

**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

**CASE NUMBER: 72565/2012**

22/8/2014

	DELETE	WHICHEVER	IS	NOT
	APPLICABLE			
(1)	REPORTABLE:	YES/NO		
(2)	OF INTEREST TO OTHER JUDGES:	YES/NO		
(3)	REVISED			
	DATE:	22 August 2014		
	SIGNATURE:	Jansen		

In the matter between: —

**LOMOTEK POLYMERS (PTY) LIMITED**

Applicant

(Registration No: 2000/011751/07)

And

**SHEERCORPS CC t/a PENNELLS TANKS**

Respondent

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**JUDGMENT**

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**JANSEN J**

- [1] The applicant in this matter is the supplier of the raw materials used in the production and manufacture of tanks used in the industrial sector. The respondent conducts business as a manufacturer of tanks used essentially in the industrial section.
- [2] The parties had a contractual relationship over an extended period of time in terms whereof it routinely supplied materials to the respondent for the production, manufacture and sale of the respondent's tanks. This relationship ended in August 2011 at which time certain amounts of money were due to the applicant by the respondent. A contract regulated the parties' relationship. This contract is referred to below.
- [3] During May 2010, in order to provide security for the applicant for the respondent's indebtedness to the respondent, (because the respondent was apparently experiencing financial difficulties) the applicant registered a notarial covering bond in the deeds office over the moveable property of the respondent. The deed granted security for an amount of R3 4000.000.00 and an additional amount of R680 000.00 for legal and general additional costs.
- [4] The respondent has failed to meet the applicant's obligations. The applicant already in 2011 filed a similar application which was struck from the roll due to lack of urgency. The merits were not traversed.

- [5] Credit facilities were extended to the respondent during August 2007 in the amount of R500 000.00. The respondent had agreed to make payment within 30 days from statement. However, its payment to the applicant was sporadic and unsatisfactory.
- [6] By mid-2009, the total indebtedness due to the applicant by the respondent was already R2 386 346.42. The parties agreed to a repayment plan and a timetable. Once again, the respondent was unable to meet its obligations.
- [7] In terms of clause 5 of the notarial bond, a certificate signed by a director of the applicant, whose appointment or authority was not required to be proved, would for all purposes be regarded as sufficient proof until proof to the contrary was given of the amount which might at any time be owing by the respondent to the applicant and secured under the bond as well as any amount debited in respect of interest as well as the rate of interest from time to time.
- [8] As regards the applicant's rights to seek protection of the security provided by the notarial bond itself, it was recorded specifically in the notarial bond that: —

*“In the event of any amount secured in terms of this bond becoming due and payable for any reason whatsoever, and not being paid, the*

*(applicant) shall immediately and without notice or demand, be entitled to: —*

*foreclose on this bond and to take possession of the goods or any portion thereof ....”*

[9] Yet further negotiations ensued and the parties entered into two agreements: —

[9.1] An agreement titled “Heads of Agreement” concluded on 28 June 2011 between the applicant, the respondent and an entity related to the respondent.

[9.2] An exclusive supplier agreement, concluded on 29 June 2011, between the applicant and the respondent.

[10] The essential purpose of the heads of agreement was to facilitate a mechanism through which the indebtedness of the respondent to the applicant could be extinguished. This was achieved through the purchase by the applicant of the assets of the related entity being Ferris Wheel Trading 1 (Pty) Ltd. This appears from clause 1 of the said agreement. The purchase price of the assets was an amount of R2 293 351.28. This appears from clause 4.1.4 of the heads of agreement.

[11] Clause 4.2 of the agreement sets out the manner in which the applicant was to pay for the assets purchased. In this regard: —

[11.1] It was agreed the applicant would set off the full extent of its claim of R2 011 711.65 against the purchase price of the assets in part payment thereof.

[11.2] Provision was made for the payment by the applicant of that which remained of the purchase price.

[12] The ultimate effect of the heads of agreement was that the indebtedness of the respondent to the applicant was wholly extinguished, thus paving the way for supply to the respondent by the applicant to commence immediately.

[13] However, from the founding and answering affidavits, it is clear that both parties employed the services of experts to assist them in establishing the precise current indebtedness of the respondent to the applicant. The experts for the applicant and respondent reached different conclusions.

[14] Their task was not facilitated by alleged set-offs to related companies allegedly having to be taken into account.

[15] The argument advanced by the applicant's counsel before me was that an amount was owing to it, and hence the notarial bond could be perfected. Although at first blush an attractive argument, it became clear to the court that one could not, on the papers, even regard such an alleged indebtedness as a certainty.

[16] On the papers before the court it is impossible to resolve these disputes of fact.

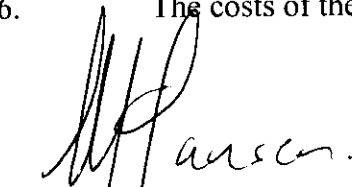
[17] As a result, the court wished to refer the matter to an independent expert as provided for by the Superior Courts Act 10 of 2013, but could only do so were the parties to agree that such a route may be followed.

[18] After the hearing, and upon realising the impossibility of hearing the matter on the affidavits filed, the parties were put to the election either to have the matter referred to an independent expert or to have the matter referred to trial. The parties reverted to me and informed me that they could not reach agreement but furnished me with an order in which they made provision for the matter to be referred to trial.

In the result, the following order, by agreement between the parties, was made an order of court: -

***Order***

1. The application is referred to trial in terms of Rule 6(5)(g).
2. The applicant's application stands as a simple summons.
3. The respondent's answering affidavit stands as a notice of intention to defend.
4. The applicant shall deliver its declaration in terms of Rule 20(1) within 15 days from the date of this order.
5. The Rules relating to the filing of further pleadings will be applicable.
6. The costs of the application are reserved.



**JANSEN J**

**JUDGE OF THE HIGH COURT**

*For the Applicant Advocate AB Rossouw SC*

(012-303-7518/083 259 2547)

Instructed by **Grobler Attorneys c/o Du Plessis & Kruyshaar**

(086 1000 779)

(Ref: RK0078 Mrs Kruyshaar)

*For the Respondent Advocate MD du Preez SC*

(012-303-7484/082 801 8393)

Instructed by **Coxwell Steyn Vise & Naude c/o Sanet de Lange Incorporated**

(Ref: S de lange/AL/SA4964)