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(N<sup>o</sup>)

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

**2017/HP/1329**

22 NOV 2017

IN THE MATTER OF:

**Section 11(2) of the Arbitration Act No.  
19 of 2000**

IN THE MATTER OF:

**Rule 9(1) of the Arbitration (Court  
Proceedings) Rules, 2001**

AND

IN THE MATTER OF:

**Sales Purchase Agreement dated 22<sup>nd</sup>  
March, 2015**

**B E T W E E N :**

SWISS SINGAPORE ENTERPRISES PTE LIMITED

**APPLICANT**

AND

NYIOMBO INVESTMENTS LIMITED

**1<sup>ST</sup> RESPONDENT**

ECOBANK ZAMBIA LIMITED

**2<sup>ND</sup> RESPONDENT**

**Before Honourable Mrs. Justice M. Mapani-Kawimbe in Chambers on the  
22<sup>nd</sup> day of November, 2017**

*For the Applicant* : *Mr. B. Moshala, Messrs Moshala & Company*  
*For the 1<sup>st</sup> Respondent* : *Mr. M. Mutemwa SC, Mutemwa Chambers*  
*For the 2<sup>nd</sup> Respondent* : *Mrs. T.K. Chirwa and Ms. S. Nyirenda,*  
*In-house Counsel, Ecobank Zambia Limited*

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**R U L I N G**

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**Cases Referred To:**

1. *Lonrho Cotton Zambia Limited v Mukuba Textiles Limited SCZ Judgment No. 11 of 2002*

**Legislation Referred To:**

1. *Arbitration Act No. 19 of 2000*
2. *Sale of Goods Act 1893*

**Other Works Referred To:**

1. *E. P. Ellinger, Eva Lomnicka and Richard Hooley, Ellinger's Modern Banking law 4<sup>th</sup> Edition, Oxford University Press*
2. *Bryan A. Garner, Black's Law Dictionary 8<sup>th</sup> Edition, Dallas, Thomson West 2004*
3. *M. G. Beate, W. D. Bishop and M.P. Furmston, Contract, Cases and Materials 4<sup>th</sup> Edition, London, Butterworths 2001*
4. *Snell's Principles of Equity, Edmund Henry & Turner Snell Sweet & Maxwell, 1982*

This application is made pursuant to Rule 9(1) of the Arbitration (Court Proceedings) Rules, 2001 and Section 11(2)(b) of the Arbitration Act, wherein the Applicant seeks the following reliefs:

- i. *An Order to secure the sum of US\$9,721,736.00 payable under contract No. MA/MPC/004/2016 to the Respondent by the Ministry of Agriculture.*
- ii. *An order as to costs.*
- iii. *Any other ancillary or corollary order that the Court shall find fit to make.*

It is supported by an Affidavit sworn by **Jetendra Kothari**, a Manager in the Applicant Company. He deposes that on 22<sup>nd</sup> March, 2015, the Applicant executed contract No.

SSOE/SC/UREA/NI/14-15 with the 1<sup>st</sup> Respondent for the supply of Prilled Urea in bulk. That clause 15 of that agreement provides that disputes under the contract will be settled by arbitration in Singapore and in accordance with the Singapore International Arbitration Centre Rules as shown in the exhibit marked "**JK1.**"

The deponent states that the Applicant supplied the 1<sup>st</sup> Respondent 27500 metric tonnes of Urea at a total cost of US\$13,014,861.00 inclusive of port charges and other miscellaneous costs as shown in the exhibit marked "**JK2.**" That the 1<sup>st</sup> Respondent partially settled USD3,293,125.00 leaving a balance of USD9,721,736.00. The deponent further states that on 23<sup>rd</sup> September, 2016 the 1<sup>st</sup> Respondent wrote a Notice of Assignment to the Ministry of Agriculture, its principal buyer for the goods supplied by the Applicant, assigning a payment under contract No. MA/MPC/004/2016 to the Applicant as shown in the exhibit marked "**JK3.**" That the Ministry of Agriculture accepted the assignment by a letter dated 4<sup>th</sup> January, 2017 as shown in the exhibit marked "**JK4.**"

The deponent avers that the total amount due to the Respondent under contract No. MA/MPC/004/2016 is USD30,608,037.37. That the amount primarily arises from the supply of stock obtained from the Applicant. That the 1<sup>st</sup> Respondent has only assigned the Applicant a paltry sum of USD3,984,572.00, much to its dissatisfaction. That the 1<sup>st</sup> Respondent has not provided any indication as to how or when it will settle the debt after the assignment.

The deponent also avers that the Applicant is aware that the Ministry of Agriculture intends to pay out the receivables to the Applicant and other parties whom the 1<sup>st</sup> Respondent assigned. That if the receivables are paid out, the Applicant will have no avenue to enforce its rights under the contract. That it is on that basis, the Applicant seeks an interim order pending arbitration to secure the sum of USD9,721,736.00 held by the Ministry of Agriculture. The deponent states that if the order is not granted, the Applicant may be unable to recover the debt owed given that the 1<sup>st</sup> Respondent has already defaulted on its contractual obligation.

According to the deponent, the Applicant undertakes to pay damages in the event that the Court or arbitrator should decide to discharge the interim measure. He prays to the Court to grant the Applicant an order to secure the sum of USD9, 721,736 held by the Ministry of Agriculture until the final determination of the arbitral proceedings.

**Jomo Makulu** deposed an Affidavit in Opposition on behalf of the 1<sup>st</sup> Respondent. He states that on 22<sup>nd</sup> March, 2015, the Applicant and the 1<sup>st</sup> Respondent executed contract No. SSOE/SC/UREA/NI/14-15 for the supply of Prilled Urea in bulk. That the Applicant supplied 27500 metric tonnes of Urea to the 1<sup>st</sup> Respondent at a total cost of USD13,014,861.00. The deponent admits that the Respondent owes the Applicant USD9,721,736.00. That it has another contract with the Ministry of Agriculture No. MA/MPC/004/2016 valued at USD30,608,037.37 wherein it assigned the Applicant USD3,984,572.00 with its consent. That the Ministry of Agriculture was informed by a Notice of Assignment dated 23<sup>rd</sup> September. 2016.

The deponent avers that the Ministry of Agriculture consented to the arrangement vide a letter dated 4<sup>th</sup> January, 2017. This is shown in the exhibits marked "**JM1**" and "**JM2**". The deponent contends that the contract value of USD30,608.037.37 does not arise from the supply of stock only ordered from the Applicant, but from the PTA Bank and Ecobank Zambia Limited as shown in the exhibits marked "**JM3**" - "**JM9**."

The deponent avers that the stocks supplied from the PTA Bank and Ecobank Zambia Limited, preceded the supply of stocks procured from the Applicant. That the 1<sup>st</sup> Respondent also assigned its payments due under contract No. MA/MPC/004/2016 to the PTA Bank and Ecobank Zambia Limited. He also avers that the Respondent is aware of its indebtedness and it informed the Applicant of interest, which has accrued on USD31,090,037,384.00, which is the outstanding value of the contract sum of USD56,029,476.00 relating to Contract No. MAL/MPC/0193/2015, from which it intends to make a further payments to the Applicant.

The deponent prays to the Court to set aside the ex-parte order securing US9,721,736.00 held by the Ministry of Agriculture because the other recipients namely, the PTA Bank and Ecobank Zambia Limited are entitled to their share of that money. He also prays for costs.

The 2<sup>nd</sup> Respondent filed an Affidavit in Opposition, which was sworn by **Victor Shidono**. He avers that the 1<sup>st</sup> Respondent was awarded contract No. MA/MPC/004/2016 by the Ministry of Agriculture for the supply and delivery of 31,042.35 metric tonnes of Urea fertilizer for the 2016/2017 farming season. That by a facility letter dated 17<sup>th</sup> October, 2016, the 1<sup>st</sup> Respondent obtained a credit from the 2<sup>nd</sup> Respondent in the sums of K84,252,234 and USD3,798,498.00.

The deponent states that by an Assignment and Domiciliation of Receivables, the Respondent irrevocably assigned the 2<sup>nd</sup> Respondent all receivables from the Ministry of Agriculture amounting to USD11,750,000 under contract No. MA/MPC/004/2016 as shown in the exhibit marked "**VS1**." Further, that the Ministry of Agriculture on 30<sup>th</sup> June, 2016,

acknowledged receipt of the Assignment and begun to make payments as shown in the exhibits marked "VS2" and "VS3."

The deponent also states that to date, the 2<sup>nd</sup> Respondent has only been paid K18,500,000.00 in respect of the facility from the Ministry of Agriculture and approximately USD9,701,381.57 remains outstanding as shown in the exhibit marked "VS4." He contends that the 2<sup>nd</sup> Respondent is entitled to its right under the Assignment and Domiciliation of Receivables and should not be barred by this action.

The deponent further states that the Applicant secured its payment with the Ministry of Agriculture after the 2<sup>nd</sup> Respondent according to its Notice of Assignment lodged on 23<sup>rd</sup> September, 2016 and acknowledged by the Ministry on 4<sup>th</sup> January, 2017. That the 2<sup>nd</sup> Respondent's claim was acknowledged by the Ministry of Agriculture on 13<sup>th</sup> September, 2016, and it has priority and precedence over the Applicant's claim.

The deponent avers that the 2<sup>nd</sup> Respondent will suffer prejudice if its rights in the Assignment are cancelled or payment is



delayed by this action. He prays to the Court to discharge the ex-parte order granted to the Applicant to secure the funds held by the Ministry of Agriculture.

In the Affidavit in Reply sworn by **Jitendra Kothari**, the Applicant contends that the 1<sup>st</sup> Respondent fraudulently created third party rights, which are meant to disadvantage it. Further, that even though the sum of USD30,608,037.37 may not have arisen from its supply contract, the value of the stock it supplied is much higher than the sum domiciled/assigned to the others. It is contended that the 1<sup>st</sup> Respondent has failed to settle the debt for over two years and this has caused the Applicant significant damage, loss and mental anguish.

The deponent avers that even if the 1<sup>st</sup> Respondent domiciled/assigned the PTA Bank USD14,873,464.67, and the 2<sup>nd</sup> Respondent USD11,750,000.00 it has not provided proof. He contends that the PTA Bank provided a very small quantity of stock at 8,783,308 MT against 15,082.60 MT and it was for MOP fertilizer and not Urea.

The deponent further contends that there is no proof that the stock received from either PTA Bank or the 2<sup>nd</sup> Respondent by the 1<sup>st</sup> Respondent was used to service its contract with the Government from which assignments were issued. The deponent states that the Applicant's debt has been outstanding since 2015 and any domiciliation/assignment should be on the basis of the date of supply.

The deponent also states that the 1<sup>st</sup> Respondent took a product from the Applicant, which it supplied to the Ministry of Agriculture without paying or obtaining permission from it and further assigned its money to third parties in defiance of the debt. That the Applicant was the first to be contracted by the 1<sup>st</sup> Respondent and must be paid its dues.

The deponent contends that the payment of its debt is not dependent on receiving payment from the Ministry of Agriculture or any other party and a possibility of immediate payment exists. That the Applicant cannot rely on a future promise of payment. The deponent states that the Applicant has a legitimate right to the money held by the Ministry of Agriculture and it does not seek to

cancel the assignments made to the other creditors but merely insists to have the debt settled.

Learned Counsels for the parties filed written submissions for which I am indebted. Learned Counsel for the Applicant referred me to section 11(2) (b) of the Arbitration Act on the interim measures that can be granted by a Court in arbitral proceedings.

Counsel went on to submit that in the present case, the Applicant intended to commence arbitral proceedings to recover the debt owed by the 1<sup>st</sup> Respondent under contract No. SSOE/SC/UREA/NI/14-15. He also stated that the contract provided that property in the goods would only pass upon full payment of the contract price. However, in breach of the contract, the 1<sup>st</sup> Respondent illegally moved the goods without the Applicant's consent and supplied them to the Ministry of Agriculture.

Counsel cited section 17(1) of the Sale of Goods Act 1893, which provides that:

**“Where there is a contract for the sale of specified or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.”**

He also cited section 17(2) of the Sale of Goods Act 1893, which reads:

**“For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case.”**

Counsel submitted that clause 16 of the parties contract reiterates the provisions of the Sale of Goods Act and provides:

**“Ownership of the goods delivered shall pass to buyer upon payment of the full purchase value in terms of this agreement.”**

Counsel contended that the 1<sup>st</sup> Respondent could not pass title of the goods because it did not pay the full purchase price. He called in aid the case of **Lonrho Cotton Zambia Limited v Mukuba Textiles Limited**<sup>1</sup>, where the Supreme Court held that:

**“When goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had.”**

Counsel submitted that since the goods still belonged to the Applicant, the 1<sup>st</sup> Respondent could not assign the receivables therein. As a consequence, it would be inimical and immoral for the 1<sup>st</sup> Respondent to determine where the proceeds should be

applied without the Applicant's involvement. He prayed to the Court to uphold the ex-parte order granted on 11<sup>th</sup> August, 2017.

Learned State Counsel filed skeleton arguments on behalf of the 1<sup>st</sup> Respondent. He submitted that the 1<sup>st</sup> Respondent did not dispute that it only paid the Applicant USD3,293,125.00 and owed it USD9,721,736.00. He conceded that the stocks procured from the Applicant by the 1<sup>st</sup> Respondent were supplied to the Ministry of Agriculture. However, the 1<sup>st</sup> Respondent procured stocks from three different suppliers namely the PTA Bank, Ecobank Zambia Limited and the Applicant. State Counsel submitted that the sum of USD30,608,037.37 arose from the aggregate of stocks secured from the three suppliers and not only the Applicant. State Counsel further submitted that the supply of stocks from the PTA Bank and Ecobank Zambia Limited preceded those from the Applicant. As a result, the 1<sup>st</sup> Respondent assigned rights in its contract with the Ministry of Agriculture to the different suppliers.

State Counsel stated that the Applicant was only assigned USD3,984,572.00, because the difference was due to the PTA Bank and Ecobank Zambia Limited. He contended that the Applicant

had no basis for securing an order preventing the Ministry of Agriculture from paying the other two creditors when the Applicant had consented to its share of assignment. State Counsel also stated that the Applicant was estopped from asserting a claim against the funds duly assigned to the other creditors.

State Counsel went on to tender submissions on the definition, validity and effect of assignments, which I shall make reference to later in this ruling. State counsel contended that the 1<sup>st</sup> Respondent created irrevocable assignments to the other parties, which could not be set aside at the instance of the Applicant. The PTA Bank, Ecobank Zambia Limited and the Applicant were all creditors of the 1<sup>st</sup> Respondent in respect of stocks of fertilizer amounting to USD30,608,037.37. On that basis, he argued that all assignments were valid and had irrevocable effect.

Learned Counsel for the 2<sup>nd</sup> Respondent filed skeleton arguments, where she submitted that the advantage sought by the Applicant was untenable at law. She reiterated the submissions tendered by State Counsel on the nature and effect of assignments. She then adverted to the learned authors of **Ellinger's Modern**

**Banking Law**<sup>1</sup>, who state that in ranking priority of competing assignments, the rule is that the assignee who gives first notice to a debtor takes precedence.

Counsel submitted that the notice of the assignment to the 2<sup>nd</sup> Respondent was given to the debtor on 30<sup>th</sup> June, 2016 and acknowledged on 15<sup>th</sup> September, 2016. The Applicant's notice was given on 23<sup>rd</sup> September, 2016 and acknowledged on 4<sup>th</sup> January, 2017. Thus, the 2<sup>nd</sup> Respondent had priority over the Applicant.

Counsel for the 2<sup>nd</sup> Respondent in her additional skeleton arguments submitted that the 2<sup>nd</sup> Respondent was not privy to the impending arbitration and could not be looped into that process. She added that since the matter was subject to arbitration, the Court would not delve into the dispute between the 1<sup>st</sup> Respondent and the Applicant.

At the hearing, the Learned Counsels placed reliance on the Affidavits and Skeleton Arguments filed herein, which I have earnestly considered. The facts are largely agreed by the parties and can be reprised as follows: the Applicant and 1<sup>st</sup> Respondent

executed contract No. SSOE/SC/UREA/NI/14-15 for the supply of Prilled Urea in the sum of USD13,014,861.00.

The 1<sup>st</sup> Respondent supplied the Urea to the Ministry of Agriculture for the 2016/17 farming season. Out of the contracted amount, the 1<sup>st</sup> Respondent has only paid the Applicant USD3,293,125.00 and still owes it USD9,721,736.00. There is another contract No. MA/MPA/004/2016 between the parties and the Ministry of Agriculture, worth US\$30,608,037.37. In that contract, the 1<sup>st</sup> Respondent assigned three creditors varying amounts. It is undeniable that clause 15 of contract no. SSOE/SC/UREA/NI/14-15 provides that disputes between the Applicant and 1<sup>st</sup> Respondent shall be referred to arbitration. It is also a fact that the 2<sup>nd</sup> Respondent is not a party to that contract.

The question that arises for determination in my view, is whether the Applicant is entitled to secure USD9,721,736.00 held by the Ministry of Agriculture pending the outcome of the arbitration.



Section 11(2) of the Arbitration Act sets out thus:

**“A party may, before or during arbitral proceedings, request from a Court an interim measure of protection and, subject to subsections (2), (3) and (4), the Court may grant such measure.**

- (2) Upon a request in terms of subsection (1), the Court may grant-**
- (a) an order for the preservation, interim custody, sale or inspection of any goods, which are the subject matter of the dispute.**
  - (b) an order securing the amount in dispute or the costs and expenses of the arbitral proceedings.”**

Rule 9(1) of the Arbitration (Court Proceedings) Rules, 2001, provides the basis upon which a party can summon the Court for an interim measures in arbitration proceedings. It reads:

**“An application under section 11 of the Act, to a Court for an interim measure of protection shall be made to a Judge of the High Court by originating summons.”**

The cited provisions entail that the Court can only consider applications seeking interim measures of protection and not the substantive issues in dispute between the parties.

The learned authors of **Black’s Law Dictionary**<sup>2</sup> at page 128, define an assignment as follows:

**“An assignment is a transfer or setting over of property or some right or interest therein, from one person to another, the terms denoting not only the act of transfer, but also the instrument by which it is effected.”**

The learned authors of **Contract, Cases and Materials**<sup>3</sup>, at page 1187 state that:

**“It will be noted that for there to be an effective legal assignment, notice must have been given in writing to the debtor, the assignment must be in writing, signed by the assignor and the assignment must be absolute.”**

I concur with the learned authors of **Snell’s Principles of Equity**<sup>4</sup>, at page 82, who state that:

**“An assignment which complies with the law as to the notice and otherwise is effectual in law to pass and transfer from the date of such notice-**

- a) **The legal right to such debt or thing in action.**
- b) **All legal and other remedies for the same, and**
- c) **The power to give a good discharge for the same without the concurrence of the assignor.**

**Thus, the assignee becomes the owner of the chosen at law, and can sue the debtor in his own name without joining to the original creditor.”**

As has already been considered, there are three assignments due to the three suppliers and are proportioned as follows:

- (i) *Swiss Singapore Enterprises PTE Limited* – USD3,293,125.00
- (ii) *Ecobank Zambia Limited* – USD11,750,000.00
- (iii) *PTA Bank* – USD14,873,464.67

At this interlocutory stage, and considering that this matter is pending arbitration, I find it inappropriate to consider the substantive issues of dispute. These range from ownership of goods

to the level of the 1<sup>st</sup> Respondent's indebtedness to the Applicant. The issue however, is whether the assignments issued by the 1<sup>st</sup> Respondent are enforceable against the Applicant's unfulfilled debt?

From the material on record, I find that the 1<sup>st</sup> Respondent delivered assignments to the Ministry of Agriculture, in favour of all three creditors. The Ministry acknowledged the assignments and executed payments, which are valid and enforceable. They must all be honoured and paid out as executed. I also find that the Applicant did not object the 1<sup>st</sup> Respondent's arrangement on its assignment . I am fortified by the exhibits marked "**JK3**" and "**JK4**" in the Affidavit in Support.

In like manner, the 2<sup>nd</sup> Respondent accepted its share of assignment vide the exhibits marked "**VS1**" to "**VS4**" in its Affidavit. The 1<sup>st</sup> Respondent's assignments are based on contract No. MA/MPC/004/2016 with the Ministry of Agriculture and in my view, they are meant to reduce the 1<sup>st</sup> Respondent's indebtedness to its creditors. The 1<sup>st</sup> Respondent admits that it still owes the creditors money beyond the assignments and they are not intended to release it from its full contractual obligations.

Having so determined, I hold that the Applicant is not entitled to secure USD9,721,736.00 held by the Ministry of Agriculture. It is only entitled to USD3,984,572.00, which is its share of assignment.

Accordingly, I find no merit in this application and discharge the ex-parte order dated 11<sup>th</sup> August, 2017, granted to the Applicant.

I award costs to the Respondents to be taxed in default of agreement.

Leave to appeal is granted.

Dated this 22<sup>nd</sup> day of November, 2017.

  
M. Mapani-Kawimbe  
**HIGH COURT JUDGE**