

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

(1)	<u>REPORTABLE: YES/NO</u>
(2)	<u>OF INTEREST TO THE JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>

Case no: 124/2022

In the matter between:

AUDITOR-GENERAL OF SOUTH AFRICA

PLANTIFF

And

THE ACCOUNTING OFFICER OF GATEWAY
AIRPORTS AUTHORITY (LTD)

FIRST DEFENDANT

GATEWAY AIRPORTS AUTHORITY (LTD)

SECOND DEFENDANT

JUDGMENT

MULLER J:

[1] The plaintiff is the Auditor-General of South Africa. The defendants are the accounting officer of the Gateways Airports Authority (Ltd) as the first defendant and Gateways Airports Authority (Ltd) as the second defendant.

The summons was served on 14 January 2022. No notice of intention to defendant was filed by the defendants.

[2] The plaintiff applied for default judgment. When the application was called counsel for the applicant was asked if the application should not have been referred to the Registrar to consider the application. Applicant's counsel informed the court that it was not, because the claim is for audit fees which is not a debt or liquidated demand as required by Rule 31(5)(a). Judgment was reserved.

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

“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...”

[4] The question to be determined is whether the claim is “a debt” or a “liquidated demand.” The term can be equated with a claim for a fixed, certain or ascertained amount.¹

[5] The plaintiff, in the particulars of claim, states that it conducted an audit at the second defendant and rendered invoices for the work performed. No payment was forthcoming with the result that the plaintiff instituted action for the recovery of R1062 192-65 together with interest.

[6] The Public Audit Act² gives effect to the provisions of the Constitution establishing and assigning functions to the Auditor-General and to provide for auditing institutions in the public sector. Section 23 of the Act, makes provision for audit fees which the plaintiff may charge. In terms of section

¹ Van Loggerenberg DE *Erasmus Superior Court Practice* Vol 2 (2016) D1-371.

² Act 25 of 2004. Hereinafter called “the Act”.

23(1) the plaintiff determines the basis for the calculations of audit fees to be recovered from auditees referred to in section 1,³ after having consulted the “Oversight Mechanism”⁴ and the National Treasury. Section 23(2) provides that an auditee shall settle the account for audit fees within 30 days, failing which the plaintiff must promptly take legal steps to recover the amount. Interest may be charged in terms of section 23(3) on any audit account at the prescribed rate in terms of section 1(2) of the Prescribed Rate of Interest Act.⁵

[7] The plaintiff, in accordance with the provisions of section 23 (1), determined its fees and rendered invoices.

[8] In *Consolidated Fish Distributors (Pty) Ltd v Sergeant Jones Valentine & Co*⁶ the claim was for the balance due for reasonable remuneration for audit services based on an implied term that defendant would pay for such services. The court held that the amount was not a debt or liquidated amount. In coming to this conclusion the court referred to Wessels *Law of Contract* 2nd ed, par 3498, who stated:

”If a person is employed to do work for another, there may be either an express contract as regards the remuneration as regards the remuneration or there may be a tacit understanding to pay the current wage or the work may be done without any agreement or understanding in respect of the remuneration. In the latter case, however, the law imposes on the employer a liability to pay the value of the work done, called a *quantum meruit*. The employer in such a case is not entitled to recover on any fixed scale, but only such remuneration as the Court deems reasonable.”⁷

[9] The court held:

³ Audits of auditees which the Auditor-General must perform in terms of section 4(1), 4(2) or 4(3).

⁴ The National Assembly in terms of section 10(3).

⁵ Act 55 of 1975.

⁶ 1966 (4) SA 427 (C).

⁷ 429A.

“The question is whether the rule of practice as laid down in *Fatti’s case* should be followed in the Division. According to *Hickman’s case* the practice in this Division is to regard only claims so expressed that ascertainment of the amount is a mere matter of calculation as being “liquidated demands”. This seems to me to exclude claims for payment in respect of services, whether professional or otherwise, where there is an implied term that a reasonable remuneration, viz, a reasonable remuneration to be determined by the Court, will be paid.”⁸

[10] In the present case the basis for the calculation of the audit fee is determined by the plaintiff in terms of section 23(1) after consultation with the oversight mechanism and the National treasury. Thus, the amount claimed is to be ascertained by mere calculation and is not based on an implied term that the fee should be reasonable.

[11] The court in *Consolidated Fish Distributors* followed the practice in that Division, despite after being made aware of the decision the Full Bench in *Fatti’s Engineering Co (Pty) v Vendick Spares (Pty) Ltd*⁹ which held that in matters which can be ascertained speedily and promptly, the court may regard such claims as a debt or liquidated demand unless there are features which preclude the court from regarding it as a debt or liquidated demand.

[12] The decision in *Consolidated Fish Distributors* must be distinguished from the facts in the present case. There is no magic to the term “audit fees” regardless of the particular facts. The facts must be examined. As this case has demonstrated the money claim is based on a calculation in terms of the provisions of the Act. The amount which can be promptly and speedily be

⁸ 430F.

⁹ 1962 (1) SA 736 (T) 739E-G .

determined is not premised on a *quantum meruit* and is not be determined by the court on what the court may be regarded as reasonable.¹⁰

[13] It follows that the amount claimed is “a debt” or “liquidated demand.” The application for default judgment, therefore, should have been referred to the Registrar in terms of Rule 31(5) (a).

Order

The application is struck from the roll

¹⁰ Middleton v Carr 1949 (2) SA 374 (A) 386.

GC MULLER

JUDGE OF THE HIGH COURT LIMPOPO

DIVISION: POLOKWANE

APPERANCES

1. For the plaintiff : Adv Westhuizen

