

IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2024/HPC/0146

BETWEEN:

ROUTE QUEST (PTY) LIMITED

AND

AL-AZIZ LOGISTICS LIMITED

ABDULLAHI ABDIAZIZ FARAH

PLAINTIFF

1ST DEFENDANT

2ND DEFENDANT



Before: The Honourable Mr. Justice L. Mwanabo on 15th January, 2025

For the Plaintiff: Mr. N. Silwamba of Messrs. Eric Silwamba, Jalasi and
Linyama Legal Practitioners

For the Defendants: Mr. C. Ngaba of Messrs. Lungu Simwanza and Company 

RULING

Cases referred to:

1. *United Engineering Group v Mackson Mungalu and Others* (2007) 30 SC
2. *The Post Newspaper v Rupiah Bwezani Banda SCZ Judgment No. 25 of 2009*
3. *Indeni Petroleum Refinery Limited v Kafco Oil Limited and 3 Others Appeal No. 207/2001*
4. *National Drug Company Limited and Zambia Privatisation Agency v Mary Katongo Appeal No. 79/2001*
5. *Sigma Financial Solutions and 3 Others v Chongo Kalela Sinyangwe Appeal No. 4/2023*
6. *Sussex Peerage Case* (1844) 11 CL & F 85
7. *Duchess Di Sora v Phillips* (1863) 10 HL CAS, 624
8. *Bumper Development v Metropolitan Police Commissioner* [1991] 4 All ER 638
9. *Earl Nelson v Lord Bridport* (1845) 8 BEAV 527 at 537

10. *Printing and Numerical Registered Company v Simpson (1875) LR 19 ER 462*
11. *Friday Mwamba v Sylvester Nthenge and 2 Others [2014] ZMCS 5*
12. *Indo-Zambia Bank Limited v Amazon Carriers and Kimberley Aretha Anthosha Baines 2014/HPC/0141*
13. *Sun Country Limited v Charles Kearney Roslyn Kearney Selected Judgment No. 20 of 2017*
14. *Chikuta v Chipata Rural (1974) ZR 303*
15. *Kufamuyeke Mukelebai v Ester Nalwamba and Others (2013) Vol. 2 ZR 312*
16. *Shell and BP Zambia Limited v Conidaris and Other (1974) ZR 354*
17. *Godfrey Miyanda v Attorney General (1984) ZR 62 (SC)*
18. *Zambia National Holdings Limited and the United National Independence Party (UNIP) v. Attorney General (1993-1994) ZR 115 (SC)*
19. *Construction & Industrial Maintenance Limited T/A Waco Kwikform v Fair Face Enterprises Limited and Others 2018/HPC/2138 (10th August, 2020)*
20. *Chansa Chipili, Powerflex (Z) Limited v Wellingtone Kanshimike and Wilson Kalumba (2012) Vol. 3 ZR 483*
21. *Axiz (Pty) Limited v Cloudtech Zambia Limited and Ravikiran Vijay Salvi CAZ Appeal No. 221 of 2020 (3 December 2021)*

Legislation referred to:

1. *The Rules of Supreme Court of England 1965 (White Book) 1999 Edition, Vol. 1*
2. *The High Court Rules, Chapter 27 of the Laws of Zambia*
3. *The Commissioner for Oaths Act, Chapter 33 of the Laws of Zambia*

Other Materials referred to:

1. **Evan Mckedrick's Contract Law 3rd Edition**

1.0 APPLICATION

- 1.1. The Defendants herein filed an application to raise a preliminary issue on point of law. The application was made pursuant to **Order 14A** as read with **Order 33 Rule 3 of the Rules of the Supreme Court of**

England¹ and is supported by an affidavit, list of authorities and skeleton arguments.

1.2. The Defendants sought determination of the following issue:

Whether this Honourable Court has jurisdiction to hear and determine this matter as the parties agreed that the governing law and forum for resolution of disputes is the law and courts of South Africa, respectively.

2.0 INTRODUCTION

2.2. The Plaintiff herein commenced this action by way of Writ of Summons on 28th February, 2024 against the Defendants claiming the following reliefs:

- (i) The sum of R1,788,289.61 or its Kwacha equivalent arrears of the rental inclusive arrears interest;***
- (ii) An Order for delivery up of 3 x NEW 2022 FUEL TANKERS; 5 x NEW 2023 BRIDGER FUEL TANKERS;***
- (iii) And the respective motor vehicle registration certificates;***
- (iv) Damages for unlawful detention and/or conversion of the said equipment;***
- (v) Costs and interest at the current Bank of Zambia lending Rate;***
- (vi) Any other relief the Court may deem fit.***

2.2. According to the Plaintiff, the tankers in issue belong to the Plaintiff who is entitled to possession of the same but they were let to the 1st Defendant and that the 2nd Defendant served as the surety and co-debtor. The Plaintiff claimed that the hire fees were not paid which stood at R1,788,289.61 by 24th July, 2023 and that the Hire Agreement had since been terminated.

2.3. The Defendants in their defence indicated that the Plaintiff and the 1st Defendant entered into two separate Lease Purchase Agreements relating to the fuel tankers. The 1st Agreement was said to have been for a period of two years and expired on 14th January, 2024. The 2nd Agreement was also for two years and was expected to expire on 3rd March, 2025. The Defendants indicated further that the two

Agreements are governed by the laws of the Republic of South Africa and subject to the jurisdiction of the South African Magistrate Court or South African High Court to determine disputes arising between the parties.

- 2.3. According to the Defendants, the 1st Defendant is entitled to full ownership of the fuel tankers at the conclusion of the Agreements and payment of the amounts due to the Plaintiff. It was contended that the 1st Defendant complied with the conditions for the 1st lease and is entitled to ownership of the three fuel tankers. The Defendant denied breaching the agreements and further disputed the Plaintiff's entitlement to cancel the Agreement.

3.0 EVIDENCE AND ARGUMENTS IN SUPPORT OF THE APPLICATION

- 3.1. The Defendants' affidavit in support of the application was deposed by the Abdullahi Abdiaziz Farah, the 2nd Defendant herein, who is a Director in the 1st Defendant Company. According to the Defendants the reliefs sought arise from a Master Lease Agreement entered into between the Plaintiff and 1st Defendant dated 14th January, 2022 and two schedules annexed thereto respectively dated 14th January, 2022 and 3rd March, 2023 ("the Agreement"). These documents were exhibited and marked "**AAF1**".
- 3.2. It was stated that a review of the Agreement, particularly Clause 14.3 provides that the Agreement will be governed and construed in accordance with the laws of the Republic of South Africa and all disputes, actions and other matters relating thereto will be determined in accordance with such law.
- 3.3. That further, as regards Jurisdiction, Clause 16 of the Agreement provides for any legal proceedings arising from the Agreement to be instituted in the Magistrate Court of any district in the South African jurisdiction or in the High Court of South Africa or any other court in that jurisdiction that might have jurisdiction and the non-exclusive jurisdiction of the Witwatersrand Local Division of the High Court of South Africa.

- 3.4. It was contended by the Defendants that by virtue of the above clauses, the parties ousted the jurisdiction of this Honourable Court to hear and determine the matter when they agreed to submit their disputes to the courts in the Republic of South Africa. The Defendants stated that the parties voluntarily and freely entered into the Agreement wherein they fixed the forum for dispute resolution and are bound to abide by the terms of the contract in respect of the mode of dispute resolution.
- 3.5. Lastly, the Defendants contended that this Court has no jurisdiction to hear and determine the matter between the Plaintiff and the Defendants as the said jurisdiction solely vests in the South African Courts.
- 3.6. The Defendants listed two issues for determination as follows:
- 3.6.1 Whether this Honourable Court has power to determine preliminary issues; and
 - 3.6.2 Whether this Honourable Court has jurisdiction to entertain the action before it.
- 3.7. On the first issue, the Defendants quoted **Order 33 Rule 3 and 7 and Order 14A Rule 1 and 2 of the White Book**¹. The cases of **United Engineering Group v Mackson Mungalu and Others**¹ and **The Post Newspaper v Rupiah Bwezani Banda**² were cited to buttress the point that preliminary issues are meant to save the Court's time as they have potential to affect the outcome of the main matter and that the Court is obliged to dispose them as a matter of priority.
- 3.8. The Defendants went on to cite other cases including **Indeni Petroleum Refinery Limited v Kafco Oil Limited and 3 Others**³ to fortify the point that this Court has jurisdiction to determine preliminary issues and in exercise of such power, to try questions of law at this early stage of the proceedings.
- 3.9. On whether this Court has jurisdiction to entertain the action before it, Clause 14.3 and 16 of the Master Lease Agreement were quoted. It was submitted that this Court cannot proceed to hear and determine the matter herein for want of jurisdiction as the Agreement prescribes the Courts with the appropriate jurisdiction to hear and determine the

matter as the parties freely and voluntarily entered into an agreement prescribing an alternative form of jurisdiction. In aid of this position, the case of **National Drug Company Limited and Zambia Privatisation Agency v Mary Katongo**⁴ was relied on.

3.10. With regard to the position of the governing law and jurisdiction in contract, a passage from the case of **Sigma Financial Solutions and 3 Others v Chongo Kalela Sinyangwe**⁵ was quoted to contend that the position of the law is that where parties have expressly consented to a governing law and to refer the disputes arising under an agreement to a foreign court/tribunal, the courts ought to give effect to what the parties have agreed to. It was submitted that in the case in *casu*, the parties agreed to laws of the Republic of South Africa to resolve any dispute arising out of the Agreement. That it is undisputed that the issue leading to the commencement of this action arose from the Agreement between the parties which provides for dispute resolution mechanism. The Defendants further submitted that this Court has no jurisdiction to hear and determine this matter in view of clauses 14.3 and 16 of the Agreement. I was asked to dismiss the matter for want of jurisdiction.

4.0 EVIDENCE AND SUBMISSIONS BY THE PLAINTIFF

- 4.1. The Plaintiff filed an Affidavit in Opposition to Notice of Motion to Raise Preliminary Issues and Summons to Dispose Case on a Point of Law deposed by its Counsel, Ntasi Silwamba.
- 4.2. It was stated that the Defendants served on the Plaintiff a Memorandum of Appearance, Defence, List of Documents, List of Witnesses, Affidavit in Support of Summons to Dispose Case on a Point of Law and a List of Authorities. That a cursory review of the Affidavit in Support of Summons to Dispose Case on a Point of Law reveals that the Defendants have exhibited an incomplete Master Lease Agreement and the Schedules marked "**AAF 1**" thereby depriving this Honourable Court of an opportunity to fully appreciate the contended documentary evidence herein.

- 4.3. It was further stated that the Plaintiff and Defendants executed a Master Lease Agreement and two separate Schedules to the Master Lease Agreement bearing Nos. 004645:008019 and 004645:009137, respectively. These documents were collectively produced and marked as **“NS 1”**.
- 4.4. It was pointed out that the Defendants in Paragraph 7 of their Affidavit in Support to Dispose Case on a Point of Law referred to Clause 14.3 of the Master Lease Agreement which only refers to the governing law and not the forum of the disputes, actions and other matters relating thereto. Further, that there is a distinction between the forum and the governing law in the legal context. The Plaintiff contended that contrary to paragraph 8 of the Defendants’ Affidavit in Support of Summons to Dispose Case on a Point of Law, the jurisdiction clause in the Master Lease Agreement provides that the parties consent to the jurisdiction of the Magistrate’s Court of any District in South Africa but that the Plaintiff ‘Lessor’ may at its election proceed in the High Court of South Africa or any other Court that might have jurisdiction. According to the Plaintiff, the High Court of Zambia has been vested with unlimited jurisdiction by the Constitution of Zambia which makes it competent to have jurisdiction to hear and determine this matter.
- 4.5. Clause 16 of the Master Lease Agreement was quoted and the Plaintiff argued that the phrase **“any other Court that might have jurisdiction”** confers a discretion on the Plaintiff ‘Lessor’ to choose the most appropriate and convenient forum for the determination of the dispute herein. Furthermore, it was contended that the phrase **“Non-exclusion jurisdiction”** indicates that this Honourable Court is one of several possible venues where legal proceedings can be initiated.
- 4.6. The Plaintiff stated that contrary to paragraph 9 of the Defendants’ Affidavit in Support of Summons to Dispose Case on a Point of Law, the parties did not oust the jurisdiction of this Honourable Court as the parties did not submit their disputes in the Courts of the Republic of South Africa as the complete reading of clause 16 provides otherwise. That in any event a cursory perusal of the Defendant’s Affidavit in Support of Summons to Dispose Case on a Point of Law

reveals that the said Affidavit and certificate of Exhibits are both not dated by the Commissioner for oaths contrary to the rules of this Honourable Court.

- 4.7. The Plaintiff insisted that this Court has the requisite jurisdiction to determine the matter between the Plaintiff and the Defendants. According to the Plaintiff this is a fit and proper case for this Honourable Court to dismiss the Defendant's Application as the same is marred with *mala fides* and designed to procrastinate to speed resolution of this matter.
- 4.8. The Plaintiff's first point of argument was around the rule of *lex loci contractus* and the doctrines of choice of law and choice of forum. The Defendants submitted that in paragraphs 8, 9, 10 of their Affidavit in Support of Summons to Dispose Case on a Point of Law this matter is governed by the laws of the Republic of South Africa and can only be heard in South African Courts. It was argued that this is misplaced and misconceived as the Defendants have misapplied the rule of *Lex Loci Contractus* and the doctrines of choice of law and choice of forum. The Plaintiff contended that the rule of *Lex Loci Contractus* is a principle of law that states that the law of the place where the contract was made governs the validity and interpretation of the contract, unless the parties have expressly or impliedly agreed otherwise.
- 4.9. The second point argued was that the clause on the choice of law does not affect the jurisdiction of the *Zambian Courts* as the choice of law and the choice of forum are distinct and independent issues all together that must be determined separately. Further that the choice of law in Clause 14 of the Master Lease Agreement executed by the parties only determines the substantive law that will be applied by the Court in resolving the dispute, not the procedural law or the authority of the Court to adjust the matter. That the rule of *Lex Loci Contractus* does not preclude the *Zambian Courts* from exercising jurisdiction over the case, as long as there is a sufficient connection between the dispute and the forum. The **Sussex Peerage Case**⁶, **Duchess Di Sora v Phillips**⁷, **Bumper Development v Metropolitan Police**

Commissioner⁸ and **Earl Nelson v Lord Bridport**⁹ were relied to fortify the point.

- 4.10. The Plaintiff's third limb of argument was on the choice of forum. The case of **Sigma Financial Solutions**⁵ *supra*, was called to aid. It was contended that in contrast to the forum/jurisdiction clause in the **Sigma Financial Solutions case**⁵ where the jurisdiction clause was expressly exclusive, Clause 16 of the Master Lease Agreement in the present case explicitly states that it is non-exclusive. That this Clause does not restrict the parties to a single specific forum but instead allows them the flexibility to choose from a range of possible forums. It was further pointed out that this is elaborated in paragraphs 9-12 of the Plaintiff's Affidavit in Opposition to Summons to Dispose of the case on a Point of Law. According to the Plaintiff, the phrase "**any other Court that might have jurisdiction**" stated in Clause 16 of the Master Lease Agreement implies that the parties did not intend to exclude the jurisdiction of any Court that would otherwise have jurisdiction under the applicable rules of private international law and the principles of jurisdiction. That the phrase also indicates that the parties recognised that the possibility that there might be more than one Court that could have jurisdiction over the dispute, depending on the facts and circumstances of the case.
- 4.11. The Plaintiff further contended that the phrase "**any other Court that might have jurisdiction**" also confers a discretion on the Plaintiff to choose the most appropriate and convenient forum for the litigation, taking into account the nature and location of the dispute, the evidence and witnesses, the costs and delays, and the interests of justice. Lastly on this point, it was contended that as mentioned in paragraph 13 of the Plaintiff's Affidavit in Opposition to Summons to Dispose case on Point of Law, the phrase "**Non-Exclusive Jurisdiction**" indicates that this Court is one of several possible venues where legal proceedings can be initiated. That in other words, while this Court has authority to handle disputes, other Courts may also have jurisdiction.

- 4.12. The fourth limb of the Plaintiff's arguments was around upholding the freedom of contract. A passage from page 3 of the learned author of **Evan Mckedrick's Contract Law 3rd Edition**¹ was quoted and the cases of **Printing and Numerical Registered Company v Simpson**¹⁰ and **Friday Mwamba v Sylvester Nthenge and 2 Others**¹¹ were called to buttress this point.
- 4.13. Lastly, the Plaintiff raised the issue of the defective Affidavit filed by the Defendants. It was contended that the Affidavit is undated which renders it null and void because the jurat and certificate of exhibits are undated. **Order 5 rule 20 (g) of the High Court Rules**², **Section 6 of the Commissioner for Oaths Act**³ and the case of **Indo-Zambia Bank Limited v Amazon Carriers and Kimberley Aretha Anthosha Baines**¹² were relied on.
- 4.14. The Plaintiff contended that it chose to bring this case before the High Court for Zambia due to its jurisdiction over the matter. That the jurisdiction is supported by several factors which include: the assets in dispute are located in Zambia; the Defendant resides in Zambia; the Plaintiff is a Zambian incorporated company; the contract in question was performed and breached in Zambia; the evidence and witnesses are in Zambia, making it the most convenient forum; and there is no other more suitable forum available. That additionally, the Zambian Court will apply South African law as per the contract's choice of law clause, ensuring no risk of injustice or prejudice to the parties. It was submitted that this is a proper case for this Honourable Court to hear and determine.

5.0 DEFENDANTS' EVIDENCE AND SUBMISSIONS IN REPLY

- 5.1. In reply, the Defendants contended that the deponent of the Affidavit in Opposition is not competent to swear to it having not been a party to the the Agreement and thus it constitutes giving evidence from the bar.
- 5.2. The Defendants also contended that it can be deduced from the Agreement in its entirety that it was the parties' intention and agreement that the disputes arising out of the Agreement be settled

in Courts of South Africa as evident by other clauses in the contract referencing South African law or otherwise. The following clauses were referred to: Clause 2.1, 14.1.12 and 14.1.13 (that defines “the Act”), Clause 2.4 (that defines the Business day), Clause 2.9 (that defines Prime Rate) and Clause 7.3 (on rentals payable). It was stated by the Defendants that from the above clauses, it is evident that the governing law and jurisdiction agreed for the settlement of disputes arising under the Agreement was the law of the Republic of South Africa and the Courts of the Republic of South Africa. The Defendants contended that the phrase “**any other Court that might have jurisdiction**” refers to any other Court in the Republic of South Africa as agreed by the parties. That this Court has no jurisdiction to hear and determine the matter as the said jurisdiction solely vests in the South African Courts.

- 5.3. On the principle of *noscitur a sociis* (that is, a word can be determined by the words surrounding it), it was submitted that the words “**any other Court that might have jurisdiction**” ought to be identified by reference to other words in the context of which they appear. That the context in which they appear is the Courts of South Africa. The case of **Sigma Financial Solutions**⁵ (supra) was again cited to cement the issue of jurisdiction.

6.0 HEARING OF THE APPLICATION

- 6.1. At the hearing of the application held on 5th September, 2024, Counsel on both sides relied on the documents filed on behalf of each party and orally augmented the parties’ positions.
- 6.2. In their oral arguments Counsel merely repeated what was already in the written arguments and affidavits.

7.0 ANALYSIS AND DECISION

- 7.1. I have heard and considered the evidence and arguments by the parties as regards the preliminary issue raised by the Defendants under **Order 14A** as read with **Order 33 rule 3 of the Rules of the Supreme Court**¹. I have noted the fact that the preliminary issue

raised by the Defendants in the application is whether this Court has jurisdiction to hear and determine the application made by the Plaintiff as the parties agreed that the governing law and forum for resolution of disputes is the law and courts of South Africa. I will first address the issues raised by the Plaintiff concerning the undated Affidavit and certificate of exhibits filed by the Defendants and that the Defendants have exhibited an incomplete Master Lease Agreement and the Schedules marked “**AAF 1**” thereby depriving this Honourable Court an opportunity to fully appreciate the contended documentary evidence herein. I will also address the issue raised by the Defendants that Counsel for the Plaintiff is not competent to swear to the Affidavit in Opposition having not been a party to the Agreement and thus it constitutes giving evidence from the bar before addressing the substantive application.

- 7.2. Counsel for the Plaintiff contended that the Affidavit in Support of Summons to Dispose Case on a Point of Law dated 16th August 2024 is undated which renders it null and void because the jurat and certificate of exhibits are undated. The Plaintiff relied on **Order 5 rule 20 (g) of the High Court Rules², Section 6 of the Commissioner for Oaths Act³** and the **Indo-Zambia Bank Limited¹²** case. The Supreme Court provided guidance on this matter in the case of **Sun Country Limited v Charles Kearney Roslyn Kearney¹³** as follows:

“The law regarding affidavits is chiefly to be found in the Commissioner for Oaths Act, chapter 33 of the Laws of Zambia, Order 5 rule 20 of the High Court Rules, chapter 27 of the Laws of Zambia and the Interpretation and General Provisions Act, chapter 2 of the Laws of Zambia. There is also a fall back position provided by Order 41 of the Supreme Court Practice (White Book) 1999 edition. In our considered opinion, a consideration of these laws should help us resolve the issue in this appeal without being drawn into attempting to interpret article 118(2)(e) of the Constitution.”

The Supreme went on to consider the above provisions and decided on whether the trial Judge was on firm ground to base his rejection of the affidavit on the deficiency or the perceived deficiency of the jurat of both the affidavit in support and the affidavit in reply.

- 7.4. The Supreme Court in the **Sun Country Limited case**¹³ supra, took the following position:

It is clear to us that the requirements under Order 5 rule 20 of the High Court Rules and section 6 of the Commissioner for Oaths Act are in respect of the form of the document as opposed to the substance. In our understanding, section 47 of the Interpretation and General Provisions Act, chapter 2 of the Laws of Zambia sheds some light on the practical consequences of defects in form on one hand and in substance on the other. That section provides as follows:

“Save as otherwise expressly provided, whenever any form is prescribed by any written law, an instrument or document which purports to be in such form, shall not be void by reason of any deviation therefrom which does not affect the substance of such instrument or document, or which is not calculated to mislead.”

The import of the above section is that if the defect in an instrument or document is in form, it is not a fundamental defect or irregularity and is thus curable. An affidavit afflicted by such a defect is receivable in proceedings under Order 5 rule 13 of the High Court Rules which counsel for the appellant quoted. That rule authorizes courts to receive affidavits despite irregularities in form. It states as follows:

“The court or a judge may permit an affidavit to be used notwithstanding it is defective in form according to the Rules, if the court or judge is satisfied that it has been sworn before a person duly authorized.”

In the present case there was no issue raised regarding the authority of the Commissioner of Oaths before whom the affidavits which the lower court deemed to have fallen foul of the law were sworn.

To further confirm that an affidavit which is defective in form only is not a minefield for a party desiring to rely on it, Order 5 rule 14 of the High Court Rules provides that:

“A defective or erroneous affidavit may be amended and resworn by leave of court or a judge, on such terms as to time, costs or otherwise as seems reasonable.”

Order 41 rule 4 of the Rules of the Supreme Court (White Book) 1999 edition, states that:

“An affidavit may, with the leave of the court, be filed or used in evidence notwithstanding any irregularity in the form thereof.”

The explanatory notes in the White Book on the effect of that rule read as follows:

“This rule is permissive. If the irregularity can be cured without undue hardship, or it is not a matter of substance or affects its actual content, then it should be put right. Any costs will fall on the solicitor responsible.”

Taking the argument further, and for good measure, the contention against expunging the affidavits premised on Order 5 rule 13 of the High Court Rules, would, of course, be open to challenge on grounds that since Order 5 rule 13 of the Rules appears to contravene a statutory provision in the name of section 6 of the Commissioner for Oaths Act, the High Court Rules, which are subsidiary legislation, have to give way to a principal provision of the statute. That, in our view, would be a decent argument to make. However, even if Order 5 Rule 13 were to be discounted from application, section 47 of the Interpretation and General

Provisions Act which we have quoted, would still be sufficient to save the affidavits in question.

We are at a loss as to why the lower court had requested the appellant to refile the application for special leave when the same application with a fully compliant affidavit was already on the record. There was, in our view, already sufficient material that the judge could have used without resorting to the technical issue arising from the refilled affidavits.

In conclusion, we hold that there was no defect in the two affidavits to merit striking them out. Neither the learned judge in his rationcination nor the learned counsel for both the appellant and the respondent in their heads of argument appear to have addressed their mind to section 47 of the Interpretation and General Provisions Act. Had the learned judge done so, he would no doubt have concluded that the affidavits that he expunged from the proceedings were, after all, receivable despite the alleged irregularity.

There is equally no reason why the court would not arrive at the same decision, at least in the case of the affidavit in reply, where the stamp of the Commissioner for Oaths states the date and place when the affidavit was attested to, although the jurat lacks one.

Despite the apparently mandatory rendition of section 6 of the Commissioner for Oaths Act, therefore, courts can under the law as we have explained it, overlook a minor irregularity such as an omission of the date when the affiant appended his signature to the affidavit. Omission of a date does not go to the jurisdiction of the court, nor does it prejudice the adverse party in any fundamental respect. It ought not to be treated as nullifying an affidavit. In these circumstances we are persuaded that the learned High Court judge ought to have risen to the higher calling

to do justice by saving the application before him and ultimately the proceedings in issue. Being of that persuasion, we think that the ends of justice would best be served by sustaining the proceeding in the lower court.”

In light of the impeccable guidance of the Supreme Court on how to treat affidavits defective in form, I will allow the Defendants’ affidavit to remain on record and be taken into account in determining the application herein as the defect in issue is in form only.

7.6. I have perused the record and taken note of the concern raised by the Plaintiff that the Defendants have exhibited an incomplete Master Lease Agreement and the Schedules thereby depriving this Court an opportunity to fully appreciate the contended documentary evidence herein. A perusal of the record shows that the last page which shows the execution of the agreement is indeed missing as well as the schedules. However, there is no contention that the parties did not sign the agreement and neither do the missing parts mentioned go to the root of the issue that this Court has been asked to determine, which is Clause 16 of the Master Lease Agreement. Therefore, the argument by the Plaintiff in that respect is not sufficient to attract rejection of the affidavit and the Master Lease Agreement in issue from consideration.

7.7. I will now address the issue raised by the Defendants that Counsel for the Plaintiff is not competent to swear to the Affidavit in Opposition having not been a party to the Agreement and thus it constitutes giving evidence from the bar. The Supreme Court in the case of **Chikuta v Chipata Rural**¹⁴ raised concern about counsel swearing affidavits in contentious matters. This position was upheld in the case of **Shell and BP Zambia Limited v Conidaris and Other**¹⁵. In the case of **The Post Newspaper v Rupiah Bwezani Banda**² cited by the Defendants **the Court held as follows:**

“Our understanding of the Chikuta case is that this Court did not impose a blanket ban of the swearing of affidavits by counsel even in procedural applications”.

I have perused the affidavit sworn by Counsel for the Plaintiff and note that Counsel's deposition focuses on the Master Lease Agreement signed by the parties herein, particularly Clause 16 which provides for legal proceedings arising from the Agreement and which courts the parties may institute the proceedings. The affidavit in my view contains Counsel's knowledge obtained from reading the Agreement which is still discouraged as guided in the Chikuta case. However, Counsel did not end there but went into what is more concerning. Counsel was very argumentative in his affidavit. He went to great lengths to give his legal interpretation of the Agreement and arguments against the Defendants' position. **Order 5 Rule 15 of the High Court Rules¹** provides that:

"An affidavit shall not contain extraneous matter by way of objection or prayer or legal arguments or conclusion."

Paragraphs 8 to 18 of the Plaintiff's affidavit deposed to by Counsel contravene the **Order 5 Rule 15 of the High Court Rules¹** and are hereby expunged.

7.8. Having addressed the legal observations raised by the parties, I will proceed to determine the Defendants' preliminary issue. The question is whether this Honourable Court has jurisdiction to hear and determine this matter in light of the parties agreeing that the governing law and forum for resolution of any disputes arising between them is the law and courts of South Africa.

7.9. **Order 14A rules 1, 2 and 3 of the White Book¹** provides as follows:

"(1) The Court may upon the application of a party or its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that-

(a) such question is suitable for determination without a trial of the action and;

(b) such determination will finally determine (subject only to any possible appeal) the entire cause or matter or any claim or issue herein.

(2) Upon such determination the Court may dismiss the cause or matter or such order or Judgment as it thinks just

(3) The Court shall not determine any question under this Order unless the parties have either-

(a) had an opportunity of being heard on the question, or

(b) consented to an order or judgment on such determination.”

Order 33 rules 3 and 7 of the White Book¹, on the other hand, provides as follows:

“(3) The Court may Order any question or issue arising in a cause or matter whether the fact or law or partly of fact or law and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated.

(7) If it appears to the Court that the decision of any question or issue arising in a cause or matter and tried separately from the cause or matter substantially disposes of the cause or matter or renders the trial of the cause or matter unnecessary, it may dismiss the cause or matter or make such other order or give such judgment therein as may be just.”

Among the requirements of **Order 14A** given under **Explanatory Note 14A/2/3 of the White Book¹** is that the defendant must have given notice of intention to defend and the question of law or construction is suitable for determination without a full trial of the action. The Defendant gave notice of intention to defend by filing a Memorandum of Appearance in the prescribed form, accompanied by a Defence on 8th August, 2024. I am satisfied that the elaboration stated in the case of **Kufamuyeke Mukelebai v Ester Nalwamba and Others¹⁶**, though a decision of even Court the same is persuasive, and the requirement has been complied with. Furthermore, the

parties were given an opportunity to be heard on the preliminary issue as presented in their respective affidavits and submissions. Based on the authorities cited above, I am satisfied that the application was properly launched under the provisions of **Order 14A of the White Book**¹. However, I do note that the Defendants filed both a Notice of Motion and Summons when **Order 14A rule 2 of the White Book**¹ provides that an application under **rule 1** may be made by Summons or motion or (notwithstanding **Order 32 rule 1**) orally. Nevertheless, this, in my view, is not fatal to the Defendants' case but simply superfluous.

- 7.10. To determine whether this Court has jurisdiction to determine the matter between the parties herein, there is need to interrogate Clause 6 of the Agreement. Clause 6 reads:

“The Lessee hereby consent in terms of Section 45 of the Magistrates Court Act, No 34 of 1944, that any legal proceedings arising from this Agreement may be instituted in the Magistrate’s Court of any district with jurisdiction in terms of Section 28(1) of the said act. Notwithstanding the above, the Lessor may at its election proceed in the High Court of South Africa or any other Court that might have jurisdiction and the Lessee submits to the non-exclusive jurisdiction of the Witwatersrand Local Division of the High Court of South Africa.”

- 7.11. The term jurisdiction was explained by Ngulube D.C.J (as he then was) in the case of **Godfrey Miyanda v Attorney General**¹⁷ 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 cognizance 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 cognizance or to the area over which the jurisdiction extends or both."

- 7.12. With regard to the jurisdiction of the High Court, the Supreme Court in the case of **Zambia National Holdings Limited and the United National Independence Party (UNIP) v. Attorney General**¹⁸ made it clear that even though the High Court enjoys original and unlimited jurisdiction, its jurisdiction is not necessarily limitless. The law may specifically limit the jurisdiction. In the case of **Construction & Industrial Maintenance Limited T/A Waco Kwikform v Fair Face Enterprises Limited and Others**¹⁹ my learned brother Bowa, J. considered an application by the Defendants for the dismissal of an action for want of jurisdiction. In that case the Judge was called upon to interpret Clause 12 of a contract signed by the parties which stated as follows:

"The Customer consents in terms of Section 45(1) of the Magistrate's Court Act No. 32 of 1944 as amended in respect of any proceedings which may be instituted against it by Form-Scaff arising out of or in connection with this contract, to the jurisdiction of any Magistrate's Court which at the time of such proceedings has jurisdiction over it in terms of Section 28 (1) of the said Magistrate's Court Act. Notwithstanding the foregoing the Customer specifically agrees that Form-Scaff may in its discretion disregard the foregoing consent to jurisdiction and institute any proceedings arising out of or in connection with this contract in the High Court of South Africa having jurisdiction."

- 7.13. Bowa J, in his ruling held as follows:

"It is my considered view that Clause 12 quoted above is clear in its terms. It is to the effect that any dispute that arises out of the contract between the Plaintiff and the Defendants is to be adjudicated upon by the Magistrate's Courts of South Africa. The clause goes further to grant the creditor the discretion to dispense with taking out an action

in the Magistrate's Courts of South Africa and instead do so in the High Court of South Africa.”

I have noted that the above clause is to a certain extent similar to Clause 16 of the Agreement of the case in *casu* except that the parts reading ***“or any other Court that might have jurisdiction and the Lessee submits to the non-exclusive jurisdiction of the Witwatersrand Local Division of the High Court of South Africa”*** are missing. In his ruling of the **Construction & Industrial Maintenance Limited case**¹⁹,

Bowa, J. went on to hold as follows:

“The Plaintiff's reliance on the case of Larco Concrete Products Ltd. (Supra) does not aid its case. I am satisfied that the parties unequivocally submitted to the jurisdiction of the Magistrate's Courts of South Africa with an option for the Plaintiff to choose to institute legal proceedings in the High Court of South Africa or such other courts having jurisdiction within the Republic of South Africa. This was a choice freely made by the parties and the courts role is to enforce the party's agreement.

The Zambia National Holdings Limited & United National Independency (sic) Party (UNIP) v. Attorney General (supra) makes clear that whilst the High Court enjoys original and unlimited jurisdiction that jurisdiction is not necessarily limitless. The law may specifically limit the jurisdiction or as observed in this case, the agreement of the parties. This is no different from arbitration clauses typically included in agreements....”

7.14. I am mindful that the Supreme Court guided on the difference between arbitration clauses and foreign jurisdiction clauses in the case of **Chansa Chipili, Powerflex (Z) Limited v Wellington Kanshimike and Wilson Kalumba**²⁰ at pages 492 and 493 that:

“We must point out that arbitration clauses are not treated the same as foreign jurisdiction clauses, they are treated differently.

Arbitration clauses are almost always granted as a choice of the parties to settle out of Court, unless a legal impediment is successfully proved. Courts will still look at the jurisdiction with which the action has the most real and substantial connection. Courts will look for connecting factors besides convenience or expense. In this appeal, there are many factors which the learned trial judge is at liberty to explore in order to decide whether or not Californian law should apply to the 2007 draft agreement between the 1st plaintiff and the 1st defendant, to which the second plaintiff and the second plaintiff were not parties.

7.15. In the **Sigma Financial Solutions Limited case⁵** cited by both parties whose facts were that Yield Financing Broker, a subsidiary of the 2nd Appellant and Extreme Trade Group run by Chongo Kalela Sinyangwe, entered into a Standard Conditions of Engagement for Consultancy Services on 11th January, 2021. The said agreement was executed in Dubai, in the United Arab Emirates. Clause 12 of the agreement stipulated that the agreement shall be governed by and construed in accordance with the laws of the United Arab Emirates and that the parties' consent to the exclusive jurisdiction and venue in the courts of the Emirate of Dubai. Following a dispute between the parties, the respondent commenced the action in the High Court of Zambia leading to the appeal in Court of Appeal. Four grounds of appeal were raised and the main issue for determination was whether the court below had jurisdiction to determine the matter in view of Clause 12 providing for exclusive jurisdiction and venue of the disputes between parties, before the UAE Court.

7.16. The Court of Appeal in that case held as follows:

“It is trite as earlier stated that parties should honor their agreement to refer disputes to foreign tribunal/court, unless it is shown that there is some other forum which is more appropriate. The respondent submitted that the Zambian court was the more appropriate forum, than the UAE Court on basis of cost, the contract is closely related to Zambia,

that the jurisdictional clause was unfair, that the companies involved are registered in Zambia. Further, that the witnesses are based in Zambia.

We had earlier held that the companies are not registered in Zambia. Arguments relating to the fact that the appellant took advantage of the ignorance of the respondent on matters of law are untenable. Ignorance of the law is no defence.

We do not agree that the court below in which the matter was commenced has jurisdiction. In our view, the appellants have proved that the Zambian court is not the appropriate forum and that UAE Court is the court that exists with jurisdiction to deal with the dispute.

We further hold that Clause 12 granting exclusive jurisdiction and venue in the courts of Dubai must be enforced. Further, the governing law of the agreement was to be construed in accordance with the United Arab Emirates without giving effect to any choice of law or conflict of law provisions. The parties' expressly consented to the exclusive jurisdiction of the UAE Court. We must give effect to what the parties agreed to."

- 7.17. The position of the law was well espoused by the Court of Appeal with regard to situations where clauses of a contract signed by parties oust the jurisdiction of the court in the case of **Axiz (Pty) Limited v Cloudtech Zambia Limited and Ravikiran Vijay Salvi**²¹. In that matter the Judge had to determine 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. The Judge opined 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. The Plaintiff appealed and the Court of Appeal held as follows:

"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, 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.”

7.18. The Court of Appeal went on to hold as follows:

“In the case of Donohue v Armco Inc and Others, 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 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.”

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 BV1, 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.”

7.19. Furthermore, the issue of convenience was considered by the Court of Appeal in the **Axiz case**²¹ (*supra*) where it was held as follows:

“Our view is that the learned trial judge erred in law and 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 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.

In the case of Steak Ranch Limited v Steak Ranches International BV1, 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 conveniens, 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.

Further, it was argued that the learned 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. 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.””

7.20. It is also important to note that the case of **Axiz case**²¹ (*supra*), was distinguished in the **Sigma Financial Solutions Limited**⁵ by the the Court of Appeal as follows:

“In the case of Axiz (Pty) Limited v Cloudtech Zambia Limited & Another, we held that it is trite law that the jurisdiction of a court cannot be ousted by a foreign jurisdiction clause. We further held that the South African ‘applicable law’ clause in the contract was different from the governing law of the contract and did not, by any stretch of imagination, oust the inherent jurisdiction of the High Court in Zambia. The Axiz case is distinguishable from the facts herein in which there is a jurisdiction clause, expressly providing for the jurisdiction of UAE courts.”

In my view, the reasoning in the **Axiz case**²¹ best applies in the case in *casu*. Indeed, as the Plaintiff has submitted, in the **Sigman Financial Solutions case**⁵ the jurisdiction clause was expressly exclusive. In the case in *casu*, Clause 16 states that apart from instituting legal proceedings in the Magistrate’s Court of any district with jurisdiction in terms of Section 28(1) of the Magistrates Court Act, No 34 of 1944 of South Africa, **“the Lessor may at its election proceed in the High Court of South Africa or any other Court that might have jurisdiction”**. Clause 16 also makes the Lessee (Defendants) **“submit to the non-exclusive jurisdiction of the**

Witwatersrand Local Division of the High Court of South Africa". (underlined for emphasis). This in my view gives the Plaintiff options to institute legal proceedings in any other Court with jurisdiction not only in South Africa. The Defendants' contention that any other court that might have jurisdiction refers to South African courts only is an attempt by Counsel to add words to the Agreement as there is no such suggestion from the reading of the Agreement itself. Therefore, I do not agree with the Defendants' argument on the principle of *noscitur a sociis*, that the context in which the words "**any other Court that might have jurisdiction**" is limited to the Courts of South Africa.

7.21. The Supreme Court in the **Chansa Chipili**²⁰ case *supra*, considered three decided cases where business transactions cross boundaries or where foreign jurisdiction clauses are present and came up with the following conclusion:

"These three cases demonstrate 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. These authorities, though not binding are persuasive."

In the present case the Plaintiff is a South African incorporated company while the 1st Defendant is a Zambian incorporated company and the 2nd Defendant is its Director. This Court *prima facie* has jurisdiction to hear and determine this matter unless it is shown that there is a more convenient forum where the matter can receive proper justice. The Plaintiff attempted to lead evidence to show that Zambia is more convenient but the source of some of the information such as the whereabouts of the assets remains questionable as the source for

such conclusion was not disclosed. Counsel was adducing evidence from the bar. However, the duty to lead such evidence was on the Defendants but no such evidence was adduced. Clearly, there is nothing adduced to make Zambian Courts less convenient fora compared to South African Courts for determination of this matter.

7.22 Guided by the cited authorities above, I hold the view that a foreign jurisdiction clause is not an automatic ouster of jurisdiction from a domestic Court. The circumstances under which the Court can be yield such jurisdiction to a court of another jurisdiction were not advanced by the Defendants. The application, therefore, fails. I find the preliminary issue raised by the Defendants to be without merit and the application is accordingly dismissed with costs to the Plaintiff.



Lastone Mwanabo
HIGH COURT JUDGE

