

2/4/2014

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED
1/4/2014	<i>[Signature]</i>
DATE	SIGNATURE

CASE NO: 49806/2013

In the matter between:

2/4/2014

CES AFRICA (PTY) LTD

Plaintiff

and

SCHALK JACOBUS BURGER

Defendant

JUDGMENT

BAM J

1. On 13 August 2013 the plaintiff instituted action against the defendant claiming payment for damages in the amount of more than R2M.
2. The defendant filed a Notice to Defend and subsequently a Notice of Exception. The exception is based on the grounds that the particulars of claim lack averments sustaining a cause of action.
3. The plaintiff's averments can be summarized as follows:

- (i) The defendant was a director of the plaintiff and a director of a company named Cost Engineering Mozambique Lda ,“CEM”;
- (ii) The defendant was responsible to collate, generate and render invoices to CEM on behalf of the plaintiff, in respect of professional services rendered by the plaintiff to CEM, for the collection of such invoiced amounts;2
- (iii) The defendant failed to collate, generate and render the said invoices for the work rendered by the plaintiff to CEM for the months of February, March and April 2013;
- (iv) CEM was paid by its client for the said work done by the plaintiff.
- (v) The defendant has breached his fiduciary duties as a director of plaintiff as contemplated in the Companies Act, by
 - (i) abusing his position as director of plaintiff:
 - (a) in order to gain advantage for CEM and/or himself;
 - (b) in that the defendant knowingly caused harm to the plaintiff in not collating, generating and rendering invoices to CEM for the said months;
 - (c) not exercising his powers/ and or performing his duties as required from a person in his position;
- (vi) Consequently the defendant caused the plaintiff to suffer damages.

4. In the defendant's heads of argument the grounds of exception are stated to be twofold:

- (a)" *Firstly, in the absence of an allegation by the plaintiff that the amounts due in terms of the invoices, cannot be recovered, it can simply not be found that the plaintiff had suffered damages."*
- (b)" *The fact that the invoices were allegedly not issued timeously, does not preclude plaintiff from generating the invoices and delivering same to the third party for payment thereof."*

5. The averments in the particulars of claim pertaining to the defendant's conduct and the breach of his fiduciary duties as director of the plaintiff, are clearly set out and, in my view, indeed sustain a cause of action and are therefore not excipiable.

6. In respect of the damages allegedly suffered by the plaintiff, the defendant's contentions that the plaintiff was obliged to aver that the funds in question "*cannot be recovered*", is evenly without substance. The plaintiff, in paragraph 8.3 of the particulars, clearly stated that *CEM* failed to pay the amounts in question at the instance of the Defendant, and in paragraph 9, that notwithstanding demand the defendant did not pay the said amounts to the plaintiff. In my view the plaintiff was not obliged to say anything more.
7. Accordingly, in my opinion, the particulars of claim contain all the necessary averments to enable the defendant to plead. It must be kept in mind that the issue to be considered in this application is not whether the plaintiff will eventually succeed in proving its case.
8. Accordingly I make the following order.

The exception is dismissed with costs.



A J BAM

JUDGE OF THE HIGH COURT

31 March 2014