IN THE COURT OF APPEAL OF ZAMBIA APPEAL NO.274/2024

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN

NYIOMBO INVESTMENTS LIMITED (IN RECEIVERSHIP)	**1ST APPELLANT**
CHUMENE INVESTMENT LIMITED	**2ND APPELLANT**
MAURICE JANGULO (AS GUARANTOR)	**3RD APPELLANT**
GALUM ADAM PATEL (AS GUARANTOR)	**4TH APPELLANT**

AND

STANDARD CHARTERED BANK OF ZAMBIA PLC	**RESPONDENT**

CORAM: Siavwapa JP, Chishimba and Patel, JJA

On 17th February and 4th March 2026

For the 1st Appellant:	Mr. G. Mata, Mrs. Chanda and Mr. M. Kawaya of Messrs Keith Mweemba Advocates
For the 2nd & 3rd Appellant:	Mr. B. Mulungushi of Messrs Milner & Paul Legal Practitioners
For the 4th Appellant:	Ms. M. Mwiinga and Mrs. M. P Lungu Messrs PNP Advocates
For the Respondent:	Mr.S. Musonda of Messrs AMW & Co Legal Practitioners

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JUDGMENT

CHISHIMBA JA, delivered the judgment of the Court.

REPUBLIC OF ZAMBIA
COURT OF APPEAL
04 MAR 2026
CIVIL REGISTRY 2
P.O. BOX 50067, LUSAKA

CASES REFERRED TO:

1. **Metalco Industries Company Limited and Others v First National Bank Zambia Limited and Another (Appeal No. 222/2021**
2. **Chikuta v Chipata Rural Council (1974) ZR 241**
3. **Zambia National Holdings Limited and Another v The Attorney-General (1993–1994) ZR 115,**
4. **Cash Crusaders Franchising (Pty) Ltd v Shakers and Movers (Z) Limited (2012) 3 ZR 174,**
5. **ZCCM Investments Holdings PLC v Vedanta Resources Holdings and Konkola Copper Mines PLC (SCZ Appeal No. 14 of 2021)**
6. **Heyman and Another v Darwins Limited (1942) 1 All ER 337**
7. **Printing and Numerical Registering Company v Sampson (L.R. 19 Eq 462)**
8. **Audrey Nyambe v Total Zambia Limited (SCZ Appeal No. 29 of 2011)**
9. **Undi Phiri v Bank of Zambia (SCZ Judgment No. 21 of 2007)**
10. **Vedanta Resources Holdings Limited v ZCCM Investment Holdings PLC and Another (Appeal No. 181/2019)**
11. **Sililo v Mend-a-Bath and Another SCZ Appeal No. 168 of 2014**
12. **Beza Consulting Inc Limited v Bari Zambia Limited and Another CAZ Appeal No. 171 of 2018**
13. **Ody's Oil Company Limited v. The Attorney General and Constantinos James Papotis SCZ Judgment No. 4 of 2012**
14. **Moba-Hotel-Convention-Centre-Ltd-vs-LYCO-Business-Solutions-Ltd CAZ Appeal No. 066 of 2022**

OTHER WORKS REFERRED TO:

1. **Black's Law Dictionary, 9th Ed. (2009)**

1.0 INTRODUCTION

1.1 This appeal is against the Ruling of Hon. Mrs. I. Z. Mbewe delivered on 30th April, 2024, dismissing the Appellants'

application to stay the proceedings and refer the parties to arbitration. The appeal contends with the issue of whether mortgage proceedings for enforcement of a mortgage by fore closure and sale are amenable to arbitration.

2.0 BACKGROUND

2.1 Between 2007 and 2013, the Respondent advanced various banking facilities to the 1st Appellant. The facilities were initially secured by debentures over fertilizer and other commodities held by or on behalf of the 1st Appellant at different locations. In addition, the indebtedness was secured by unlimited guarantees executed by the 3rd and 4th Appellants and the late Maureen Dlamini, the 5th Appellant.

2.2 By an Amendment and Restatement Agreement dated 7th April 2013, the Bank consolidated and restated the facilities, making available to the 1st Appellant an aggregate sum of USD 150 million, comprising two committed term loan facilities with staggered repayment periods. The primary security for the restated facilities remained charges over commodities.

2.3 Concerns subsequently arose regarding the integrity of the commodity security, following reports of tampering and interference with the stock. As a result, the collateral manager

was removed. In order to further secure the indebtedness, the Bank requested additional security from the 1st Appellant.

2.4 Consequently, by a Mortgage Deed dated 6th January 2014, the 1st Appellant mortgaged its properties known as Stand Nos. 5277 and 5278, Buyantashi Road, Lusaka, which mortgage was duly registered. Thereafter, by a further facility letter dated 27th November 2014, the Bank advanced an additional USD 12 million, to be secured by properties located in Kapiri Mposhi, namely Stand Nos. 197, 198, 220 and 221, which were intended to be consolidated into Stand No. 198 Kapiri Mposhi. The Kapiri properties were pledged through resolutions and by deposit of title deeds, creating equitable mortgages.

2.5 The 1st Appellant subsequently defaulted on its obligations. In February 2018, the Bank demanded repayment of the outstanding indebtedness, which as at 28th February 2018 stood at approximately USD 43 million, inclusive of interest. Demands were also issued to the guarantors and to the 2nd Respondent in its capacity as equitable mortgagor. Partial payment was thereafter made, which marginally reduced the 1st Appellant's indebtedness.

2.6 The Respondent commenced a mortgage action in the lower Court by Originating Summons, seeking, *inter alia*, payment of the sums due, declarations of its status as mortgagee, possession of the mortgaged properties, foreclosure, sale, and recovery of enforcement costs.

2.7 In response to the action, the Appellants applied for a stay of proceedings and referral of the Parties to arbitration pursuant to section 10 of the Arbitration Act, relying on an arbitration clause contained in a Field Warehousing and Storage Agreement executed between the Respondent, the 1st Appellant, and a collateral manager. They contended that the dispute before the Court was not a mere mortgage enforcement action, but arose from, or was closely connected to, alleged breaches of the Field Warehousing and Storage Agreement.

3.0 DECISION OF THE COURT BELOW

3.1 The lower Court dismissed the application, holding that the proceedings before it were for the enforcement of a mortgage arising from banking facilities and security documents. Further, that the arbitration clause relied on did not govern the dispute.

4.0 GROUNDS OF APPEAL

4.1 Dissatisfied with the decision of the lower Court, the Appellants appealed to this Court, raising the following grounds of appeal:

1. **The learned Court below erred in both law and fact when it found that the true nature of the originating process and the context in which the matter arises was that of a simple mortgage action contrary to the facts on record.**
2. **The learned Court below erred in law and in fact when it found that the dispute revolves around the banking facilities, security documents and deed of guarantor and that the Field Storage and Warehousing Agreement is a separate agreement between the plaintiff, 1st defendant and ACE as collateral managers.**
3. **The learned Court below erred in law and in fact when it denied the Defendants' application to refer the matter to arbitration on the basis that the banking facilities and all other contractual obligations arising in any way or in connection with the agreement are to be governed by Zambian law and that the 1st Defendant irrevocably submitted to the non-exclusive jurisdiction of the Zambian courts.**
4. **The learned Court below erred in law and in fact when it held that the issues raised in relation to the Field Storage and Warehousing Agreement were not pleaded and the issue of the lack of a handover and pilferage do not form part of thc Plaintiff's mortgage action hence there is no justification for a stay of proceedings and referral to arbitration.**
5. **The learned Court below erred in law and in fact when it held that even if the arbitration agreement were applicable, it would not affect the 3rd and 4th Defendants in their capacity as guarantors as they are non-parties to the Field Storage and**

Warehousing Agreement; despite the 3rd and 4th Defendants having consented to being subject to the arbitration agreement.

6. **The learned Court below erred in law and in fact when it held that in light of the mortgage action and as guided by section 10 of the Arbitration Act No. 19 of 2000, the present action is not subject to the arbitration agreement in clause 15 of the Field Storage and Warehousing Agreement.**

5.0 APPELLANT'S HEADS OF ARGUMENT

5.1 In ground one the Appellants contend that the transaction between the parties was, in substance, a loan agreement supported by multiple interrelated documents, namely; the facility agreement, the Field Warehousing and Storage Agreement, mortgages, debentures, and deeds of guarantee. They argue that the mortgage instruments were merely modes of enforcement in the event of default and did not define the true nature of the dispute.

5.2 It is submitted that the Field Warehousing and Storage Agreement was central to the operation of the loan, as the commodities managed under that agreement constituted the primary security. Reliance is placed on the pleadings and evidence adduced at trial showing that the alleged breaches of the Field Warehousing and Storage Agreement substantially contributed to the default giving rise to the proceedings.

5.3 In support of the proposition that the existence of a mortgage does not, of itself, preclude arbitration where the dispute is broader and intertwined with other agreements, reliance is placed on the case of **Metalco Industries Company Limited and Others v First National Bank Zambia Limited and Another**[1]. The Appellants contend that, under sections 6(2), 6(3), and 10 of the Arbitration Act, mortgage disputes are not excluded from arbitration, particularly where jurisdiction clauses in facility agreements are expressed to be non-exclusive.

5.4 The Appellants further contend that the reliefs sought do not determine the appropriate forum. Reference was made to the case of **Chikuta v Chipata Rural Council**[2], in submitting that the learned Judge erred in reducing the dispute to the form of the originating process rather than its substantive content.

5.5 In ground two, the Appellants submit that the learned Judge erred in holding that the Field Warehousing and Storage Agreement was a separate and collateral agreement unrelated to the banking facilities. They contend that the two agreements were mutually referential and interdependent, as demonstrated by express provisions in the Field Warehousing

and Storage Agreement making its operation conditional upon the execution of the facility agreement, and by corresponding references in the facility agreement to financing against warehouse receipts.

5.6 The Appellants submit that the Field Warehousing and Storage Agreement governed inspection, monitoring, custody, and accountability of the secured commodities, and that failures under that agreement directly affected the repayment structure and ultimately led to default. On that basis, they contend that the dispute could not properly be determined without engaging the arbitration clause governing that agreement.

5.7 Under ground three, the Appellants submit that the learned Judge misdirected herself by holding that the submission to the non-exclusive jurisdiction of the Zambian courts in the facility agreement displaced the arbitration agreement. The fact that agreements are governed by Zambian law does not exclude arbitration, as arbitration itself is regulated by Zambian law under the Arbitration Act. A non-exclusive jurisdiction clause does not bar arbitral jurisdiction and cannot override a clear arbitration agreement.

5.8 Reliance is placed on **section 10 of the Arbitration Act,** as interpreted in the cases of **Zambia National Holdings Limited and Another v The Attorney-General**[3], **Cash Crusaders Franchising (Pty) Ltd v Shakers and Movers (Z) Limited**[4], **and ZCCM Investments Holdings PLC v Vedanta Resources Holdings and Konkola Copper Mines PLC**[5], on the proposition that where parties have agreed to arbitrate, the court has a prima facie duty to give effect to that agreement unless it is null, void, inoperative, or incapable of being performed.

5.9 Further, reliance was placed on the English case of Heyman **and Another v Darwins Limited**[6] to support the principle that an arbitration clause survives disputes regarding the underlying contract and governs the mode of dispute resolution.

5.10 The Appellants have also referred to the cases of **Printing and Numerical Registering Company v Sampson**[7] on the principle of freedom of contract, and **Audrey Nyambe v Total Zambia Limited**[8]**.** That in *casu* a close reading of the arbitration clause demonstrates that it is operative and enforceable.

5.11 In addressing ground four, the Appellants submit that the learned Judge erred in holding that issues relating to the Field Warehousing and Storage Agreement, including lack of handover and pilferage, were not pleaded and therefore irrelevant. It is their contention that these matters were pleaded in both the Respondent's affidavit in support of the originating summons and in the Appellants' defences. Reference was made to the case of **Undi Phiri v Bank of Zambia**[9] to support the proposition of the principle that where evidence on an unpleaded issue is led without objection, the court is entitled to consider it.

5.12 In ground five, it is submitted that the learned Judge erred in holding that the arbitration agreement could not affect the 3rd and 4th Appellants as guarantors. Reference was made to the case of **Vedanta Resources Holdings Limited v ZCCM Investment Holdings PLC and Another**[10] and contended that the presence of third parties is not, of itself, a bar to arbitration. Non-parties may validly consent to arbitration, and that the affidavit evidence shows that the guarantors expressly consented to the matter being referred to arbitration and to being parties thereto.

5.13 In conclusion, the Appellants submit that the arbitration agreement was neither null, void, inoperative nor incapable of being performed, and that the learned Judge misdirected herself in declining to give effect to it.

6.0 RESPONDENT'S HEADS OF ARGUMENT

6.1 The Respondent filed Heads of Argument in which it contends that the learned Judge correctly refused to stay the proceedings and refer the Parties to arbitration, having properly characterised the dispute as a mortgage action arising from banking facilities and security documents, rather than a dispute under the Field Warehousing and Storage Agreement.

6.2 The Respondent submits that the central question on appeal is whether the dispute before the lower Court was one "subject to an arbitration agreement" within the meaning of **section 10 of the Arbitration Act, No. 19 of 2000**. This question must be answered by examining the true nature of the dispute and the reliefs sought, as opposed to the mere existence of an arbitration clause in a collateral agreement. In this regard, reliance was placed on the case of **Audrey Nyambe v Total Zambia Limited (supra)**, where the Supreme Court held that

the wording of the arbitration clause and the nature of the dispute must be closely examined before a referral to arbitration can be made.

6.3 According to the Respondent, its relationship with the 1st Appellant was that of banker and customer, pursuant to which loan facilities were advanced and secured by, inter alia, legal and equitable mortgages, charges over fertilizer stock, and deeds of guarantee executed by the 3rd and 4th Appellants. The proceedings in the High Court were commenced to enforce these banking facilities and securities, and the reliefs sought were confined to payment of the outstanding debt, foreclosure, possession, and sale of mortgaged properties.

6.4 It is further submitted that the Field Warehousing and Storage Agreement was executed solely because fertilizer stock formed part of the security and was intended to govern the relationship among the Respondent, the 1st Appellant, and ACE Audit as collateral manager. The Agreement regulated inspection, monitoring, and warehousing services only, and that the 2nd, 3rd and 4th Appellants were not parties to that Agreement. Accordingly, the arbitration clause contained therein could not apply to them, a position grounded in the doctrine of privity of contract.

6.5 The Respondent's position is that the learned Judge correctly held that the arbitration clause in the Agreement was limited in scope and applied only to disputes arising out of or in connection with that Agreement. None of the reliefs sought in the lower Court arose from the Agreement, but rather from the banking facility letters, mortgage deeds, and guarantees, all of which expressly submitted disputes to the non-exclusive jurisdiction of the Zambian courts and contained no arbitration clause.

6.6 In support of this position, reliance is placed on the case of **Metalco Industries Company Limited and Others v First National Bank Zambia Limited and Another (supra)**, where this Court held that arbitration clauses in facility agreements do not extend to separate security documents which do not themselves contain arbitration clauses, and that enforcement of mortgages and guarantees is properly within the jurisdiction of the High Court.

6.7 Therefore, the attempt to rely on alleged breaches of the Field Warehousing and Storage Agreement is misplaced, as such matters were not pleaded and, in any event, do not alter the nature of the action before the Court. A stay of proceedings

cannot be justified on the basis of issues that do not form part of the pleaded claim.

6.8 With respect to the argument that the guarantors consented to arbitration, the Respondent submits that this issue did not arise in the Court below and cannot be raised for the first time on appeal. Reference was made to the case of **Sililo v Mend-a-Bath and Another**[11], where it was held that a ground of appeal must attack an actual finding of the lower court, and that new issues cannot be introduced on appeal. The Respondent maintains that non-parties to an arbitration agreement cannot be bound by it, a position reinforced by the Supreme Court decision in **ZCCM Investments Holdings PLC v Vedanta Resources Holdings Ltd and Another(supra)**.

6.9 The Respondent therefore submits that the learned Judge was on firm ground in holding that the dispute was not amenable to arbitration and that the application to stay proceedings was properly dismissed.

7.0 APPELLANT'S HEADS OF ARGUMENT IN REPLY

7.1 In reply, the Appellants maintain that the learned Judge erred by holding that the matter was a simple mortgage action. In determining the true nature of a dispute, the Court was

required to consider the entirety of the pleadings, the conduct of the proceedings, and not merely the Respondent's originating documents.

7.2 The Appellants contend that although the matter was commenced by originating summons, it proceeded in substance as if commenced by writ, owing to its complexity. They contend that the record of proceedings demonstrates that the Field Warehousing and Storage Agreement was central to the dispute before the lower court. Though the Respondent relied on the case **Metalco Industries Company Limited and Others v First National Bank Zambia Limited and Another(supra)**, that authority expressly recognises that a facility agreement may have annexures and interrelated documents. Further, that the facts of **Metalco** are distinguishable, as the Field Warehousing and Storage Agreement in the present case was not a stand-alone document.

7.3 The Appellants contend that the record shows that the Field Warehousing and Storage Agreement expressly referred to the banking facilities, and that the facility documents, in turn, made reference to the collateral arrangements. The two

agreements were interlinked and could not properly be treated as separate contractual regimes.

7.4 The Appellants submit that according to the learned authors of Handbook on Arbitration in Zambia, an arbitration agreement may be incorporated by reference where a written contract refers to another document containing an arbitration clause.

7.5 The facility documents and the Field Warehousing and Storage Agreement were intended to operate back to back, and that the proper execution of the facility depended on the warehousing arrangement. On that basis, the arbitration clause in the Field Warehousing and Storage Agreement was incorporated into the overall contractual framework and could not be severed from it.

7.6 The Appellants further argue that, unlike the facts in **Metalco (supra)**, the primary agreement in this matter did not rely on the mortgage deeds and guarantees for its operation, but rather on the Field Warehousing and Storage Agreement. The Supreme Court in the Metalco case acknowledged that an arbitration clause may validly be found in a separate agreement.

7.7 The Appellants dispute the finding that issues relating to lack of handover and pilferage under the Field Warehousing and Storage Agreement were not pleaded and therefore irrelevant. They reiterate that the warehousing agreement was a critical document underpinning the banking facility and was expressly referred to in the facility documents. Consequently, the absence of an express arbitration clause in the facility documents was overridden by their incorporation of the Field Warehousing and Storage Agreement.

7.8 Regarding the applicability of the arbitration clause to the guarantors, the Appellants submit that their intention to have parties referred to arbitration was expressly stated in paragraph 13 of the affidavit in support, where the Defendants deposed that they wished the matter to be determined through arbitration.

7.9 The Appellants referred to the case of **ZCCM Investments Holdings PLC v Vedanta Resources Holdings and Konkola Copper Mines PLC (supra)** and submitted that the presence or absence of third-party rights does not determine whether a matter is arbitrable. Once an arbitral tribunal finds that a dispute falls within the arbitration agreement, the court ought not to re-open that question.

7.10 Relying on the Handbook on Arbitration in Zambia, the Appellants further submit that while arbitration does not provide a statutory mechanism for joinder of multiple parties, consolidation or concurrent hearings remain possible by consent. They take the position that what is critical is the consent of the party bound by the arbitration clause, which, in this case, the Respondent had already given by being a party to the Field Warehousing and Storage Agreement. The question of who else participates in the arbitration does not determine whether the matter should be referred to arbitration.

7.11 The Appellants pray that the appeal be allowed, the ruling of the High Court be set aside, and the matter be stayed and referred to arbitration, with costs.

8.0 AT THE HEARING

8.1 The Parties relied on the arguments on record and reiterated the issues therein.

9.0 ANALYSIS AND DECISION OF THE COURT

9.1 We have considered the appeal, the authorities cited and the arguments advanced by both learned counsel. The following facts not in dispute, that the Respondent advanced various

loan and credit facilities to the 1st Appellant. It is not disputed that the facilities were secured by several security instruments, including:

(a) debentures over commodities;

(b) legal and equitable mortgages over immovable properties; and

(c) deeds of guarantee executed by the 3rd, 4th and 5th Appellants.

9.2 The facilities were restated and consolidated by an Amendment and Restatement Agreement dated 7th April 2013, under which it was established that the Respondent made available an aggregate sum of USD 150 million.

9.3 It is not in dispute that concerns arose regarding the commodity security, leading to the removal of the collateral manager and the Respondent's request for additional security.

9.4 This resulted in the 1st Appellant executing a registered legal mortgage over Stand Nos. 5277 and 5278, Buyantashi Road, Lusaka, and further provided equitable mortgages over properties in Kapiri Mposhi, including Stand No. 198 Kapiri Mposhi. The Respondent subsequently advanced an additional USD 12 million facility secured by the Kapiri Mposhi properties.

9.5 It is common cause that the 1st Appellant defaulted in servicing the facilities. Subsequently, the Respondent issued letters of demand in February 2018.

9.6 As at 28th February 2018, the outstanding indebtedness stood at approximately USD 43 million, inclusive of interest, and only partial repayment was thereafter made.

9.7 It is not in dispute that the Respondent commenced proceedings against the Appellants in the lower Court seeking reliefs including payment of the outstanding sums, possession of the mortgaged properties, foreclosure, sale, and enforcement of the securities.

9.8 It is undisputed that a Field Warehousing and Storage Agreement existed between the Respondent, the 1st Appellant, and a collateral manager, and that the Agreement contained an arbitration clause. The 3rd and 4th Appellants were not parties to the Field Warehousing and Storage Agreement, but were parties to the guarantees and security documents. The Appellants applied before the lower Court for a stay of proceedings and referral to arbitration pursuant to **section 10 of the Arbitration Act**, relying on the arbitration clause in the Field Warehousing and Storage Agreement.

9.9 The lower Court dismissed the application, holding that the proceedings before it were mortgage enforcement proceedings not subject to the arbitration agreement. It is this decision that is subject of this appeal.

9.10 In view of the aforestated facts and the arguments on appeal, the main issues for determination as we see them are as follows:

1. **Whether the learned Judge erred by describing the proceedings before the lower Court as purely a mortgage action, as opposed to a dispute arising out of or in connection with the Field Warehousing and Storage Agreement.**
2. **Whether the dispute before the lower Court was a matter "subject to an arbitration agreement" within the meaning of section 10 of the Arbitration Act, No. 19 of 2000, which obliged the Court to stay the proceedings and refer the parties to arbitration.**
3. **Whether the arbitration clause contained in the Field Warehousing and Storage Agreement extended to disputes arising from the banking facilities, mortgages, debentures, and guarantees, which formed the basis of the Respondent's claim.**

9.11 Section **10 of the Arbitration Act** provides that:

> **A court before which legal proceedings are brought in a matter which is subject to 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.

9.12 This position was settled in the case of **Beza Consulting Inc Limited v Bari Zambia Limited and Another**[12]. In that case we addressed the question of the effect of an arbitration clause on a court's jurisdiction. We held, in clear terms, that the mere existence of an arbitration agreement does not automatically oust the jurisdiction of the court. The ouster contemplated by **section 10 of the Arbitration Act** is triggered only upon a request by a party to the arbitration agreement. It therefore follows that where parties request for a matter to be referred to arbitration, as a result of a valid arbitration agreement, a court must in appropriate circumstances, refer to the matter to arbitration.

9.13 For the Court to assume jurisdiction of a matter, it is therefore imperative to begin by determining whether a matter is subject to arbitration. In doing so consideration is made to:

(a) the nature of the dispute;

(b) the reliefs sought; and

(c) the scope of the arbitration clause relied upon.

9.14 In **Audrey Nyambe v Total Zambia Limited (supra)** it was held that in determining whether a matter is amenable to

arbitration or not, it is imperative that the wording used in the arbitration clause itself are closely studied. In **Metalco Industries(supra)** relied on by both parties, the Court stated that the mere existence of an arbitration clause in one of several related agreements does not, of itself, render all disputes between the parties arbitrable.

9.15 In the case of **ZCCM V Vedanta Resources and Another(supra)**, the Supreme Court referred to its decision in **Ody's Oil Company Limited v. The Attorney General and Constantinos James Papotis**[13] and held that:

> **we guided that faced with the question whether a matter should be determined by arbitration or not: The court must be satisfied that there is first an agreement, that the arbitration agreement is valid, and or that it is not null and void, inoperative or incapable of being performed.**

9.16 In the case of **Moba Hotel Convention Centre Ltd vs LYCO Business Solutions Ltd**[14] we stated the following:

> **"What was meant by the Supreme Court in the Audrey Nyambe case by reference to studying the words used in an arbitration clause was that the courts must determine whether the agreement or clause is worded in such a way that there are pre-existing conditions essential to the subjection of the matter to arbitration, such as a time limit within which arbitration proceedings are to be commenced or only after an amicable settlement fails."**

9.17 In light of the above authorities, we have carefully analysed the various facilities entered into between the 1st Appellant and the Respondent. We have also considered both the restated facility agreement dated 7th April, 2013 which set the aggregate amount owed to the Respondent. According to the relevant provisions of Field Warehousing Agreement:

> **The Depositor is, subject to the security interest of the Bank, the owner of Fertilizer products herein generally referred to as "the Goods" which shall be delivered by the Depositor for storage, inspection, monitoring and field warehousing by ACE at designated Storage Facility.**
>
> **The Bank and its Affiliates have agreed to grant a credit facility to the Depositor to finance the purchase of said Goods.**
>
> **The Depositor and the Bank wish ACE to provide inspection, monitoring and field warehousing services as described in Annex II hereto attached for the account of the Bank and ACE has agreed to do so upon the terms and conditions mentioned hereinafter.**

9.18 The said agreement further provides that:

> **In the case of any dispute or differences arising out of or in connection with this Agreement or its construction, operation, termination or cancellation, the parties shall meet and attempt to settle such disputes or differences by means of negotiations between them.**
>
> **If the parties cannot settle any such dispute or difference es by negotiations within twenty-one (21) days after first commencing negotiations, then, unless ACE has previously notified the parties in writing that it wishes any dispute or**

difference to be settled by a court of law, such dispute or differences shall be settled by arbitration. The award of the arbitrator shall be final and binding upon the parties.

9.19 The plain reading of this clause entails that any dispute that stems from the agreed terms under the agreement shall be settled by arbitration. The Appellants have relied on this provision to show that the dispute that was before the lower Court stems from or is connected to the Field Warehousing Agreement. In our considered view, the Field Housing Agreement governed the housing, monitoring and inspection of commodities.

9.20 The facilities that were obtained by the Appellants were governed by the Restated Agreement 2013. This Agreement consolidated all the facilities that the Appellants held with the Respondent. Under those respective agreements no arbitration clauses were set out for dispute resolution. Perusal of the originating process revealed the reliefs sought related to the indebtedness of the Appellants, the Respondent's rights as mortgagees and enforcement of the mortgages.

9.21 These reliefs arise purely from banking facilities and their enforcement, not from performance or breach of the Field Warehousing and Storage Agreement.

9.22 It is our position that although the Appellants contended that the Field Warehousing and Storage Agreement was central to the dispute, the learned Judge was on firm ground when she found that the character of a dispute is determined by the substance of the claim as pleaded and the remedies sought. Allegations relating to pilferage, lack of handover, or failures by the collateral manager were not the foundation of the Respondent's claim before the lower court and did not form the basis upon which the it sought the relief.

9.23 The arbitration clause that the Appellants rely on is contained in the Field Warehousing and Storage Agreement, an agreement regulating the management, inspection, and custody of commodities. Its scope is limited to disputes arising out of or in connection with that agreement and cannot extend to the dispute relating to default under the Loan facilities.

9.24 On that basis alone, we are of the firm view that the arbitration clause in the Field Warehousing Agreement cannot be extended to the mortgage action before the lower Court as the nature of the dispute does not warrant it. The lower Court cannot be faulted for refusing to stay proceedings and refer the Parties to arbitration.

10.0 CONCLUSION

10.1 We find no merit in the appeal, and accordingly dismiss it with costs to the Respondent.

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M. J. Siavwapa
JUDGE PRESIDENT

.....
F.M. Chishimba
COURT OF APPEAL JUDGE

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A.N. Patel S.C
COURT OF APPEAL JUDGE