

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

2016/HP/ARB/0009

**IN THE MATTER OF: AN APPLICATION FOR INTERIM RELIEF  
PENDING THE COMMENCEMENT AND  
CONCLUSION OF ARBITRATION  
PROCEEDINGS**

**BETWEEN:**

**HOTELLIER LIMITED**

**AND**

**EASTERN AND SOUTHERN AFRICAN TRADE  
AND DEVELOPMENT BANK**



**APPLICANT**

**RESPONDENT**

Before Hon. Mrs. Justice A. M. Banda-Bobo on 16<sup>th</sup> June, 2017

**FOR THE APPLICANT: Mr. M. M. Mundashi, SC with Mr. D.  
M. Chakoleka of Messrs Mulenga  
Mundashi Kasonde Legal Practitioners**

**FOR THE RESPONDENT : Mr. M. L. Sikaulu, with E. Hanziba of  
SLM Legal Practitioners**

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**R U L I N G**

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**Legislation and other Works referred to:**

- Arbitration Act No. 19 of 2000
- Statutory Instrument No. 75 of 2001

On 17<sup>th</sup> October, 2016, the applicant filed Originating Summons for an interim measure of protection pending the commencement and



conclusion of arbitration proceedings pursuant to Section 11(1) and (2) of the Arbitration Act No. 19 of 2000 as read together with Rule 9 of the Arbitration (Court Proceedings) Rules, Statutory Instrument No. 75 of 2001. They also filed an affidavit in support as the record will show. I granted the ex-parte order Interim measure of protection on 27<sup>th</sup> October, 2016.

However before the matter could be heard, there was an application to serve process by substituted service which I granted. On 7<sup>th</sup> November, 2016, when the matter came up, even though there was counsel for the respondent, the matter could not proceed as he said he had not been formally appointed, and needed to obtain instructions. The same was the position on 6<sup>th</sup> December, 2016. On 13<sup>th</sup> February, 2017, parties filed consent summons for notice to adjourn the matter which was scheduled for hearing on 16<sup>th</sup> February, 2017. On 30<sup>th</sup> March, 2017, when the matter came up, Mr. Chakoleka co-counsel for the applicant informed Court that arbitration proceedings had commenced and parties were in the process of constituting a tribunal. He still went ahead and asked that the application before Court be heard. They were yet to file an affidavit in reply to the affidavit in opposition which had been filed by the respondent. The reply was filed on 23<sup>rd</sup> May, 2017.

I have set out the above for reasons that will become clear in this Ruling later.

The application was only heard on 1<sup>st</sup> June, 2017. In the meantime, the respondent filed an affidavit in opposition and later the applicant filed their affidavit in reply. All these documents are on record, and I have taken note of their contents and the parties, during the hearing relied on them in arguing their case.

The gist of the application before me is that a dispute has arisen between the parties regarding a Loan Agreement. That the Loan Agreement provides for arbitration as a mode of dispute resolution. The applicant is apprehensive that the respondent may place the applicant in receivership before the matter goes for arbitration, hence the invocation of Section 11(1) and (2) of the Arbitration Act. Section 11 of the Act is clear on the powers of the Court to grant interim measures of protection to any party, before or during arbitral proceedings. Sub section (2) of Section 11 sets out the reliefs the Court can grant upon request in terms of sub section 1 thereof.

Sub section 4 of Section 11 states that:

- “4. The Court shall not grant an order or injunction under this Section unless**
- (a) The arbitral tribunal has not yet been appointed and the matter is urgent**
  - (b) The arbitral tribunal is not competent to grant the order or injunction;**
  - (c) The urgency of the matter makes it impracticable to seek such order or injunction from the arbitral tribunal ...”**

My reading of the above is that the Court will invoke its powers under Section 11 only where a tribunal has not yet been appointed, and the matter is urgent, or that the tribunal so appointed is not competent to grant the order or injunction.

In casu, it is a fact that the loan agreement that is in dispute today, has an arbitration clause, and that the applicant has since declared a dispute. It is also a fact, as stated by the applicant in his reply and as was confirmed by counsel during oral submissions that infact a tribunal has since been constituted to deal with the arbitration process. Infact, paragraphs 13 to 22 of the affidavit in reply to the affidavit in opposition speaks to this issue. I believe that there is no dispute that a tribunal has since been validly constituted to deal with the issues in dispute between the parties. This tribunal having been properly constituted, is competent to grant the order under Section 11(1) and or an order of injunction. I do not believe that the urgency of this matter is such that the parties herein cannot seek this protection order from the duly constituted tribunal.

It is possible that at the time the applicant made this application, the apprehension was real; and the matter was urgent. However, the conduct of both parties in prosecuting this matter as shown above makes me believe that there is no longer such an urgency as would prevent the applicant from seeking this same order before the constituted tribunal. I had expected that when it became apparent to both parties that a tribunal had since been validly constituted,

they would proceed under Section 11(4) of the Act. Infact, Mr. Chakoleka at one of the aborted hearings did state that despite the tribunal being constituted, they still wanted their application to be heard. This to me was an indication that he was aware of the provisions of Section 11(4) of the Act. I am alive to the fact that this application was made before the arbitration tribunal was constituted. However the parties have not indicated to Court why they should not, in the circumstances currently prevailing, seek the same relief from the tribunal already constituted.

In the premise, I deem that the relief being sought before this Court cannot continue, and this Court cannot grant the relief sought as doing so would be an abrogation of Section 11(4) which precludes a Court from granting an order of the type sought where a tribunal has been appointed. I would therefore ask that the applicant applies before the tribunal for an interim measure of protection. In the premise, the application before this Court is not granted. I make no order as to costs.

Leave to appeal is granted.

**Delivered at Lusaka on the 16<sup>th</sup> day of June, 2017**



**Mrs. Justice A. M. Banda-Bobo**  
**High Court Judge**