

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)**

Case No. 3541/2018

Date heard: 31 October 2019

Date delivered: 5 November 2019

In the matter between:

ANNE VAN DER MERWE t/a ANNE'S CARE CENTRE **Applicant / Defendant**

And

EASTERN PROVINCE CATERERS (PTY) LTD **Respondent / Plaintiff**

JUDGMENT

Beyleveld AJ:

[1] The applicant seeks an order that the default judgment obtained against her by the respondent be rescinded.

[2] The respondent commenced action proceedings against the applicant in October 2018 claiming payment of catering services rendered by the respondent to the applicant in terms of a written catering contract concluded between the parties on 25 January 2018.

[3] Default judgment was obtained against the applicant on 25 January 2019, service of the summons has been served at the *domicilium* address of the applicant. The summons was served on a Ms Chantel Marais.

[4] The applicant claims she was in hospital at the time the summons was served and states that she only became aware that action had been instituted when she was served with a writ of execution. Summons was properly served on the applicant's employee but no affidavit is filed by the person (Karl van der Merwe) to whom Ms Marais says she handed the summons.

[5] The applicant in her founding affidavit refers to a meeting with the respondent's representative after the issue of summons. She was informed of her indebtedness in the sum of R101 000.00. The probabilities that during this discussion no reference was made to the summons, in which a similar amount is claimed, are so remote that one can justifiably reject any contention that the applicant was unaware of the summons. What is particularly significant is the absence of an affidavit from Mr van der Merwe disclosing what he did with the summons.

[6] Furthermore, the applicant's accountant, after service of the summons, spoke to the respondent's representative regarding outstanding amounts. The respondent contends that a payment proposal was made, whilst the applicant asserts that the

conversation was in connection with discrepancies in the account and if there “*were monies outstanding, the correct amount being determined, we would then pay in instalments, if need be.*”

[7] Leaving aside the Plascon Evans rule, the overwhelming probabilities are that the applicant’s accountant was instructed after receipt of the summons, to negotiate payment in instalments.

[8] I am accordingly of the view that there has not been a reasonable and acceptable explanation for the default¹ and on this basis alone the application stands to be dismissed.

[9] I am also of the view that the applicant has not shown that there is a *bona fide* defence to the claim which *prima facie* has some prospect of success².

[10] The applicant is silent as to whether the application is in terms of Rule 42, the common law or Rule 31. It seems, however, that inferentially the applicant relies on Rule 31(2)(b) as the allegation contained in paragraph 22 of the answering affidavit is simply noted by the applicant in reply. The respondent in paragraph 22 states that the application for rescission “appears to be premised on the provisions of Rule 31(2)(b)”.

[11] Whatever description the applicant gives the basis of the application, the common law ground to set aside a judgment may also be considered .

¹ Chetty v Law Society, Transvaal 1985 (2) SA 756 (A)

² Colyn v Tiger Food Industries t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA)

[12] The application cannot be in terms of Rule 42³. It also cannot be in terms of Rule 31(2)(b) as the judgment was not granted by a court.

[13] Has the applicant shown that there is a *bona fide* defence which *prima facie* has some prospects of success?

[14] Put differently, has the applicant raised the existence of an issue fit for trial⁴

[15] What must, therefore, be considered is whether the applicant has sufficiently succeeded in making out a *bona fide* defence which has prospects of success.

[16] The applicant's defence is an alleged counterclaim.

[17] It is common cause that the catering agreement has been cancelled. What is not common cause is the reason for cancellation.

[18] The respondent contends that the agreement was consensually cancelled by virtue of the applicant's precarious financial position whereas the applicant's notice to cancel lists dissatisfaction with the quality of food.

[19] The respondent, in turn, communicated in writing with the applicant a few days later recording that the agreement was consensually cancelled "*due to financial constraints*".

[20] The applicant does not deny the letter by the respondent dated 22 June 2018 confirming cancellation of the agreement by virtue of financial constraints, and claiming payment of monies outstanding for June 2018, nor does she deny a further

³ Lodhi 2 Properties Investments CC and Another v Bonder Developments (Pty) Ltd 2007 (6) SA 87 (SCA)

⁴ Sanderson Technitool (Pty) Ltd v Intermenua (Pty) Ltd 1980 (4) SA 573 (A) at 575H-576A

letter dated 27 June 2018 recording non-payment and notice of a last meal to be served.

[21] One would have expected the applicant to have raised the allegation of inadequate performance when faced with payment demands. Whether she, as a layperson, understood the technical meaning of a counterclaim, is not the important question; the question is rather why she did not raise lack of performance when asked to pay. She, in fact, makes some payments without demur⁵.

[22] The applicant is in law entitled to raise an unliquidated counterclaim as a defence⁶.

[23] I am not satisfied that the applicant has sufficiently disclosed the nature and grounds “of her counterclaim”⁷. Very little or no detail is furnished and one gains the distinct impression that the counterclaim is a belated afterthought. It is not even disclosed when the patients left , nor is there a confirmatory affidavit from any of them. Furthermore, one would have expected the applicant to raise the loss of patients with the respondent, particularly when pressed for payment.

[24] For the reasons set out above, I am of the view that the application stands to be dismissed. There is no reason why costs should not follow the result.

[25] I, therefore, grant the following order:

[25.1] The application is dismissed with costs.

⁵ The respondent when seeking judgment erroneously omitted to credit two small payments. Counsel for the respondent indicated that the applicant has been credited with such amounts, including a further payment made after judgment.

⁶ E.H Hassim Hardware v Fab Tanks CC [2017] ZASCA 145 at [21]

⁷ E.H Hassim hardware *supra* at para [28]

