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

Reportable:	**NO**
Of Interest to other Judges:	**NO**
Circulate to Magistrates:	**NO**

Case No: 3062/2020

In the matter between:

FIRSTRAND BANK LIMITED **APPLICANT**
(REGISTRATION NUMBER: 1929/001225/06)

and

39 INDABA ACCOMMODATION AND CATERING (PTY) LTD **RESPONDENT**
(REGISTRATION NUMBER: 2013/070706/07)

HEARD ON: 04 FEBRUARY 2021

JUDGMENT BY: MBHELE, ADJP

DELIVERED ON: 17 MAY 2021

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[1] The applicant approached this court on motion seeking an order in the following terms:

1. That the applicant be authorized to perfect its security in terms of the general notarial covering bond, BN2265/2017 attached as annexure **"FA2"** to the founding affidavit (hereinafter *the bond*);

2. That the applicant be authorized to take possession, through the relevant sheriff for the district of Kroonstad and/or through any other sheriff in respect of any area of jurisdiction of the High Court of South Africa, of the livestock of the respondent to the maximum value of **R500 000.00** and an additional **R100 000.00** (the value to be determined by the relevant sheriff), situated at the farm Delport's Rust 853, district Kroonstad, Free State Province, or wherever same may be situated (hereinafter *the livestock*) and to retain possession of the livestock as security for so long as the respondent remains indebted to the applicant;

3. That such sheriff/s as provided for in paragraph 2 above, be directed and authorized to take all such steps as may be required in order to give effect to the provisions contained in paragraphs 1 and 2 above, including without derogating from the generality of the aforegoing, to take the livestock into possession on behalf of applicant in any manner as such Sheriff/s may deem fit and practical;

4. That the taking into possession of the livestock by the sheriff/s, as provided for in paragraphs 2 and 3 above, shall constitute possession by applicant pursuant to the bond and in perfection of applicant's rights under the bond;

5. That the respondent, as well as any other party who opposes the application, be ordered to pay the costs of this application on an attorney and client scale;

6. That this order shall not prejudice the rights of any persons having a real right in and to any of the livestock acquired prior to the granting of this order;

7. Further and/or alternative relief.

[2] On 25 April 2017 the First Rand Bank (Applicant) and 39 Indaba Accommodation and Catering (Respondent) entered into a number of related transactions. They included:

2.1 An agreement between the applicant and the respondent in terms of which the applicant lent and advanced to the respondent an amount of R1 000 000 (the loan agreement).

In addition to the above the salient terms of the loan agreement are the following:

2.1.1 The loan period of the agreement was 60 calendar months (clause 3.2);

2.1.2 The outstanding amount in terms of the loan agreement from time to time would accrue interest at the prime interest rate plus 1.5% per annum calculated daily and compounded monthly.

2.1.3 The respondent would repay the loan amount in terms of the loan agreement to the applicant by making separate interest payments and capital repayments as follows:

2.1.4 The respondent would pay the interest which accrued in terms of the loan agreement to the applicant monthly in arrears;

2.1.5 The respondent would repay the outstanding amount in terms of the loan agreement in 5 equal annual instalments each until such time as the outstanding amount in terms of the loan agreement has been paid in full with a first capital repayment on 31 May 2018 and a final capital repayment on 31 May 2022.

2.1.6 A certificate signed by any manager of the applicant whose appointment and authority need not be proved, certifying any amount outstanding in terms of the loan agreement as well as the rates of interest and other charges applicable thereto shall be prima facie proof of the matter stated therein for all purposes;

2.1.7 The respondent indemnified the applicant against all costs and expenses, including legal fees and costs on

an attorney and own client scale, together with any VAT, incurred in or in connection with the preservation and enforcement of any rights of the applicant under the loan agreement;

An event of default would occur if the respondent fails to pay any amount due in terms of the loan agreement;

2.1.8 Upon the occurrence of an event of default the applicant would, in addition to and without prejudice to any other rights which the applicant may have in terms of the loan agreement or in law, have the right, without further notice, to:

2.1.8.1 accelerate or place on demand payment of all amounts owing by the respondent in terms of the loan agreement and all such amounts shall become immediately due and payable; and/or

2.1.8.2 call up and execute on any security and security document which the applicant holds;

2.2 An agreement between the applicant and the respondent in terms of which the applicant made available to the respondent the credit facility wherein the respondent obtained credit facility from the applicant in the amount of R 1 350 000.00 (the facility agreement). The relevant terms of the facility agreement are as stated below:

2.2.1 The facility was repayable by the respondent to the applicant on demand and subject to annual review;

2.2.2 Interest would accrue on the debit balance of the facility at the prime interest rate from time to time plus 1.5% calculated on the daily outstanding balance and compounded monthly;

2.2.3 A breach would occur if the respondent fails to make any schedule payments required to be made under

the facility agreement to the applicant within two business days of the applicable due date;

2.2.4 In the event of a breach of the facility agreement by the respondent the applicant would in addition and without any prejudice to any other rights that it may have in law, be entitled to claim immediate repayment of all amounts outstanding under the facility;

2.2.5 A certificate signed by any general manager of the applicant, whose appointment, qualification and authority need not be proved, setting forth the amount of the respondent's indebtedness to the applicant shall, unless the contrary is proven, be prima facie proof of the amount that the respondent owes to the applicant in terms of the facility agreement;

2.2.6 The respondent undertook to pay the legal costs incurred by the applicant in connection with proceedings for the recovery of any amount owing by the respondent to the applicant in terms of the facility agreement on an attorney and own client scale.

2.3 On 9 May 2017 the respondent executed the Notarial bond in favour of the applicant. The bond was registered with the Registrar of Deeds in Bloemfontein on or about 18 May 2017. The relevant terms of the bond are the following:

2.3.1 The respondent in general bound the livestock which the respondent already possessed or may possess in future, without exception, as security for the due payment of any amount owing by the respondent to the applicant at the time of the registration of the bond or any time thereafter arising from whatsoever causes limited to an amount of **R500 000.00** and additional amount of **R100 000.00** in respect of interest, collection costs, default administration charges and

other costs and fees permissible in terms of applicable legislation;

2.3.2 In the event of any default by the respondent in the observance or performance of any of the conditions of the bond or the failure by the respondent to discharge any obligation or liability to the applicant on the due date thereof or to pay on demand any sum which may be legally claimable by the applicant or if in the opinion of the applicant its securities in terms of the bond requires to be perfected by possession then in such instances the applicant shall at its sole discretion be entitled forthwith to consider the amount of the respondent's indebtedness towards the applicant to be legally claimable and due without notice and the applicant may forthwith proceed without any further authority or consent from the respondent to take possession and hold in pledge any of the assets forming part of the security under the bond;

2.3.3 Any amount due and payable by the respondent to the applicant may be determined and proved by a certificate signed by any manager of the applicant. It shall not be necessary to prove the appointment of the person signing the certificate and the said certificate shall constitute *prima facie* proof that the amount stated there in is due, owing and payable;

[3] Mr. Bester, on behalf of the respondent, submitted that the applicant failed to make out a case for the relief sought in that the deponent of the founding affidavit was not authorised to act on behalf of the applicant, the applicant failed to comply with the terms of the facility agreement in order to show the Respondent's indebtedness and that the notarial bond is vague in that it was

registered in the style of the special notarial bond because it was registered over specific assets.

[4] In her opposing affidavit Cornelia Van Aswegen, on behalf of the respondent, challenged the authority of Andri Joey Kuhn to act on behalf of the applicant and to depose to the affidavits in these proceedings.

[5] In his founding affidavit Kuhn states that he is authorised to act on behalf of the applicant and in support thereof he attached a document titled, 'Sub Delegation of Authority' signed by the applicant's National Manager: Commercial Recoveries. Below is the said delegation of authority.

'**SUB DELEGATION OF AUTHORITY**

In terms of the authority delegated to me by **Michael Brian Vaye-Lyle**, Chief Executive Officer of First National Commercial Banking, a division of First National Bank, a division of FirstRand Bank Limited ("the Bank") in accordance with the resolution passed on 24 November 2008, by the Board Directors of First Rand Bank Limited ("the Resolution"), **I, Cornelius Abraham Verster**, National Manager: Commercial Recoveries, do hereby sub delegate in terms of clause 4.1 of the Resolution to **Andri Joey Kuhn**, the authorities as set out below:

Sue for recoveries of monies	To demand, sue for and enforce payment of and to recover, receive and give effectual receipts and acquaintances for all or any monies, securities for money, debts, goods or property, and to compound and allow time for payment or satisfaction of any debt, and of any claim or demand by or against the Bank.
To institute legal action with another party	To institute, conduct, defend, intervene in, compound or abandon in any competent court or courts of law or tribunal having lawful jurisdiction, any legal proceedings by or against the Bank or its officers, or otherwise concerning the affairs of the Bank; to object

	to, oppose and defend any act or exercise of any power or function by any authority and settle any matter arising there from; to nominate and appoint an attorney or attorneys and other professional advisers for the aforesaid purposes; and to sign and execute all necessary powers and documents required for the above purposes.
Settle/compromise debts	To adjust, settle, compromise and submit to arbitration all accounts, debts, claims, demands, disputes and matters which may subsist or arise between the bank and person, persons, company, corporation or body whatsoever; and for the purpose of arbitration, to make the necessary appointments, sign and execute the necessary instruments and do all things required in that regard.
Liquidation and insolvency proceedings	To act on behalf of the Bank in all matters relating to the institution or commencement of liquidation, winding-up, judicial management or sequestration proceedings and matters arising out of the insolvency or liquidation or winding-up or judicial management or sequestration or assignment of any estate, or composition, or arrangement with creditors of any person, company, corporation, body or association and for these purpose to sign, execute and present all petitions, proofs, proxies or other documents, to attend all meeting of creditors of any estate (deceased and/or insolvent), company, corporation, body or association in liquidation or being wound up or under judicial management which may be indebted to the Bank; to vote on all matters, to consent to assignment of the estate of any of the Bank's debtors; and generally to exercise all rights attaching to the Bank as creditor.
Cancellation of mortgage bonds	To consent to the cancellation of mortgage bonds or deeds of hypothecation (both hereinafter referred to as "bonds") passed by or ceded in favour of the Bank and to the cancellation of cession of bonds cedetes to the Bank as security.
Cession of bonds	To grant cessions of all bonds, leases and other securities held by the Bank; to consent

	to waivers and adjustments of preference under bonds and other securities, to give and grant releases of persons and/or property from bonds and others securities; to consent to the writing down of bonds and other securities, to consent to substitution of mortgagors or property under bonds; to vary the terms or conditions of bonds; to consent to or authorize any other act required to be registered or recorded in any Deeds registry or other public office in respect of bonds; and for the aforesaid purposes to appoint attorneys and agents generally to do all acts and sign all deeds that may be necessary.
Lodge certificate/declarations with Deeds Office or other state authority	To make, lodge, file and register with any registrar or other official or officials of any government, council, municipal body or other authority any necessary documents, declarations, statements, balance sheets, certificates and particulars, and to sign, certify and otherwise verify the same.
Vote as representative of Bank at meetings	To vote at the meetings of any company or companies or other bodies, or otherwise to act as proxy or representative of the Bank in respect of any shares or stock other securities by the Bank therein; and for that purpose to sign and execute any proxies other instruments.'

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[6] In **Mall (Cape) (Pty.) Ltd. v Merino Kooperasie Bpk (1957) F (2) SA 347 at** 351- 352 the court considered the question of authority to institute proceedings on behalf of an artificial person such as a company and remarked as follows:

> 'I proceed now to consider the case of an artificial person, like a company or cooperative society. In such a case there is judicial precedent for holding that objection may be taken if there is nothing before the Court to show that the applicant has duly authorised the institution of notice of motion proceedings (see for example *Royal Worcester Corset Co*. v *Kesler's Stores*, 1927 CPD 143; *Langeberg Kooperasie Beperk v Folscher and Another*, 1950 (2) SA 618 (C)). Unlike an individual, an artificial person can only function through

its agents and it can only take decisions by the passing of resolutions in the manner provided by its constitution.
An attorney instructed to commence notice of motion proceedings by, say, the secretary or general manager of a company would not necessarily know whether the company had resolved to do so, nor whether the necessary formalities had been complied with in regard to the passing of the resolution. It seems to me, therefore, that in the case of an artificial person there is more room for mistakes to occur and less reason to presume that it is properly before the Court or that proceedings which purport to be brought in its name have in fact been authorised by it.
There is a considerable amount of authority for the proposition that, where a company commences proceedings by way of petition, it must appear that the person who makes the petition on behalf of the company is duly authorised by the company to do so (see for example *Lurie Brothers Ltd*. v *Archache*, 1927 NPD 139, and the other cases mentioned in Herbstein and van Winsen, *Civil Practice of the Superior Courts in South Africa*, at pp. 37, 38). This seems to me to be a salutary rule and one which should apply also to notice of motion proceedings where the applicant is an artificial person. In such cases some evidence should be placed before the Court to show that the applicant has duly resolved to institute the proceedings and that the proceedings are instituted at its instance. Unlike the case of an individual, the mere signature of the notice of motion by an attorney and the fact that the proceedings purport to be brought in the name of the applicant are in my view insufficient. The best evidence that the proceedings have been properly authorised would be provided by an affidavit made by an official of the company annexing a copy of the resolution but I do not consider that that form of proof is necessary in every case. Each case must be considered on its own merits and the Court must decide whether enough has been placed before it to warrant the conclusion that it is the applicant which is litigating and not some unauthorised person on its behalf. Where, as in the present case, the respondent has offered no evidence at all to suggest that the applicant is not properly before the Court, then I consider that a minimum of evidence will be required from the applicant (*cf. Parsons v Barkly East Municipality, supra; Thelma Court Flats (Pty.) Ltd v McSwigin*, 1954 (3) SA 457 (C)).'

[7] In **Eskom v Soweto City Council 1992 (2) SA 703 (W)** at **705 E-H** the court remarked as follows when dealing with the authority to institute legal proceedings:

'The care displayed in the past about proof of authority was rational. It was inspired by the fear that a person may deny that he was party to litigation carried on in his name. His signature to the process, or when that does not eventuate, formal proof of authority I would avoid undue risk to the opposite party, to the administration of justice and sometimes even to his own attorney.

> ……The developed view, adopted in Court Rule 7(1), is that the risk is adequately managed on a different level. If the attorney is authorised to bring the application on behalf of the applicant, the application necessarily is that of the applicant. There is no need that any other person, whether he be a witness or someone who becomes involved especially in the context of authority, should additionally be authorised. It is therefore sufficient to know whether or not the attorney acts with authority. As to when and how the attorney's authority should be proved, the Rule-maker made a policy decision. Perhaps because the risk is minimal that an attorney will act for a person without authority to do so, proof is dispensed with except only if the other party challenges the authority. See Rule 7(1) and (at 706B-D):
> If then applicant had qualms about whether the 'interlocutory application' is authorised by respondent, that authority had to be challenged on the level of whether [the respondent's attorney] held empowerment. Apart from more informal requests or enquiries, applicant's remedy was to use Court Rule 7(1). It was not to hand up heads of argument, apply textual analysis and make submissions about the adequacy of the words used by a deponent about his own authority.'

[8] In **ANC Umvoti Council Caucus And Others v Umvoti Municipality 2010** (**3) SA 31 (KZP)** Gorven, J remarked as follows:

> "Whether or not the litigation has been properly authorised by the artificial person named as the litigant should not be dealt with by means of evidence led in the application. If clarity is required, it should be obtained by means of rule 7(1), since this is a procedure which safeguards the interests of both parties. It frees the applicant from having to produce proof of what may not be in issue, thus saving an inordinate waste of time and expense in 'the many resolutions, delegations and substitutions still attached to applications' It protects a respondent in that, once the challenge is made in terms of rule 7(1), no further steps may be taken by the applicant unless the attorney satisfies the court that he or she is so authorised. Of course, if the challenge is to the authority of the respondent's attorney in an application, these comments apply equally, but for the opposite reasons."

[9] It is clear from the above authorities that a court must be satisfied that some proof exists to show that the proceedings brought on behalf of an artificial person have been authorised. Each case must be considered on its own merits and it is the Court that must decide whether sufficient proof has been placed before it to warrant the conclusion that it is the company that is litigating and not some

unauthorised individual. See **Mall** *supra*. The deponent of the founding affidavit attached a document showing that he has been authorised to institute these proceedings on behalf of the applicant. I am satisfied that the sub delegation of authority attached to the founding affidavit constitute sufficient proof that the deponent to the founding affidavit has the necessary authority to institute these proceedings.

[10] The respondent did not challenge the authority of the deponent to the founding affidavit by means of Rule 7 (1). The respondent dealt with the document attached as proof of authority of the deponent to the founding affidavit by means of evidence.

[11] The respondent avers that the applicant failed to prove the indebtedness of the respondent because the certificate of balance of the facility agreement was signed by a manager and not a general manager as agreed in clause 6 of the facility agreement. Clause 6 prescribes that a certificate of balance signed by any general manager of the Bank shall constitute *prima facie* proof of indebtedness.

[12] The certificate of balance was signed by the manager, Business Recoveries (Free State) of the Applicant. The agreement does not stipulate that an agreement must be signed by a person holding a position of a General Manager of the Bank, it requires a signature of *any general manager*. The term any general manager refers to an unspecified manager within the employ of the applicant. It does not necessarily refer to the General Manager of the applicant. The signatory of the certificate of balance in the current matter is a

manager for Business Recoveries of the applicant in the Free State Province and in my view his position fits the description in clause 6 of the facility agreement. The argument by the respondent is without merit and stands to be rejected.

[13] Mr. Bester contended that although the Notarial Bond is titled General Notarial Bond, it is vague and creates an impression that it is a special notarial bond in that it is not registered over the respondent's movable property but over the respondent's specific movables being livestock. Section 1(1) of **The Security By Means of Movable Property Act 57 of 1993** (SMPA) provides as follows:

> "(1) If a notarial bond hypothecating corporeal movable property specified and described in the bond in a manner which renders it readily recognizable, is registered after the commencement of this Act in accordance with the Deeds Registries Act, 1937 (Act 47 of 1937), such property shall
> *(a)* subject to any encumbrance resting upon it on the date of registration of the bond; and
> *(b)* notwithstanding the fact that it has not been delivered to the mortgagee, be deemed to have been pledged to the mortgagee as effectually as if it had expressly been pledged and delivered to the mortgagee."

[14] The Notarial Bond is registered over the respondent's livestock, both such as the Mortgagor already or may in future become possessed of, without any exception, submitting them all and the choice thereof to constraint and execution as the law directs. In **Ikea Trading UND Design AG v BOE Bank Ltd 2005 (2) SA 7** at **par. 10 and 11** the Supreme Court of Appeal held as follows when it determined the test on whether an item is readily recognisable in terms of section 1(1) of SMPA:

> "[10] The test for determining whether an item is 'readily recognisable' from the bond in terms of s 1(1), contends BOE Bank, is whether third parties can determine the identity of each asset without regard to extrinsic evidence. This is essential, it argues, to avoid fraud and controversy, and leaves no room for conflict.

> ‘[11] In my view, the correctness of this test is evident from the wording of the section itself: The property must be '*specified and described in the bond* in a manner which renders it *readily recognisable*' (my emphasis). Of course the description of the property in the bond must be related to the reality on the ground. In dealing with a contract for the sale of land, where the material terms are required by statute to be in writing, Watermeyer CJ said in *Van Wyk v Rottcher's Saw Mills (Pty) Ltd*1948 (1) SA 983 (A) at 990:
>
> > ‘A contract of sale of land in writing is in itself a mere abstraction, it consists of ideas expressed in words, but the relationship of those ideas to the concrete things which the ideas represent cannot be understood without evidence. In a Court of law, of course, in every case evidence is essential in order to identify the thing which corresponds to the idea expressed in the words of the written contract. The abstract mental conception produced by the words has to be translated into the concrete reality on the ground by evidence.'
> > But evidence of that nature does not supplement the document. It simply correlates the description with the property’

[15] The movable property that is the subject of the bond is not readily recognisable as stipulated in Section 1(1) of the SMPA. The bonded property is the livestock that respondent already possessed and may possess in future with no specific identifying features. There is no precise and clear description of the hypothecated property. The livestock in dispute is incapable of being readily recognisable by a third party. There are no distinct features attached to this livestock. In my view the relevant livestock fails to meet the test set in **Ikea** *supra* and does not satisfy the provisions of Section 1 (1) of SMPA. The agreement is clear and there is nothing vague and ambiguous about its terms. I am satisfied that the applicant has made a case for the relief sought. The application must succeed. There is no reason why costs should not follow the event and not be in conformity with the parties’ agreements.

ORDER

1. The applicant is authorized to perfect its security in terms of the general notarial covering bond, BN2265/2017.

2. The applicant is authorized to take possession, through the relevant sheriff for the district of Kroonstad and/or through any other sheriff in respect of any area of jurisdiction of the High Court of South Africa, of the livestock of the respondent to the maximum value of **R500 000.00** and an additional **R100 000.00** (the value to be determined by the relevant sheriff), situated at the farm Delport's Rust 853, district Kroonstad, Free State Province, or wherever same may be situated and to retain possession of the livestock as security for so long as the respondent remains indebted to the applicant;

3. The aforementioned sheriff/s is directed and authorized to take all such steps as may be required in order to give effect to the provisions contained in paragraphs 1 and 2 above, including without derogating from the generality of the aforegoing, to take the livestock into possession on behalf of applicant in any manner as such Sheriff/s may deem fit and practical;

4. The taking into possession of the livestock by the sheriff/s, as stated in paragraphs 2 and 3 above, shall constitute possession by applicant pursuant to the bond and in perfection of applicant's rights under the bond;

5. The respondent is ordered to pay costs of this application on an attorney and client scale including costs of Counsel;

6. This order shall not prejudice the rights of any persons having a real right in and to any of the livestock acquired prior to the granting of this order.

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N.M. MBHELE, J

On behalf of the plaintiff — Adv Bester
Instructed by:
Symington & De Kok
BLOEMFONTEIN

On behalf of the defendant:	Adv.Groenewald Instructed by: Kramer Weihmann & Joubert BLOEMFONTEIN