[illegible] HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 1062/2012

In the matter between:-

THE STANDARD BANK OF S A LIMITED Plaintiff

and

G H LOUBSER BOERDERY CC Respondent
(Reg No. CK2003/040704/23)

DELIVERED ON: 10 AUGUST 2012

MOCUMIE, J

[1] This is an opposed application in which the applicant seeks relief for an order in the following terms:

> "1. That the Applicant be authorised and empowered to perfect its security in terms of the special notarial covering bond BN1186/2007 in respect of forty-five dairy cows ("*the cows*"), being the property of the Respondent;
>
> 2. That the Applicant be authorised to enter in and upon the premises of the Respondent at the farm Goedehoop, Koppies, Free State Province, or any other premises of the Respondent where the cows may be found, to exercise the rights afforded to the Applicant's in terms of clause 12 of Annexure "A" to the Applicant's founding

affidavit, including the right to take and retain possession of the cows of the Respondent as long as the Applicant may deem fit.

3. That the Applicant be authorised to sell and dispose of the cows by public auction or by private treaty, or otherwise, in such a manner and on such terms as the Applicant may decide and to convey a valid title to any purchasers thereof. [Deleted during the hearing on 14 June 2012]

4. That the Applicant be authorised to remove the cows from the premises of the respondent referred in prayer 1 above, for the purpose of dealing therewith in terms of this order.

5. Should it be necessary, that the Sheriff of the High Court be authorised to execute the terms of 1 and 4 above on behalf of the Applicant.

6. That the Respondent be ordered to pay the costs of this application on the scale as between attorney and client.

7. Further and/or alternative relief."

[2] Applicant is Standard Bank of South Africa Ltd, a company duly incorporated and registered as a commercial bank and a credit provider as defined in the National Credit Act, 34 of 2005 *("the Act")*, which has its principal place of business and registered head office at 9th Floor, Standard Bank

Centre, 5 Simmonds Street, Johannesburg, Gauteng Province. Respondent is G H Loubser Boerdery CC, a close corporation, duly incorporated in terms of the laws of the Republic of South Africa with registered address, and *domicilium citandi et executandi*, at the farm Goedehoop, Koppies, Free State Province.

[3] Although denied by respondent, on the basis of absence of proof of the agreement, applicant alleged that on 22 October 2004 the parties entered into an oral agreement in terms of which the respondent opened a business current account with an overdraft facility at the applicant. In terms of this oral agreement, the amount outstanding in terms of the aforesaid overdraft facility was repayable by respondent to it on demand.

[4] On 29 November 2006 applicant, through its duly appointed representative, and respondent, represented by Gabriël Hendrik Loubser *("Loubser")* and Christina Magdalena Loubser, entered into a business term loan agreement, *("the business term loan")* attached to the papers as annexure "B".

The material terms of the business term loan were the following:

"7.1 The loan facility amount paid to, or on behalf of, the Respondent was an amount of **R300 000-00**;

7.2 Interest would be charged at 1% (one percent) per annum above the prime interest rate ruling from time to time;

7.3 The interest payable by the respondent is calculated on a daily basis from the outstanding balance, is charged monthly in arrears on a date convenient to the Applicant and was due and payable immediately. Any interest which is unpaid on the due date, would be capitalised on that date;

7.4 The Applicant may convert the business term loan facility to one repayable on demand if any of the following default events occurred:

7.4.1 if the Respondent breach any of the terms of the business term loan or any other agreement between the Applicant and the Respondent, and the Respondent fails to remedy the breach within seven (7) day of receiving writing notice to do so; or

7.4.2 the Respondent fails to pay any amount due in terms of clause 7 of the letter of grant, and the

Respondent fails to remedy his breach within seven (7) days of receiving written notice to do so.

7.5 The principal debt, together with interest, was repayable by the Respondent over an initial term of eighty-four months. The minimum monthly instalment payable by the Respondent is calculated using a repayment factor of 1/45th of the facility amount. The minimum monthly instalment is **R6 666-67**.

7.6 A certificate signed by one of the managers of the Applicant, whose appointment need not be proved, will, on its mere production, be sufficient proof, unless the contrary is proved, of the amount of the debt at any time, the fact that the debt is due and payable, the rate of interest payable, the date from which the interest is calculated and any other matter relating to the debt.

7.7 The Respondent will pay all fees, costs and charges referred to in the business term loan, including legal costs on an attorney and client scale."

[5] On 16 September 2008 the parties again entered into another agreement, a written agricultural production loan agreement *("the agricultural production loan agreement")*. A copy thereof is appended to the paginated papers as annexure "D".

[6] The material terms of the agricultural production loan agreement were the following:

> "11.1 The principal debt or credit limit available by the Respondent at the inception of the aforesaid agreement was the amount of **R1 million**;
>
> 11.2 Interest could be charged by the Applicant at a variable interest rate linked to the prime interest rate by a margin of 0.75% above the prime and was therefore subject to change;
>
> 11.3 The term of the aforesaid agreement was twelve months;
>
> 11.4 The loan amount was repayable, in full, from the first crops proceeds or was to be reduced as the proceeds from the sale of the crop were received;
>
> 11.5 The agricultural production loan agreement could not be carried over to the next year and had to be fully repaid by **31 August 2009**;
>
> 11.6 The Respondent would be in default of the aforesaid agreement if it failed to make payment, in full, on or before the payment date of any amount owing by it."

[7] In its founding affidavit applicant alleged that it complied with the aforesaid agreements and respondent breached the agreements by failing to make the necessary payments to it after due demand. In respect of:

7.1 the oral agreement, respondent is owing the amount of R161 492.37 plus interest, calculated at the rate of 13.5% per annum, calculated daily and compounded monthly in arrears, from 25 September 2011 to date of final payment to the applicant. A copy of the certificate of balance is appended to the papers as annexure "F".

7.2 the business term loan, respondent is owing an amount of R235 857.89 plus interest calculated at a rate of 10.5% per annum, calculated daily and compounded monthly in arrears, from 25 September 2011. A copy of the certificate of balance is appended to the papers as annexure "C".

7.3 the agricultural production loan, respondent is owing an amount of R71 676.82 plus interest at the rate of 11.25% per annum, calculated daily and compounded monthly in arrears, from 25 September 2011 to date of final payment to the applicant. A copy of the certificate of balance is appended to the papers as annexure "E".

Applicant alleged that respondent was currently indebted to it in the amount of R479 522.09.

[8] As security for payment by respondent to applicant of all monies due, by respondent to applicant in general, the Notarial Bond (annexure "A") was registered in the Bloemfontein Deeds Registry on 18 January 2007.

[9] The express terms of the Notarial Bond are:

> "18.1 The Respondent acknowledged and declared that it was indebted to the Applicant in the amount of **R300 000-00** (Three Hundred Thousand Rand);
>
> 18.2 The Respondent renounced all benefits from the legal exceptions, including *non numeratae pecuniae*, *non causa debiti*, *errore calculi*, revision of accounts, no value received, excussion and division, *de duobus vel pluribus reis debendi*, and all other legal benefits and exceptions with the force, meaning and effect whereof it declared itself to be fully acquainted;
>
> 18.3 <u>The Respondent hypothecated to and in favour of the Applicant forty-five dairy cows at **R7 000-00** (Seven Thousand Rand) per cow, in general;</u>
>
> 18.4 <u>The Respondent declared and acknowledged that the notarial bond is continuing covering security for all and any sums of monies that may now or in future be due, owing and payable by the Applicant from the Respondent from whatsoever cause arising.</u>

18.5 The Respondent consented to attorney and client costs in the event of it breaching the notarial bond." (Own emphasis)

[10] The Notarial Bond further provides *inter alia* as follows:

"19.3 In the event of the Respondent failing to pay any amount payable under the notarial bond on the due date or commit a breach of any term of condition of the notarial bond, then in such event the Applicant would, without prejudice of any other right or remedy which the Applicant has in terms of the notarial bond or otherwise, being entitled to:

19.3.1 claim and recover from the Respondent the full amount of the Respondent's indebtedness towards the Applicant;

19.3.2 to enter any premises occupied by the Respondent and to take possession of any of the assets thereof described in the notarial bond;

19.3.3 <u>to keep the aforesaid assets as security for payment of the amounts outstanding by the Applicant to the Respondent and to keep same in its possession as long as the Applicant may deem it necessary</u>; (Own emphasis)

> 19.3.4 to sell the assets by way of public auction, or otherwise in the sole discretion of the Applicant on the terms and conditions which the Applicant deems necessary."

[11] In his answering affidavit Loubser, on behalf of respondent,

11.1 denied that there was an oral agreement entered into in terms of which respondent opened a business current account with an overdraft facility at applicant. Respondent further denied owing any amount in terms of this alleged oral agreement.

11.2 denied that the certificate of balance constitutes sufficient proof of the indebtedness and that the applicant has provided any proof of the amount of R300 000.00 or how was it taken up.

11.3 denied that it is in breach of the agricultural production loan agreement and challenges the certificate of balance.

[12] Respondent further raised a point *in limine* that applicant had not established a right to perfect its security, in that the alleged indebtedness of respondent has not been endorsed by any court of law by means of a judgment or otherwise.

"1*(1)* If a Notarial bond hypothecating corporeal movable property specified and described in the bond in a manner which renders it readily recognisable, is registered after the commencement of this Act in accordance with the Deeds Registries Act, 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."

[16] Harms JA referring to the work of Joubert (ed) **LAWSA** Vol 17 1st reissue para [517] in **Contract Forwarding (Pty) Ltd v Chesterfin (Pty) Ltd and Others** 2003 (2) SA 253 (SCA) at 257E-H recently restated the law governing the hypothecation of movable property for security as follows:

[3] "The holder of a general notarial bond does not enjoy a real right of security in the assets subject to the bond. There is nothing to prevent the owner from dealing with and disposing of the assets subject to the bond, or of bonding them to another creditor. The creditor cannot prevent the alienation or pledge of the assets subject to

the bond, cannot follow up the property in the hands of the acquirer and cannot prevent a judicial attachment. The rights of the bondholder are of importance mainly upon insolvency. The bondholder is not a secured creditor and is entitled to a preference over the concurrent creditors of the insolvent only with respect to the proceeds of assets subject to the bond. In order for such a right afforded to a creditor in terms of a notarial bond to be regarded as a real right actual possession of the movable assets is a prerequisite, such a creditor must perfect its notarial bond by taking physical possession of such assets encumbered.

[4] A perfection clause entitles the holder of the bond to take possession of the movables over which the bond has been registered .Such a clause amounts to an agreement to constitute a pledge and will be enforced at the instance of the bondholder, whereupon the creditor obtains a real right of security..."

[17] Mr Els, on behalf of respondent, submitted that the dairy cows concerned are readily identifiable as prescribed in s1 (1) of the Act, thus, there was no need for applicant to perfect its security. He submitted further that Clause 13.3 of the Notarial Bond stated that before applicant could invoke any of its rights in terms of the Notarial Bond it must have

called upon respondent to deliver the dairy cows. Absent such request the application ought to be dismissed.

[18] Both counsel referred to **Die Standard Bank van Suid-Afrika en Hendrik Christiaan Calitz** unreported judgment of Wright, J delivered on 13 April 2000 in support and against the submission that it was peremptory for applicant to have requested respondent to deliver the disputed dairy cows first before initiating these proceedings.

[19] Mr Els urged me to follow the **Standard Bank v HC Calitz** matter as it was on all fours with this case. I cannot agree with him.

[20] The **Standard Bank vs HC Calitz**-case is distinguishable on the basis that applicant in that matter sought the relief to perfect it security without any notice to respondent which was correctly described as a draconic step to take and not to be condoned by courts. Secondly, the facts of the **Standard Bank and HC Calitz** case are different from the facts of this case.

[21] Clause 13.1-13.3 of the Notarial Bond in this case provides:

"Die bank mag sonder benadeling van enige ander regte –

13.1 Die regte uitoefen wat ingevolge hierdie verband aan hom verleen is met inbegrip van,maar nie beperk nie tot,daardie regte wat in 12 hierbo vermeld is –

13.1.1. Of asonderlik of gesamentlik of in sodanige tye wat die bank geskik mag vind;

13.1.2. self of deur middle van enige direkteur,bestuurder,beampte,werknemer,dienaar.agent of onafhanklike kontrakteur deur hom vir hierdie doel be noem;

13.1.3. in afsonderlike regsgedinge(synde die verbandgeweer hiermee afstand doen van die reg om te pleit dat sodanige regte tydens een geding uitgeoefen moes gewees het);"

13.2 onverwyld op aanvraag enige koste of uitgawes wat redelikerwys by die uitoefening van enige sodanige regte aangegaan is,op die verbangewer verhaal;

13.3 indien die verbandgewer weier om op aanvraag besit van die bates oor te gee,by enige bevoegde hof aansoek doe nom 'n bevel vir die lewering van sodanige bates."

[22] This clause is couched in permissive language. Especially if read with clause 12 of the same Notarial Bond, it gives

applicant several options to exercise upon respondent's failure to comply with the terms and conditions of the agreements including requesting respondent to deliver the hypothecated assets. But, it definitely does not prescribe that applicant must first request respondent to return the hypothecated assets. The request is but one of the options which applicant could have exercised and it chose not to but opted for the court route which is just as permissible.

[23] To that extent, in terms of the Notarial Bond in this case applicant was not obliged to request respondent to deliver the cows first before it approached the court. There is simply no peremptory provision to that effect in the Notarial Bond in this case unlike in the **Standard Bank v HC Calitz** matter.

[24] Mr Zietsman referring to the Supreme Court of Appeal case of **Ikea Trading Und Design AG v BOE Bank Ltd** 2005 (2) SA 7 (SCA) submitted that the forty five dairy cows, referred to in the Notarial Bond, were without specific identification mark or number and thus not readily identifiable as prescribed by section 1(1) of the Act to the extent that one

was not able to distinguish them from the rest of the other dairy cows on respondent's property.

[25] In **<u>Ikea Trading</u>** above at 12B - D para [10] and [11] the Supreme Court of Appeal stated:

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

[26] The dairy cows in dispute are identified on the Notarial Bond as forty five dairy cows without any specific reference to any distinct features or description. In my view, this lack of clear and specific distinction of the particular forty five dairy cows in dispute on the Notarial Bond or other wise made it virtually impossible to separate them from others if attached by other creditors or to trace them in the event that they were removed from where they were. In my view, the description of the forty five dairy cows in dispute does not satisfy the provisions of section1 (1). Even if I may be wrong on this, respondent has, in any event and over and above clause

3.3.1, also encumbered all its movable assets in terms of clause 3.3.2 of the Notarial Bond. The forty five dairy cows automatically fall thereunder.

[27] The argument that the dairy cows were milked every day and if removed from their environment, might suffer stress and not be as productive as they should be, which will result in hardship for respondent and others affected such as employees and that its business can close down if applicant is allowed to perfect its security cannot stand. I find it highly improbable that applicant can insist to take possession of the dairy cows only to let them die from stress or lack of proper care at the risk of forfeiting what is due to it. Neither can I disregard the clear intention between the parties to be bound by the terms and conditions agreed upon in the event of failure to comply with any such terms and conditions by any party. Contrary to what was strenuously suggested on behalf of respondent, the circumstances of this case are totally different from the harsh circumstances which prevailed in **Haynes v King Williamstown Municipality** 1951 (2) SA 371 (A).

[28] I am satisfied that applicant has proven its case on a *prima facie* basis that the amounts, referred to in the certificates of balance as per annexures "C" ,"E" and "F" to the founding papers, are in fact due to applicant. Applicant has further proven that it complied with the aforesaid agreements and that respondent breached the agreements by failing to make the necessary payments to applicant after due demand by applicant. The reasons respondent has advanced why it failed to comply with the clear terms of the agreements are not relevant at this stage, in this type of proceedings.

[29] I am bound to follow the Supreme Court of Appeal's decision of **Contract Forwarding Ltd** referred to above where the Court stated that applicant in a situation such as this is in the same position as any other creditor and has no better rights than other creditors unless and except if it establishes its rights by taking possession of the hypothecated assets.

[30] This begs the question. If applicant in this case is prevented from exerting its rights in terms of a clear and unequivocal agreement between it and respondent what other options does it have? None.

[31] In the circumstances, I am of the view that applicant is entitled to the relief sought based on the agreement between the parties as per clause 19.9.3 of the Notarial Bond

> "to keep the aforesaid assets as security for payment of the amounts outstanding by the Applicant to the Respondent and to keep same in its possession as long as the Applicant may deem it necessary..."

[32] I am furthermore satisfied that applicant has established a right to the relief it seeks. Its security needs protection.

[33] Insofar as costs are concerned there is no reason why the general rule applicable to costs should not apply. In the instance, I make the following order:

ORDER:

"The application is granted with costs."

B.C. MOCUMIE, J

On behalf of applicant:	Adv P Zietsman SC Instructed by: Matsepes Inc BLOEMFONTEIN
On behalf of respondent:	Adv J Els Instructed by: Rosendorff Reitz Barry BLOEMFONTEIN