

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

**2011/HP/0183**

**BETWEEN:**

**STEAK RANCH LIMITED**

**APPLICANT**

**AND**

**STEAK RANCHES INTERNATIONAL BV**

**RESPONDENT**

**BEFORE THE HON. JUSTICE NIGEL K. MUTUNA ON 3<sup>rd</sup> DAY OF APRIL, 2012**

For the Plaintiff : Mrs. P.K. Yangailo of Messrs PH Yangailo &  
Company  
For the Defendant : Mr. A. Dudhia and Ms M. Banda of Messrs Musa  
Dudhia & Company

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## **RULING**

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Cases referred to:

- 1. *Lumus Agricultural Services Company Limited & Others -VS- Gwembe Valley Development Company Limited (In receivership) (1999) ZR at page 1.***
- 2. *Anuj Kumar Rathi Krishnan -VS- The People HPA/11/2010 (Unreported).***
- 3. *Mount Albert Borough Council -VS- Australasian, etc, Assurance Society Ltd (1938) A.C. 224.***
- 4. *Spiliada Maritime Corporation -VS- Consulex Limited The Spiliada (1986) 3 ALL ER page 625.***

Other authorities referred to:

1. **Supreme Court Practice 1999 Volume 1**
2. **The Authentication of Documents Act, Chapter 75 of the Laws of Zambia**
3. **Cheshire & North's Private International Law, 11<sup>th</sup> edition, Butterworths.**
4. **Dicey & Morris (1980), The Conflict of Laws 10<sup>th</sup> edition**
5. **Halsburys Laws of England 4<sup>th</sup> edition Re-issue, Volume 8(3)**
6. **Blacks Law Dictionary by B. Garner 8<sup>th</sup> edition.**
7. **High Court Act Chapter 27 of the Laws of Zambia.**
8. **Constitution Chapter 1 of the Laws of Zambia.**

The delay in delivery of this ruling is regretted.

This is the Defendant's application to dismiss the action on a preliminary point of law. It is made pursuant to Orders 14A rule 1 and 33 rule 7 of the **Supreme Court Practice 1999 (whitebook)**. By the said application, the Defendant seeks an order to dismiss this action upon the determination of the following points of law, namely;

"1 *Authentication issue*

(a) *Whether or not the Franchise agreement was executed in South Africa;*

(b) *Whether it was authenticated for use in Zambia and*

(c) *If the Franchise Agreement was not authenticated then whether the Franchise Agreement can be used before the Court in Zambia*

2 *Conveniens Forum issue*

(a) *Whether or not the dispute between the parties should be heard in South Africa due to the fact that the governing law of the Franchise Agreement as stated in clause u is South African law for the enforcement of any alleged right."*

In support of the application, the Defendant filed an affidavit sworn by one Arshad Dudhia on 23<sup>rd</sup> August, 2011. Along with the said affidavit the Defendant filed skeleton arguments and supplementary skeleton arguments on 23<sup>rd</sup> August, 2011 and 21<sup>st</sup> October, 2011, respectively.

The Plaintiff's response is by way of an affidavit in opposition sworn by one Nicholas Moyo and skeleton arguments, both filed on 17<sup>th</sup> October, 2011.

The evidence as it is revealed in the affidavit in support is that the Plaintiff and Defendant had entered into a Franchise Agreement (the agreement) dated 1<sup>st</sup> November, 2001. The said agreement was executed by the two in the Republic of South Africa and provides, *inter alia*, that it shall be governed by the laws of the Republic of South Africa. Therefore the most convenient forum for the resolution of the dispute is South Africa. Further, since the agreement was executed outside Zambia and was not authenticated in accordance with the provisions of ***The Authentication of Documents Act***, the agreement cannot be enforced against either of the parties before any Court of law in Zambia.

The evidence in the affidavit in opposition confirms that the parties entered into the agreement and that it was executed in South Africa. It went on to reveal that the agreement does not state that South African law would apply exclusively as it provides for application of Zambian law where appropriate. Further, that there is no exclusion of jurisdiction by the Zambian Courts. This was especially so because the Defendant being controlled from the Netherlands has very little connection to South Africa unlike the Plaintiff which is operated from Zambia.

The affidavit ended by revealing that the agreement had been duly authenticated in compliance with ***The Authentication of Documents Act***. It can therefore be enforced by either party.

The application came up for hearing on 8<sup>th</sup> December, 2011.

In the Defendant's skeleton arguments, Mr. A Dudhia and Ms M. Banda began by highlighting the background to the matter. In so doing they confirmed that the parties had executed the agreement in South Africa and that by clause u the agreement was to be governed and interpreted in accordance with laws of South Africa. Counsel went on to justify the application with reference to Order 14A rule 1 as read with Order 33 rule 7 of the ***whitebook***. They argued that this Court has jurisdiction to determine the preliminary issues at this stage of the proceedings and in the absence of holding a full trial. Further that should the Court find that the application is meritorious, it should dismiss the action.

Counsel proceeded to argue the issues raised as follows. As regards authentication of the agreement, counsel argued that a document executed outside Zambia cannot be used for any purpose in Zambia if it is not authenticated in line with Section 3 of ***The Authentication of Documents Act*** (the Act). It was argued that the agreement produced in evidence as exhibit "AAD1" had not been authenticated in line with the Act and neither had it been authenticated at all. As a result of this, the agreement is null and void and cannot be enforced in Zambia. Further that although the law made provision for a document executed outside Zambia to be authenticated as late as a year after its execution, such a document should not be acted upon prior to its authentication. In articulating the foregoing arguments counsel drew my attention to the cases of ***Lummus Agricultural Services Company Limited & others -VS- Gwembe Valley***

***Development Company Limited (in Receivership) (1) and Anuj Kumar Rathi Krisnan -VS- The People (2).***

Counsel went on to argue that the subsequent authentication of the agreement as evidenced by exhibit “NM1” to the affidavit in opposition did not validate it because the authentication was done subsequent to commencement of the action and not in accordance with Section 3 of the Act.

As regards the issue of *forum non conveniens* counsel argued that even if the agreement was otherwise enforceable in Zambia, clause u provided for the agreement to be governed by South African law. Therefore, the convenient forum for the resolution of the dispute is South Africa. The parties having expressed their intention in words via clause u on the applicable law, the Court is bound to give effect to their intention. Counsel made reference to ***Dicey and Morris (1980), The Conflict of Laws*** and the case of ***Mount Albert Borough Council -VS- Australasian, etc, Assurance Society Ltd (3)***. The intention of the parties was clearly that the agreement should be governed by the laws of South Africa. This follows from the fact that one of the parties is based in The Netherlands whilst the other Zambia, as such, and as is common with international commercial agreements, the parties chose a neutral law to govern their relationship. Quoting from ***Dicey and Morris***, counsel argued further that this 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 is it by its terms or by implication governed by Zambia law.

In the Plaintiff's skeleton arguments, counsel for the Plaintiff Mrs. P.K. Yangailo began her arguments by confirming that the agreement was indeed executed in South Africa. For this reason it required to be authenticated in

accordance with Section 3(d)(ii) of the Act. The said Section does not prescribe a time limit within which a document should be authenticated. Further, the Plaintiff had caused the agreement to be authenticated on 8<sup>th</sup> July, 2011 by the Assistant Director in the Department of International Relations and Corporations in the Ministry of Foreign Affairs at Pretoria, South Africa. Having been so authenticated the agreement is compliant with the requirements of the Act. She stated that a document signed outside Zambia is available for use in Zambian Courts as long as it is authenticated before it is introduced into evidence before the Zambian Courts. The agreement in issue had not been introduced into evidence yet and as such there was nothing wrong with its being authenticated at this stage.

Counsel went on to argue that the facts in the **Lumus (1)** case are distinguished from the facts in this case because in the **Lumus (1)** case, an attempt was made to introduce the document in issue before it was authenticated and against a third party. The subsequent authentication of the agreement is therefore in conformity with the principle in the **Lumus (1)** case because it was authenticated prior to its being introduced into evidence.

As regards the argument on *forum non conveniens*, counsel argued that clause u of the agreement does not expressly state whether it is the South African or Zambian Courts that have jurisdiction to determine the dispute. Further that, the issue of jurisdiction should not be confused with the issue of the applicable law as provided in the contract. My attention in this respect was drawn to **Halsbury's Laws of England 4<sup>th</sup> edition reissue, Volume 8(3)**. Counsel went on to argue that application of foreign law in Zambia is a fact that must be proved in the absence of which Zambian law would apply. For this reason the parties to the agreement gave themselves an option to either apply South African or Zambian law. She proceeded to trace the development of the principle of *forum non conveniens* in English law with

reference to ***Cheshire and North's Private International Law***, quoting from the case of ***Spiliada Maritme Corpn -VS- Consulex Limited (4)***.

Counsel went on to restate the argument that the agreement does not specify which Court has jurisdiction in relation to a dispute arising from it. This being the case the jurisdictional issue should be settled in terms of Sections 4 and 9 of the ***High Court Act*** and Article 94 of the ***Constitution***. By these two Sections and Article this Court has inherent jurisdiction in all matters. The circumstances of this case also lend credence to the argument because the Plaintiff is a Zambian registered company, carrying on business in Zambia with its seat of management and control in Zambia. The Defendant on the other hand is operated from the Netherlands and not South Africa. Counsel ended her arguments by articulating the principles in statutory interpretation.

I have considered the affidavits and the arguments by counsel for the parties. By this application, the Defendant has requested this Court to consider the preliminary issues raised, which I have reproduced at page R2 of this ruling. It is the Defendant's prayer that this Court should uphold the preliminary issues raised and in so doing dismiss this action.

The application as a whole is anchored on Orders 14A as read with Order 33 rule 7 of the ***whitebook*** which state as follows;

Order 14A (1)

***“(1) The Court may upon the application of a party or of 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 full 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 therein.**

**(2) Upon such determination the Court may dismiss the cause or matter or make such order or judgment as it thinks just."**

Order 33 rule 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."**

By the said orders, this Court is firstly clothed with jurisdiction to entertain an application by way of a preliminary issue raised at any stage of the proceedings in a matter. Secondly, if the determination of the issue is such that the Court finds that the action as a whole will have been disposed of by such determination, may dismiss the matter. In view of the foregoing this application is therefore properly presented and I do have jurisdiction to entertain it.

I now turn to determine the issues raised. The first issue is one of validity of the use of or reliance on the agreement by the Plaintiff in prosecuting its action against the Defendant. The Defendant has questioned the Plaintiff's use of the agreement in prosecuting this action because initially the agreement was not authenticated in accordance with the provisions of Section 3 of the Act, and subsequently, although authenticated, it was not in line with the said Section.



In determining this issue I intend to first define authentication, then state the law with respect to documents requiring to be authenticated and finally state whether or not it was necessary for the Plaintiff to authenticate the agreement in accordance with Section 3 of the Act.

The definition section in the Act is Section 2 and it states as follows in defining the word authentication;

***“In this Act, unless the context otherwise requires -  
“authentication”, when applied to a document, means the  
verification of any signature thereon:...***

(The underlining is the Courts for emphasis only).

Further, ***Blacks Law Dictionary, eighth edition*** by ***Bryan A. Garner***, defines authentication in like manner at page 142 as follows;

***“Broadly, the act of proving that something (as a document) is  
true or genuine, esp. so that it may be admitted as evidence.”***

It can be discerned from the foregoing definitions that authentication is the confirmation of the genuineness of the document and or signatures thereon for purposes of admitting it into evidence.

As regards when a document should be or is required to be authenticated and how it should be authenticated Section 3 of the Act states as follows;

***“Any document executed outside Zambia shall be deemed to  
be sufficiently authenticated for the purpose of use in Zambia  
if -***

***(a) In the case of a document executed in Great Britain  
or  
Ireland it be duly authenticated by a notary public under  
his***

***signature and seal of office.***

***(b) In the case of a document executed in any part of Her***

***Britannic Majesty's dominions outside the United Kingdom it***

***be duly authenticated by the signature and seal of office of the mayor of any town or of a notary public or of the permanent head of any Government Department in any such part of Her Britannic Majesty's dominions;***

***(c) In the case of document executed in any of Her Britannic***

***Majesty's territories or protectorates in Africa it be duly authenticated by the signature and seal of office of any notary, magistrate, permanent head of a Government Department, Resident Commissioner or Assistant Commissioner in or of any such territory or protectorate;***

***(d) In the case of a document executed in any place outside Her***

***Britannic Majesty's dominions (hereinafter referred to as a "foreign place") it be duly authenticated by the signature and seal of office -***

***(i) Of a British Consul-General, Consul or Vice-Consul in such foreign place; or***

***(ii) Of any Secretary of State, Under-Secretary of State, Governor, Colonial Secretary, or of any other person in such foreign place who shall be shown by the certificate of a Consul or Vice-Consul of such foreign place in Zambia to be duly authorized under the law of such foreign place to authenticate such document."***

The **Lumus (1)** and **Rathi (2)** cases as counsel for the Defendant argued have interpreted the meaning and effect of section 3 of the Act as follows. In the case of the former it held as follows at page 8

***“It is quite clear from section 3 that if a document executed outside Zambia is authenticated as provided, then it shall be deemed or presumed to be valid for use in this country and if it is not authenticated then the converse is true that it is deemed not to be valid and cannot be used in the country.”***

The latter states as follows at pages 39 and 40.

***“This section demonstrates the need for a document executed outside Zambia to be notarized for it to be valid for use in Zambia...since the said documents were deposed to outside Zambia, they should have been authenticated in accordance with section 3 of The Authentication of Documents Act, for purpose of validating them, for use in Zambia. In view of the fact that the documents were not so authenticated, the trial Court erred at law in admitting them in evidence.”***

The effect of the principles highlighted in the foregoing authorities is that a document executed outside Zambia needs to be authenticated in accordance with Section 3 of the Act if it is to be valid for use in Zambia. However, the facts of the **Lumus (1)** and **Rhati (2)** cases indicate that the persons challenging the use of the documents executed outside the country were strangers or third parties to the documents. In the former case the First Appellant who challenged the use of a notice of appointment of receivers executed outside Zambia was not a party to the document. The same was the case in the **Rhati (2)** case, in which the appellant challenged the validity of documents to which he was not a party and which emanated from the United Kingdom. In this matter the Defendant who is challenging the use of the agreement is a party to the agreement. To this extent the two

cases, i.e. **Lumus (1)** and **Rhati (2)** case are distinguished from this matter. Further in, my considered view, where the party challenging a document executed outside Zambia is a party to the document and he does not, as is the case in this matter, dispute that he executed the document or the validity of the signatures thereon, there is no need for such a document to be authenticated in accordance with Section 3 of the Act to make it valid for use in Zambia. My finding is arrived at by revisiting the definition and indeed purpose of authentication of document as highlighted in Section 2 of the Act and **Blacks Law Dictionary**, which is for purposes of validating or proving that the document is genuine. The parties to this matter have both confirmed that they executed the agreement and have not disputed this fact nor the genuineness of the agreement and as such it is to be taken as a genuine document which does not need authentication. In making the foregoing finding I have also revisited the other holding by the Court in the **Lumus (1)** case at page 9 which states that;

***“We agree with the decision that an instrument which is not attested or registered is valid between the parties but ineffective against other persons...”***

This holding confirms my finding that the agreement is valid between the two parties.

In view of my finding in the preceding paragraphs, I find no merit in the first preliminary issue raised by the Defendant and accordingly dismiss it.

I now turn to determine the preliminary issue raised in respect of the issue of *forum non conveniens*.

In championing its position, it has been argued by the Defendant that the South African Court's are the most suitable forum for determination of the dispute because the parties executed the agreement in South Africa and

agreed that they would apply South African law in interpreting the agreement. On the other hand the Plaintiff has argued that the fact that the parties agree on South African law does not, in and of itself, mean that it is the South African Courts that have jurisdiction to determine the matter. It was argued that the governing law of a contract must be viewed separately from the issue of jurisdiction. Further, that in determining the latter what is crucial is the agreement of the parties and in the absence of such agreement connecting factors such as where the parties are resident and conduct their business. It was argued that the Defendant has no connections whatsoever to South Africa (save for the fact that the agreement was executed in South African) as it carries on business in The Netherlands. On the other hand, the Plaintiff is connected to Zambia by virtue of its operations being based in Zambia.

In defining the terms *forum conveniens* and *forum non conveniens*, **Blacks Law Dictionary** puts in simple perspective the criteria that the Court should consider in determining the appropriate forum for adjudication of a matter. It states at pages 680 to 681 as follows; firstly in respect of *forum conveniens*;

***“The Court in which an action is most appropriately brought, considering the best interests and convenience of the parties and witnesses C.F FORUM NON CONVENIENS”***

And secondly in respect of the *forum non conveniens*;

***“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 - Also termed forum inconviens.***

***“Forum non conveniens allows a Court to exercise its discretion to avoid the oppression or vexation that might result from automatically honoring Plaintiff’s forum choice. However, dismissal on the basis of forum non conveniens also requires that there be an alternative forum in which the suit can be prosecuted. It must appear that jurisdiction over all parties can be secured and that complete relief can be obtained in the supposedly more convenient Court. Further, in at least some states, it has been held that the doctrine cannot be successfully invoked when the Plaintiff is resident of the forum state since, effectively, one of the functions of the state Courts is to provide a tribunal in which their residents can obtain an adjudication of their grievance. But in most instances a balancing of the convenience to all the parties will be considered and no one factor will preclude a forum non conveniens dismissal, as long as another forum is available” Jack H. Friedenthal et al., Civil Procedure §§ 2.17, at 87-88 (2d ed. 1993).”***

(The underling is the Court’s emphasis only).

It is clear from the foregoing definitions that as the terms suggest a matter should be determined in the Court where it is most convenient for the parties to it. Further, the presumption is that the Court in which the action is commenced has jurisdiction unless the party challenging jurisdiction can prove otherwise. In doing so he must demonstrate that the forum in which an action has been commenced is not convenient and that an alternative convenient forum exists.

The principles highlighted in the preceding paragraph are confirmed by the holding in the case of ***Spiliada Maritime Corporation -VS- Cansulex Limited The Spiliada (4)*** which states as follows at page 844;

***“(1) The fundamental principle applicable to both the stay of English proceedings on the ground that some forum was the appropriate forum and also the grant of leave to serve proceedings out of the jurisdiction was that the Court would choose that forum in which the case could be tried more suitably for the interests of all the parties and for the ends of justice (see p 846 c d, p 847 a to c, p 853 d e and p 854j, post); dictum of Lord Kinneer in *Sim v Robinow* (1892) 19 R (Ct of Seas) 665 applied; *Societe du Gaz de Paris v SA de Navigation ‘Les Armateurs Francias’* 1926 SC (HL) 13 considered.***

***(2) In the case of an application for a stay of English proceedings the burden of proof lay on the Defendant to show that the Court should exercise its discretion to grant a stay. Moreover, the Defendant was required to show not merely that England was not the natural or appropriate forum for the trial but that there was another available forum which was clearly or distinctly more appropriate than the English forum. In considering whether there was another forum for the trial but that there was another forum which was more appropriate the Court would look for that forum with which the action had the most real and substantial connection, eg in terms of convenience or expense, availability of witnesses, the law governing the relevant transaction, and the places where the parties resided or carried on business. If, however, the Court concluded that there was another forum which was prima facie more appropriate than the English Court it would normally grant a stay unless there were circumstances militating***

***against a stay, eg if the Plaintiff would not obtain justice in the foreign jurisdiction”***

(The underlining is the Court’s for emphasis only).

The foregoing passage clearly demonstrates that the principle determining factor is not the choice of law the parties have made. The applicable law is merely one of the elements to be considered.

Applying the foregoing test to this matter, a perusal of the agreement which is produced as exhibit AD1 to the affidavit in support of this application at page 3 thereof, clause B1 indicates that the Plaintiff has the right to set up a specialized restaurant. The said restaurant is located at shop number LO1 Manda Hill, Shopping Centre, Great East Road Lusaka, Zambia. This demonstrates that the agreement as it relates to the setting up of the aforementioned restaurant is to be performed in Zambia. Further, by paragraph 7 of the affidavit in opposition filed by one Nicholas Moyo, the Plaintiff is registered, operated and controlled in the Republic of Zambia under Zambian law. This fact is confirmed by clause A. 1.2. of exhibit AD1 which clause states that the Plaintiff is a company registered in accordance with the laws of the Republic of Zambia. Further, although clause u stipulates that the law of South Africa is the governing law there is an option left open for application of Zambian law. The said clause is at page 39 of exhibit AD1 and it states, *inter alia*, as follows;

*“This agreement shall be governed and interpreted according to the laws of the Republic of South Africa, save that if for any reason any Court in Zambia having jurisdiction to hear or determine any proceedings in terms of this agreement refuses to apply the laws of the Republic of South Africa, then solely for the purpose of such proceedings this agreement shall be deemed governed by the laws of Zambia.”*



This fact and the other facts I have highlighted in the earlier part of this paragraph clearly demonstrates that the agreement has its closest connection to Zambia. The argument by the Defendant that South Africa is the most convenient forum is therefore untenable as there appears no connection by the agreement or the parties to South Africa save for the fact that clause u stipulates application of South African law as a first alternative in the interpretation of the agreement. The Defendant has therefore failed to discharge the onus placed upon it as per ***The Spiliada (4)*** case of demonstrating that there is an alternative forum which is more convenient.

My findings in the preceding paragraph are fortified by the fact that domestic Courts as I have stated earlier are presumed to have jurisdiction unless the contrary is proved. I would venture to state that, therein lies the rational behind the provisions of article 94 of the ***constitution*** which vests original jurisdiction to this Court in all matters. The article state as follows;

Article 94 (1)

***“There shall be a High Court for the Republic which shall have, except as to the proceedings in which the Industrial Relations Court has exclusive jurisdiction under the Industrial and Labour Relations Act, unlimited and original jurisdiction to hear and determine any civil or criminal proceedings under any law and such jurisdiction and powers as may be conferred on it by this Constitution or any other law.”***

(The underlining is the Court’s for emphasis only).

Preliminary issue 2 therefore also fails.

In arriving at the foregoing finding, I have considered the arguments advanced by counsel for the Defendant on the applicable law to the dispute

and quotes from ***Dicey and Morris***. Though I endorse the principles stated therein, I find that they are only relevant where there is a dispute by the parties as to applicable law or where conflict of laws issues arise. This is not the situation in this matter as the applicable law is agreed upon by the parties.

By way of conclusion, this application lacks merit and I accordingly dismiss it with costs. I further direct that the matter come up for a Scheduling Conference on 17<sup>th</sup> day of April, 2012 at 08:15 hours.

**Delivered on the 3<sup>rd</sup> day of April, 2012.**

Nigel K. Mutuna  
**HIGH COURT JUDGE**