



IN THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA

CASE NO: 40806/2018

SIGNATURE 	DATE 30/06/2021
ELECTRONICALLY DELIVERED CIRCULATED BY EMAIL	
SIGNATURE	

In the matter between:

NTANGA NKUHLU INCORPORATED

Plaintiff/Applicant

And

INDEPENDENT DEVELOPMENT TRUST

1ST Defendant/1st Respondent

**TRUSTEES FOR THE TIME BEING INDEPENDENT
DEVELOPMENT TRUST NO IT NO:669/91**

2nd Defendant/2nd Respondent

DATE OF HEARING: This matter was enrolled for hearing on 23 JUNE 2021, and dealt with or determined on the basis of the papers or record and written argument filed on behalf of the parties, without appearance and oral argument.

DATE OF JUDGMENT: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time of hand-down is deemed to be 30 JUNE 2021.

JUDGMENT

[1] This matter came before me in the Unopposed Motion Court on 23 June 2021 for the adjudication of a Default Judgment Application set down by the Plaintiff on the ground that the Defendants were *ipso facto* barred from filing a Plea. The Application was cited (seemingly incorrectly) to be in terms of Rule 31 (5) of the Uniform Rules of Court. The Plaintiff served a Summons issued in this court on the 1st Defendant, the Independent Development Trust on 17 June 2018 and subsequently on the Trustees of the Trust, the 2nd Defendant on 4 November 2019, following a court order for their joinder on 5 September 2019.

[2] The Plaintiff's cause of action as set out in its particulars of claim is founded on a cession that the Plaintiff, a firm of attorneys is alleged to have concluded with its client, namely M J Mboya Project Managers who ceded to the Plaintiff its entire entitlement and legal right to claim against the Defendants for services Mboya rendered to the Defendants in the amount of R1 544 982.20. Further that the Plaintiff afterwards demanded payment of the amount from the Defendants and they failed to pay.

[3] On 12 December 2019 the Plaintiff served on the Defendants a Notice of Bar calling upon them to file their Plea within five (5) days from date of service. The Defendants missed the deadline of 17 January 2020 and filed their Plea only on 28 January 2020, without filing an Application for Upliftment of the Bar (the Defendant had alleged that the *dies* expired on 22 January 2020). Consequently, the Applicant proceeded on 20 February 2020 to issue a Default Judgment Application which was formally served on the Defendant more than a year later on 14 May 2021 and set it down for hearing on 23 June 2021.

[4] No further documents were served between the parties since the 'out of time' Plea on 28 January 2020 until on the eve of the hearing of the Default Judgment Application on 22 June 2021, when the Defendants' Application for Upliftment of the Bar was uploaded on caseline and served on the Plaintiff. However, no opposing papers to the Default Judgment or for an Application for a postponement were filed.

[5] At the time when the virtual hearing of the Default Judgment Application was supposed to commence, the Defendants' Counsel experienced problems with the connection. The parties were then given an opportunity to make written representations. The matter was decided on the submissions made and the relevant documents filed of record in the Default Judgment Application. It was upon the Defendants' Counsel to indicate the Defendant's right to be heard as the Plaintiff was adamant that the Default Judgment Application hearing was to proceed unopposed, regard being had to the fact that there were no papers filed to oppose or delay the Default Judgment Application.

[6] The Defendants in its heads of argument delivered on 25 June 2021, accepted that the Defendants are *ipso facto* barred and stated, as a matter of fact that the Defendants had instituted an Application for upliftment of the bar. All the same, the Default Judgment Application was the only matter before court. The Application for the Upliftment of Bar was still to be properly delivered and set down. The issue therefore to be decided is whether or not the Plaintiff has made a case in its papers for Judgment to be granted. Whether there is sufficient evidence to prove its cause of action.

[7] The Plaintiff in its heads of argument confirms that the Application is brought under Rule 31 (2) (a).

[8] The Defendants on the other hand argue against the court granting the Application for Default Judgment alleging in the heads of argument that:

1.1 The Plaintiff has failed in its Affidavit in support of the default judgment to quantify its claim, arguing that the claim is not for a debt or a liquidated claim therefore required in terms of Rule 32, to be quantified.

1.2 The grounds proffered in the Defendants' Application for Upliftment of Bar should be considered in deciding whether or not to grant Default Judgment.

[9] The Plea and the Application for the Upliftment of the Bar are not before me and therefore will not be considered for the purposes of whether or not to grant the Plaintiff Default Judgment to its claim. There is also no Application for the postponement of the Default Judgment. As a result, the only issue to be decided is whether or not the Plaintiff is, on its papers, entitled to a Default Judgment.

[10] In Default Judgment Applications, the court has got to be satisfied that the Plaintiff has pleaded a cause of action and put evidence before court that entitles it to the Judgment it is seeking. As the Plaintiff's Application is in terms of s 31 (2) (a), for it to be considered, it should comply with the requirements as set out in the rule's provision which reads:

"Whenever in an action the claim or, if there is more than one claim, any of the claims is not for a debt or liquidated demand and a Defendant is in default of delivery of notice of intention to defend or of a Plea, the Plaintiff may set the action down as provided in subrule (4) for default judgment and the court may, after hearing evidence, grant judgment against the Defendant or make such order as it deems fit. (my emphasis)

[11] It is therefore clear that when the claim is not for a debt or a liquidated demand, the court would grant judgment based on the evidence submitted to establish or prove the amount claimed or the cause of action pleaded. The evidence can be either *viva voce* or by Affidavit.

[12] Notwithstanding having stated that this is a Rule 31 (2) (a) Application, the Plaintiff's Counsel argued in her heads of argument that the Plaintiff's claim is for a liquidated amount culminating from an agreement of cession of a claim against the Defendants for the payment of the amount of R 1 544 982.20 for services rendered, as it appears in the combined summons.

[13] Plaintiff's Counsel, furthermore, based on her argument that the claim is for a liquidated amount, implores the court to grant the Default Judgment under Rule 31 (5) (a). In conclusion she then again submits that the plaintiff has complied with requirements for default judgment in terms of Rule 31(2)(a) of the uniform rules of court. No thought is put to the meaning of the concept of a liquidated amount or demand and both used incomprehensibly.

[14] In the Plaintiff's particulars of claim, it is only stated that the Plaintiff entered into an agreement of cession with Mboya in terms of which Mboya ceded his entire entitlement and legal right to claim against the Defendants to Plaintiff for services Mboya rendered in the amount of R 1 544 982.20, which cession was accepted by the Plaintiff. The Defendants have failed or refused to pay notwithstanding Plaintiff making a demand for payment, wherefore prays for an order in its favour.

[15] In the Affidavit supporting the Default Judgment Application, the Plaintiff sets out all the steps in the proceedings that led to the Application. Nothing further is mentioned in relation to the cause of action or about the alleged amount claimed or demand.

[16] According to Erasmus' Superior Court Practice, at D1-371 a liquidated demand can be equated with a claim for fixed, certain or ascertained amount or thing and includes a liquidated claim as known in common law. A liquidated demand under the Default Judgment requirement is said to cover much more than the liquidated amount in money as in relation to Summary Judgments. In *Fatti's Engineering Co (Pty) Ltd v Vendick Spares (Pty) Ltd* 1962 (1) SA 736 (T) the full court 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).

[17] In *Tredoux v Kellerman* 2010 (1) SA 160 (CPD) at 166E–F, the Court held that:

“A liquidated amount in money is an amount which is either agreed upon or which is capable of 'speedy and prompt ascertainment' or put differently, where ascertainment of the amount in issue is mere matter of calculation.”

[18] The test is therefore whether the claim is capable of speedy and prompt ascertainment. Furthermore, 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.)

[19] It is not known how the amount claimed as alleged by the Plaintiff is computed or quantified, if it has been agreed upon, had become due, if so when and if it has also become payable for the purpose interest as well. It is also not known whether the amount arose from a contractual obligation that was periodically fulfilled. There is no evidence if the amount has accrued to the cedent in a lump sum or invoices issued; see *Standard Bank of South Africa v Renico Construction (Pty) Ltd* (2011/33789) [2012] ZAGPJHC 287; 2015 (2) SA 89 (GJ) (20 September 2012) where Sutherland J remarked that:

"It bears emphasis to remark that the condition of 'illiquidity' is not a result if absence of evidence or proof of the indebtedness; rather it is the result of an inability to compute a figure in the absence of an investigation that is more than a mechanical exercise. (Cf: *Lester Investments (Pty) Ltd v Narshi* 1951 (2) SA 464 (C) at esp 470F – 472A.)"

[20] The Plaintiff's claim is not easily or speedily ascertainable, but requires evidence either to prove the amount or the cause of action. It is therefore not for a liquidated demand. The Plaintiff's Affidavit in support of the Default Judgment Application has only the historical account of what led to the launching of the Application without giving any further details on the alleged claim. Both the Summons and the Supporting Affidavit to the Default Judgment Application lack the averments and or evidence that is necessary to sustain a Judgment.

Under the circumstances the following order is made:

1. The Default Judgment is refused with no order as to costs.



N.V. Khumalo

**Judge of the High Court
Gauteng Division**

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