn by Breneus Francis Ndunguru, a Senior Game Officer in the Directorate of Wild life in the Ministry of Tourism and Natural Resources and was supplemented by an affidavit of Saidi Hassan Mnkeni, a game Warden in the same Director stationed at Arusha..

The Applicant's contention is that the withdrawal of the 2 hunting blocks was malicious, clandestine and implied.

On the other hand the Respondents dispute in total all that

was negatively alleged. They argue that the decision was properly reached; that Applicant was sufficiently given notice and afforded chance to be heard as per communications dated 6th April 1995; 25th April, 1998 and an invoice issued by Mnkeni on 18th April and further extension orally to 28th from 27th April (/citing (CA) Agro Industries Limited Versus The Attorney General, Civil Appeal No.34 of 1990); that reasons advanced by 2nd Respondent are reasonable as they were based "on official correspondences and documents available at the Ministry"; that the "fees" referred to in the "Consensus" Agreement do not cover "Top-up fees which is penal in character," and which "cannot be given a prior deadline for payment because it is not possible to foresee when a violation would occur" and that therefore the deadline indicated therein is inapplicable leaving the 1st Respondent to act as he did". They concluded that there was no use of re-allocating the blocks to a party who would under - utilise them.

Let us now briefly go over what the court's powers are as regards judicial review of administrative decisions.

It is generally and legally agreed that administrative decision/actions can be reviewed by Courts if they depict illegality, irrationality and procedural impropriety. The reliefs which courts grant are in the form of Certiorari, Mandamus and prohibition ordinarily known as prerogative orders and which are both discretionary and equitable.

Thus, errors of law; reliance upon erroneous factual conclusions; absence of any evidence or where the evidence gathered cannot reasonably support the finding reached; reliance on irrelevant consideration i.e. extraneous matters, or omission to rely on relevant matter; fettering discretion, that is failure to freely and reasonably exercise the discretion; improper delegation of decision - making; failure to consider facts in a particular case as opposed to generality under the disguise of adhering to particular practice or policy (all the above generally falling under ultra-vires principle); failure to observe the basic principles of natural justice of impartiality and fairness-failure of fair hearing (generally, captured in the Latin maxims - Nemo judex in causa sua and aud alteram) are all basis upon which the court can rely to review any administrative decision or action. As regards the latter principles, bias would be imputed if an interested party has private access to the adjudicator or the dispute is prejudged or a disqualified person participates; and it will also be held that the complainant was given no right to be heard or there was no procedural fairness if no notice was issued. Other instances include where the opposite party's case was not sufficiently availed to the complainant; when complainant was given no opportunity to be heard either orally or by written submissions, depending on the circumstances of a particular case. It will also be held as a violation of the referred to principles if (though there is no general duty to

given reasons (unless so prescribed by statute), no reasons are given for the taking of a particular action or making of a particular decision as that is generally implied as necessary to enable the person affected decide on whether or not there was any error, i.e. of law, committed. Also, "Natural justice" would enjoined the Administrative body to act fairly in consonance with legitimate expectations of the person to be affected by the decision.

While still on this I should hastily point out that in his submission, the learned counsel for the Applicant ably cited and made reference to various relevant authorities (both local and foreign), all substantially elucidating on the principles I have summarised above. He referred to the Zamora (1961) 2 AC 77; Rv Leigh (1897) 1 Q B 132; Wednesbury Corporation V. London & North Western Railway (1905) AC 426 (on ultra vires), and Desouza V Tanga Town council (1961) E.A 337; Northumberland Compensation Appeals Tribunal (1952) 1 KB 338; Congreve V Home Office (1976) A.C 692; Padfield V Minister of Agriculture, Fisheries and Food (1968) AC; Jama Yusuphu V Minister for Home Affairs (1990) TLR 80; Donald Kilala V. Mwanza District council (1973) TLR 192 in which wiseman V Borneman (1963) 3 ALLER 275 was quoted with approval, and The book by Prof. H.W.R. Wade entitled "Administrative law; ELBS 6th E.R 1988, in which is quoted among others, the case of R V University of Cambridge 91723) 1st str. 557.

Now, let us subject the facts of the case before us to the relevant principles of law summarised above.

Before going into other matters I should decide on the status of the "Consensus Agreement" between TAHOA and the Ministry and the Wildlife Department. A copy of this agreement forms part of the annexures relied upon by the Applicant. It is dated 14.11.94 and was signed, among others, by the Minister of Tourism, Natural Resources and Environment, The Director of Wild life and the chairman TAHOA (the status of the remaining signatory is unclear as the stamp effected is not legible, although circumstantially it could be of the Permanent Secretary). While the Applicant attaches much reliance on this agreement, especially regarding the deadline on which fees had to be paid, the Respondents seem to sideline it by saying that this application has nothing to with that agreement and that in any case the fees stipulated in condition five therein do not include the top-up fee. This is vividly asserted in the affidavit of one Ndunguru - paras 4 and 5, in which it is stated, among others,

> "4...contents of paragraphs 5 and 6 of the affidavit is partly irrelevant to the extent that being a member of TAHOA has nothing to do with the application and partly denied to the extent that the alleged Consensus Agreement of November 1994 has nothing to do with the application at hand otherwise the

Applicant is put to strict proof thereof.

5. Further the Respondents aver that the issue of "top up charges are not fee as the Applicant alleges, but are penalties or fines for not reaching the minimum hunting requirement of 40%".

The above piece of the counter-affidavit was attacking Applicant's Managing Director's affidavit in para 5 and 6 which can as under,

"5. That the Applicant is a member of the Tanzania Hunting Operations Association (TAHOA) that brings together hunting companies and hunters to protect their interest and ensure that its members conserve and utilise the wild-life in a sustainable manner and as agreed with the government.

6. That in November 1994 TAHOA entered into a Consensus Agreement with the Minister for Tourism, natural Resources and Environment and the Director of Wildlife upon which the government pledged that inter-alia, payment of all required fees by hunting companies within the stipulated time, which is the 30th of April, each year".

Reflecting on these arguments in relation to the said

"Consensus Agreement", with respect to Mr Kamba, Senior State Attorney, I cannot go with him that that Agreement is a useless piece of document as regards the issue at hand and that the fees stated therein do not include top-up fees.

In order to appreciate the basis of my conclusion one has to look at the relevant contents of the said agreement. Page one and part of page two of the said Agreement provide,

> "The Wildlife hunting sector, is going through a crisis. This crisis has been exacerbated by persistent adverse reports in the media.
>
> The reports often ignore the glaring fact that hunting operates through a definite set of rules and regulations.
>
> According to the rules, hunting is very important, and basic to conservation. It is high time TAHOA closed ranks with the Ministry and the Wildlife Division in promoting high standards of operation.

ALLOCATION AND WITHDRAWAL OF HUNTING BLOCKS

In 1990 the Government made a commitment in a public announcement by Mr Matern Lumbanga, then Principal Secretary of Tourism, to the effect that so long as a hunting company observes a given set of conditions (which

follows), the renewal of allocation of blocks was automatic for a minimum of 5 years. The duration of five years is imperious, and considered optimal by all conservation organizations world wide. This period of 5 years allows sufficient time to make a return on essential investments, which are necessary to meet the various obligations hunting companies have toward the Country. Besidas it gives encouragement and latitude to the hunting outfitters to prepare a rational hunting plan. It is proved by experience that the hunting outfitter takes better care of its hunting grounds if he is sure to come back to the same area in future.

CONDITIONS REQUIRED BY GOVERNMENT

1. An average of 40% utilization of the entire quota allocated to the company. This 40% should be related to the monetary value of the wildlife quota, and not to the proportion of animals killed. A guaranteed financial minimum return for an area, whether the quota is met or not, is good approach. The spirit of conservation must be first and foremost in the hunting industry.

2.Contribute to anti-poaching activities in cooperation with the Wildlife Division.

3. Opening up of roads and airstrips which will continue to be used by anti-poaching squads during the hunting off season. The Wildlife Division will also use these facilities to oversee the areas so opened up.

4. Assistance to communities adjacent to the hunting areas.

5. Payment of all required fees within the stipulated time (30 of April).

6. Shipment of the client trophies within good time.

When these conditions are met, the Government will not withdraw or subdivide allocated blocks, save for very grave or fundamental reasons.

Should there be a dispute between a hunting outfitter and the Wildlife Division authorities, in any matter relating to hunting other than the six conditions stated herein, the dispute should be referred to an appeal committee comprising of the Minister of Tourism, the Principal Secretary of

Tourism, the Director of Wildlife as decision makers, and the Chairman of TAHOA, or, in his absence, any other Director of the board of TAHOA in an advisory capacity." (emphasis mine)

On page 5 of the same agreement, there is yet the following,

"ALLOCATION OF BLOCKS

Will be a matter concerning mainly new companies, since an old operating company which observes all the six requisite conditions will keep their blocks, which is just.

Allocation of blocks should be publicly available from Wildlife offices.

For viable management of a hunting company, a minimum of 5 hunting blocks is necessary.

The blocks allocation letter from the Wildlife Division will be considered a legal contract." (emphasis mine)

Going through these excepts quoted above Mr Kamba, Senior State Attorney's observation which tend to brand this agreement as irrelevant cannot be accepted. It clearly comes out as a policy document, which among others, guides and controls hunting activities in Tanzania and on which both the hunters (including the Applicant) and the government rely. Mr Kamba is not

suggesting that government officials and more specifically, government Ministers would go along signing documents in the name of government, purporting to pronounce government directives, policies, undertakings and commitment just as a show - off or for no official purpose and use at all save as a mere joke! I shudder to think of any government acting thus and more so of a respected government, both nationally and internationally, like Tanzania.

From this "Consensus Agreement" I further hold that hunting licence holders are required to pay their fees by 30th April each year and that once one complies with the six conditions outlined, the government would not "withdraw or subdivide allocated blocks, save for very grave or fundamental reasons" (emphasis mine)

What about the interpretation of the term "fees"? In the same vein, whatever restriction on interpretation that maybe attached to the word "fees", I have failed to strike the basis of Mr Kamba's and Ndunguru's differentiation put on "top-up fees" and any other "fees". It is not of insignificance that both Mr Kamba and Mr Ndunguru however much they tried to run away from the term "fees" they constantly, in the submission and affidavit, still call what is required to be paid in order to reach the 40% of utility of the quota to a particular block, a "top-up fee"!

A term "fee" in the Blacks Law Dictionary, 6th Edition, is defined, among others, as,

> "A charge fixed by law for services of public officers or for use of a privilege under

> control of government... A recompense for an official or professional service or charge or emolument or compensation for a particular act or service. A fixed charge or perquisite charge as recompense for labour; reward, compensation, or wage given to a person for performance of service or something done or to be done"/ (emphasis mine)

Does the above definition exclude the 'top-up fee' under discussion? In my considered view, the answer is in the negative. I am satisfied that the "top-up fee" falls squarely under the "fees" referred to under condition five of the "Consensus Agreement".

That settled let us now turn to whether the 1st and 2nd Respondents' action violated any of the enumerated principles as alleged by the Applicant.

Having carefully considered the contents of the various communications between the parties, the 'Consensus Agreement, arguments of the opposing parties, and the law, I am satisfied that when the 1st Respondent fixed the deadline on which the Applicant was required to pay the top-up fee to 27th, and then 28th April, 1998, he acted unilaterally and arbitrary, for, the set date of 30th April, had not been officially varied; he acted unreasonably, for, he could not issue a demand on a non-working date, execute it on Applicant again on a non-working date and at his residence as if there was an emergency, let along refuse to

accept payment of fees a day (29/4/98) before the official deadline. That apart, the Applicant was afforded no chance to defend his plight, and no reasons were advanced for the withdrawal of the 2 hunting blocks. I have also found that the 2nd Respondent acted on false information, and insufficient evidence when dismissing the Applicant's appeal to her. I will endeavor herebelow to demonstrate how and why I have arrived at the said conclusions.

Although Mr Kamba, Senior State Attorney, insists that the Respondent gave Applicant enough notice, invoice and reminders against which adamancy to pay the top-up of the 40% under - utilization of the quota went on to be displayed by Applicant until the 28/4/98 when the decision to withdraw the two blocks was made, and therefore justified, this argument suffers from various short-comings as I will shortly demonstrate.

The Respondent's letter dated 6/4/98, simply informs the Applicant as follows,

> "We wish to inform you that your firm has hunted below 40% of the quota given for the under listed hunting blocks:
>
> 1. Muhuwesi Game Reserve (14%)
> 2. Kizigo Game Reserve (C) (33%)
> 3. Kizigo Game Reserve (E) (16%)
>
> Consequently, your required to top up the difference before 10th of April, 1998.

Otherwise the said Block(s) shall be withdrawn from your use and possession without further notice.

Mabula Misungwi

for DIRECTOR OF WILDLIFE"

On the face of it therefore this would be taken to be enough notice whereby failure to pay a top up fee the Applicant would have been liable to forfeit the three blocks (this is assuming the 30th April deadline did not exist). Before the "deadline" (10/4/98), however, on 9/4/98, the Applicant successfully challenges the percentages referred to by Respondent. The said letter, in part reads,

> "After your hunting department in Arusha checked the figures again the figures came from
>
> Muhesi Game Reserve (your letter 14%) now 22,5%
>
> Kisigo Game Reserve (C) 33%) now 49%
>
> Kisigo Game Reserve (E) 16%) now 23%
>
> We wish to retain this (3) blocks and we hope the department will assist us in tackling the problems. (See our letters of 20th of October and 1st of November --- enclosed). also see your letter of Monday the 6th of April from your Antipoaching dept. Where we

agree to pay for the building of a permanent settlement for 5 people to be build between the Village and the Reserve - and not having them stay 110 km away at Manjoni.

To reconsider the full payment of the missing % I would like to draw your attention to the 2 enclosed letters .... then pls. let me know <u>what you would consider a fair % that I should pay to your department</u>. Which we will do then right away, after your reply.

Thanking you for your understanding and consideration

Wengert - Windrose - Safari

Franz T Wengert"(emphasis mine, but the phraseology and wording remains as presented by the author)

What do we gather from this letter? The percentages are disputed, and there is clear evidence that the so called "top-up fee" is not certain. If the latter were different there would be no point of Applicant including in his letter the last 27 (twenty seven) words. That aside however, the Respondents proceed to concede errors on percentages revealed in their earlier communication dated 6/4/98 which Mr Kamba brands as enough notice. They do this on 25/4/98 (a non-working day) where a letter bearing the following is written,

"<u>REF: UNDER UTILIZATION</u>:

Please refer to your letter dated 9th April,

1998 on the issue of under - utilization.
We are writing to inform you that, this office acknowledges the changes indicated in your letter on performance utilization figures as follows:-

1. Muhesi Game Reserve 21%
2. Kizigo Game Reserve (C) 49%)
3. Kizigo Game Reserve (E) 23%

I have therefore been instructed to inform you that you should make a top-up to 40% for the two under-utilized blocks (Muhesi Game Reserve and Kizigo Game Reserve (E) as indicated above) by 27th April, 1998. Please contact Arusha office to this effect.

Yours sincerely,

Mabula Misungwi

for DIRECTOR OF WILDLIFE"

Again, what do we find in this? Percentage errors are conceded and rectified accordingly and the deadline earlier set on 10/4/98 is changed to 27th. However, one fundamental question raised by Applicant, regarding how much should be paid is not touched (let us assume that the advice contained therein that he should contact Arusha office is aimed at this although if everything was certain one wonders why was the figure not categorically stated).

Be that as it may, can Mr Kamba, SSA, still maintain that up to then (25/4/98) the notice given on 6/4/98 was still valid, with all those variations? My considered view is that if it was ever one the validity had already been spent and vacated as the letter of 25/4/98 exemplified. As if failure to correctly respond to Applicant's letter of 9/4/98 was not enough, and as much as the latest letter was written on a non-working day, the deadline set was a non-working day (27/4/98)! Suffice to observe here that this can be equated to a legend, told in many communities, in which it is said that a chief not wishing his daughter to be married to a certain suitor, set two impossible conditions - the suitor was required, in order to qualify as a husband to the Chief's daughter, one, to clean cut into pieces, a rock without blunting the sharpness of the axe made of Iron, and, two, draw water using a gourd made of net! Back to our case, how did the 1st Respondent expect Applicant to effect payment on a non-working day? Without drawing uncalled for inferences, what emergency was there for the 1st Respondent to have acted in that rushy manner and speed? We are even told that the letter was faxed to Arusha, and an order made by the 1st Respondent directing that Applicant be served on that same non-working day and at his home! Mnkeni's affidavit is clear on this,

> "4.That on 27th April, 1998 was a public holiday, but as stated in paragraph 2 above, I was in my office working. In the course of

working, I received a phone call from the director of Wildlife headquarters Dar es Salaam informing that a Fax to the Applicant is send(?) to me and I have to take it to the Applicant without delay.

5.That immediately on receipt of the said Fax, I called the Applicant by home telephone and he personally came to collect it in my office.

6.That the applicant read the said Fax in my presence and appealed to pay the required Topup on 28th which was a working day, the request was accepted by the Director of Wildlife.

7.That at 3.00 Pm on 28th April, 1998 one employee of the Applicant named Ms Mosha came to my office alleging that the payment would be effected the following day E.e 29th April, 1998 the request was not accepted by the Director of wildlife and the applicant never issue(?) any reason whatsoever for not affecting the payment on the agreed date.

8. That as a result of the applicant's failure to pay the topup charges, the aforementioned hunting blocks were withdrawn

and granted to another serious hunter."

I should pose here and observe that while it is a very well known fact and commendable for that matter, that most officials, both in government, parastatal and private offices work on holidays and week-ends to clear up back-log issues, this should not be done over-zealousnesly with complete oblivion of practice and procedure, otherwise well intentioned and honest acts may draw adverse inferences.

As to why payment was not made on 28th, the Applicant's version is that Bank processes commenced on 28th, a working day, would have taken 24 hours as the Arusha Branch had to contact Dar es Salaam office first, on the other hand, Mukeni, as per para 7 of his affidavit, says that Applicant asked for 29th without giving reasons! In such situation, is it possible for the Applicant having failed to pay, to have simply requested for extension till 29th without giving any reason at all? I very much doubt this version, as much as I doubt para 3 of the same Affidavit where the same officer states:-

> "3. That I personally know the applicant and some of her workers, and on 10th April, 1998 I issued an Invoice to the applicant to pay the not yet paid Topup charged/fees for two hunting blocks that is, Muhesi Game Reserve and Kizigo East hunting block for the Applicant failed to utilise to at least minimum of 40% the applicant never complied

with Copy of thesame is attached herein as annexture D1."

I doubt the correctness of this para because of four factors-if indeed he issued an invoice why is he silent regarding to whom it was handed (and more so when he was responding to an affidavit which disputes having received anything like that). Secondly, as soundly fronted by the Applicant, the invoice is indicated to have been issued on 13/4/98 and not 18/4/98 as claimed. Thirdly, the said invoice indicates to have been issued by Mnkeni as supported by para. 3 of his affidavit, but the same invoice, assuming it is a true copy of folio 137 indicated thereon,is written, "Attention Mr Mkeni, H" - if he (Mnkeni) is the author, how was he again bringing its contents to the attention of himself? Lastly, if indeed it was issued, could the letter written on 25/4/98 responding to Applicant's letter dated 9/4/98, which letter was inquiring as to how much was supposed to be paid, be silent on this very central issue? With all the above, the version as explained by Eddy Moshi in her affidavit remains more plausible. In her affidavit, among others, she stated,

"2. That on the morning of 28th April, 1998, I was asked by Mr Franz Wengert to go and talk to Mr Hassani Mnkeni of the Wildlife Department about the payment of the top-up fees for the underutilized two blocks i.e. Muhesi Game Reserve and Kizigo Game Reserve

(E).

3. That when I met Mr Mnkeni that morning I asked him to give me the breakdown of the top up fees that the Applicant is supposed to pay so that I should rush to the Bank and obtain the Bank Drafts and pay them that day. Mr Hassani Mnkeni gave me the said breakdown where upon I went to the NBC Uhuru Road Branch and asked them to issue Bank Drafts in favour of the first Respondent amounting to $21,308 only to be told that the an amount of more than $5,000 needs to get an okay from the NBC Headquarters in Dar es Salaam. In addition, they said that this might take 24 hours or more and they promised me, due to my urgency pleading, that they would try to expedite the process to the following day i.e. 29th April 1998.

4. Upon receiving this information I went back to the Applicant's office and informed Mr Wengert this information who immediately sent mr David Masambi to go to the Game Department office to relay this information to Mr Hassani Mnkeni and ask him to accept the payment in form of the Bank Draft the following day.

5. While Mr David Masambi was still in Mr Mnkeni's office he called me by way of telephone and told me that the Game Department in Arusha have received instructions from the Director of Wildlife not to receive the payment from the Applicant the following day and that the Applicant should effect the said payment that day only. I wish, therefore, to state that what is stated in paragraphs 7 of Mr Mnkeni's Affidavit is not true as I went to his office in the morning and not the afternoon and the one who went to his office in the afternoon is Mr David Masambi. Otherwise Mr Mnkeni is put into strictest proof thereof.

6. That upon receiving this information I told my Boss Mr Wengert who instructed me to call the Director of Wildlife in Dar es Salaam and explain the circumstances that have made the payment of the said top-up fees that day to become impossible.

7. That I immediately called Mr Bakari Mbano, the Wildlife Director, and explained the reasons that has made the Applicant fail to effect the payment on that day only to be told by him that we should borrow somewhere.

> I told that is(?) impossible to obtain such amount of money at that time, and besides it will be unprocedural to pay in cash since the required fees are only paid in Bank Drafts which as explained above could not be obtained that day. I once again pleaded to him to let us pay him at 9.00 a.m the following day i.e. 29th April 1998 the request that was adamantly refused by him.
> 8. That I went on to ask that perhaps if he doesn't believe my explanation he should talk to my boss who was around during that conversation but he refused and said that in Kiswahili "Kila Mtu Abebe Msalaba Wake".

With respect, the above does not only indicate the unreasonableness of the refusal to accept the top-up fee but also creates doubts which may lead one to believe (though possibly mistakenly) that the decision had already been reached that whatever a reason should be witch hunted for withdrawal of the two hunting blocks! It is no wonder, as per the affidavit of the Managing Director, that when he contacted Mr Luhanjo, the Permanent Secretary of that Ministry who happened to be in Arusha at the material time and informed him of the conditionalities attached he brushed everything aside as a joke, (for, indeed, in all fairness, thats how they should be termed) and proceeded to

advise him to pay the day following, 29/4/98. However, what seemed to be a joke turned out to be real for the Applicant was never allowed to pay!

Now, this drama did not end there: On 15/5/98 the 1st Respondent proceeded to issue a letter allocating only three blocks (impliedly withdrawing the other two) in a language pregnant with praises. The body of the letter reads,

"RE: APPROVAL FOR CONTINUAL USE OF BLOCKS

FOR THE YEAR(JULY - DECEMBER) 1998

Having examined your good performance and noting that you had paid all government dues, we have approved the use of the underlisted blocks by your company for the year 1998.

1. Lake Natron Game controlled Area (N)
2. Moyowosi Game Reserve (S)
3. Kizigo Game Reserve (C)

We wish you a nice hunting season.

Yours sincerely,

Mabula Misungwi

for DIRECTOR OF WILDLIFE"(emphasis mine)

One would have expected the 1st Respondent to indicate in this very letter a fact that the two other hunting blocks have been withdrawn, and reasons thereof and this should have been so considering what is contained on page 2 of the "Consensus Agreement" which requires minimum blocks in order to have viable

management of a hunting company. The letter, however, is couched in such way that in the eyes of any one who knew nothing of the conflict simmering between the parties could only give credit and congratulations to Applicant for a successful and commendable job which managed to secure the Director of Wildlife's praises for good performance! The shortfall in this administrative action needs no emphasis!

Nevertheless; the Applicant was not cowed down by this set back. He lodged his complaint to the Minister in a letter which runs as follows:

> "Dear Honarable Minister Meghji,
> My name is Franz J. Wengert of Wengert - Windrose - Safari. We have been in Tanzania hunting since 1982!
> We just happen to have lost 2 of our blocks in a very unfair and injust way I do not want to be told at a later stage, that I have caused all this legal problems etc., without having consulted the Minister and to get a reply from you!
> Mr Harrison Mwakyembe (my Lawyer and known to you) told me that this will be a very embarrassing case for the Ministry! I want to avoid that!
> But I can not accept the way and how I had

lost those blocks. You might also not have been told all the facts by your Game department!

please give me a few minutes and a decision on your side!

Yours sincerely

Franz J. Wengert

Wengert - Windrose - Safari"

This attracted the Minister's response to the following effect,

"RE: APPEAL AGAINST ALLOCATION OF HUNTING BLOCKS

I wish to acknowledge receipt of your letter dated 19th May, 1998, regarding the above subject. In your letter you informed me that you had lost two hunting blocks in a very unfair and unjust way.

I have read your correspondences with great care, and also consulted the Director of Wildlife in order to get facts from both sides. The information I have gathered about this issue is as follows:

1) The Director informed you to pay the top up through his letter Ref. No GD/T.80/81/89 dated 6 April 1998.

2) Your office representative Mrs E. Moshi

phoned the office of the Director of Wildlife telling then that the utilisation percentages shown in the above mentioned letter did not tally with your record. The response from the Director of Wildlife was that, you should go to Tourist Hunting Office in Arusha and reconcile your records and effect the required payment.

This was confirmed by your letter dated 9/4/98. However this letter was received in the office of Director of Wildlife on 21/4/1998.

Thereafter, the tourist hunting office in Arusha issued you an Invoice N. GD/AR/TH/16VIII/387 dated 18th April, 1998. However, you did not effect the payment despite continued efforts of reminding you by the staff of Wildlife Division in Arusha.

The Director's letter dated 25th April, 1998 and faxed to you on 27th April, 1998 was made prior to the telephone call to your house, unfortunately you refused to receive the fax and demanded it to be faxed to your office. Your refusal to receive the fax through your home Facsimile caused the delay.

> Based on the information available and evidence availed to me, I have no alternative other than agreeing to the decision made earlier.
>
> Having said this, I hope you will show the best vigilance with your remaining three hunting blocks and I wish you all the best in the next hunting season.
>
> Thank you
>
> Zakia Hamdani Meghji (MP)
>
> MINISTER FOR NATURAL RESOURCES AND TOURISM"
>
> (emphasis mine)

The Minister's letter seems to brush aside the Applicant's complaints as meritless. The learned Senior State Attorney submits that reasons contained in this letter "are reasonable to the extent that they are based on official correspondences and documents available at the Ministry"! With respect, this is unsurportable. First, even if it was true that the Minister based his conclusions on "records and correspondences available at the Ministry", if the latter are found to be false and untrue the otherwise reasonableness of the decision becomes unreasonable, for, we are not looking at what the Minister believed but rather on what transpired and which is in actual confrontation with the Applicant's interests.

Secondly, the background and evidence we have already gone

through leaves no one in doubt that the Minister acted or was fed with wrong information, and also failed to consider or was not advised as regards other relevant considerations, i.e. the "Consensus Agreement" of which she is a signatory, and on which she is completely silent in her letter.

Further, the Minister's letter shows that she took "great care" to analyse the Applicant's complaint basing on an advice by the 1st Respondent, the very person who all along set into motion actions complained of! It is not hard therefore to find why she was misled! Had she given Applicant chance of being heard, possibly in the presence of 1st Respondent, it is no wonder she would have reached a different conclusion. Unfortunately she did not: she decided to believe and be guided by the word of only one of the parties to a conflict! As a result she flops into unsupported conclusions as reflected in paragraphs (from top) 4, 5, 6, & 7 which are not supported by any written correspondence apart from being contradicted by her officer's affidavits. Suffice to say that I have already demonstrated that there is no evidence to establish that an invoice was issued at all. Besides, the evidence of her Game warden, Mnkeni, stationed at Arusha, as per his affidavit, contradicts the allegations (strongly denied by Applicant) that Applicant refused to receive a fasmile message of 25th at his home. The applicant's Managing Director disputes having fasmile facilities at his home and his assertion remained unshaken throughout. If it ever exited, then,

the Respondents would have readily provided its number and the one who strived to send the message without success. The Arusha Game warden is silent on this save saying that after receiving the fax message (the contents of the letter dated 25/4/98) and instructions he telephoned Applicant's Managing Director who went to his office and collected the message! Common sense, clothed with modernity, would wonder whether one would prefer to move from one place to another, to physically receive a message or just remain seated at his home and receive the same.

From what have been discussed, it stands out clearly that the 1st Respondent abused his powers by unilaterally and arbitrarily setting the deadline for payment of necessary fees to 27th and the 28th April, 1998 contrary to the already set date of 30/4/98 as per "Consensus Agreement". He further abused his powers by refusing payment of the top-up fee on 29/4/98, and this was unreasonable, first, considering the fact that it was a day before striking the deadline, and secondly, even if it was otherwise, refusing payment when there was a sound and justifiable reason for delay. I concede that failure to pay top-up fees on the stipulated date (30/4/98) could be a basis for withdrawal of hunting licences on hunting blocks, and for that matter, notice may not be necessary, for, the Applicant, would have known the deadline - the requirement for payment of top - up fees and consequence for failure. But, where the authority that may be, makes it impossible for the person statutorily required

to pay fees to pay it within the stipulated time he cannot be condemned to have failed to pay the same and can't be condemned to suffer the consequences for the failure. The 1st Respondent, the Director of Wildlife, for reasons best known to himself decided to set a deadline of his own, which decision barred Applicant from paying the required top up fee within the official time, and therefore his subsequent acts against Applicant's interests allegedly for failure to pay the fees were without any colour of legality and can only be but a nullity for being a clear abuse of his powers. Besides, the 1st Respondent's decision and actions of 25th, 27th and 28th April, 1998 exhibit hasty elements akin to those of a fire- brigade in action, which however good intentioned they might have been cannot escape being branded unreasonable let alone failing being saved from an imputation of bias. Lastly, while the Applicant was entitled to be told reasons for the withdrawal of the two hunting blocks (which the 1st Respondent never bothered to give) the reasons indicated in the 2nd Respondent's letter responding to Applicant's complaints are not reasons legally recognisable as they were based on false reports; on explanation of one party (1st Respondent) who was in any case interested in the issue as a whole as he was the key player in the actions complained against and omitted considering one vital evidence, the "Consensus Agreement".

In conclusion, considering the errors both of law and facts displayed above, the Respondents's decisions cannot be left to stand. They are declared a nullity. The application stands allowed with costs.

L.B. Kalegeya

JUDGE

Delivered on 9.2.99