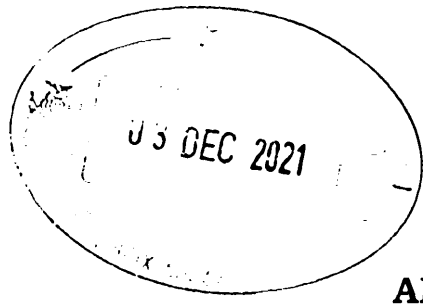
IN THE COURT OF APPEAL OF ZAMBIA **Appeal No.221/2020**
HOLDEN AT LUSAKA
(Civil Jurisdiction)



BETWEEN:

AXIZ (PTY) LIMITED **APPELLANT**

AND

CLOUDTECH ZAMBIA LIMITED **1ST RESPONDENT**

RAVIKIRAN VIJAY SALVI **2ND RESPONDENT**

CORAM: Chashi, Sichinga and Banda-Bobo, JJA
On the 27th day of August, 2021 and 3rd December, 2021.

For the Appellant: Ms. M. Kapotwe of Messrs Mesdames Theotis Mutemi Legal Practitioners

For the Respondents: Mr. L. Mtonga of Messrs Philsong & Partners Legal Practitioners

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JUDGMENT

BANDA-BOBO, JA, delivered the Judgment of the Court

Cases referred to:

1. Steak Ranch Limited v Steak Ranches International BV (2011/HP/0183) Unreported
2. Chansa Chipili and Powerflex (z) Limited v Wellingtone Kanshimike and Wilson Kalumba (2012) ZR 483
3. Spiliada Maritime Corporation v Consulex Limited "The Spiliada" (1986) 3 ALL ER Page 625
4. Fehmarn (1958) 1 WLR 159
5. Mournt Albert Borough Council v Australia ETC Assurance Society Limited A.C 224
6. Friday Mwamba v Sylvester Nthenge and Two Others SCZ Judgment No.5 of 2013
7. Kalusha Bwalya v Chadore Properties and Ian Chamunora Nyalugwe Haruperi SCZ Appeal No. 222/2013
8. Colgate Pamolive Zambia Inc v Abel Shemu Chuka and 10 Others (SCZ Judgment No.11 of 2005 - SCZ (Appeal No.181 of 2005)
9. Donohue v Armco Inc and Others [2000] 1 Lloyd's Rep. 579
10. Godfrey Miyanda v. The High Court (1984) Z.R. 62

Legislation referred to:

1. The Constitution of Zambia (Amendment) Act No.2 of 2016
2. Order 11 Rule 1(4) of the High Court Rules, Chapter 27 of the Laws of Zambia

Other Works referred to:

1. Dicey & Morris (1980), The Conflict of Laws, 10th Edition
2. *Cheshire and Northis Private International Law* at page 238

1.0. INTRODUCTION

1.1. This is an appeal against the whole Ruling of Honorable Justice, E.L. Musona, where he found that the agreement entered into by the parties expressly stated that it would be governed by South African law and precluded Zambian courts from trying

the suit. The judge thus dismissed the Plaintiff's action for lack of jurisdiction.

2.0. BACKGROUND

2.1. The brief background to this matter is that it arose from a dispute regarding an agreement between the Plaintiff and the 1st Defendant wherein the Plaintiff appointed the 1st Defendant as reseller of its computer equipment and products. The agreement also incorporated a deed of surety that bound the 2nd Defendant as surety and co-principal debtor together with the 1st Defendant as regards the 2nd Defendant's obligations under the agreement. Unfortunately, the 1st Defendant failed to discharge its obligation to pay the price of the goods supplied to it. Aggrieved by the Defendant's action, the Plaintiff commenced an action by way of writ of summons and statement of claim and endorsed with the following claims:

1. **Payment of the sum of USD160,718.78 being sums due and owing to the Plaintiff for the supply of various computer equipment under the reseller agreement;**
2. **Interest on the aforesaid sum at the rate of 10% per annum tempore morae to date of the writ;**

3. **Interest at the London Inter Bank Offered Rate (LIBOR) from date of writ to date of payment;**
4. **Costs of and occasioned by this action; and**
5. **Any other reliefs that the Court deems fit.**

2.2. However, before the matter could be heard substantively, the Defendants filed summons with a supporting affidavit for the matter to be dismissed for want of jurisdiction pursuant to Order 11 Rule 1(4) of the High Court Rules. It was argued that the parties had agreed that the re-seller agreement which was the subject of the dispute, would be governed by South African Law, and that this therefore affected the Zambian Court's jurisdiction to preside over the matter.

2.3. The Judge in his Ruling on the above, determined that there was a sole issue that had to be determined, this being **whether the case before him should be determined in Zambia on the basis of convenience despite the fact that the agreement in issue was governed by South African Law.** He determined that the fact that the agreement expressly stated that it would be governed by South African Law, meant that it precluded the Court and Zambian Courts from trying the suit.

3.0 **The Appeal**

3.1 Aggrieved with the Court's Ruling, the Plaintiff has now appealed against the whole Ruling on the following grounds:

(1). The learned puisne Judge erred in law and in fact when he held that by citing the case of **Fehmarn** as well as raising the principle of *forum non conveniens*, the Appellant conceded that the Court lacks jurisdiction, contrary to the holding in the case in **Steak Ranch Limited v Steak Ranches International BV**[1].

(2). The learned puisne judge erred in law and fact when he held that the case of **Fehmarn** is distinguishable from this matter in that it did not involve perishable goods, when the legal principle was the same;

(3). The learned puisne judge erred in law when he ousted the inherent jurisdiction of the Zambian High Court, by making a finding that the fact that the agreement expressly stated that it would be governed by South African law, precludes this Court and Zambian Courts from trying the suit, contrary to the holding in the case of

Chansa Chipili and Powerflex (Z) Limited v Wellingtone Kanshimike and Wilson Kalumba[2]

4.0 **Arguments in Support**

4.1 Counsel indicated that he would argue grounds one and two together, while ground three would be argued separately, but first.

4.2 The argument in ground three was that the Court should not have ousted the inherent jurisdiction of the Zambian High Court contrary to the holding in the case of **Chansa Chipili and Powerflex (Z) Limited v Wellingtone Kanshimike and Wilson Kalumba[2]**. Counsel's argument was that the Zambian courts have the requisite jurisdiction to try this matter, despite the agreement expressly stating that it would be governed by South African law.

4.3 Ms. Kapotwe counsel for the Appellant argued that the interpretation of the holding in the case of **Chansa Chipili and Powerflex (Z) Limited v Wellingtone Kanshimike and Wilson Kalumba[2]** was that the governing law of a contract, is different from that of the applicable law. Therefore, the South African

applicable law in this matter was different from the governing law of the contract and that this should not oust the jurisdiction of the High court. She further submitted that an agreement between parties could not oust the inherent jurisdiction of the Zambian High Court whose jurisdiction was both constitutional and statutory. In support of her argument she referred to Article 134 of the Constitution of Zambia (Amendment) Act, No.2 of 2016. She argued that based on the above, the court below had inherent and unlimited jurisdiction in all matters, and had jurisdiction to deal with the triable issues raised in the Appellant's pleadings including the South African applicable law clause. She submitted that this position was confirmed in the cases of **Steak Ranch Limited v Steak Ranches International BV**[1] and **Chansa Chipili and Powerflex (Z) Limited v Wellingtone Kanshimike and Wilson Kalumba**[2]**.** She further submitted that the learned Judge in the court below misdirected himself in dismissing the action for lack of jurisdiction as the governing law of a contract is a different legal issue from that of the applicable law of the Reseller Agreement which is an issue that should be resolved at trial. Additionally,

she argued that in accordance with the extract from Cheshire and North's Private International Law at page 238, the court below did have the discretion to disregard the express foreign jurisdiction clause.

4.4 In arguing grounds one and two it was submitted that in bringing up the argument of *"forum non conveniens"* the Appellant was not conceding that the Zambian courts lacked jurisdiction on this matter. That the argument was advanced not as a consensus that the court lacked jurisdiction but rather, to give the court some factors to take into consideration in determining where the matter should be tried. It was counsel's further contention that the courts have a discretion to look at the convenience of each case and decide on a balance of convenience where the matter should be tried. In support of the foregoing, reliance was placed on the **Chansa Chipili[2] case,** once again.

4.5 Counsel argued that the 1st Respondent is registered and operates in Zambia, and that the 2nd Respondent resides in Zambia. Counsel argued that as a result of the foregoing the Appellant was fortified by the holding in the **Fehmarn**[4] case by

stating that the agreement has a close connection to Zambia and should therefore be tried in this jurisdiction, as the more convenient forum

4.6 She argued that the Supreme court in the **Chansa Chipili**[2] case did not distinguish the case before it with the **Fehmarn**[4] case or consider whether the goods were perishable or not. It is on these premises that the Appellant contends that the court below fell into grave error when it proceeded to make this distinction, as the legal principles involved in both cases remained the same.

4.7 It was Counsel's further contention that the affidavit in support of the Respondent's application to dismiss the matter for want of jurisdiction, appearing on pages 31 to 41 of the Record of Appeal did not demonstrate that the commencement of this action in the High Court for Zambia would be inconvenient, and that an alternative convenient forum existed. Furthermore, that the Respondents did not show how they would be prejudiced, if this matter were to be tried in Zambia. It was Counsel's contention that the Respondents failed to discharge the onus placed upon them as espoused in **the Steak Ranch**[1] **case**, that

one must demonstrate that there is an alternative forum which is more convenient. Counsel argued that when the argument of *forum non conveniens* was raised in **the Steak Ranch[1] case**, the court did not consider the same to be an admission that the court had no jurisdiction but that in the holding, the court held inter alia that the applicable law was merely one of the elements to be considered.

4.8 In conclusion, Counsel contended that the principle determining factor of where this case is to be tried, was not the choice of law the parties have made, but rather that the applicable law is merely one of the elements to be considered and it was their prayer that this Court reverses the decision of the learned trial judge in the court below and allow the matter to be remitted back for trial and prayed for costs of and occasioned by this Appeal.

5 Arguments in Opposition

5.1 The Respondents in their heads of argument and in response to ground three, submitted that the learned trial Judge was on firm ground when he held that the fact that the Agreement expressly stated that South African Law would govern the

contract meant that it precluded Zambian courts from determining the matter. Counsel for the Respondents' argued that the doctrine of sanctity of contracts demands that once a contract is freely and voluntarily entered into, it should be held sacred and it should be enforced by the courts of law. In support of the foregoing principle, Counsel drew the court's attention to the cases of **Friday Mwamba v Sylvester Nthenge and Two Others[6], Mournt Albert Borough Council v Australia ETC Assurance Society Limited[5], Kalusha Bwalya v Chadore Properties and Ian Chamunora Nyalugwe[7]** and **Colgate Palmolive Zambia Inc v Abel Shemu Chuka and 10 Others[8]**. It was Counsel's contention that the parties had consciously reduced their agreement into writing and contracted that it would be governed by South African Law. His argument was that it was evident from the agreement that the law the parties wished to be governed by was unambiguously set out in the said contract and should therefore be enforced by the Courts.

5.2 Counsel argued that the applicable law in a contract in dispute is an issue termed by the legal community as "*conflict of laws*". He went on to submit that in a conflict of laws case, a court

must determine which law applies to the particular contract in dispute. He argued that this in essence governs the agreement and that in *casu*, the applicable law was tied to jurisdiction. He further argued that the parties understood that the implication of the agreement to which they appended their signatures stripped the Zambian courts of jurisdiction to try this matter. Therefore, Counsel argued, that, this court should give effect to the contents of the agreement and uphold the decision of the lower court.

5.3 Counsel vehemently argued that the settlement of the legal question on jurisdiction is based on circumstances and the evidence available. He argued that in the present case the Respondents had produced sufficient evidence, namely, clause 1.1.2.2 which ousts the jurisdiction of the Zambian courts as contracted by the parties. As regards the Appellant's argument that the High Court has unlimited and original jurisdiction to hear and determine any proceedings by virtue of its unlimited and original jurisdiction, he contended that this did not amount to international jurisdiction and cannot therefore clothe the Zambian courts with the jurisdiction to administer South

African law. Counsel submitted that it was critical to distinguish the present case from that of **Chansa Chipili**[2] cited by the Appellant. He contended that the present case was totally different from the facts in the **Chansa Chipili**[2] case, because the parties to the appeal were not privy to the agreement as they were not the parties that signed the Californian agreement, whereas the Appellant and the 1st Respondent herein were privy to the agreement that ousts the jurisdiction of the Zambian courts. Further, that in **the Steak Ranch**[1] case the reasons the court held in the manner they did was because the wording of the clause left an option open for application of Zambian law. That the High court held that the agreement had its closest connection to Zambia based on that particular opening, whereas in the present case, the clause did not leave room for the applicability of Zambian law. Counsel submitted that the applicable law in the present case was not ambiguous and that it could not be one of the things to be resolved at trial as argued by the Appellant and that the issue of governing law was simply a matter of semantics and could not be a separate legal issue to be raised late in the day.

5.4 In response to grounds one and two, Counsel for the Respondent agreed with the Ruling of the court where the learned trial Judge held that the Appellant had conceded that the court lacked jurisdiction when it urged the court to consider the matter on a *convenience* basis by citing the case of **Fehmarn**[4] and that the said case dealt with perishable goods whereas the present case did not.

5.5 Counsel was of the view that, if the Appellant believed that Zambian courts have the jurisdiction to determine this matter, it would not be in a position to argue the principle of *forum non conveniens*. He submitted that the Appellant in its endeavour to establish that the agreement has its closest connection to Zambia, indirectly agreed with the Respondents that the Zambian courts have no jurisdiction in this matter.

5.6 Counsel disagreed with the Appellants argument that the issue of *forum non conveniens* was raised merely for the court to consider some factors in determining the fact that the matter should be determined in Zambia and stating that the same does not hold water. He echoed the words of the learned trial judge that *"the principle cannot be said to apply to the converse; that a*

court that lacks jurisdiction can assume jurisdiction for the convenience of the litigants and Witnesses". He argued that the issue of *forum non conveniens* should not arise unless this court decides to overlook the provisions of the Constitution and clothe the Zambian courts with the jurisdiction to apply South African law. He argued that in casu, the case had a substantial connection to South African law because the Appellant was a business incorporated in South Africa and the parties agreed to be governed by South African law.

5.7 As regards the cases of the **Spiliada Maritime[3] and Fehmarn[4],** Counsel submitted that the court considered an alternative forum because the necessary jurisdiction existed to warrant the doctrine of *forum non conveniens* as a result of the circumstances that surrounded the two cases. Counsel further contended that the onus to demonstrate that an alternative forum exists which is more convenient for this Court could not have reasonably been placed on the Respondents when the court below lacked the jurisdiction to hear such a matter.

5.8 He submitted that the parties did not intend for Zambian law to apply, or indeed use Zambian courts to deal with any dispute

that arose, and the need to discharge the evidential burden to establish a more convenient forum did not arise whatsoever. The Respondent prayed that all grounds be dismissed for lack of merit with costs to the Respondents.

5.9 Arguments in Reply

5.10 In reply to ground three, Counsel for the Appellant argued that the Respondents' argument that, the contract the parties entered into ought to be governed by South African Law and that the courts must uphold this wish, including the wish that the applicable law in this case is tied to jurisdiction was unwarranted and misconceived. This was because the Respondents misunderstood the issues in contention. She argued that the dispute was not centered on which law was applicable because this was explicit in the agreement and that guidance was given in the cases of **Steak Ranch Limited v Steak Ranches International BV**[1] and from Dicey & Morris (1980), The Conflict of Laws 10th Edition. That Counsel's argument was that the court should not assume jurisdiction because the agreement was not made in Zambia nor was it made by or through an agent trading or residing in Zambia and

neither was it by its terms or by implication governed by Zambian law.

5.11 It was Counsel's contention that the applicable law of the agreement ought to be viewed separately from the issue of jurisdiction of the court below. She contended that the fact that the parties agreed on South African law as the applicable law did not in itself mean that South African courts had jurisdiction to determine the matter. She went on to argue that in fact the applicable law clause appearing on page 38 of the Record of Appeal showed that the parties did not state which courts of law would have jurisdiction to determine the matter. Thus, it was her contention that the law governing an agreement was a different legal issue from that of jurisdiction. To buttress her position, she reverted to the case of **Chansa Chipili and Powerflex (Z) Limited v Wellingtone Kanshimike and Wilson Kalumba**[2] where the supreme court held that:

> **"what must be understood in this appeal is that the governing law of a contract, where that is spelt out, is a different legal issue from that of jurisdiction...."**

5.12 Counsel contented that an agreement between parties could not oust the inherent jurisdiction of the Zambian High Court, whose jurisdiction was both Constitutional and statutory. Counsel contended that there was a difference between the validity of the contract in question and the jurisdiction of the court. Additionally, that the Court in the **Chipili case**[2] stated that the governing law of a contract where it is spelt out, is a different legal issue from that of jurisdiction. She argued that the Respondents were misguided in their assertion that the issue of privity of a contract was the deciding factor on the issue of jurisdiction. She further argued that in **the Chipili case**[2] the court found that the court below had jurisdiction and remitted the action for trial by the learned trial judge, despite the Californian foreign jurisdiction clause. Therefore, she argued that, the court below did have the jurisdiction to try this matter.

5.13 As regards **the Steak Ranch case**[1] Counsel argued that the Respondents' Counsel had alleged that the wording of the foreign clause in the aforstated case left an option open for the application of Zambian law and that, the agreement had its closest connection to Zambia, based on that particular opening.

It was Counsel's contention that the Respondents were attempting to mislead this Court, and that a proper reading of this case revealed that the court itself stated that the applicable law was merely one of the elements to be considered in determining the forum for trial.

5.14 In reviewing the case of **Steak Ranch**[1] against the Respondents arguments, Counsel contended that the Supreme Court in the aforementioned case did not reverse the finding of the court below and that the applicable law was merely one of the elements to be considered in determining the forum for trial. She argued that the Respondents argument that this was the sole determining factor was unwarranted. Secondly that, the finding of the case as stated, supported her argument that the applicable law of a contract is to be contrasted with the jurisdiction of a court. Thirdly, that the Zambian courts are clothed with the requisite jurisdiction to apply foreign laws.

5.15 In reply to grounds one and two, Counsel's contention was that, the applicable law is not the only determining factor in choosing the forum and that the courts have a discretion to look at the convenience of each case and decide where the matter should

be tried as held in the cases of **Steak Ranch**[1], **Chansa Chipili**[2] and **Fehmarn**[4]. Further, she impugned the Respondent's arguments that they had no evidential burden to discharge in their failing to show the court below that an alternative forum exists. To buttress the foregoing, Counsel cited the case of **Spiliada Maritime Corporation v Consulex Limited "The Spiliada"**[3].

5.16 She further argued that the High Court in the case of **Steak Ranch**[1] held that the presumption is that the court in which the action is commenced has jurisdiction unless the party challenging jurisdiction can prove otherwise. Further that one must demonstrate that the forum in which an action has been commenced is not convenient and that an alternative convenient forum exists. Counsel argued that in the present case the Respondents failed to discharge the burden that an alternative convenient forum existed, whereas the Appellant has demonstrated that the 1st Respondent is registered and operates in Zambia, and the 2nd Respondent resides in Zambia. That therefore, the agreement has a close connection to Zambia and

should therefore be tried in this jurisdiction, as the more convenient forum.

5.17 Counsel refuted the Respondents' argument that the case of **Spiliada**[3] was distinguishable from the present case because it involved an arbitration clause. She submitted that this case was referred to by the courts in both **Steak Ranch**[1] **and Chansa Chipili**[2] **case** and that in making their determination that, in dealing with agreements with foreign law clauses, settlement of the legal question on jurisdiction is based on several factors and that those cases did not distinguish **the Spiliada**[3] **case** on the ground that it referred to an arbitration clause. She contended that what one can deduce from the said cases was that the courts, despite the foreign applicable law or jurisdiction clauses, found that they had jurisdiction to try a matter based on the evidence before them. Finally, Counsel re-emphasized her argument that the Supreme court in the case of **Chansa Chipili**[2] did not distinguish the **Fehmarn**[4] **case** or consider whether the goods were perishable or not. She implored this court to disregard the Respondents argument that the case was distinguishable.

5.18 In conclusion Counsel submitted that the applicable law clause in the present case was not in itself decisive on the legal question of jurisdiction and that the court below erred in law and fact when it did not consider other factors and evidence brought before it regarding jurisdiction.

6 Hearing

6.2 Counsel for the Appellant Ms. Kapotwe applied to augment the Appellant's heads of argument and reply and corrected a few typographical errors. Counsel relied on the heads of argument filed on 18th December, 2020 and mainly recited and amplified the contents of the aforementioned arguments. She added briefly that, there were no reasons advanced by the Respondents to show in what circumstances a trial court was limited in hearing the matter before it. She argued that the Respondents did not show how they would fail to obtain justice in this jurisdiction. She contended that the court therefore erred when it dismissed the whole matter. She prayed that the appeal be dismissed with costs.

6.3 Mr. Mtonga, Counsel for the Respondents relied on the heads of argument filed into court and briefly augmented his

submissions by illustrating the principle of the boiler plate clause in a contract. He argued that this principle helps to state where a dispute ought to be heard and that in casu it was agreed by both parties that if a dispute arose parties would go to the South African Magistrate court. He argued that in casu there was no justice to be determined and he prayed for this matter to be dismissed as the lower court had no jurisdiction to hear it.

7 Decision of this Court

7.2 We have perused the Record of Appeal and considered the Ruling of the court below and the submissions filed by learned Counsel for the parties, including the oral arguments advanced. As a starting point, it is our view that the learned Judge misdirected himself when he found that the sole issue for determination in this matter was whether the case before him should be determined in Zambia on the basis of conveniens despite the fact that the agreement in issue was governed by South African Law. For reasons that will be made clear in the judgment, our view is that the sole issue for determination is whether the Zambian Courts have jurisdiction to determine this

matter in view of the clause in the agreement which said that any dispute between the parties would be governed solely by South African Law.

7.3 In this appeal, we will consider the grounds as presented and argued by the parties for purposes of consistency.

7.4 In ground three, the Appellant's contention is that the court fell into grave error by making a finding that Zambian Courts do not have jurisdiction to try the suit because the agreement expressly stated that it would be governed by South African law. Counsel for the Respondent, on the other hand, submitted that the learned trial Judge in the court below was on firm ground when he held that the fact that the agreement expressly stated that South African Law would govern the contract meant that Zambian Courts were precluded from determining the matter. His argument was that the parties consciously reduced their agreement into writing and contracted that it be governed by South African Law, thus implying that the appended signatures on the agreement meant that the Zambian Courts were stripped of their jurisdiction.

7.5 It is trite law that the jurisdiction of a court cannot be ousted by a foreign jurisdiction clause. In the case of ***Godfrey Miyanda v The High Court[10],*** the Supreme Court defined the term jurisdiction as follows:

> ***"The term "jurisdiction" should first be understood. In one sense, it is the authority which a court has to decide matters that are litigated before it; in another sense, it is the authority which a court has to take cognisance of matters presented in a formal way for its decision. The limits of authority of each of the courts in Zambia are stated in the appropriate legislation. Such limits may relate to the kind and nature of the actions and matters of which the particular court has cognisance or to the area over which the jurisdiction extends, or both."***

7.6 In the case of **Donohue v Armco Inc and Others[9],** it was held that:

> **"The foreign jurisdiction clause does not have the effect of conferring jurisdiction on the chosen court but that the court retains a discretion to decline to exercise that jurisdiction based on an overriding consideration of forum conveniens."**

And in the case of **Chansa Chipili and Powerflex (Z) Limited v Wellingtone Kanshimike and Wilson Kalumba[2]** it was observed:

"..... that in business transactions, with foreign jurisdiction clauses, where business is partly conducted in foreign countries, settlement of the legal question on jurisdiction is based on circumstances supported by the evidence available. Thus, while parties may agree on foreign jurisdiction in an attempt to oust the jurisdiction of the state or country where they have business activities such state or country may rightly claim jurisdiction depending on the circumstances in a given case."

7.7 Based on the above, we agree with Counsel for the Appellant that clearly the South African 'applicable law' clause in the contract is different from the governing law of the contract and does not by any stretch of imagination oust the inherent jurisdiction of the High Court in Zambia. Further, and as stated in **Steak Ranch Limited v Steak Ranches International BV**[1], domestic courts are presumed to have jurisdiction unless the contrary is proved. Therefore, the learned trial Judge in the court below misdirected himself in dismissing the action for lack of jurisdiction as the governing law of a contract is a different legal issue from that of jurisdiction. We find merit in ground three.

7.8 Ms. Kapotwe, Counsel for the Appellant argued grounds one and two together, contending that the Court below had the requisite jurisdiction to try this matter. That, when it advanced the principle of *forum non conveniens,* the Appellant was merely attempting to show the Court all the relevant factors to determine the appropriate forum for this case and not that it was conceding that the court below lacked jurisdiction. On the other hand, the Respondent agreed with the Ruling of the learned High Court Judge that the Appellant conceded that the court lacked jurisdiction when it urged the court to consider the matter on a *convenience* basis by citing the **Fehmarn[4] case** and that the said case was distinguishable from this matter because it did not involve perishable goods.

7.9 Our view is that the learned trial judge erred in law and fact when he held that by citing the case of **Fehmarn[4]** as well as raising the principle of *forum non conveniens,* the Appellant conceded that the court lacked jurisdiction. We therefore agree with Counsel for the Appellant that the trial Judge fell into grave error by holding the foregoing. As explained by the Appellant it is clear that its intention when bringing up the issue of *forum*

non conveniens did not mean they were conceding on the issue of jurisdiction, but rather were trying to demonstrate that there were other factors the court could consider when determining where the matter should be tried.

7.10 In the case of **Steak Ranch Limited v Steak Ranches International BV[1],** it was observed that enforcement by the Zambian courts of the choice of foreign clauses cannot be ruled as imperative; but it should depend on the balance of convenience, in particular, circumstances and the exigencies of justice of the law. It is therefore our view and we agree with Counsel for the Appellant that in this instance, when highlighting the issue of *forum convieniens,* the Appellant was merely trying to convince the trial Judge that the court in Zambia was the most appropriate to consider the best interest and convenience of the parties.

7.11 Further, it was argued that the learned judge erred in law and fact when he held that the case of **Fehmarn[4]** is distinguishable from this matter in that it did not involve perishable goods,

when the legal principle was the same. The doctrine of *Forum Non Conveniens* is that:

> **"The doctrine that an appropriate forum even though competent under the law may divest itself of jurisdiction if, for the convenience of the litigants and the witnesses, it appears that the action should proceed in another forum in which the action might also have been properly brought in the first place."**

7.12 Simply put and as expounded in the **Steak Ranch[1] case** the Respondent ought to demonstrate that there is an alternative forum in which it is more convenient for the matter to be heard. There must be consideration as to whether there is another forum which is more appropriate in which the action has the most real and substantial connection such as convenience or expense. In our view the judge erred in law and fact by stating that the **case of Fehmarn[4]** is distinguishable from this matter because it did not involve perishable goods. This was indeed a fact but not the principle. The principle to be drawn from the **Fehmarn[4] case** and on which the Appellants relied, was that the agreement had a close connection to Zambia. The Appellant demonstrated that the Respondent companies were both

resident in Zambia and therefore they had the closest connection to Zambia. The legal issue was not perishable goods but rather the settlement of the question of jurisdiction based on the circumstances supported by the evidence available.

7.13 In the **Spiliada[3] case** though distinguishable from the present case, the matter involved the application for a stay or dismissal of proceedings falling within the proper jurisdiction of the court which could only be granted on very narrow grounds. Among the many legal principles in that case, Lord Goff, in his judgment held amongst other things that:

> **"Where there is some other forum which is the appropriate forum for the trial of the action, the burden resting on the defendant is not just to show that England is not the natural or appropriate forum for the trial, but to establish that there is another available forum which is clearly or distinctly more appropriate than the English forum."**

7.14 Our view is that the learned trial judge erred in law and fact when he held that by citing the case of **Fehmarn[4]** as well as raising the principle of forum non conveniens, the Appellant conceded that the court lacked jurisdiction. We agree with Counsel for the Appellant that the trial Judge fell into grave error by holding the

foregoing. As explained by the Appellant, it is clear that its intention when bringing up the issue of *forum non conveniens* did not mean they were conceding on the issue of jurisdiction but rather what the Appellant was trying to demonstrate was that there were other factors the court could consider when determining where the matter should be tried. The judge failed to properly evaluate the evidence before him regarding the legal question on jurisdiction. Both grounds one and two have merit and succeed.

7.15 All three grounds having succeeded, the net result is that the matter will be sent back to the High Court, for trial before another Judge. Costs for this application to abide the outcome in the Lower Court.

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J. CHASHI
COURT OF APPEAL JUDGE

.....
D. L. Y. SICHINGA, SC
COURT OF APPEAL JUDGE

.....
A. M. BANDA-BOBO
COURT OF APPEAL JUDGE