



**IN THE NORTH WEST HIGH COURT
(MAFIKENG)**

CASE NO.: 1422/2012

In the matter between:

THAW TRADING

PLAINTIFF

and

CENTRAL LAKE TRADING 214 (PTY) LTD

DEFENDANT

JUDGMENT

LANDMAN J:

Introduction

[1] This is an application based on a summons where the defendant is in default. The application came before me in Motion Court as a result of the registrar's referral of the plaintiff's application for default judgment for hearing to the open court in terms of the provisions of Rule 31(5)(b)(vi).

[2] The plaintiff issued a simple summons out of this court against the defendant for payment of the amount of R2 283 864.60 for construction services rendered and building material delivered to the defendant at the latter's special instance and request, based on a verbal agreement reached between the parties for a low cost housing project known as Kuruman Phase 2. The plaintiff alleges that the amount claimed is due and payable.

[3] The summons was served at the address, which plaintiff alleges is the registered address of the defendant, namely Office No 21, Sanlam Building, 42 Boom Street, Rustenburg. This address falls within this court's jurisdiction. Service was effected on 22 October 2012 by affixing it to the main door as no other manner of service was possible.

[4] The defendant failed to enter an appearance to defend within the *dies* and the plaintiff's attorney of record applied to a registrar for default judgment in terms of the provisions of Rule 31(5)(a). The application was enrolled for this purpose in a registrar's office for 31 January 2013.

[5] Rule 31(5)(a) provides that:

“(5)(a) Whenever a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff, if he or she wishes to obtain judgment by default, shall where each of the claims is for a debt or liquidated demand, file with the registrar a written application for judgment against such defendant: Provided that when a defendant is in default of delivery of a plea, the plaintiff shall give such defendant not less than 5 days' notice of his or her intention to apply for default judgment.”

[6] The registrar was not prepared to grant default judgment in favour of the plaintiff. The registrar set out his reason for referring the application to a Judge in open court. It was referred because the plaintiff's claim is based on an oral agreement.

[7] Mr Smith, who appeared on behalf of the plaintiff, submitted that the registrar erred in referring the matter for hearing in open court on the basis that he did. He went on to submit that this court should refer the matter back to the registrar for reconsideration in terms of Rule 31(5)(a) of the Uniform Rules of Court.

[8] Mr Smith submitted that this court is empowered to make such an order in terms of the provisions of Rule 31, read with the provisions of section 173 of the Constitution of the Republic of South Africa of 1996.

Evaluation

[9] There are three questions to be answered. The first is was the registrar entitled to grant default judgment on the application? The second is whether the registrar should have referred the application to open court? The third is what is to be done about the situation?

Is the registrar entitled to grant default judgment in this matter?

[10] Mr Smith is correct that the application for default judgment is for a liquidated amount, based on a summons which was properly served and the defendant failed to enter appearance to defend timeously or at all. He submitted that the mere fact that a claim is based on an oral agreement does not render such a claim for an illiquid amount nor does it require evidence to be led. The plaintiff's claim does not require evidence to prove either the amount of the claim or the cause of action.

Meaning of a debt or liquidated demand

[11] The Uniform Rules of Court do not define a debt or liquidated demand.

[12] A debt is defined as a certain sum payable in respect of a liquidated money demand, recoverable by action. See **Debt, Stroud's Judicial Dictionary, Fifth Edition.**

[13] The full court in **Fatti's Engineering Co (Pty) Ltd v Vendick Spares (Pty) Ltd** 1962 (1) SA 736 (T) held that in spite of the special meaning given to the words 'liquidated demand' in the former Transvaal Rules of Court, the expression 'debt or liquidated demand' includes a liquidated claim as known in our common law. The court found that a claim capable of speedy and prompt ascertainment is a 'debt or liquidated demand' (see page 739).

[14] A court has a discretion to decide whether a claim is capable of speedy and prompt ascertainment. Boshoff J (as he then was) in **Fatti's Engineering Co (Pty) Ltd v Vendick Spares (Pty) Ltd** at page 739 made the following observation:

"The absence of uniformity in the decided cases is attributable to the fact that in each case a discretion was exercised according to the facts then before the Court. The inevitable result is that it is not possible to formulate precise rules as to when a claim should be regarded as liquidated in the sense that it is capable of being speedily and promptly ascertained." (At 739 A–B.)

"Similarly, where a contract for the rendering of services is concluded and the parties do not agree as to the remuneration to be paid therefore, it is an implied term of the contract that a reasonable remuneration will be paid for such services; such remuneration depends on what is regarded as reasonable in that particular trade or profession. In our organised society with businesses, trades and professions organised as they are it is normally a matter of no difficulty to determine the usual and current market price of articles sold and the reasonable remuneration for services rendered. These are matters which as a rule can be ascertained speedily and promptly. Generally speaking therefore a Court can, in exercising its discretion regard such a claim as a debt or liquidated demand unless of course there are features, appearing from the claim as framed or other relevant circumstances, which preclude the Court from

regarding such a claim as a debt or liquidated demand in the sense discussed in this judgment. This would not be out of keeping with the character of the expression 'debt or liquidated demand' as it is known in the English Rules of Court from which the expression is derived." (At 739G.)

[15] A debt or liquidated demand, relating to default judgment, covers much more than a liquidated amount in money, but a liquidated amount in money is a liquidated demand. See **Erasmus, Superior Court Practice**, page B1-198 (service issue 38). Coetzee J, in **Quality Machine Builder v M I Thermocouples (Pty) Ltd** [1982] 4 All SA 217 (W), makes it clear that the principle, as explained in **Fatti's Engineering Co (Pty) Ltd v Vendick Spares (Pty) Ltd 1962 (1) SA 736 (T)**, which applies in respect of a liquidated demand as regards default judgment would also apply in respect of a liquid claim in money in a summary judgment application. He said at page 220:

"It seems to me, on a proper analysis of the judgment of BOSHOFF J in the Fattis Engineering Co case, that it cannot be said that the ratio of his judgment is only applicable to applications for default judgment, as suggested by defendant's counsel. The ratio is as applicable to applications in terms of Rule 32 (1) (b)."

[16] The courts have considered the following claims to be a 'debt or liquidate demand':

- A claim based on a mandate given by a client to an attorney and where the attorney sues for fees and disbursements. It was implied that the amount was fair and reasonable; or the usual or normal amount due. See **Deeb v Pinter** 1984 (2) SA 501 (W).
- A claim for the repayment of an amount wrongfully and unlawfully stolen. See **Van der Westhuizen, NO v Kleynhans and Another** 1969 (3) SA 174 (O).
- An amount which is the fair, reasonable and equitable value of certain movable assets, the property of the plaintiff sold by the

defendant who received and has retained the proceeds and despite demand failed to account to the plaintiff for the amount thereof. See **Beringer v Beringer** 1953 (1) SA 38 (E).

- A claim for the cost of work or labour done and material or parts supplied. See **Fatti's Engineering Co (Pty) Ltd v Vendick Spares (Pty) Ltd** (supra) and **International Harvester v Ferreira** 1975 (3) SA 831 (SE).

Does an oral agreement render the claim illiquid?

[17] The mere fact that a cause of action is based on an oral agreement does not render the claim illiquid. The test is whether the claim is capable of speedy and prompt ascertainment. The court in **Quality Machine Builder v M I Thermocouples (Pty) Ltd** [1982] 4 All SA 217 (W), found that a claim for a fair and reasonable remuneration for work done and material delivered, which was based on an oral contract, was a liquidated amount in money. See also **Pick 'n Pay Retailers (Pty) Ltd h/a Hypermarkets v Dednam** 1984 (4) SA 673 (O).

Exceptions to jurisdiction

[18] There are, however, some instances of a debt or a liquidated amount which falls outside the jurisdiction of the registrar. See **Gundwana v Steko Development CC** 2011 (8) BCLR 792 (CC) which declared that:

“It is unconstitutional for a Registrar of a High Court to declare immovable property specially executable when ordering default judgment under rule 31(5) of the Uniform Rules of Court to the extent that this permits the sale in execution of the home of a person.”

See also **Van Winsen, The Civil Practice of the Supreme Court of South Africa**, fourth edition, at page 533.

Should the registrar have referred the application to open court?

[19] In the light of the concepts of “debt” and “liquidated amount” outlined above it was unnecessary for the assistant registrar to refer the application to this court. But one of the safeguard which accompanies the registrar’s jurisdiction is the power to refer an application to open court. In terms of the provisions of Rule 31(5)(b)(vi), a registrar may refer an application for default judgment to the open court. Erasmus, Superior Court Practice B1–204B–1 says the application should be referred if:

“Evidence is required to prove the amount of the claim or the cause of action; or
The Registrar has a legitimate doubt whether judgment should be granted or not.”

[20] Apart from the law there is a practical problem which Mr Smith highlighted. Of late, a registrar has referred a number of applications for default judgment for hearing before the open court, because each cause of action is being based on a verbal agreement. The registrar appears to be of the view that he is not empowered to grant default judgment in such circumstances, alternatively that evidence is required to prove these claims or there is doubt about whether judgment should be granted or not.

[21] In terms of the provisions of Rule 31(5)(a), plaintiffs are compelled to enrol all applications for default judgment of a liquidated amount before the registrar. The complaint is that plaintiffs are compelled to first apply to the registrar for default judgment, full knowing that the application relating to an oral agreement will in all probability be referred by the registrar, as a result of the view held by him, to the open court for hearing. This results in delay and

increased and unnecessary costs. Mr Smith also points out that the registrar's continued referral of such matters also results in an increased burden on Judges to consider default judgment applications which could and should have been granted by the registrar.

[22] Mr Smith contends that should the registrar have legitimate concerns or queries, he or she is empowered to call for and receive written or oral submissions in terms of the provisions of Rule 31(5)(b)(v). Thereafter, and if there is still a legitimate doubt, the registrar may refer the application for hearing before the open court.

[23] It would not be conducive to the administration of justice to place a strict interpretation on the registrar's power to refer an application. An unnecessarily restrictive approach would not be in the interest of litigants or justice. The registrar had, *prima facie*, a legitimate concern and it was open to him to take the action which he did to avoid the possibility of him committing an injustice.

What is to be done about the situation?

[24] Mr Smith submitted that the registrar's referral of the application for default judgment is a purely administrative act and it is a ruling or an order of an interlocutory nature. The ruling does not dispose of the issue and can accordingly be varied on good cause shown. Mr Smith submitted that it is competent for this court to refer the application for default judgment back to registrar instead of granting default judgment.

[25] No doubt this relief can be afforded but, because of the delay, I intend to grant default judgment and to order that a copy of this judgment be distributed

by the Chief Registrar to such members of her staff as are entitled to grant default judgment.

Order

[26] Judgment is granted against the defendant for:

1. Payment of the amount of R2 283 864.60.
2. Payment of interest on the above amount at 15,5% per annum *tempore morae* to date of final payment.
3. Costs of suit.
4. The Chief Registrar is directed to acquaint the Registrars with the contents of this judgment.

A A LANDMAN

JUDGE OF THE HIGH COURT

APPEARANCES:

DATE OF HEARING : 07 FEBRUARY 2013

DATE OF JUDGMENT : 14 MARCH 2013

FOR THE APPLICANT : MR P SMITH

FOR THE RESPONDENT : NO APPEARANCE

ATTORNEYS FOR THE APPLICANT : MINCHIN & KELLY