SK6607/JH

IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

(REPUBLIC OF SOUTH AFRICA)

CASE NO : **2011/33978**

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

DATE 24/6/2013 SIGNATURE

In the matter between:

WEIR MINERALS AFRICA (PTY) LIMITED Applicant

And

MINING PRESSURE SYSTEMS (PTY) LIMITED Respondent

JUDGMENT

KOLBE AJ:

INTRODUCTION

[1] In the notice of motion, the Applicant claimed from the Respondent, payment of the sum of R2 756 197,27, alternatively R1 768 978,92 and that

the balance of the claim be referred to trial.

[2] Subsequent to initiating the application proceedings, and on 12 October 2012, the Respondent paid to the Plaintiff the sum of R1 768 978,92 and tendered the Applicant's costs up to the date of payment, leaving a balance of R 987 218,35 which is the subject of the present dispute between the parties.

NATURE OF THE CLAIM

[3] It is the Applicant's case that the Respondent, on 31 May 2010, applied for a credit facility with Linatex Africa (Pty) Limited ("Linatex") with respect to the supply of goods by Linatex to the Respondent.

[4] Pursuant to the agreement Linatex supplied goods to the Respondent as a consequence of which the Respondent became indebted to Linatex.

[5] On 2 August 2011 the Applicant, in terms of an amalgamation agreement between the Applicant and Linatex, acquired all right, title and interest in the agreement entered into between Linatex and the Respondent.

[6] It is averred that an outstanding amount of R3 259 059,95 as at 4 February 2011 was raised with the Respondent and several meetings held

with to resolve the issue.

[7] Notwithstanding the fact that it is common cause that these meetings were held and notwithstanding payment by the Respondent to the Applicant after application proceedings had been initiated, the Respondent disputes the existence of the alleged credit facility and the amalgamation agreement.

[8] This denial is based on the contention that the deponent to the Applicant's founding affidavit, one Mr de Lange who described himself as the Chief Financial Officer of the Applicant, lacked the necessary personal knowledge to depose to the affidavit and that his affidavit consequently constitutes hearsay evidence.

[9] In this regard I was referred to the judgment in **Trekker Investments (Pty) Limited v Wimpy Bar** 1977 (3) SA 447 (WLD), a summary judgment application in which it was held, with respect to an affidavit signed by a director of a cessionary company, that there was nothing in that affidavit to indicate that he had any connection with the cedent of the claim or that he was in a position to state that there was no *bona fide* defence to such claim. An application for summary judgment was consequently refused.

[10] This is not a summary judgment application and Mr de Lange furthermore seems to have been a signatory to the amalgamation agreement

which was filed pursuant to a notice in terms of Rule 35(14).

[11] It was submitted on behalf of the Respondent that the Applicant has not proved the alleged agreement and that to the extent that there is an admission of having received certain goods and making payment, it must have been pursuant to some other agreement.

[12] It is impossible to determine on affidavit, to what extent De Lange's affidavit in fact constitutes hearsay evidence and his reference to the credit facility entered into between Linatex and the Respondent as well as the amalgamation agreement is irrelevant as goods were supplied to the Respondent pursuant to another agreement and the Respondent's admitted indebtedness to the Applicant in the amount of R1 768 978,92 did not arise from the amalgamation agreement.

[13] With respect to the Respondent's disputing of the balance claimed, various unsatisfactory aspects in the Respondent's answering affidavit were pointed out by counsel representing the Applicant, in support of the contention that the Respondent created fictitious disputes of fact. So for instance is tax invoice 322805 with delivery note 4912 for an amount of R261 544,50 not explained by the Respondent.

[14] In view of the conclusion I have reached in this matter it is not

necessary to refer to further inconsistencies in the answering affidavit highlighted during argument which, so it was contended, created fictitious disputes of fact and I express no view in this regard.

[15] Be this as it may, it is clear that the Respondent not only disputes its liability to pay the balance of the claim, namely R 987 218,35 to the Applicant, a dispute the Applicant sought in the notice of motion to be referred to trial, but also the existence of the agreements on which the claim is allegedly based.

[16] On behalf of the Respondent it was submitted that the dispute should have been foreseen and that the Applicant should have proceeded by way of action.

[17] It is clear that a dispute of fact with respect to portion of the claim was foreseen which is the reason why a referral to trial was sought in the notice of motion with respect to that portion. However, there is nothing to indicate that the Applicant could have foreseen that the existence of the facility and amalgamation agreements would be disputed.

[18] Whether or not the Respondent created fictitious disputes of fact can only be determined in trial proceedings.

[19] In the result I make the following order:

1. The dispute with respect to the Respondent's obligation to pay to the Applicant the balance of its claim namely R 987 218,35 is referred to trial.

2. The notice of motion shall stand as a simple summons and the answering affidavit as a notice of intention to defend, the date of service and filing being the date of this judgment, whereafter the normal rules relating to trials will apply.

3. The costs of this application from date of payment of R1 768 928,92 by the Respondent to the Applicant is reserved for determination by the trial Court.

KOLBE AJ