IN THE COURT OF APPEAL FOR ZAMBIA **APPEAL No. 289/2023**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

GRANDVIEW INTERNATIONAL LIMITED	**1ST APPELLANT**
GRANDVIEW PROPERTIES LIMITED	**2ND APPELLANT**
INFINITY GROUP ZAMBIA LIMITED	**3RD APPELLANT**
BOKANI SOKO	**4TH APPELLANT**
ESTHER AMA ODANI	**5TH APPELLANT**

AND

BARAK FUND LIMITED *(Suing on behalf of Barak Structured Trade Finance Segregated Portfolio)*	**RESPONDENT**

Coram: ***Chashi, Sichinga and Sharpe-Phiri, JJA***

on 19 June and 25 July 2024

For the Appellants: Mr. L. Phiri and Mr. J. Tembo of Messrs August Hill and Associates

For the Respondent: Mr. K. Phiri of Messrs Corpus Legal Practitioners

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JUDGMENT

Sichinga JA delivered the Judgment of the Court.

Cases referred to:

1. *Stanley Mwambazi v Morester Farms Limited (1977) Z.R, 108*
2. *Water Wells Limited v Jackson (1984) Z.R, 98*
3. *Finance Bank Zambia Limited v Dimitrios Monokandilos Filandria Kouri (1997/HP/136)*
4. *Dr. Kenneth Kaunda and Another v Central Chambers and 5 Others, SCZ Appeal No.237 of 2013*
5. *Attorney General v Cecil Dulu Nundwe (SCZ/8/20/2004)*
6. *Twampane Mining Co-operative Society Limited v E and M Storti Mining Limited, S.C.Z. Judgment No. 20 of 2011*
7. *Garnet Industries Ltd v David Richard Everson (1987) Z.R, 104*
8. *Clayton v Hybrid Poultry Farms Limited S.C.Z. No. 15 of 2006*
9. *Dunlop Pneumatic Tyre Co. v New Garage and Motors Co. (1915) A.C. 79*
10. *OTK Limited v Amanita Zambiana Limited and Others (2011) ZMHC 23*
11. *Turnkey Properties Limited v Lusaka West Development Company Limited and 2 Others (1984) Z.R, 85*
12. *Ody's Oil Company Limited v Attorney General and Another (2012) Z.R, 164*
13. *Cash Crusaders Franchising PTY Limited v Shakers & Movers (Z) Limited (2012) Vol. 3 Z.R, 174*
14. *Gateway Services v Engen Petroleum (Z) Limited SCZ Appeal No. 31 of 2003*
15. *Evans Milimo v Zambia Daily Mail Limited and Attorney-General CAZ Appeal No. 24 of 2021*
16. *Sangwa v The Legal Practitioners Committee of the Law Association of Zambia SCZ Appeal No.121 of 2013)*
17. *Vangelatos v Vangelatos, SCZ Appeal No. 7 of 2006*
18. *Leopard Ridge Safaris Limited v Zambia Wildlife Authority (2008) Z.R, 97 Vol. 2*

19. *Pouwels Construction Zambia Limited and Pouwels Hotels and Resorts Limited v Inyatsi Construction Limited, SCZ Appeal No. 23 of 2016*

Legislation referred to:

1. *The High Court Rules, Chapter 27 of the Laws of Zambia*
2. *The Supreme Court Rules (1965) 1999 Edition (White Book)*
3. *The Arbitration Act, No. 19 of 2000*
4. *Arbitration (Court Proceedings) Rules, Statutory Instrument No. 75 of 2001*

Other works referred to:

1. *Halsbury's Laws of England, 5th Edition, Vol. 2 (2008)*
2. *S. Nesbitt and H. Quinlan, The Status and Operation of Unilateral or Optional Arbitration Clauses', 22 Arbitration International (2006), p.133, 134*

1.0 Introduction

1.0 This is an appeal against the ruling of the High Court Commercial Division delivered on 17 November 2022, by Lady Justice Mwenda-Zimba. In the said ruling, the learned Judge considered two applications, namely, to stay execution of the writ of possession and judgment in default, and to set aside the writ of possession and judgment in default. She found that the defendants' applications lacked merit and dismissed them with costs to the plaintiff.

2.0 Background

2.1 In the introductory part of this judgment, we shall refer to the parties by their designations in the court below.

2.2 The brief background of this matter is that the plaintiff, Barak Fund Limited, respondent now, commenced an action against the defendants (now appellants), by way of writ of summons and statement of claim, amended once with leave of court on 8 April 2022, seeking the following reliefs:

(i) An order that the defendants pay to the plaintiff all monies in the sum of USD21,180,472.00 or any sum to be found due, inclusive of unpaid accrued interest being the outstanding sum under the Facility Agreements secured by Third-Party Mortgages and guarantees, which is due and owing to the plaintiff and having been advanced to the 1st defendant under the Facility Agreements;

(ii) Delivery by the 2nd, 4th and 5th defendants, to the plaintiff, of vacant possession of the Mortgaged Properties;

(iii) An order of foreclosure and sale of the Mortgaged Properties;

(iv) An order for the enforcement of the Personal Guarantees against the 4th and 5th defendants;

(v) Damages for breach of contract;

(vi) Interest;

(vii) Legal costs; and

(viii) Any other reliefs that the court may deem necessary.

2.3 The defendants having failed to enter appearance and file a defence, a judgment in default of appearance and defence was entered on 16 June 2022, in favour of the plaintiff as follows:

(i) An order that the defendants pay the plaintiff all monies in the sum of USD21,180,472.00 or any such sum to be found due inclusive of unpaid accrued interest being the outstanding sum under the Facility agreements secured by Third-Party Mortgages and guarantees, which is due and owing to the plaintiff and having been advanced to the 1st defendant under the Facility Agreements;

(ii) Delivery up by the 2nd, 4th and 5th defendants, to the plaintiff of vacant possession of the Mortgaged Properties being, CL/8 of F/609/265/A16; CL/6 of F/609/265/A16; CL/7 of F/609/265/A16; CL/24 of F/609/265/A16; Plot No. 724 Lusaka; and Subdivision 'L' of Subdivision No. 1141 of subdivision 'A' of Farm No. 378a Lusaka.

(iii) An order for foreclosure and sale of the Mortgaged Properties;

(iv) Orders for the enforcement of the Personal Guarantee against the 3rd and 4th defendants;

(v) Damages for breach of contract;

(vi) Interest; and

(vii) Costs.

2.4 Pursuant to said default judgment, the plaintiff proceeded to issue a writ of possession and writ of Fieri Facias (Fifa), both dated 23 September 2022.

2.5 On 21 October 2022, the defendants filed twofold applications; for an order of stay of execution of the default judgment; and to set aside the writ of possession and the judgment. The application was heard on 17 November 2022 and the Judge delivered an *ex-tempore* ruling dismissing the application with costs to the plaintiff. Leave to appeal to the Court of Appeal

was not granted and thus, the defendants applied to the lower court for leave to appeal, which was denied.

2.6 The defendants renewed the application before a single Judge of this Court, who granted leave to appeal.

3.0 Decision of the court below

3.1 After considering the applications, the learned Judge highlighted the principles governing the setting aside of judgment in default of defence. That a default judgment will be set aside where there is no inordinate delay on the part of a defendant applying to set such judgment aside and where there is a defence on the merits. The learned Judge, relied on the cases of ***Stanley Mwambazi v Morester Farms Limited***[1] and ***Water Wells Limited v Jackson***[2]. She found that the defendants did not make the application to set aside judgment in good time. That, the application was made over four (4) months after the judgment and the reasons given for the delay, that the parties had engaged in *ex-curia* discussions, was not justifiable because *ex-curia* discussions do not stop time from running. Further, that if the defendants were unhappy with the judgment in default, they ought to have applied to set it aside promptly and the fact that the parties' negotiations collapsed, did not justify their coming to court late. The learned Judge also found that the defendants failed to demonstrate that they had a defence on the merits as their proposed defence contained bare denials of averments.

3.2 The learned Judge further found that, the 1st and 4th defendants had admitted the debt in an acknowledgement of debt, exhibited as **"TJS2"**, in the affidavit in opposition. That, the sum of USD18,258,147.00, plus interest was admitted in an agreement dated 7 March 2019, and the sum in the judgment in default was USD21,180,472.00 which included interest. She stated that the defendants contended that the judgment sum was in contention, but did not show how and why. She found that there was no reason to set aside the judgment as there was an admission.

3.3 The learned Judge ultimately found no merit in both applications and accordingly dismissed them with costs to the plaintiff.

4.0 The appeal

4.1 Dissatisfied with the ruling of the lower court, the defendants appealed to this Court fronting four grounds as follows:

1. ***The lower court erred in law and fact when it held that the delays by the Appellants in making the application to set aside the judgment in default was inordinate and inexcusable, despite the fact that there were ex-curia negotiations among the parties, long after the judgment in default was entered;***

2. ***The lower court erred in law and fact when it held that the Appellants do not have a defence on the merits and there are no triable issues worthy of a full trial, despite there being a***

dispute as to the interest rate and penalties regarding the sum due (if any), which is clearly a triable issue;

3. ***The lower court erred in law and fact when it relied on an acknowledgement of debt agreement, a document, the authenticity, admissibility and provenance of which can only be tested at a full trial; and***

4. ***The lower court erred in law and fact when it proceeded to hear the application to set aside the judgment in default before hearing the application to refer the parties to arbitration, which speaks to the jurisdiction of the court.***

5.0 Appellants' arguments in support of the appeal

5.1 At the hearing of the appeal, Mr. L. Phiri, learned counsel for the appellants, relied on the heads of argument filed on 11 September 2023, the gist of which is that they have a defence on the merits and have exhibited a triable issue, which they contend is the primary consideration in setting aside a judgment in default.

5.2 Further, that no prejudice will be occasioned to the respondent should the matter be sent to trial.

5.3 In support of ground one of the appeal, counsel invited us to take note of ***Order 20 Rule 3 and Order 12 Rule 2 of the High Court Rules***[1] which provide as follows:

Order 20, rule 3

"Any judgment by default, whether under this Order or under any of these Rules, may be set aside by the Court or a Judge, upon such terms as to costs or otherwise as the Court or Judge may think fit."

Order 12, rule 2

"Where judgment is entered pursuant to the provisions of this Order, it shall be lawful for the Court or a Judge to set aside or vary such judgment upon such terms as may be just."

5.4 Counsel also referred us to the case of ***Stanley Mwambazi v Morester Farms Limited*** *supra*, and submitted that the Court in that case set aside a judgment in default when the defendant gave the excuse for failing to enter appearance as negotiations for a settlement. That, the Court stated that it is always the practice of courts to encourage such negotiations.

5.5 Further, relying on the case of ***Water Wells Limited v Jackson*** *supra*, counsel submitted that a defence on the merits is the overriding consideration in setting aside a judgment in default and that all other factors such as the reason for the default or delay in setting aside the judgment in default are secondary, provided they do not prejudice the plaintiff. To further buttress this submission, counsel referred us to ***Practice Note 13/9/12 of the Rules of the Supreme Court of England***[2].

5.6 Citing the cases of ***Finance Bank Zambia Limited v Dimitrios Monokandilos Filandria Kouri***[3], ***Dr. Kenneth Kaunda and Another v Central Chambers and 5 Others***[4]

and ***Attorney-General v Cecil Dulu Nundwe***[5], counsel submitted that the determination of inordinate delay in a defendant applying to set aside a judgment in default should be decided on a case-by-case basis. That, therefore, in the present case, the delay in making the application to set aside the default judgment was not inordinate, given that the parties were engaged in *ex-curia* settlement negotiations, with a view to resolving the dispute regarding the sums owed, if any. That, it was only after the respondent issued a writ of possession on 23 September 2022, in bad faith, that the appellants promptly made the requisite application on 21 October 2022, as it became apparent that the respondent was not inclined to settle.

5.7 Counsel, cited the case of ***Twampane Mining Co-operative Society Limited v E and M Storti Mining Limited***[6], and acknowledged the principle that *ex-curia* settlements will not stop time from running where the rules of court have prescribed a time to do a certain act. However, counsel contended that the facts *in casu* are distinguishable from the ***Twampane case*** as the appellants herein had not breached a prescribed time to take a step.

5.8 Further, that the requirement under *the High Court Rules* and the decided cases is that a default judgment may be set aside on such terms as may be just, with the primary concern being a defence on the merits, as opposed to inordinate delay in making the application to set aside.

5.9 We were urged to uphold the first ground of appeal.

5.10 In support of ground two, counsel still placed reliance on the case of ***Stanley Mwambazi*** and the case of ***Garnet Industries Ltd v David Richard Everson***[7]. He submitted that among the principles espoused in the two cases is that there will be triable issues where a defendant has a viable defence on the merits of the case and there is reason to have a trial. Further, the case of ***Clayton v Hybrid Poultry Farms Limited***[8] was cited for its holding to the effect that an applicant does not have to concentrate too much on why he failed to enter appearance and file a defence, but that he has an arguable defence on the merits by providing *prima facie* evidence, such as, documentary proof that he was no longer bound by the contract as earlier concluded. It was argued that *in casu*, the appellants have a defence on the merits which discloses a triable issue, namely, the respondent's claim includes penal interest which is illegal in this jurisdiction. That, from the documents on the record, it could be gleaned that the appellants borrowed the sum of USD11,985,155.85 and repaid the sum of USD5,216,531.73, while the respondent is claiming well over USD21,000,000.00 which is inclusive of penal interest. Counsel submitted that this is a triable issue that can only be determined with a full trial, namely, that the sum owed to the respondent, which goes to the very root of the action, is an aggregated amount that includes penalties and interest which, even if agreed to by the parties, is illegal.

5.11 Counsel for the appellants, thus submitted that it was irregular for the lower court to have awarded the respondent an amount due, inclusive of penal interest. Reliance was placed on the case of ***Dunlop Pneumatic Tyre Co. v New Garage and Motors Co.***[9] and on this note, we were urged to uphold ground two of the appeal.

5.12 In support of ground three, counsel referred us to the case of ***OTK Limited v Amanita Zambiana Limited and Others***[10] and submitted that before a document can be relied on as evidence, there is need to lay a foundation and establish the validity or authenticity of such document. That, the lower court's ruling that the appellants had admitted to the amount claimed by the respondent was hinged on the Acknowledgment of Debt agreement, which was an untested document. That, the authenticity of the said document, as well as the validity of the 4th appellant's signature can only be proven at trial.

5.13 Further, that the Acknowledgment of Debt agreement has not been tested as to whether it meets the requirements of a valid contract. Furthermore, that the agreement was only signed by the 1st and 4th appellants, but the lower court's order bound all the appellants. Citing the case of ***Turnkey Properties Limited v Lusaka West Development Company Limited and 2 Others***[11], it was contended that it is improper for a court hearing an interlocutory application to make comments, which have the effect of pre-empting the decision of the issues, which are to be decided on the merits at the trial of the matter.

It was advanced that the lower court ought not to have delved into the agreement and relied on the same, without according the parties a full trial, which robbed the appellants of their right to have their case heard on the merits. With this, we were urged to set aside the judgment in default and to uphold ground three of the appeal.

5.14 In support of ground four, it was submitted that the respondent and the 1st appellant entered into a Purchase and Repurchase Agreement in 2015, exhibited a pages 1148 to 1209 of the record of appeal, through which the respondent availed facilities to the 1st appellant. That, the said agreement contained an arbitration clause stipulating that arbitration shall be resorted to, in the event of a dispute between the parties. Further, the Revolving Facility Agreement also contained an arbitration clause, which allowed the respondent to opt for arbitration or litigation. A dispute arose under the Purchase and Repurchase Agreement, however the respondent commenced an action in the lower court, despite the arbitration clause.

5.15 It was stated that the statement of claim exhibited at pages 1339 to 1345 of the record of appeal, bundled all the agreements together in a bid to have the entire dispute determined by the court, when in fact, the dispute under the Purchase and Repurchase Agreement should have been settled by way of arbitration. Counsel contended that, by their application dated 2 November 2022, exhibited at pages 1166-

2092 of the record of appeal, the appellants invoked the arbitration clause and raised the question of whether the lower court had jurisdiction to determine the matter in so far as it related to the Purchase and Repurchase Agreement. To this end, we were referred to ***section 10 of the Arbitration Act[3].***

5.16 Citing the cases of ***Ody's Oil Company Limited v Attorney General and Another[12]*** and ***Cash Crusaders Franchising PTY Limited v Shakers & Movers (Z) Limited[13]***, it was submitted that where parties have a valid arbitration agreement, the court is obliged to refer the matter to arbitration. In addition, that where parties decide to have their dispute adjudicated upon through arbitration, they oust the jurisdiction of the courts, save in the limited circumstances provided by law.

5.17 Furthermore, that an application to refer a matter to arbitration goes to the jurisdiction of the court and as such, should be given priority by the lower court. That, therefore, the lower court's refusal to hear the application to refer the parties to arbitration was a clear error of law. We were urged to uphold the fourth ground of appeal.

6.0 Respondent's arguments opposing the appeal

6.1 In opposing the appeal, Mr. K. Phiri, learned counsel for the respondent, relied on the respondent's heads of argument filed on 12 October 2023. For reasons which will soon become

apparent, we will only summarise the respondent's arguments in ground four.

6.2 In opposing the last ground, that the lower court ought not to have heard the application to set aside the judgment in default before hearing the application to refer the matter to arbitration, it was submitted that the appellants' argument was bereft of merit and not feasible.

6.3 The respondent argued that, if it went under the assumption that the lower court should have referred the matter to arbitration, and by extension, ousted its jurisdiction, then there would not have been a forum to hear the application to set aside the default judgment. The rationale for this submission is that the judgment in default is valid until set aside.

6.4 It was submitted that an arbitral tribunal has no jurisdiction to entertain an application to set aside a judgment in default executed by a Judge of the High Court. In support of this submission, reliance was placed on the ***Arbitration Act*** *supra* and the ***Arbitration (Court Proceedings) Rules***[4], which do not have provision for an arbitral tribunal to set aside a judgment in default.

6.5 It was submitted that ***Order 20, rule 3 of the High Court Rules*** *supra* confers discretion only on a Court or Judge to set aside a default judgment.

6.6 Counsel argued that the court retained jurisdiction until it made an order to refer the matter to arbitration. That arbitration clauses do not rob the court of its jurisdiction, but simply stay its powers where there are proceedings and refers them to arbitration. Reliance was placed on the case of ***Gateway Services v Engen Petroleum (Z) Limited***[14] where the Supreme Court stated as follows:

> ***"The agreement and the authorities cited are to the effect that the Court's jurisdiction is not ousted by an arbitration clause."***

6.7 It was submitted that courts maintain their jurisdiction until an order referring the matter to arbitration is made. That in the present case, the proceedings had come to an end. As such there was no dispute to refer to arbitration.

6.8 Counsel argued that the application to refer the matter to arbitration was prematurely before this Court because there was a default judgment on the record.

6.9 It was also argued that the application to set aside the judgment in default was filed first, on 21 October 2022, and the application to refer the matter to arbitration was subsequently filed on 4 November 2022. As such, the former application ought to have been heard first. Reliance was placed on the case of ***Evans Milimo v Zambia Daily Mail Limited and Attorney-General***[15] where this Court held as follows:

"The application for extension of time was made earlier than the one to dismiss the action. In view of the above, the same ought to have been heard first before the application to dismiss for want of prosecution, as it was on record."

6.10 Whilst the above case does not relate to judgments in default, we were urged to consider the principle that the application that has been filed earlier has to be heard first because it is earlier on record.

6.11 In conclusion, we were urged to dismiss the fourth ground as the procedure that the application to refer the matter to arbitration should have been heard first is not feasible. We were further urged to dismiss the appeal in its entirety and uphold the ruling of the lower court.

7.0 Our decision on appeal

7.1 We have carefully considered the assailed ruling of the court below together with the record of appeal and the arguments in support and against the appeal. The issue before us in this appeal is whether the learned Judge in the court below was on firm ground when she declined to stay execution of the writ of possession and judgment in default, and to set aside the writ of possession and judgment in default granted on 16 June 2022.

7.2 We shall begin by addressing the fourth ground of appeal as the appellants have raised issues on jurisdiction, which if

adjudged meritoriously, are bound to have a bearing on the rest of the grounds, as well as the proceedings in the lower court.

7.3 The appellants argued, in ground four, that the parties herein had executed a valid arbitration agreement which they endeavored to invoke by an application to refer the parties to arbitration filed on 4 November 2022. Page 1155 of the record of appeal, volume 3 refers. The application was titled:

> ***"Ex-parte application for stay of execution of judgment in default of appearance and defence dated 16th June 2022 pending hearing of summons for an order to stay proceedings and refer the parties to arbitration (Pursuant to Order 36, rule 10 of the High Court Rules, Chapter 27 of the Laws of Zambia as read together with Order 45, rule 11 and Order 47, rule 1 of the Rules of the Supreme Court (1999) Edition and Section 13 of the of the High Court Act, Chapter 27 of the Laws of Zambia)."***

7.4 We also note from the record that before the above application was filed on 21 October 2022, the appellants filed an application for an order for stay of execution of judgment in default of appearance and defence on 16 June 2022, and to set aside the said judgment, as well as the writ of possession issued on 22 September 2022. The applications filed on 21 October 2022, were heard on 17 November 2022. On the same day, the learned Judge delivered the *ex-tempore* ruling, the subject of the appeal herein. The application to stay proceedings and refer the matter to arbitration was, however, not heard and determined.

7.5 A perusal of the record of appeal reveals that in paragraph 7 of the statement of claim (page 1340 of the record) the following was averred:

> ***"7. By a Purchase and Repurchase Agreement dated 2 July 2015 as amended on 30 July 2015 and a Revolving Loan Agreement dated 1 July 2015 as amended on 2 March 2017 (collectively the "Facility Agreements"), the Plaintiff made available to the 1st Defendant facilities which as at 9 November 2021 amounted to USD21,180,472.00, inclusive of accrued, but unpaid interest (the "Debt")."***

7.6 The collective Facility Agreements above, pursuant to which this matter was commenced, were both executed only by the respondent (lender) and the 1st appellant (borrower), and each had dispute resolution clauses as follows:

> *"Purchase and Repurchase Agreement*
>
> ***20. Dispute Resolution***
>
> ***20.1 All disputes arising out of or in connection with the Agreement shall be finally settled under the Rules of Arbitration of the LCIA ("the Rules")...Such arbitration shall be held in London, England or Lusaka, Zambia or such other jurisdiction as determined by Barak at its sole and absolute discretion and shall be held in a summary manner with a view to being completed as soon as possible.***
>
> ...
>
> ***20.3 This clause 20 will not preclude any Party from access to an appropriate court of law for interim relief in respect of urgent matters by way of, inter alia, an interdict or mandamus pending finalization of this dispute resolution process.***
>
> *Revolving Loan Agreement*
>
> ***29. Dispute Resolution***

29.1 Barak, at its sole and absolute discretion, shall be entitled to refer any and all disputes arising out of or in connection with the Agreement, to arbitration or determination by the court.

29.2 Any dispute arising out of or in connection with this Agreement and referred to arbitration in terms of clause 29.1, including any question regarding its existence, validity or termination, shall be finally resolved by arbitration under the LCIA Rules, which Rules are deemed to be incorporated by reference into this clause.

...

29.7 Referring a dispute to arbitration in terms of this clause 29 will not preclude Barak from access to an appropriate court of law for interim relief in respect of urgent matters by way of, inter alia, an interdict or mandamus pending finalization of this dispute resolution process."

7.7 Our understanding of the clauses reproduced above is that, under the Purchase and Repurchase Agreement, every dispute should be referred to arbitration, with the liberty to subject urgent interlocutory or interim applications/remedies to appropriate courts of law. Under the Purchase and Repurchase Agreement, therefore, there is no option to have disputes resolved by the courts (except the limited interlocutory applications) and, where a matter is commenced before the courts, as *in casu*, either party can invoke clause 20.1, by making an application to refer the matter to arbitration.

7.8 Under the Revolving Loan Agreement, on the other hand, a dispute arising thereunder may be referred to arbitration or the courts, solely at the discretion of the respondent. In other

words, it is the respondent's call to decide what type of dispute resolution the parties are to subject themselves, in respect of disputes arising under the Revolving Loan Agreement.

7.9 What is created by the two arbitration clauses is a contradiction that makes enforceability of either clause difficult, since the two agreements in which they are contained are collectively the Facility Agreements, on which the action herein is premised. It is not clear, which portion of the default alleged in the statement of claim, could be ascribed to the Purchase and Repurchase Agreement, and which could be ascribed to the Revolving Loan Agreement.

7.10 In terms of construction of arbitration agreements, the guidance prescribed by the learned authors of ***Halsbury's Laws of England***[1], at paragraph 1215 is as follows:

> ***"... arbitration is consensual, and depends upon the intention of the parties as expressed in their agreement; only from the agreement is it possible to tell what kind of disputes they intended to submit to arbitration; and the meaning which parties intended to express by the words which they used will be affected by the commercial background. A proper approach to construction therefore requires the court to give effect, so far as the language used by the parties will permit, to the commercial purpose of the arbitration clause. The construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of their relationship to be decided by the same tribunal; and the clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction."***

7.11 The arbitration clauses in the Revolving Loan Agreement are generally less clear than articulated by *Halsbury's Laws.*

7.12 The learned authors of ***Nesbitt and Quinlan***[2], in their work, ***'The Status and Operation of Unilateral or Optional Arbitration Clauses'***, state as follows, regarding unilateral arbitration clauses:

> ***"A unilateral option arbitration clause is a clause under which the parties bound by it are restricted to bringing proceedings in a particular jurisdiction, while at the same time providing one or more of the parties the option to elect that the dispute be referred to arbitration.***
>
> ***In its most common form, the unilateral arbitration clause provides a party or parties to a contract with the option of unilaterally submitting a dispute to arbitration, whilst the other party (parties) are restricted to bringing proceedings in the courts of a particular jurisdiction."***

7.13 It appears that, in order for a unilateral arbitration clause to successfully encompass the features espoused above, care must be taken to ensure that it is drafted clearly and concisely, with specificity regarding the disputes to be referred to arbitration, if not all. It is equally important, that such a clause is consistent with other agreements (where it is intended to be read as one with the other agreements of the same transaction), ensuring that the same arbitration agreement is applicable in all agreements.

7.14 In the present case, the procedure of appointing the arbitral tribunal under the Revolving Loan Agreement, is manifestly at variance with that prescribed under the Purchase and Repurchase Agreement. Clearly, these are competing positions

that would be difficult to enforce independently without resulting in some absurdity. This begs the question, *'which of the two dispute resolution clauses should carry the day?'* In such situations, the practice is usually to resolve the issue using the *contra proferentem* rule. However, this rule was expressly ousted from applying to the Revolving Loan Agreement, and which ousting is well within the rights of the parties. Clause 31.12 of the agreement, to this end, provides as follows:

> ***"The contra proferentem rule shall not apply and accordingly, none of the provisions hereof shall be construed against or interpreted to the disadvantage of the Party responsible for the drafting or preparation of such provisions."***

7.15 There still remains, however, the contradiction between the dispute resolution clauses in the Purchase and Repurchase Agreement and the Revolving Loan Agreement. Our view is that the *contra proferentem* rule having been expressly excluded from application, we have to employ other methods of resolving the contradiction of the two provisions.

7.16 The next thing to consider would have been simply to question, *'which of the two agreements was executed first in time?'* In so doing, the dispute resolution clause in the agreement executed last is the one that is adopted over the first. However, this is not tenable because, despite the agreements relating to the same transaction, they were executed independently and not with the view of the latter

replacing the former. The latter agreement was signed a day after the former and it contains no clause to the effect that it was executed to replace the whole or part of the former. In any event, the record reveals that there were further amendments to both agreements which essentially altered either agreement's position from being first executed to being last executed.

7.17 What remains to be done, in a bid to resolve the contradiction in the two dispute resolution clauses is to thoroughly examine the wording of the two clauses, against practical standards. We have looked at the dispute resolution clause in the Purchase and Repurchase Agreement and it appears to be well within the acceptable standards of an arbitration clause. We have also looked at the dispute resolution clause in the Revolving Loan Agreement and observe an issue of concern, particularly under clause 29.1 which provides that:

> "***Barak, at its sole and absolute discretion, shall be entitled to refer any and all disputes arising out of or in connection with the Agreement, to arbitration or determination by the court.***"

7.18 It is obvious that the respondent's intention in including the clause above in the agreement was so as to have an advantage over the other party to the agreement, in terms of a unilateral arbitration clause. The standard and common form of such a clause has been espoused in paragraph 7.10 above. The standard is simply that, in a unilateral arbitration clause, there has to be an established jurisdiction (usually the courts),

that the disadvantaged party will be restricted to and can utilise, in the event that they wish to legally pursue the advantaged party; and then there has to be the special option reserved only for the advantaged party to utilise arbitration in the place of the courts. This standard entails that there is a default dispute resolution forum established and common to both parties before the advantaged party can have the privilege to be the one to solely invoke arbitration.

7.19 In *casu*, however, this is not what can be seen from clause 29.1 of the Revolving Loan Agreement. The said clause 29.1 literally establishes no default dispute resolution forum, but vests all power and option to decide which mode of dispute resolution to be invoked, solely in the respondent. In other words, even if the respondent were to conduct itself in a manner that would justify the 1st appellant bringing an action against it, the 1st appellant's hands would be tied until the respondent itself decides where the 1st appellant should take its legal suit. We would imagine that the respondent would be most reluctant to refer a matter in which it is to be defendant, either to the courts or to arbitration. Therefore, by clause 29.1 only the respondent gets to decide by what means the 1st appellant will try to enforce its rights. This, in our view, perfectly fits in what are referred to as *'pathologically or poorly drafted clauses'*. In its current form, therefore, clause 29.1 cannot be invoked.

7.20 The effect of our finding above is that the only arbitration clause that is valid as pertains to the collective Facility Agreements, in *casu*, is the one in the Purchase and Repurchase Agreement whose salient portions provide as follows:

> "***Dispute Resolution***
>
> ***20.1 All disputes arising out of or in connection with the Agreement shall be finally settled under the Rules of Arbitration of the LCIA ("the Rules") ...Such arbitration shall be held in London, England or Lusaka, Zambia or such other jurisdiction as determined by Barak at its sole and absolute discretion and shall be held in a summary manner with a view to being completed as soon as possible.***
>
> ...
>
> ***20.3 This clause 20 will not preclude any Party from access to an appropriate court of law for interim relief in respect of urgent matters by way of, inter alia, an interdict or mandamus pending finalization of this dispute resolution process."***

7.21 Having found that clause 20 of the Purchase and Repurchase Agreement is the only valid arbitration agreement *in casu*, what then is the effect of this finding on the jurisdiction of the court and the proceedings in the court below?

7.22 It has been established that there is a valid arbitration agreement in clause 20 of the Purchase and Repurchase Agreement, and it is on the record that the appellants had, on 4 November 2022, applied to the learned Judge in the lower court for a stay of proceedings and reference of the matter to arbitration. This application was made about thirteen (13) days before the learned Judge delivered the impugned ruling,

in which she declined to stay execution of the writ of possession and judgment in default, and to set aside the writ of possession and judgment in default. The learned Judge did not hear and determine the application to stay proceedings and refer the matter to arbitration.

7.23 On the subject of arbitration agreements and substantive claims before courts, ***section 10 of the Arbitration Act*** *supra* provides that:

> ***"(1) A court before which legal proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so requests at any stage of the proceedings and notwithstanding any written law, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.***
>
> ***(2) Where proceedings referred to in subsection (1) have been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court."***

7.24 The Supreme Court has pronounced itself on the import of *section 10* above in the case of ***Sangwa v The Legal Practitioners Committee of the Law Association of Zambia***[16], where it held as follows:

> ***"The interpretation we have given to section 10 is that it compels a court to stay proceedings before it which are commenced in contravention of an arbitration agreement and refer the parties to arbitration. The stay and referral of the parties to arbitration marks the end of those proceedings before the court because the parties will have been referred to their preferred choice of dispute resolution forum. The court is only precluded from staying proceedings where the***

arbitration clause is not enforceable or cannot be invoked for being pathologically or poorly drafted."

7.25 The Supreme Court equally pronounced itself in the cases of ***Vangelatos v Vangelatos***[17] and ***Leopard Ridge Safaris Limited v Zambia Wildlife Authority***[18], that a Judge has no choice, but to stay proceedings and refer the parties to arbitration where there is a valid arbitration agreement.

7.26 Further, in the case of ***Pouwels Construction Zambia Limited and Pouwels Hotels and Resorts Limited v Inyatsi Construction Limited***[19], where a High Court Judge refused to refer the matter to arbitration pursuant to *section 10 of the Arbitration Act*, the Supreme Court held, *inter alia*, that:

> ***"The court below inflicted the legal proceedings on the 1st appellant against its will and in violation of the arbitration agreement. Since there was a valid arbitration agreement, the learned trial judge had no jurisdiction to adjudicate the matter. He had an obligation to stay proceedings and refer the parties to their choice of dispute resolution."***

7.27 The Supreme Court, in fortifying its pronouncement above, further highlighted the rationale behind arbitration clauses, as follows:

> ***"An arbitration clause is inserted in a contract at the time of its conclusion because the parties contemplate as a matter of commercial convenience that it is desirable to adopt this mechanism for resolving the disputes that may arise in the course of their business relationship. Its construction should, therefore, be influenced by the consideration of the underlying commercial purpose of including such a clause in the agreement."***

7.28 From the foregoing, we are equally of the view that the learned Judge in the lower court, ought to have immediately addressed her mind to consideration of the appellants' pending application to stay proceedings and refer the matter to arbitration, the moment she received the application. By proceeding to hear and determine the applications that culminated into the impugned ruling, the learned Judge erred in law because she did not have the requisite jurisdiction to hear the substance of this matter, in the face of an arbitration agreement. In this regard, we find merit in ground four of the appeal.

7.29 Having found in paragraph 7.21 above that there is a valid arbitration clause on the record, we make the following consequential orders in line with the *Pouwels case*:

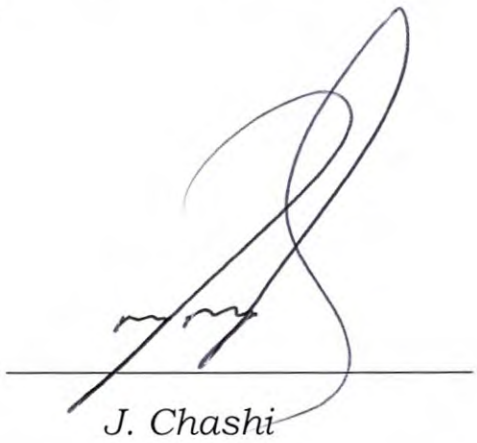
1. ***We set aside the writ of possession and the judgment in default of 16 June 2022;***
2. ***We stay the proceedings in the lower court; and***
3. ***We refer the parties to arbitration.***

7.30 In view of our findings above, grounds one, two and three are rendered otiose.

9.0 Conclusion

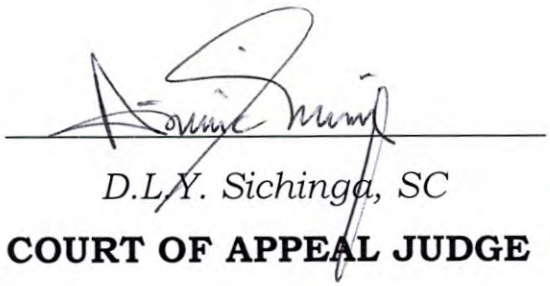
9.1 We allow the appeal on the success of ground four.

9.2 Costs awarded to the appellants to be agreed or taxed in default thereof.



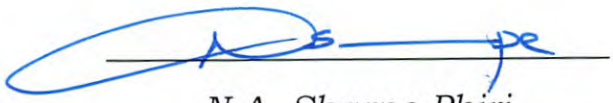
J. Chashi

COURT OF APPEAL JUDGE



D.L.Y. Sichinga, SC

COURT OF APPEAL JUDGE



N.A. Sharpe-Phiri

COURT OF APPEAL JUDGE