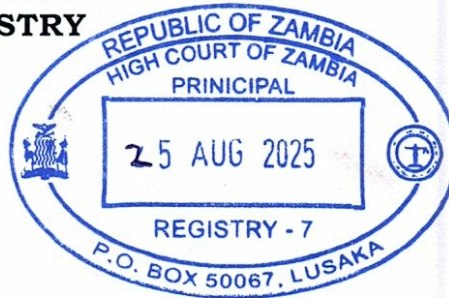


**IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

2023/HP/0017



BETWEEN:

AUSTIN LUNGU

PLAINTIFF

AND

JESFIEL INVESTMENTS LIMITED

DEFENDANT

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA IN CHAMBERS THIS 25th
DAY OF AUGUST, 2025**

*For the Plaintiff : Mr Andrew Nkunika, Messrs Nkunika and Chipeta Legal
Practitioners*

For the Defendant : Ms Constance Mwila Mulenga, Messrs Ilunga and Company

R U L I N G

CASES REFERRED TO:

1. *Stanley Mwambazi v Morester Farms Limited 1977 ZR 108*
2. *Waterwells Limited v Wilson Samuel Jackson 1984 ZR 98*
3. *Covindbhai Baghibhai and Vallabhai Bagabhai Patel v Monile Holding Company Limited 1993 - 1994 ZR 20*
4. *Rosemary Bwalya v National Commercial Bank Plc Appeal No 133 of 2005*
5. *John W.K Clayton v Hybrid Poultry Farms Limited 2006 ZR 70*
6. *Anti-Corruption Commission v Charles Sambundu Appeal No 54 of 2013*
7. *Chifuti Maxwell v Chafinga Rodney Mwansa and Rodgers Chipili Mwansa SCZ Appeal No 09/2016*

LEGISLATION REFERRED TO:

1. *The High Court Rules, Chapter 27 of the Laws of Zambia*

1. INTRODUCTION

- 1.1 An application was filed by Jesfiel Investments Limited, the Defendant herein on 28th March, 2025 pursuant to **Order 12 Rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia** to set aside the Judgment which was entered in default of appearance and defence on 14th February, 2025.
- 1.2 The application was supported by an affidavit and a List of Authorities and Skeleton Arguments.
- 1.3 An affidavit in opposition and a List of Authorities and Skeleton Arguments in opposition were filed on 27th May, 2025.

2. BACKGROUND

- 2.1 Austin Lungu commenced this action on 10th January, 2023, by Writ of Summons which was accompanied by a statement of claim and the other documents, claiming:
 - i. An Order to Jesfiel Investments Limited to pay Austin Lungu the contractually agreed commission of K190,000.00;*
 - ii. Interest;*
 - iii. Costs incidental to this action;*
 - iv. Any other relief that the Court may deem fit.*
- 2.2 Judgment in default of appearance and defence was entered on 10th August, 2023. Thereafter, on 8th August, 2024, Jesfiel Investments Limited applied to stay sale of the goods that were seized in execution, pending an application to set

aside the default Judgment pursuant to **Order 3 Rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia.**

- 2.3 The default Judgment was set aside in a Ruling dated 6th November, 2024 in which Jesfiel Investments Limited was directed to enter appearance and file its' defence by 28th November, 2024.
- 2.4 The said appearance and defence was not entered as directed, which resulted in another Judgment in default of appearance and defence being entered against Jesfiel Investments Limited. That is what prompted the application, which is the subject of this Ruling being filed.

3. SUBMISSIONS AT THE HEARING

SUBMISSIONS BY COUNSEL FOR JESFIEL INVESTMENTS LIMITED

- 3.1 Counsel for Jesfiel Investments Limited relied on the documents which were filed in support of the application, stating that Jesfiel Investments Limited had always been desirous of defending the case.
- 3.2 He explained the failure to enter appearance and file the defence, as being due to inadvertence during internal hand over of the matter within the firm. In that respect, Counsel stated that Counsel who had conduct of the matter initially, was in the process of leaving the firm, and it was mistakenly believed that the Court had not issued any order pertaining to the entering of appearance and filing a defence.
- 3.3 Further submission was made, that Jesfiel Investments Limited was unaware that this Court delivered a Ruling in

which a date for entering appearance and filing a defence was set. It was also Counsel's submission, that there was no intention on the part of Jesfiel Investments Limited to disobey the Order and delay the matter.

- 3.4 Reiteration was made, citing the cases of ***Rosemary Bwalya v National Commercial Bank Plc*** ⁽⁴⁾, ***Waterwells Limited v Wilson Samuel Jackson*** ⁽²⁾ and ***Stanley Mwambazi v Morester Farms Limited*** ⁽¹⁾ that Jesfiel Investments Limited has a defence on the merits, and even if it defaulted on entering appearance and filing its' defence. Therefore, triable issues should be allowed to proceed to trial.
- 3.5 It was also stated that in the case of ***Chifuti Maxwell v Rodney Mwansa and Rodgers Chipili Mwansa*** ⁽⁷⁾ reliance was placed on the principles as set out in ***Zuckerman on Civil Practice*** which states that the primary consideration for a Judge at the hearing is the reason for the default.
- 3.6 Based on that, Counsel submitted that it was in the interest of justice that Jesfiel Investments Limited be heard on the merits, and that costs be in the cause.

RESPONSE BY COUNSEL FOR AUSTIN LUNGU

- 3.7 In response, Counsel stated that they relied on the affidavit in opposition and the List of Authorities and skeleton arguments, which they had filed in opposition to the application on 27th May, 2025. The position that Counsel took, was that Jesfiel Investments Limited had sufficient opportunity to enter appearance and file its' defence.

- 3.8 He noted that this was not the first time that default Judgment had been entered against Jesfiel Investments Limited. It was added that Jesfiel Investments Limited had been aware of the proceedings, and it was served all the appropriate documents at the appropriate time.
- 3.9 Counsel took the view that Austin Lungu could not be penalized for any misfeasance on the part of Jesfiel Investments Limited. In that regard, Counsel noted that internal administrative issues within the firm, did not take away from Jesfiel Investments Limited's obligation to comply with the Court's order.
- 3.10 It was also stated that the proposed defence did not amount to a defence on the merits, and no plausible explanation had been given for the default in entering appearance and filing a defence.
- 3.11 Authority in support of that position was stated as being the case of ***Waterwells Limited v Wilson Samuel Jackson*** (2).

REPLY BY COUNSEL FOR JESFIEL INVESTMENTS LIMITED

- 3.12 Counsel in reply, with regard to the assertion that Jesfiel Investments Limited was served all the documents, stated that the Ruling of the Court and the Default Judgment were not served on Jesfiel Investments Limited.
- 3.13 The submission in reply, was also that the defence as proposed, had raised triable issues which the Court should consider. Thus, the prayer was that the default Judgment be set aside as there was a defence on the merits.

4. DECISION OF THE COURT

4.1 The application to set aside the default Judgment was made pursuant to **Order 12 Rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia**. That Order provides that:

“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.”

4.2 Field Chilufya Kaweme, the Managing Director of Jesfiel Investment in giving reasons why the default Judgment which was entered on 17th February, 2025, should be set aside, gave a background to the matter, and stated that this Court on 6th November, 2024 delivered a Ruling which Austin Lungu had to date not served it.

4.3 The averment was that a perusal of the record, showed that no affidavit was filed by Austin Lungu to show proof of service on Jesfiel Investments Limited.

4.4 Field Chilufya Kaweme in further deposing, stated that the Court in the Ruling directed that appearance and defence be filed by 28th November, 2024. It also his averment, that Jesfiel Investments Limited only became aware of the Ruling, when it conducted a search on the record, on 23rd March, 2025. He added that only then did, it become aware, to its' shock, that a default Judgment had been entered against it, on 17th February, 2025.

- 4.5 The failure to enter appearance and file a defence was attributed to not having been served the Ruling which this Court delivered, and as a result not being aware of when the appearance and defence should have been filed.
- 4.6 Field Chilufya Kaweme stated that Jesfiel Investments Limited had a defence on the merits, which was exhibited as 'FCK1'. Thus, the application should be granted.
- 4.7 In the List of Authorities and Skeleton Arguments in support, the case of ***Covindbhai Baghibhai and Vallabhai Bagabhai Patel v Monile Holding Company Limited*** ⁽³⁾ was stated as having held that:
- “The Court will set aside a default judgment if a triable issue is disclosed.”***
- 4.8 In arguing that the default Judgment should be set aside, the argument was that reasons had been given for the default in entering appearance and filing the defence. It was stated that the intended defence had been exhibited to the affidavit which was filed in support of the application. Therefore, the default Judgment should be set aside.
- 4.9 Austin Lungu in opposition, averred that he conducted a search on the Court record on 4th December, 2024 to see whether Jesfiel Investments Limited had entered appearance and filed its' defence, after the Court delivered the Ruling directing Jesfiel Investments Limited to enter appearance and file its' defence on 28th November, 2024.
- 4.10 He also deposed that Jesfiel Investments had had several opportunities to enter appearance and file its' defence, but

had not done so. Austin Lungu stated that the application to set aside the default Judgment was frivolous and vexatious, and a waste of the Court's time, and was in fact a total disrespect of the Court.

- 4.11 The arguments in the List of Authorities and Skeleton Arguments in opposition were that the cases of ***Anti-Corruption Commission v Charles Sambundu*** ⁽⁶⁾ and ***John W.K Clayton v Hybrid Poultry Farms Limited*** ⁽⁵⁾ held that in order for a defence to be valid, as a defence on the merits, a party has to show that they have an arguable defence on the merits, by providing prima facie evidence.
- 4.12 It was argued that the defence as proposed, merely contained bare denials without traversing the claims that had been made by Austin Lungu. The case of ***Waterwells Limited v Wilson Samuel Jackson*** ⁽²⁾ was stated as having held that a defence on the merits is the more important consideration in setting aside a default Judgment.
- 4.13 Therefore, as no defence on the merits had been disclosed, as the proposed defence contained admissions and bare denials, there was no legal basis for setting aside the default Judgment.
- 4.14 It was added that doing so, would cause miscarriage of justice, and would result in irreparable damage, mental anguish and economic loss to Austin Lungu.
- 4.15 The authorities that have been cited by both Austin Lungu and Jesfiel Investments Limited show that the Court will set aside a default Judgment where a defence on the merits is

disclosed. Those authorities further show that while an explanation for the default in entering appearance and filing a defence is necessary, it is the defence on the merits that is the more important consideration.

- 4.16 The argument by Austin Lungu was that the proposed defence which is exhibited as 'FCK1' to the affidavit which was filed in support of the application, contains admissions and bare denials. As such, it is not an arguable defence that warrants the default Judgment being set aside.
- 4.17 He also contended that setting aside the default Judgment will cause a miscarriage of justice, irreparable damage, mental anguish and economic loss to him.
- 4.18 A perusal of the proposed defence shows that Jesfiel Investments Limited agrees that it contracted to pay Austin Lungu to secure its business to supply the Zambia Airforce (ZAF) masks. It denies that it agreed to pay him K190, 000.00 as commission once it was paid K480, 000.00 for the supply of masks by ZAF, stating that the amount agreed as commission was K80, 000.00.
- 4.19 Jesfiel Investments Limited admits Austin Lungu's assertion that ZAF made a part payment of K50, 000.00. As regards the contention that ZAF paid Jesfiel Investments Limited the balance of K430, 000.00, that is admitted, and Jesfiel Investments Limited's intended defence is that upon being paid in full, it paid Austin Lungu the sum of K80, 000.00 which was agreed as commission.

- 4.20 However, Austin Lungu returned to Jesfiel Investments Limited requesting to be paid K50, 000.00 as he had a shortfall in paying those who helped him secure the contract.
- 4.21 The defence as proposed is further that, the condition of paying Austin Lungu K190, 000.00 only came about when Jesfiel Investments Limited was in desperate need of a contract that would pay out immediately, and it only agreed as Austin Lungu indicated that to obtain the contract and get payment within a week, he would need to secure the same by paying those who would help him.
- 4.22 The contention is that Austin Lungu failed to deliver the contract within one week of engagement, and it was indicated to Austin Lungu that the contract would not be on the basis of payment of K190, 000.00.
- 4.23 There is a proposed counterclaim to nullify the contract as Austin Lungu did not deliver it within one week.
- 4.24 On the basis of the proposed defence, it is not true that the defence contains merely bare denials. Rather, a defence and counterclaim to the claims is proposed. On that basis, a defence on the merits is disclosed.

5. CONCLUSION

- 5.1 As such, triable issues have been raised, and I set aside the default Judgment. However, looking at the reasons advanced for the failure to enter appearance and file the defence following the delivery of this Court's ruling on 6th November, 2024 in which Jesfiel Investments Limited was directed to enter appearance and file its' defence by 28th November,

2024, the record shows that this Court on 4th November, 2024 issued notices to Austin Lungu in person, and to Ilunga and Company, the advocates for Jesfiel Investments Limited to collect the Ruling on 6th November, 2024.

- 5.2 Ilunga and Company being based in Kalulushi have not indicated on the Court record who their agents are in Lusaka in line with **Order 11 Rule 4 of the High Court Rules, Chapter 27 of the Laws of Zambia.**
- 5.3 As there are no agents for Messrs Ilunga and Company as required by law, Jesfiel Investments Limited cannot argue that they were not served the Ruling of the Court, as the Court issued notices for collection of the Ruling. Jesfiel Investments Limited shall accordingly bear Austin Lungu's costs from the time that he filed this action up to now, when I have set aside the default Judgment for the second time.
- 5.4 The costs are payable forthwith, and shall be taxed in default of agreement. Jesfiel Investments Limited shall enter appearance and file its' defence and the other documents by 16th September, 2025.

DATED AT LUSAKA THE 25th DAY OF AUGUST, 2025



S. Kaunda
S. KAUNDA NEWA
HIGH COURT JUDGE