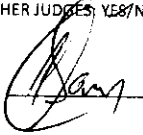


IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

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

Case No. 49803/13

In the matter between

CES AFRICA (PTY) LTD

and

SCHALK JACOBUS BURGER

DALENE MAARTENS-BURGER

2/4/2014
Applicant

First Respondent

Second Respondent

JUDGMENT

BAM J

1. The *dramatis personae* in this application are the three directors, as they were, of the applicant company, namely Mr Ernst Kellerman (managing director), Mr Dries Willemse and Mr Schalk Burger. (The latter resigned as director and he and his wife are cited as respondents.)

2. The applicant, by way of Notice of Motion, claims payment from the respondents in the amount of R838 829.89. The application is opposed.

3. The first respondent, a quantity surveyor, was appointed as director of the applicant on 1 March 2012 and resigned on 30 April 2013. The respondents are directors of a company named Nimbus Beleggings (Pty) Ltd, ("*Nimbus*").
4. It is alleged by the applicant, represented by the remaining two directors, that the first respondent fraudulently dissipated and misappropriated funds of the applicant, with full knowledge of the second respondent, by causing certain payments from clients of the applicant, due to the applicant, to be deposited into the bank account of Nimbus.
5. The payments were identified as follows:
 - (i) R80 814.60 – Client --Durapi Consulting CC-- Invoice 838-CA -- dd 25 April 2013;
 - (ii) R142 723.44 – Client CEMS (Pty) Ltd -- Invoice 837CA -- dd 25 April 2014;
 - (iii) R144 382.14 – Client – CEMS (Pty) Ltd – Invoice 833-CA -- dd 25 March 2013;
 - (iv) R362 941.39 -- Client – Durapi Consulting CC – Invoice 838-CA -- dd 25 March 2013.
6. The respondents admitted having deposited the amounts reflected above, save for the amount of R142 723.44, in respect of the par 5(ii) - Invoice 837CA, but denied that the funds were miss-appropriated as alleged. The respondents further admitted that the funds belonged to the applicant but averred that the money was deposited with full knowledge of the other directors and shareholders of the applicant.

7. In the applicant's founding affidavit it was stated that Messrs Kellerman and Willemse for the first time learnt that the first respondent diverted the funds, referred to above, when they were so advised by the first respondent during a board meeting held on 12 April 2013. In this regard reference was made to the minutes of the meeting, kept by the first respondent, attached to the founding affidavit as Annexure FA3. (P26).
8. Pertaining to this issue the following passages in the said minutes seem to be relevant:

In par 2 it was noted:

"Ernst asked everybody to follow up on the outstanding accounts in order to clear the Debtors/Creditors backlog.

3. The abovementioned discussion led to a debate on the situation in Centurion. Schalk informed the Meeting that he had already progressed far along the process to set up the independent Cost Center for Centurion. This included setting up a new Company and opening up a new Bank Account. Dries informed the meeting that in his opinion, Schalk was deliberately excluding him from partaking in the day to day running of the Company."

And after further debate.

"Ernst then requested that Schalk should cease to pursue the course of independent Company until the matter has been thoroughly discussed again. Schalk insisted that such a discussion take place with all the shareholders being present as soon as possible . . ."

"5. On a discussion on the current situation and as to how the salaries not paid by Ernst prior to his leaving for Cabora Bassa were paid, Schalk revealed that he had in pursuance of the agreement that Cost Centres be

established, made interim arrangements for all outstanding Centurion funds to be deposited in another account held in one of his companies. He then proceeded to pay the balance of the salaries and some other costs which would be afforded from this account. This was discussed with his own Auditor prior to being put in place. He assured the Meeting that all transactions were duly captured on record and that once the new account was operational, all relevant funds would immediately be transferred to that account."

9. It is also stated in the applicant's founding affidavit, deposed to by Mr Willemse, that:(p9, last line, to p10, lines 1 and 2):

"Kellerman made it abundantly clear to the First Respondent at the said meeting that the First Respondent was not entitled to conduct the affairs of the Applicant as he had unilaterally decided to do as aforesaid."

Accordingly it was contended by the applicant that the first respondent was obliged to stop any conduct in respect of payments of funds due to the applicant into the account of Nimbus.

10. The first respondent's version is that his intention of diverting the funds was to protect the applicant company's funds as a result of Mr Kellerman's, conduct in respect of finance management. According to the first respondent he kept all the shareholders and directors informed about his arrangements regarding the funds in question. The first respondent specifically denied, as alluded to above, that the funds were misappropriated and added that he had already paid R1,4M from Nimbus' bank account towards the applicant's expenses and disbursements.

11. From the answering affidavit of the respondents, as confirmed by the applicant's replying affidavit, it appears that the affairs of several companies were historically intertwined. The three directors of the applicant were involved with each other even before they were appointed directors of the applicant.

12. As far as this matter is concerned, it is however obvious, as reflected in the minutes of the meeting of 12 April 2013, that the relationship between Mr Kellerman and Mr Willemse, on the one side, and the first respondent, on the other side were, to say the least, very strained and that it actually reached a stage where animosity between the three directors almost reached a breaking point, apparently as a result of various issues, including questions about shares and other financial aspects concerning the applicant's business, as well as the managing of the applicant's business. In this regard the following was noted in the said minutes:

(After a discussion between the three directors in regards to outstanding amounts "loosely calculated" as R1,3M, and Mr Kellerman expressing his concerns that the applicant was overdrawn at Nedbank, and, that the applicant owed him R2,M, which amount was "pumped into the system to start up" the applicant company.)

"Dries Willemse supported this view and Schalk did not. Ernst mentioned that Schalk could not walk away now as he was morally bound to honour the situation and assist Ernst in the serious matter of the SARS account. Schalk indicated that he had no intention to 'walk away' but had to re-assess his situation on the facts at hand, ie the animosity from Dries and a continuing downward spiral of cash flow from Ernst and the CESA situation."

(And after further discussion about setting up a new company, the following:)

"Dries informed the meeting that, in his opinion, Schalk was deliberately excluding him from partaking in the day-to-day running of the company."

(Then, after a further apparently heated debate, including reference by Mr Burger to a certain inter-company situation, the following:)

"Ernst immediately threatened legal action if Schalk persisted along this course as, in his opinion this was 'illegal' and that should it continue, he would next meet Schalk in court."

(Further debate followed and Mr Kellerman indicated that he would withdraw his threat of litigation but Mr Burger insisted that it should stay on record.)

13. In the applicant's replying affidavit certain words and comment used in referring to the first respondent, were *prima facie* defamatory. I will later return to the issue whether the relationship between the directors, alluded to, is relevant to the question whether the applicant has proved its case.

14. It is clear that a factual dispute exists between the parties pertaining to two questions:

- (i) Whether Messrs Kellerman and Willemse was aware, before the meeting of 12 April, of Mr Burgers' actions to divert the funds due to the applicant to the account of Nimbus, and;
- (ii) Whether Mr Burger fraudulently miss-appropriated the funds in question.

15. The following aspects come into play.

16. The board meeting of 12 April was preceded by a meeting on 7 March. The three directors and two other people attended. One of the items on the agenda, item 3.3 (SB 19, p131), reads as follows:

"Bank accounts to be split and reporting procedure to Board to be discussed and formalized at the Board meeting."

17. It is on the contents of the said item 3.3 that the first respondent bases his contention that the other directors knew quite well about the payment of the funds into the account of Nimbus he informed them about during the meeting of 12 April. In this regard the first respondent stated that the other directors knew about the existence of Nimbus and that he did inform them that the funds paid into the account of Nimbus would be transferred into the new ABSA account once the latter account had been moved and renamed. According to the first respondent this contention is also confirmed by the contents of an Email from Mr Kellerman, (Annexure SB 20, p133 of the answering affidavit, dated 16 April 2013) directed to the first respondent, where the following appears:

"Stuur asb ook vir my 'n uiteensetting van watter bedrae verskuldig is aan CES Africa in die rekening van Nimbus betaal is, asook watter bedrae daaruit betaal is."

18. The first respondent also referred to an Email from Mr Kellerman dated 24 April 2013, stating that all monies due to the applicant should be paid to the applicant. To this Email the first respondent responded that the arrangement was to keep the *status quo*, pertaining to the depositing of the funds, intact. (Annexures SB 21, p134, and SB 22, p136).

19. Subsequent to the meeting of 12 April 2013, the first respondent E-mailed the invoices of the monies to Mr Kellerman. On 16 April Mr Kellerman requested the first respondent (Annexure SB 20, p133) to forward to him a detailed set out of which amounts indebted to the applicant were deposited in the bank account of Nimbus.

20. As alluded to above, it is conceded by the respondents that the first respondent caused the aforementioned funds to be deposited into the account of Nimbus, as follows:

- (i) (Item par 5(iii) above) R144 382.14 – Invoice 834-CA – date of deposit – 5/07/2013; (Annexure SB 16, p124, refers to a similar amount deposited on 27/03/2013)
- (ii) (Item par 5(iv) above) R362 941.39 -- Invoice 833 CA -- date of deposit -- 27/03/2013.

21. The bank statement reflecting the deposit of item par 5(i) above, R80 814.60, was not attached to the answering affidavit. It was however admitted that the amount was in fact deposited into the Nimbus account. It appears from Annexure SB16 to the answering affidavit, p124, that that amount was deposited on 25/04/2013.

22. It need to be stated that the said bank statements reflect that on the day the amount referred to in par 20(i) was deposited, the bank account showed a positive balance, however, pertaining to the amount referred to in par 20(ii), the very next day that amount was deposited, the positive balance in the bank account continued to decrease far below the amount deposited.

23. It was further contended, and explained by the respondents, that several amounts were paid out from the Nimbus account to the applicant, or on behalf of the applicant, totaling more than R1 400 000 00. In this regard the respondents, in my view, substantiated their contention with certain documentary proof.
24. Pertaining to the factual issues raised by the parties, especially in regards to the backdrop concerning the relations between the three directors and the other companies preceding the establishment of the applicant, several disputes of fact arose. In this regard the applicant is clearly at risk that it should have foreseen the problem of instituting its claim by way of motion proceedings. I deem it unnecessary to refer to the law, it is trite.
25. In considering the allegations by the parties in the respective affidavits, the factual disputes are prominent. It is in my view not possible to reconcile the differences and to decide this application on the papers. The respondent's version, despite probable justifiable criticism, cannot be rejected as false.
26. I again refer to the animosity between the parties to which I have referred to above. In the replying affidavit, p 195 pars 33.11 and 33.2, the applicant refers to documents fraudulently created by the first respondent, and that the first respondent is "*a forger and visibly a mala fide litigant*". In my view the objective facts do not substantiate that remark. The said words however underscore the antagonism shown by Messrs Kellerman and Willemse towards the first respondent. In my view this attitude of the two directors contaminated any objective representation of the facts by the applicant.

27. I do not deem it expedient to in detail discuss and analyse the factual disputes between the parties. In my view it suffices to say that the first respondent's version that he did not miss-appropriated the applicant's funds, as alleged by the applicant, must be accepted.

28. Accordingly the following order is made:

The application is dismissed with costs.

A handwritten signature in black ink, appearing to read 'A J Bam', is written over the printed name.

A J BAM

JUDGE OF THE HIGH COURT

28 March 2014