

ZAMBIA / JUDGMENT

# Percy Mussa v William Tembo (2020/HP/0448) [2024] ZMHC 280 (28 November 2024)

[2024] ZMHC 280

COURT

High Court of Zambia

CASE / FILE NUMBER

2020/HP/0448

Source: zambialii.org · Research copy typeset by Esheria. Not court-issued or certified.

## Source record

IN THE HIGH COURT FOR ZAMBIA  
AT THE PRJNCJP AL REGISTRY

? \:,f"

/

HOLDEN AT LUSAKA

\_ ( r

(Civil jun·sdiction)

~ -

—,,”

c\}PLJC O F z

-

~,~;;

•.&gt;

- ~ --111,,8

,~ -· ,,,,~i~,J"1 1~

· tPAL

r

? I NOV 2124

BETWEEN:

PERCY MUSSA

AND

H[<.ifSTRY . 2

.50067. LU5

2020/HP/D448

L~:1

--=

PLAINTIFF

WILLIAM TEMBO

DEFENDANT

For the Plaintiff: Mr. K Mambwe of Fred Jere & co Legal Practitioners

For the Defendant: Mr. M Mulele of GM Legal Practitioners.

## RULING

### CASES REFERRED TO:

1. Water Wells Limited v Wilson Samuel Jackson (1984) Z. R 98;
2. Stanley Mwambazi v Morester Farms Limited (1977) Z. R 108; LEGISLATION REFERRED TO:
  1. High Court Rules Chapter 27 of The Laws of Zambia; 1.0

## INTRODUCTION

1.1 This is a ruling on an application dated 1st December, 2020 to set aside a Judgment in Default dated 28th August, 2020. The application was made pursuant to Order XLI rule 4 and Order XX rule 3 of the High Court Rules, Chapter 27 of the Laws of Zambia. -Rl- 2.0 BACKGROUND 2.1 The background leading to this application is that on 5th May, 2020 the Plaintiff commenced an action against the Defendant via writ of summons claiming the following:-

- i. An order for the return of Goods seized from the Plaintiff's house. In the alternative an order of payment of K213,994.00 being the total value of the good seized from the Plaintiff's house. Interest, costs and any other reliefs the court would deem fit. ii. iii. iv. v. 2.2 The service of process was done via substituted service. 2.3 After failure by the Defendant to enter appearance and defense, the Plaintiff on 28th August, 2020 obtained a judgment in default of appearance and defense against the Defendant. 3.0 AFFIDAVIT EVIDENCE IN SUPPORT OF THE APPLICATION 3 .1 The Affidavit in support was filed into court on 1st December, 2020 and was deposed by Mr. William Tembo, the Defendant in this matter. 3 .2 He deposed therein that on 5th May, 2020 the Plaintiff commenced this action against him and that his not having entered appearance was not deliberate but solely on the ground that he was unaware of these proceedings before this Court. 3.3 3.4 He further deposed that he has a defense on the merits. He went on to exhibit a copy of his draft defense. -R2- 7.2 The issue before me for consideration is whether or not the judgment in default of defense and appearance that the Plaintiff obtained against the Defendant should be set aside. 7.3 In analyzing the same, I am guided by the Supreme Court who 1n a plethora of authorities

including *M wambazi V Morester Farms Limited*, and *Waterwells Limited v Wilson Samuel Jackson* has guided that in dealing with an application to set aside a default judgment, the question to consider is whether a defense on the merits has been raised or not. In addition, the court has to consider, whether or not the applicant has given a reasonable explanation for his failure to file a defense within the stipulated time. Furthermore, that it is the disclosure of the defense on the merits which is a more important point to consider. 7.4 In the current case, I should, therefore, consider whether there is a defense on the merits and also whether the defendant has given a reasonable explanation for the default. In the *Waterwell Limited* case the Supreme Court simply put it that:- "Indeed the Court of Appeal in England has held to similar effect in *Ladup v Siu* , when they said that, although it is usual on an application to set aside a default judgment, not only to show a defense on the merits but also to give an explanation of the default, it is the defense on the merits which is the more important point to consider. We agree with them that, it is wrong to regard the explanation for the default, instead of the arguable defense as the primary consideration. If the plaintiff would not be prejudiced by allowing the defendant to defend the claim then the action should be allowed to go on trial. On the authorities to which we have referred, it is obvious that as at the time when the defendant first made application (which is the proper time to take into account) the delay and I or possible prejudice was of small enough a magnitude which could have been compensated by an order for costs. It only remains to consider whether the primary consideration. namely, the arguable defense. exists in this case." -R4- I '

7. 5 The above holding clearly empahsizes the importance of a defendant having an arguable defense on the merits, where there is an application to set aside a default judgment. 7.6 I have examined the Defendant's proposed defense reproduced hereunder:-
  - i. The contents of paragraph 1 and 2 of the statement of claim are admitted. ii. The contents of paragraph 3 of the plaintiff's statement of claim is disputed and the defendant herein will aver that the goods seized where seized under a warrant of distress issued by Messrs. Zulu and company being advocates for Moses Kalenga the landlord therein. The Plaintiff shall further aver that the said Moses Kalenga authorized the defendant herein to distrain such of the goods and chattels as may lawfully be distrained. The contents of paragraph 4 of the plaintiff's statement of claim are disputed on the grounds that the said seizure was legal and the defendant shall aver that due to the warrant of distress issued the said seizure was legal. The contents of paragraph 5 of the statement of claim are disputed. the defendant will aver that the goods were advertised and sold for cost of storage at the subordinate court. iv. iii.
  - v. The contents of paragraph 6 are disputed on the ground that the plaintiff sued the landlord and obtained a stay for the sale of the seized goods but the goods were not returned to plaintiffs' custody. The defendant will further aver that the reason for not returning the goods was premised on the fact that the court order obtained did not provide for the return of such goods. vi. The Defendant shall urge the honorable court to dismiss the Plaintiffs action for lack of merit with costs to the defendant. 7.8 After an immense examination of the

above defense it is my considered view that the Defendant has an arguable defense on the merits as he is claiming that there was a warrant of distress against the Plaintiff which allowed him to seize the goods in the manner he did. 7.9 Furthermore, it is my considered view that the Defendant has, however, not convincingly explained his reason for the default as he simply stated -R5- that he was not aware of the proceedings without giving any further explanations. However, bearing in mind the guidance of the Supreme Court in the above case of *Waterwells Limited v Wilson Samuel Jackson* that the primary consideration must be the presence of an arguable defense on the merits, I find that this is an appropriate case for this Court to set aside the default judgment granted to the Plaintiff herein. 7.10 For the foregoing reasons, the Defendant's application to set aside the judgment in default of appearance and defense succeeds. 7.11 I, however, award costs to the Plaintiff occasioned by this application. The said costs are to be taxed in default of agreement. 7.12 Leave to Appeal is hereby granted. Delivered at Lusaka this 28th day of November, 2024 -R6-

---

### Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

**ORIGINAL SOURCE**      <https://zambialii.org/judgments/all/2024/?alphabet=p>

**CASE PAGE**              <https://chat.esheria.ai/case-law/zambia/percy-mussa-v-william-tembo-DefaultJudgment-high-court-of-zambia-2024--6a3ea4e53b1caa91297f2011>

Prepared on 11 October 2026 · Esheria