

COPY

IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY

Case no: 2174/17

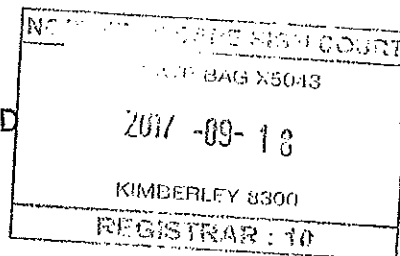
In the application of:

THE STANDARD BANK OF SOUTH AFRICA LIMITED

Applicant

and

SAXENDRIFT MINE (PTY) LTD
[in business rescue]



First Respondent

TREVOR MURGATROYD

Second Respondent

(in his capacity as business rescue practitioner of
SAXENDRIFT MINE (PTY) LTD [in business rescue])

PETER VAN DEN STEEN

Third Respondent

(in his capacity as business rescue practitioner of
SAXENDRIFT MINE (PTY) LTD [in business rescue])

NOTICE OF MOTION

BE PLEASED TO TAKE NOTICE that the Applicant intends to make application on Wednesday 20 September 2017 at 14:00 or as soon thereafter as counsel for the Applicant can be heard for an order in the following terms:

1. Condoning non-compliance with the forms, service and timeframes prescribed by the Uniform Rules of the above Honourable Court, so that this application be heard as one of urgency.
2. That the general moratorium on legal proceedings against the First Respondent be uplifted and that leave be granted to the Applicant in terms of section 133(1)(b) of the Companies Act 71 of 2008 ("the Act") to commence and proceed with this application.
3. That a Rule *nisí* do issue, returnable on **20 October 2017** at **10h00**, calling upon the Respondents to show cause, if any, why the following orders shall not be made:
 - 2.1 That notarial special and general covering bond BN 14101/2015 (hereafter "the bond") ("VP5" to the founding affidavit) be perfected;
 - 2.2 That the Applicant, through its duly authorised representatives, be authorised and ordered to attach all the First Respondent's moveable property and effects (of whatever description and wherever situated), to the value of **R12 710 390.57** alternatively **R 10 710 390.57** for the purposes of perfecting the Applicant's bond.

- 2.3 That the Sheriff of the High Court be ordered to take all necessary steps to ensure the execution of this order by taking such steps or to deal with the situation as the Sheriff deems appropriate;
- 2.4 That the First Respondent be ordered to pay the costs of the application;
- 2.5 That the Second and Third Respondent be ordered to pay the costs of the application only in the event of opposition;
- 3 That paragraphs 2.1 to 2.3 above operate with immediate effect pending finalisation of the application;
- 4 Further and/or alternative relief.

KINDLY TAKE NOTICE that the attached founding affidavit of **VINSIN PILLAY**, together with annexures thereto, will be used in support hereof.

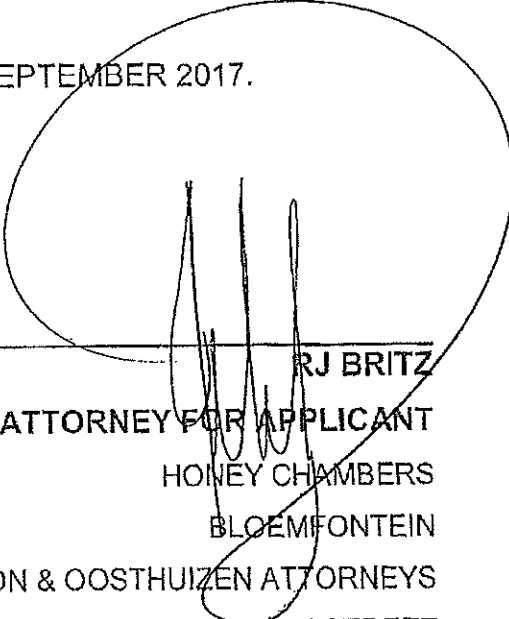
BE PLEASED TO TAKE NOTICE FURTHER that the Applicant has appointed the office of **Hugo, Mathewson & Oosthuizen, Kimberley, Northern Cape Province**, at which address it will accept notice and service of all process in these proceedings.

BE PLEASED TO TAKE NOTICE FURTHER that, if you intend to oppose this application, you are required:

- (a) to notify the Applicant's attorney, in writing, on Monday 18 September 2017 at 15:00 ; and
- (b) to file your answering affidavit, if any, on Tuesday 19 September 2017 at 15:00;

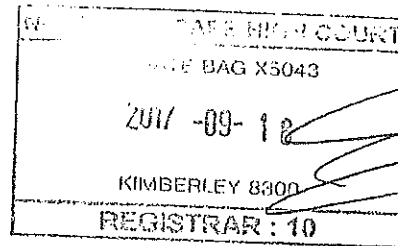
KINDLY enrol the matter for hearing as an urgent application.

SIGNED at KIMBERLEY this 18th day of SEPTEMBER 2017.



RJ BRITZ
ATTORNEY FOR APPLICANT
HONEY CHAMBERS
BLOEMFONTEIN
C/O HUGO MATHEWSON & OOSTHUIZEN ATTORNEYS
3A BEAN STREET
KIMBERLEY
REF: J OOSTHUIZEN

TO:
THE REGISTRAR
HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION,
KIMBERLEY



AND TO:

THE RESPONDENTS
C/O WERKSMANS ATTORNEYS
155 5TH STREET
SANDTON
GAUTENG PROVINCE

SERVICE VIA EMAIL
'lbecker@werksmans.com'

AND TO:

THE AFFECTED PARTIES
C/O 2ND AND 3RD RESPONDENTS
WERKSMANS ATTORNEYS
155 5TH STREET
SANDTON
GAUTENG PROVINCE

SERVICE VIA EMAIL
'lbecker@werksmans.com'

IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY

Case no:

In the application of:

THE STANDARD BANK OF SOUTH AFRICA LIMITED Applicant

and

SAXENDRIFT MINE (PTY) LTD First Respondent
[in business rescue]

TREVOR MURGATROYD Second Respondent
(in his capacity as business rescue practitioner of
SAXENDRIFT MINE (PTY) LTD [in business rescue])

PETER VAN DEN STEEN Third Respondent
(in his capacity as business rescue practitioner of
SAXENDRIFT MINE (PTY) LTD [in business rescue])

FOUNDING AFFIDAVIT

I, the undersigned,

VINSIN PILLAY

do hereby make oath and say:

(Handwritten initials)

1.

I am an adult Manager: Business Support, Rescue & Recoveries, Personal and Business Banking Credit, a division of the Applicant, employed as such by the Applicant at Kingsmead, DURBAN Kwa-Zulu Natal Province.

2.

I am duly authorised to depose to this affidavit and to institute legal proceedings on Applicant's behalf with respect to any claim and/or exposure to the Applicant not exceeding Twenty Five (25) Million Rand. I append my Certificate of Authority marked "VPI".

3.

I have been personally involved in the recovery of the First Respondent's debt due to the Applicant and the subsequent business rescue process of the First Respondent. I have also gained information pertaining to the First Respondent from the Applicant's books, records and documents in my possession and/or under my control.

V.P.I.

4.

The facts stated herein are within my personal knowledge, unless the context indicates otherwise, and are to the best of my belief both true and correct.

5.

Where I make submissions of a legal nature I do so on advice of the Applicant's legal representatives which advice I verily believe to be correct.

6.

THE PARTIES:

6.1 Applicant is **THE STANDARD BANK OF SOUTH AFRICA LIMITED**, (hereafter "the Bank") a company duly incorporated as such in accordance with the Company Laws of the Republic of South Africa and registered as a commercial bank, which has its principal place of business and registered head office at Standard Bank Centre, 5 Simmons Street, JOHANNESBURG, Gauteng Province.

6.2 First Respondent is **SAXENDRIFT MINE (PTY)LTD [In business rescue]** (hereafter "Saxendrift") a company duly registered in accordance with the Company Laws of the Republic of South Africa with

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its registered address at 2A Erasmus Street, Barkley West, Northern Cape Province.

6.3 Second Respondent is **TREVOR MURGATROYD N.O.** a major male business rescue practitioner who is cited in these proceedings in his capacity as duly appointed business rescue practitioner of Saxendrift, with address c/o Werksmans Attorneys, 155 5th Street, Sandton, Gauteng province.

6.4 Third Respondent is **PETER VAN DEN STEEN N.O.** a major male business rescue practitioner who is cited in these proceedings in his capacity as duly appointed business rescue practitioner of Saxendrift, with address c/o Werksmans Attorneys, 155 5th Street, Sandton, Gauteng province.

NATURE OF APPLICATION:

7.

The Bank seeks urgent relief to attach the movable assets of Saxendrift which have been generally bound to the Bank as security under a special and general notarial covering bond for the due payment of monies due and owing to the Bank.

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8.

THE COURT'S JURISDICTION:

I submit that this court has the necessary jurisdiction to hear and adjudicate upon this matter for the following reasons:

- 8.1 All of the assets to be secured in terms of the special and general notarial covering bond are currently within the area of jurisdiction of this Honourable Court; and
- 8.2 Saxendrift's registered office is situated within the area of jurisdiction of this Honourable Court.

9.

SAXENDRIFT'S PROVISIONAL LIQUIDATION PROCEEDINGS AND THE
SUBSEQUENT BUSINESS RESCUE PROCEEDINGS:

- 9.1 On 23 March 2017 C Rock Mining (Pty) Ltd made application in this Honourable Court for a provisional winding-up order of Saxendrift. The application was successful and a provisional winding-up order, returnable on 22 June 2017, was granted.
- 9.2 Subsequent thereto Just Tracks CC, a creditor of Saxendrift applied, on 18 May 2017, for and order that the provisional liquidation proceedings

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be set aside and to commence business rescue proceedings in accordance with section 131(1) of the Companies Act, 2008 ("the Act").

9.3 The application was successful and Saxendrift commenced business rescue proceedings on 18 May 2017 in terms of an order of this Honourable Court. A copy of the order is appended as "VP 2".

9.6 The Second – and Third Respondent (hereafter, collectively referred to as "the BRP") were duly appointed as the First Respondent's business rescue practitioners.

10.

LEAVE TO INSTITUTE LEGAL PROCEEDINGS - SECTION 133(1)(b) OF THE COMPANIES ACT, 2008:

10.1 As a result of the status of Saxendrift i.e. in business rescue, there is a general moratorium on legal proceedings against the company unless the business rescue practitioner has consented, in writing, to the institution of legal proceedings against such a company.

10.2 In this matter the Bank merely seeks to perfect the general part of its special and general notarial covering bond by attaching the movable assets of Saxendrift.

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- 10.3 On 13 September 2017 the Bank requested the BRP to voluntarily consent to the attachment of the movable assets so as to perfect the Bank's bond failing such consent, to consent in writing that the Bank may proceed to institute legal proceedings against Saxendrift to protect the Bank's rights. A copy of the Bank's letter is appended as "VP3"

- 10.4 The BRP neither consented to the attachment of the movable assets nor to the institution of legal proceedings against Saxendrift. Instead, on 14 September 2017, the BRP informed the Bank that they are in the process of launching urgent proceedings to place Saxendrift under provisional winding-up. The BRP's letter in this regard is appended as "VP4".

- 10.5 The Bank will thus first move for an order that the general moratorium against legal proceedings be uplifted and that leave be granted to the Bank, in accordance with section 133(1)(b) of the Act, to institute this application.

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1.1

THE SPECIAL AND GENERAL NOTARIAL COVERING BOND:

11.1 On 12 May 2015 Saxendrift consented to the registration, by the Registrar of Deeds JOHANNESBURG, of a special and general notarial covering bond number BN 14101/2015/2015 (hereafter the "Bond") in favour of the Bank as security for the fulfilment of Saxendrift's obligations, and any future obligations whatsoever cause arising, to the Bank.

11.2 A true copy of the Bond is appended marked "VP5".

11.3 The relevant material terms of the bond are:

11.3.1 Saxendrift (hereafter also referred to as "the Mortgagor") has applied to the Bank to be allowed advances, credits and other banking facilities whether as principal debtor, guarantor or surety or otherwise howsoever, to which application the Bank has acceded upon the express condition that it shall always be in the entire discretion of the Bank as to the extent, nature and duration of the advances; credits and other facilities so allowed and upon the further special condition that this bond is duly executed and registered;

11.3.2 the Mortgagor has agreed to pass this bond in favour of the Bank as security for any existing and for all its future

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indebtedness to the bank from whatsoever cause arising up to the amount of the maximum sum and the additional sum hereinafter referred to;

11.3.3 at the time of executing this bond, the assets of the mortgagor are situated at –

RAMAINING EXTENT OF THE FARM SAXENDRIFT NO. 20
and
REMAINING EXTENT OF PORTION 2 OF THE FARM ANNEX SAXES DRIFTS NO. 21, DISTRICT DOUGLAS, NORTHERN CAPE;

11.3.4 the Mortgagor acknowledged and declared that it is truly and lawfully indebted and held and firmly bound to and in favour of the Bank, its successors in title, order or assigns for the sum of R40 million and the additional sum of R10 million of lawful money arising from any cause, including but not restricted to –

11.3.4.1 existing future and contingent indebtedness;

11.3.4.2 indebtedness incurred by the mortgagor in its own name, jointly in the names of the Mortgagor and other person, or in the name of any firm in which

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the Mortgagor may be trading either solely or in partnership with others or otherwise;

11.3.4.3 indebtedness arising from money lent or advanced, or to be lent or advanced, promissory notes or bills of exchange made, accepted or endorsed, money withdrawn on account, acts or guarantee and suretyship executed by the Mortgagor or given by the Bank on the Mortgagor's behalf, sums paid by the Bank in respect of premiums of insurance, licence fees, taxes, sums paid by the bank in respect of amounts referred to in section 102(1) of the National Credit Act, 2005 ("the Act"), commission on charges, legal costs of recovery which will be as between attorney and own client, any realisation costs including advertising costs and the utilisation of any other banking facilities or otherwise;

11.3.4.4 indebtedness arising from any indemnity given by the Mortgagor in favour of the Bank in respect of loss, liability, damage, claims, costs or expenses of any kind (including without limitation, sums due by the mortgagor in respect of amounts referred to in section 102 of the Act) which may be suffered

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by and/or made against the Bank in respect of any guarantee given by the Bank to any third party in respect of the mortgagor's obligations to such third party from time to time;

11.3.4.5 interest on all amounts (including arrear interest) secured by this bond, calculated in a manner and at the rate agreed upon between the Mortgagor and the Bank or, failing such agreement, in the manner and at the rate usually required by the Bank for the kind of transaction in question; and

11.3.4.6 any costs incurred by the Bank in connection with the bond;
(clauses 1 to 1.3)

11.3.5 the Mortgagor declared to bind and hypothecate to and in favour of the Bank the following assets in terms of the security by means of Immovable Property Act, 57 of 1993, as amended or re-enacted from time to time:

(a) Niewejaarskraal Plant Phase worth R41 754 060
(purchased 31 August 2013);

(b) Saxendrift New Complex Plant worth R14 940 274
(purchased 1 April 2013);

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- (c) IFS Screen – 3NJK 0001 worth R8 077 847
(purchased 1 April 2014);

and all its movable property and affects (of whatever description and wherever situated) both such as the mortgagor may now possess or in the future become possessed of, without exception and without in any way limiting the generality of these provisions.

Situated at Remaining Extent of the farm Saxendrift no. 20 and the Remaining Extent of Portion 2 of the farm Annex Saxes Drifts no. 21, district Douglas, Northern Cape

(Hereinafter referred to as "the assets"), submitting the assets or the choice thereof to constrain an execution as the Law directs.

(Clause 3.2)

11.3.6 An event of default shall occur if the mortgagor refuses and/or neglects to –

11.3.6.1 pay interest, capital, commission, charges, premiums of insurance or any other sums due and payable by the Mortgagor in terms hereof or from

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- whatsoever other cause arising promptly by the due date for payment thereof; or
(clause 11.1.1)
- 11.3.6.2 carry out, or breaches any of the other terms, conditions or stipulations of this bond;
(clause 11.1.2)
- 11.3.6.3 carry out any of the terms, conditions or stipulations of any bond which is collateral hereto;
or
(clause 11.1.3)
- 11.3.6.4 the Mortgagor is sequestrated, is placed in liquidation or under judicial management whether provisionally, voluntarily or otherwise;
(clause 11.2.1)
- 11.3.6.5 changes the nature of the activities or the activities of any of its subsidiaries or controlled companies in any material respect or materially reduces the scope thereof or disposes of any material subsidiary without the bank's prior written consent;
(clause 11.2.4)

11.3.6.6 commits any breach with any material contract binding upon it entitling the other party to that contract to cancel the same or to accelerate performance by the mortgagor of any obligation due thereunder;
 (clause 11.2.6)

11.3.7 upon the happening of an event of default and, where applicable, subsequent to the fulfilment of any requirements imposed on it by the Act including, but not limited to, the requirements of section 129 of the Act, the Bank shall, without prejudice to any other right which it has in terms hereof, be entitled:

11.3.7.1 notwithstanding the terms and conditions of any indebtedness of the mortgagor to the bank arising before, simultaneously with or after the execution of this bond to declare the full amount of the mortgagor's indebtedness to the bank from whatsoever cause arising to be due and payable forthwith and to claim and recover the same from the mortgagor forthwith on demand;
 (clause 12.1)

11.3.7.2 to hold the assets as security for the payment of the indebtedness of the mortgagor to the bank and

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to retain such possession for so long as the bank may deem fit;

(clause 12.2)

11.3.8 the Bank shall be entitled without prejudice to any other rights:

11.3.8.1 to exercise the rights afforded to it in terms of this bond including (but not limited to) those referred to in clause 12, (i.e. the rights on the happening of an event of default);

(clause 13.1)

11.3.8.2 either separately or jointly or in such order and combination and at such times as the Bank may think fit;

(clause 13.1.1)

11.3.8.3 itself or through any director, manager, officer, employee, servant, agent or independent contractor nominated by it for the purpose; and

(clause 13.1.2)

11.3.8.4 in separate legal actions to recover from the Mortgagor forthwith on demand any costs or expenses reasonably incurred in exercising any of such rights; and

(clause 13.2)

11.3.8.5 if the Mortgagor shall refuse to give possession of the assets on demand, to apply to any competent Court for an order for delivery of such assets.

(clause 13.3)

11.3.9 A certificate signed by any of the bank's managers whose appointment need not be proved, will on its mere production be sufficient proof of any amount due and owing by the mortgagor in terms of the bond, unless the contrary is proved.

(clause 18)

SAXENDRIFT'S INDEBTEDNESS:

12.

12.1 Saxendrift's indebtedness to the Bank is as follows:

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- 12.1.1 R 4 075.62 on primary overdraft account number 040500926; and
- 12.1.2 R12 706 314.95 on secondary overdraft account number 240067061;

12.2 As prima facie proof of Saxendrift's indebtedness to the Bank I append two Certificates of Indebtedness, signed by me, as "VP6" and "VP7" respectively.

MERITS OF THE APPLICATION:

13.

13.1 It is evident from that which have been set out herein that Saxendrift has previously been liquidated provisionally and subsequent thereto it was placed under judicial management, i.e. business rescue proceedings. Accordingly it is submitted that an event of default, as defined in the bond, has occurred and the Bank is entitled to exercise its rights in terms of the bond.

13.2 The Bank has requested the BPR to allow the Bank to attach the movable assets which forms part of the general notarial covering bond in order for the Bank to perfect its security. In this regard the Honourable Court is again referred to the letter of demand which has been appended as "VP3".

13.3 The BPR refuses to allow the Bank to perfect its general bond and accordingly it is submitted that the only remedy available to the Bank is to approach this Honourable Court for an order of attachment of Saxendrift's movable property falling under the bond so as to perfect the Bank's security.

13.4 The Bank realises that an order for the removal of Saxendrift's movable assets would effectively bringing the company to its knees and halt any production and business activities. That is certainly not the Bank's intention and therefore the Bank merely moves for an order to attach the movable assets in order to perfect its security.

VALUE OF THE BANK'S SECURITY:

14.

14.1 As mentioned above, the Bank holds both a special and general notarial bond.

14.2 Three assets, as identified in the bond, has been specially hypothecated in terms of the Security by Means of Movable Property Act 57 of 1993.

14.3 The combined value of the assets, at the time when they were purchased, were more than R 60 million.

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14.3

14.4 However the BRP provided the Bank with a desktop valuation of all Saxendrift's assets, a copy of which is appended as "VP8", and it is evident from the desktop valuation that the depreciated value of the assets which are specially bond to the Bank are only worth R 2 000 000.00. In this regard the Honourable Court is referred to the desktop valuation and description, and valuation, of the following assets:

<i>"Niewejaarskraal Plant Phase 1a</i>	<i>R 2000 000.00</i>
<i>SHC Plant Additions 2</i>	<i>written off</i>
<i>IFS Screen - 3NJK0001</i>	<i>no value"</i>

14.5 The Bank has unconfirmed information that the IFS Screens were sold by Saxendrift prior to business rescue proceedings. That is probably why the BRP's desktop valuation shows no value in respect of the IFS Screens. However the Bank's endeavours with the BRP to ascertain the correct factual position did not yield a positive result and, for purposes of this application the Bank accepts that the IFS Screens have been sold.

14.6 The Bank have also not been in a position to value the aforesaid assets but it might turn out to be that the BRP's desktop valuation of the Niewejaarskraal Plant Phase 1a was a bit optimistic and that the real market value is much lower than the desktop valuation.

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14.7 Accordingly the Bank will move for an order to attach movable assets to the total value of R 12 710 390.57, alternatively to the value of R 10 710 390.57.

15.

URGENCY:

15.1 While the Bank was in the process of preparing this application the BPR, on 15 September 2017, filed an urgent application under case number 2161/2017 to convert the business rescue proceedings into liquidation proceedings. The said application has been set down for hearing on Friday 22 September 2017 at 10h00.

15.2 I will instruct the Bank's attorney to make arrangements for the aforesaid application to be placed before the Court at the time when this application is heard.

15.3 The BRP allege, inter alia, that Saxendrift cannot be rescued and that it is both commercially and factually insolvent.

15.4 The Bank will not be able to perfect its general notarial bond once the business rescue proceedings are converted into liquidation proceedings.

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- 15.5 It is thus impossible to bring this application within the normal time limits prescribed by the Rules of Court and it is imperative that this application be heard before the application to convert the business rescue proceedings into liquidation proceedings.
- 15.6 Accordingly it is submitted that this application is, by its very nature, urgent and the Honourable Court is requested to condone the Bank's non-compliance with the forms and time limits prescribed by the Rules of Court.
- 15.7 The Bank has set the application down for hearing on Wednesday 20 September 2017 so as to give the Bank time to execute the attachment before the hearing of the BPR's application to convert the business rescue proceedings into liquidation proceedings.

SERVICE OF THE APPLICATION:

16.

The BRP has indicated, in writing, that they will accept service of any court process at the office of their attorneys, to wit Werksmans Attorneys. The Bank will also furnish notice of this application to Saxendrift's creditors and any security holders. Saxendrift has no employees.

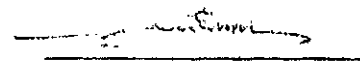
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Saxendrift

CONCLUSION:

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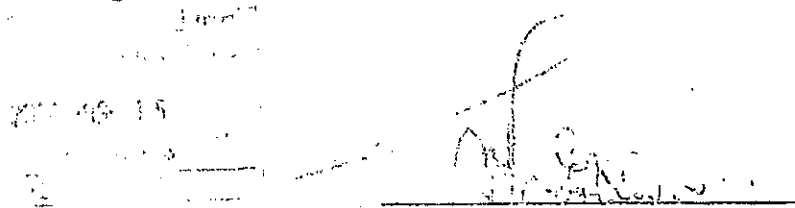
In the circumstances, I respectfully submit that the Bank has made out a *prima facie* case and I humbly request the Honourable Court to grant the relief sought in the notice of motion prefixed hereto.

SIGNED at DURBAN on this 15th day of SEPTEMBER 2017.



DEPONENT: V PILLAY

I certify that the deponent has acknowledged that he understands the contents of this affidavit, that he has no objection to taking the prescribed oath, that he has declared that he considers the oath to be binding on his conscience and that he has sworn to the veracity of the contents of this affidavit before me at Durban on this 15 day of Sept 2017 and signed the affidavit in my presence; the regulations contained in Government Notice No. 1258 of 21 July 1972, as amended by Government Notice No. 1648 of 17 August 1977, as amended, having been complied with.



COMMISSIONER OF OATHS

FULL NAMES:

[Handwritten name]

ADDRESS:

[Handwritten address]

CAPACITY:

[Handwritten capacity]

AREA:

[Handwritten area]

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