



**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable/Not reportable

Case number: 1645/2024

In the matter between:

REEF CATERERS (PTY) LTD

PLAINTIFF

and

VAAL CHRISTIAN SCHOOL NPC

DEFENDANT

Coram: Loubser J

Heard: 31 October 2024

Delivered: 7 November 2024

Summary: Summary judgment – whether replication filed together with summary judgment application may be considered for purpose of determining whether Defendant's defence is *bona fide*

ORDER

1. Summary judgment in the amount of R386 650.29 is entered in favour of the Plaintiff against the Defendant.
2. The defendant to pay the costs of the summary judgment application and the action on the party and party scale, including the fees of counsel on scale B.

JUDGMENT

LOUBSER J

[1] This is an application for summary judgment by the Plaintiff against the Defendant for payment of the amount of R386 650.29. The application followed on a summons issued by the Plaintiff, and a plea that was subsequently filed by the Defendant. In terms of the summons, a written contract was concluded between the parties on about 22 May 2023, in terms of which the Plaintiff was to provide catering services to the Defendant school at a monthly fee payable by the Defendant. It is alleged that the Defendant fell in arrears with the payments in the amount claimed, and that the Plaintiff then terminated the contract on 11 January 2024.

[2] In its plea, the Defendant denied that the Plaintiff had complied with all its obligations in terms of the contract in that the Plaintiff failed to provide the agreed services in a professional manner. Students at the school contracted food poisoning as a result, which caused parents to remove students from the school. As a further result, the school did not receive timeous payments from its students, and the school suffered vast financial losses following the said conduct of the Plaintiff, it is stated in the plea. The Defendant could therefore not make payment to the Plaintiff.

[3] The Defendant further pleaded that the outstanding amount claimed, is denied. It also alleged that the invoices on which the outstanding amount is based, were never received by the Defendant.

[4] The Plaintiff then filed a replication to the plea on about 11 June 2024. Together with the replication, the Plaintiff filed this application for summary judgment. In the replication, it is denied that the Plaintiff had breached the contract, and it is alleged that the Defendant's own financial constraints were the reason for its failure to make timeous payment of the Plaintiff's invoices. The Plaintiff further referred to a meeting on 30 November 2023 between the parties, where a representative of the Defendant confirmed that the contract was terminated as a result of the Defendant's financial constraints.

[5] The Plaintiff further alleged in the replication that the relevant invoices were delivered to the Defendant by hand as well as by email and by letter, and copies of the emails and the letter are attached to the replication. Screenshots of WhatsApp messages exchanged between representatives of the Plaintiff and the Defendant on 11 January 2024 are also appended to the replication. The representative of the Defendant informed in one of those messages as follows:

“Hi Clinton, I’m not sure why Reef Caterers are involving attorneys at this stage. I have communicated regularly with the CEO and director informing them that on opening week we will make payment on the account. We just haven’t had the funds to date”.

[6] In its affidavit in support of summary judgment, the Plaintiff contends that none of the defences raised by the Defendant are *bona fide* or raise a dispute which requires ventilation at trial. In terms of Rule 32(3)(b) a defendant in summary judgment proceedings must satisfy the court that he has a *bona fide* defence to the action. He must disclose fully the nature and grounds of his defence and the material facts relied upon therefore.

[7] In contending as such, the Plaintiff referred to the communications appended to the replication, and said that it is clear that the invoices were sent to the Defendant. Also, it is clear from those communications that it was not any alleged breach of contract by the Plaintiff which resulted in the Defendant’s failure to pay. At the time, the Defendant never alleged any failures by the Plaintiff in the execution of its duties, the Plaintiff said.

[8] The core issue in this application is whether a plaintiff in summary judgment proceedings can rely on allegations in its replication and annexures thereto in order to show a lack of *bona fides* on the part of the Defendant. In the matter of *Ingenuity Property Investments (Pty) Ltd v Ignite Fitness (Pty) Ltd*¹ it was held as follows:² “ A replication also serves as a response to the defences raised in the plea and explains why they do not raise triable issues. It does not serve as amplification of the cause of action. In this sense a replication and the summary judgment affidavit under the amended Rule 32 effectively perform similar functions. There is no reason why a plaintiff should be precluded from delivering its replication simultaneously with its application for summary judgment and incorporating by reference the allegations in the replication.”

[9] I respectfully agree with this view expressed in the Ingenuity-decision, on condition that the application for summary judgment is not filed clearly after the replication has been filed. When this happens, the plaintiff’s replication would constitute a further procedural step which would mean that he has waived his right to apply for summary judgment.³ I therefore find that the Plaintiff was entitled to incorporate the allegations in the replication by reference in its affidavit in support of summary judgment.

[10] In terms of Rule 32(3)(b) the Defendant now had to satisfy the court by affidavit that it has a *bona fide* defence to the action, and such affidavit must disclose fully the nature

¹ 2023 (5) SA 439 (WCC)

² At para [50]

³ Arum Transport CC v Mkhwenkwe Construction CC 2022(2) SA (KZP)


and grounds of the defence and the material facts relied upon therefor, in order to avoid an order of summary judgment. In its opposing affidavit the Defendant reiterated that the Plaintiff had breached the terms of the contract, and that the failure of the Defendant to pay was due to the financial losses it suffered as a result of the Plaintiff's breach. The Defendant further alleged that the contract was mutually terminated at the meeting of 30 November 2023, and reference is made to an email received by the Defendant from the Plaintiff the following day, which reads "as discussed yesterday, we confirm that our contract was mutually terminated due to financial constraints". Significantly, there is no mention of an alleged breach of contract by the Plaintiff in the said email.

[11] The Defendant further persisted in its denial that the invoices were ever sent to them, but the WhatsApp message in which the Defendant undertook to pay, is admitted. The Defendant explains in relation to this message that it had not specified what amount it would pay. But this is not the point. The point is that it is not explained why the alleged breach of the Plaintiff was not referred to in the WhatsApp message. Lastly, the Defendant indicated that it intends to file a counterclaim in the action as soon as its losses have been quantified.

[12] The mere existence of a potential counterclaim here can, in my view, not stand in the way of summary judgment. This is so, because the existence of a counterclaim can only be considered once the Defendant has shown that it has a *bona fide* defence in that the Plaintiff had breached the contract by providing defective services, causing the Defendant financial loss. That this defence is *bona fide*, has not been shown, because there is no prior indication or allegation to the effect that the Plaintiff's breach of contract has caused the termination of the contract. To the contrary, it is clear from the correspondence and the emails that only the financial constraints of the Defendant resulted in its inability to pay at the time, which in turn resulted in the termination of the contract.

[13] Consequently, the Plaintiff is entitled to an order of summary judgment in its favour. The following order is made:

1. Summary judgment in the amount of R386 650.29 is entered in favour of the Plaintiff against the Defendant.
2. The defendant to pay the costs of the summary judgment application and the action on the party and party scale, including the fees of counsel on scale B.



P.J. LOUBSER, J

For the Plaintiff:

Adv. H. J. van der Merwe

Instructed by:

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Cooper Majiedt Inc, Bloemfontein

For the Defendant:

Adv. P. C. Ploos van Amstel

Instructed by:

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