



IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

In the matter between:

CASE NO:

2458/09

COMBUSTION TECHNOLOGY (PTY) LTD

Applicant

and

T.R. MECHANICALS 786 CC
Registration No. CK2001/067239/23

Respondent

NOTICE OF MOTION

BE PLEASED TO TAKE NOTICE that application will be made on behalf of the abovenamed Applicant on Thursday 12 February 2009 at 10h00 or so soon thereafter as counsel for the Applicant may be heard for an order in the following terms:

1. That this application be heard as a matter of urgency and that the Applicant's failure to comply with the rules of court with regard to form, service and time periods be condoned.
2. That a rule *nisi* be issued calling upon all persons concerned to appear and show cause, if any, to the above Honourable Court on a date to be determined by it as to why, pending an action for specific performance (to be instituted by the Applicant within 30 days from confirmation of the rule *nisi*):
 - 2.1. the Applicant's managing director, Grant Eric Renecle should forthwith not be restored as the sole authorised signatory on account number 62169062727 (branch code: 201109), First National Bank, Plumstead, as well as the linked call account in the name of Respondent with the said bank;
 - 2.2. that all funds received from the employer continue to be paid into the said accounts;
 - 2.3. and why the Respondent should not be ordered to pay the costs of this application.

3. That the relief sought in 2.1 and 2.2 above operate as an interim interdict pending the return date of the rule *nisi*.

TAKE NOTICE FURTHER that the affidavit of Grant Eric Renecle annexed hereto will be used in support hereof.

TAKE NOTICE FURTHER that the Applicant has appointed the offices of Abrahams & Gross Inc, 1st Floor, 56 Shortmarket Street, Cape Town as the address at which it will accept delivery of all documents herein.

Dated at Cape Town this 11th day of February 2009.

ABRAHAMS & GROSS INC
Applicant's Attorneys

Per: 
J. Simon
1st Floor
56 Shortmarket Street
Cape Town
(Ref: JS/gn/W16200)
Tel: (021) 422 1323

TO : **THE REGISTRAR**
High Court
Cape Town

AND TO: **T.R. MECHANICALS 786 CC**
Respondent
Unit 1
1832 Capricorn Crescent
Capricorn Park
Muizenberg
c/o SAMUELS ATTORNEYS AT LAW
Respondent's Attorney
Samuels Chambers
7 Egham Street
Wynberg

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Registration No. CK2001/067239/23

Respondent

FOUNDING AFFIDAVIT

I, the undersigned,

GRANT ERIC RENECLÉ

do hereby make oath and state that:

DEPONENT

1. I am an adult male businessman and the managing director of the

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S.

Applicant herein.

2. The facts herein contained are, save where otherwise stated or appears within my personal knowledge and are both true and correct. Where facts are not within my personal knowledge I, having regard to the source thereof verily believe the veracity thereof.
3. I am duly authorised to bring this application on behalf of the Applicant.

APPLICANT

4. The Applicant is Combustion Technology (Pty) Ltd, a company with limited liability duly incorporated in accordance with the provisions of the Companies Act No. 61 of 1973 and which conducts business as a distributor, installer and maintainer of industrial steam boiler systems from its principal place of business at Unit 28E, 60 White Road, Retreat, Western Cape.

A handwritten signature in black ink, consisting of a stylized 'C' followed by a 'T' and a dash.

RESPONDENT

5. Respondent is T.R. Mechanicals 786 CC, a close corporation duly incorporated in accordance with the provisions of the Close Corporations Act No. 69 of 1984 under registration number CK2001/067239/23 and having its principal place of business at Unit 1, 1832 Capricorn Crescent, Capricorn Park, Muizenberg, Western Cape.
6. The Respondent is engaged in mechanical installation works.

THE TENDER

7. In or about January / February 2008 the Department of Public Transport, Roads and Works Chief Directorate Capital Works awarded tender number: GC1739/10/2007 in respect of a specialist proposal to convert four sixteen ton industrial coal fired steam boilers to natural gas firing at Johannesburg Hospital to Respondent.
8. The tender document runs to several hundred pages and I will for sake of brevity not annex a copy thereof hereto but will ensure that it

A handwritten signature in black ink, appearing to be 'A. B.', is located at the bottom right of the page.

is available to the court at the hearing hereof.

9. The aforementioned tender was awarded to the Respondent pursuant to the submission of a tender document prepared by me in course and scope of my employment with Applicant. It was submitted by the Respondent to the department. Applicant as a result of its specialist expertise is responsible for performing 100% of the work done on the project.

THE AGREEMENT BETWEEN APPLICANT AND RESPONDENT

10. Prior to making the submission referred to above the Applicant, represented by me, and the Respondent represented by Ridwan Taliep, concluded an oral agreement the express, alternatively implied, alternatively tacit terms of which were as follows:

10.1 the Applicant, as a result of its specialist expertise, would perform the bulk of the work under the tender;

10.2 a bank account would be opened in the name of the Respondent with me as the sole authorised signatory in

A handwritten signature in black ink, appearing to be 'Ak B.', is located in the bottom right corner of the page.

respect thereof;

- 10.3 all funds received from the government department would be paid into the aforementioned bank account;
- 10.4 the Applicant would procure for the government department a performance guarantee on behalf of Respondent from a recognised bank or financial institution in respect of 5% of the contract value;
- 10.5 the Applicant would invoice Respondent in respect of work done pursuant to the tender upon receipt of the funds by Respondent from the government. Upon receipt of 100% of the said funds Respondent would invoice the Applicant for 5% of the funds so received.

THE BANK ACCOUNT

- 11. Respondent duly opened a bank account with First National Bank, Plumstead, (Branch Code 201109) being a business cheque account with Account No: 62169062727.

A handwritten signature in black ink, appearing to be 'ale' followed by a stylized flourish.

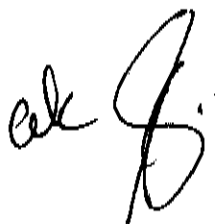
12. In accordance with its agreement with the Applicant the Respondent nominated me as the sole authorised signatory on the account.
13. A copy of a letter from the said bank dated 23 January 2008 reflecting the details of the account is annexed hereto marked "GER1".
14. On the same date the bank issued a performance guarantee on behalf of Applicant as referred to above. A copy thereof is annexed hereto marked "GER2".

THE WORKS

15. Pursuant to the foregoing the Applicant commenced work on the project.
16. Each month I would, on behalf of Respondent, invoice the government department in respect of work done. I would personally prepare these invoices and in my capacity as the sole signatory on the cheque account in the name of Respondent receive the payments made pursuant thereto.

A handwritten signature in black ink, appearing to be 'ale' followed by a stylized flourish.

17. Applicant, who had performed all of the services in respect of which the government department had paid, would then invoice Respondent for the same amount and invite Respondent to invoice it for 5% of the funds received from the government.
18. During the course of last year this procedure was consistently employed without demur from the Respondent. Transactions totalling approximately R14 000 000,00 were involved. There is still work outstanding to the tune of about R1 400 000,00.
19. It is to be noted that despite the fact that I was the sole signatory on the account, the Respondent's member Yumna Taliep was at all time given access thereto as a user and could accordingly view all transactions conducted on the account twenty four hours a day, seven days a week.
20. The Respondent in breach of its agreement with the Applicant has unilaterally instructed the bank to cancel my authority as signatory on the account. I believe that this occurred on or about the 27th of January 2009. The bank has advised that it is unable to rectify the

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situation without a court order to this effect. A copy of Applicant's attorney's letter together with the bank's response thereto is annexed marked "GER3" and "GER4" respectively.

21. Since the aforementioned unlawful and unilateral act the Applicant is not only not able to access the relevant financial information, but furthermore has no control over the funds received which materially increases its financial exposure in the whole project.
22. The aforementioned action has furthermore had the effect that funds received from the government department are not being paid to the Applicant despite the fact that the Applicant has invoiced Respondent therefore. I believe that the balance in the cheque account at present ought to be in the region of R250 000,00. All of this is due owing and payable to the Applicant.

RETENTION MONIES

23. The situation was exacerbated by the fact that the government department had in error failed to deduct a 5% retention from payments made to Respondent with the result that Respondent was historically

A handwritten signature in black ink, appearing to be 'ale B.', located in the bottom right corner of the page.

overpaid on each amount received from the government department. Respondent was accordingly pursuant to a *bona fide* error paid sums in excess of those that are due to it.

24. Not only has this resulted in the Applicant receiving less funds that it should have received in terms of the agreement, it has furthermore resulted in a deadlock between the Applicant and the Respondent with regard to the continuation of the project. This poses a further threat to the Applicant who, as stated hereinabove, was obliged to put up the guarantee for 5% of the value of the works.
25. The Applicant is now caught on the horns of a dilemma. Should it continue to perform pursuant to the tender it will be doing so at risk as it has not been paid for the work already performed. Should it fail to do so it raises the danger that the government department might well cancel the contract due to the failure on the part of the Respondent to perform in terms thereof. This matter is accordingly extremely urgent.
26. The only remedy is that the Applicant's right to have its managing director, namely myself, as the sole authorised signatory on the bank accounts be restored forthwith.

A handwritten signature in black ink, consisting of a stylized 'ab' followed by a large, looped 'B'.

REQUISITE FOR AN INTERIM INTERDICT

27. I submit that it is clear that:

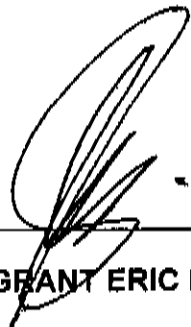
27.1 The Applicant has established a *prima facie* right;

27.2 the Applicant faces the very real prospect of suffering irreparable harm should the relief sought not be granted;

27.3 the Applicant has no alternative remedy;

27.4 the balance of convenience favours the Applicant.

28. I accordingly respectfully pray for an order in terms of the notice of motion herein.



GRANT ERIC RENECLÉ

I certify that:

1. the deponent acknowledged to me that:



- 1.1 he knows and understands the contents of this declaration;
 - 1.2 he has no objection to taking the prescribed oath;
 - 1.3 he considers the prescribed oath to be binding on his conscience;
2. the deponent thereafter uttered the words, "*I swear that the contents of this declaration are true, so help me God*";
 3. the deponent signed this declaration in my presence at the address set out hereunder on this 11th day of February 2009

Alhaji
COMMISSIONER OF OATHS
ANTON FARREL KATZ
Practising Advocate
Suite 618
56 Keeron Street
Cape Town





23 January 2008

To Whom It May Concern

CONFIRMATION OF BANKING DETAILS
TR MECHANICALS 786 CC
REG NO: CK2001/067239/23

This letter serves to confirm that we have opened the abovementioned account in our books, the details are as follows:-

Account number	62169062727
Branch Code	201109
Branch	Plumstead
Type	Business Cheque Account

Any queries, kindly contact me on **083 390 9970**.

Thanking You.

Julie Nefdt

External Consultant

1st Floor, Tokai-on-Main Office Park
46 Main Road
Tokai
7945
Tel (021) 713 3802, Fax (021) 713 3810, Cell 083 390 9770

e-mail : JNefdt@FNB.co.za

First National Bank - a division of FirstRand Bank Limited.
An Authorised Financial Services Provider

"GER 2"

General Indemnity
Form 30 (d)



FNB
First National Bank

A division of FirstRand Bank Limited
Reg. No: 1929/001225/06
An Authorised Financial Services Provider

Date 23 JANUARY 2008

To: FirstRand Bank Limited

Whereas I/we hereby request you to issue on my/our account suretyships, guarantees or indemnities for me/us and/or for any of the following persons, partnerships, close corporations, companies and trusts:

1. T R MECHANICALS 786 C C REG NO: 2001/067239/23

Whereas you may from time to time bind yourself as sureties in solidum and co-principal debtors for or otherwise guarantee the due performance of my/our contracts with or undertakings to other persons, I/we the undersigned, jointly and severally undertake to pay to you on demand any amount which may be demanded from you and any costs, charges and expenses which you may sustain or incur in connection with any such act of suretyship, guarantee or indemnity which you may enter into or give, and in the event of payment having been demanded from you or your making any payments in respect of any such suretyship, guarantee or indemnity, I/we hereby request and irrevocably authorise and empower you to make any payments and to comply with any demands which may be claimed or made under such suretyship, guarantee or indemnity and I/we further hereby request and irrevocably authorise and empower you forthwith to debit the amount so demanded or paid to my/our account or the accounts of either of us in your books without reference to me/us whether such account or accounts be in credit or debit and without prejudice to your right to recover all such amounts from me/us.

I/we further agree that any payment which you shall make, shall be binding upon me/us and shall be accepted by me/us in any legal proceedings as *prima facie* evidence that you were liable to make such payment or comply with such demand (hereinafter referred to as the "*prima facie* evidence" clause).

I/we acknowledge that you shall only be entitled to rely upon the "*prima facie* evidence" clause above in the event of such payment made by you having been made under the condition that if it is afterwards found that such payment was not due, it is to be repaid to you and further that I/we shall on request be entitled to receive cession of all your right, title and interest in any claims which you may have flowing from payments made as aforesaid, provided that I/we shall only become entitled to receive such cession upon my/our making payment of the amount claimed by you in terms of this indemnity.

I/we acknowledge that you have the right at any time during the existence of any act of suretyship, guarantee or indemnity to call upon me/us at your discretion to furnish you forthwith with cash or approved security for the full amount of any such act of suretyship, guarantee or indemnity, and in the event of your calling upon me/us to do so and my/our failing to comply, you will have the right to recover from me/us the amount so claimed.

I/we agree that:

- (a) Whenever cash is furnished to you in terms hereof, you shall upon receipt of such cash become the owner thereof and that I/we shall have no claim whatsoever thereto.
- (b) The only rights which I/we may have against you arising out of the furnishing of cash as aforesaid will be as follows:
 - (i) I/we shall have no claim against you and no amount whatsoever shall be owing due or payable by you to me/us unless and until I/we establish (the onus being upon me/us) firstly that you have no further liability in terms of any aforementioned act of suretyship, guarantee or indemnity and secondly that I/we would not have any further liability to you in terms of this indemnity.
 - (ii) Should I/we succeed in establishing the foregoing my/our claim against you shall be limited to the amount (if any) by which the cash furnished as aforesaid exceeds:
 - (aa) The amount of your liability in terms of any such act of suretyship, guarantee or indemnity together with any costs, charges and expenses which you may incur or sustain in connection therewith; or
 - (bb) The amount of my/our liability to you in terms of the indemnity;and should there be any difference between the amounts referred to in (aa) and (bb) above, the applicable amount will be the greater of the two.

I/we hereby choose *dominium et executandi* at the relative address set out hereunder or, in the case of a company, at its registered address.

FOR AND ON BEHALF OF COMBUSTION TECHNOLOGY (PTY) LTD REG NO: 2000/011755/07

Signature

Signature

Address 60 WHITE ROAD

RETREAF

7945

(which must be a street address)

ah



The Department of Public Transport Roads and Works
 Chief Directorate Capital Works of the Gauteng Provincial Government
 Private Bag X83
 Marshalltown
 2107

FIRSTRAND BANK LIMITED

FINB INTERNATIONAL BANKING 26-46-65

Guarantee number:

G0657/399554/GLO

COMBUSTION

TECHNOLOGY (PTY) LTD

DATE : 23 January 2008
 GUARANTEE NUMBER : G0657/399554/GLO

PERFORMANCE GUARANTEE

CONTRACT NUMBER: GC1739/10/2007

With reference to the above Contract made or to be made between The Department of Public Transport Roads and Works: Chief Directorate Capital Works of the Gauteng Provincial Government ("the Employer") and TR Mechanicals 786 CC Reg No. 2001/067239/23 ("the Contractor") for the Engineering and Construction Services to convert Four Industrial Coal Fired Steam Boilers for natural Gas Firing and to Upgrade the Boiler House at Johannesburg Hospital, Parktown, Johannesburg ("the Contract").

We, the undersigned Greg Patrick Hill and Washeala Price on behalf of FirstRand Bank Limited ("the Bank") and duly authorised thereto do hereby bind the said Bank as guarantor for the due and faithful performance of all the terms and conditions of the Contracts by the *Contractor* and for all losses, damages and expenses that may be suffered or incurred by the *Employer* as a result of non-performance of the Contracts by the *Contractor*, subject to the following conditions:

- (1) The terms *Employer*, *Contractor*, *Project Manager*, *Works* and *Defect Certificate* have the meaning as assigned to them by the *conditions of contract* listed in the Contract data for the aforesaid Contract.
- (2) The Bank renounces the benefits from the legal exceptions benefit of excussion and division and no value received which might or could be pleaded against the validity of this Performance Guarantee, with the meaning and effect of which exceptions the Bank declares itself to be fully acquainted.
- (3) The *Employer* has the absolute right to arrange his affairs with the *Contractor* in any manner which the *Employer* deems fit and without being advised thereof the Bank shall not have the right to claim his release on account of any conduct alleged to be prejudicial to the Bank. Without derogating from the foregoing compromise, extension of the construction period, indulgence, release or variation of the *Contractor's* obligation shall not affect the validity of this Performance Guarantee.
- (4) This Performance Guarantee will expire on the earlier of:
 - the date that the Bank receives a notice from the *Project Manager* stating that the last Defects Certificate has been issued, that all amounts due from the *Contractor* as certified in terms of the Contracts have been received by the *Employer* and that the *Contractor* has fulfilled all his obligations under the Contracts; or



- the date that the Bank issues a replacement Performance Guarantee for such lesser/higher amount as may be required by the *Project Manager*.

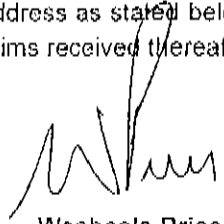
always provided that this Performance Guarantee will not lapse in the event the Bank is notified by the *Project Manager*, (before the dates above), of the *Employer's* intention to institute claims and the particulars thereof, in which event this Performance Guarantee shall remain in force until all such claims are paid and settled.

- (5) The amount of this Performance Guarantee shall be payable to the *Employer* upon the *Employer's* written demand and no later than 7 (seven) days following the submission to the Bank of a certificate signed by the *Project Manager* stating the amount of the *Employer's* losses, damages and expenses incurred as a result of the non-performance aforesaid. The signed certificate shall be deemed to be *prima facie* proof of the extent of the *Employer's* loss, damage and expense.
- (6) Our total liability hereunder shall not in aggregate exceed the sum of R670,000.00 (Six Hundred and Seventy Thousand Rand Only) ("the Guaranteed Sum")
- (7) This Performance Guarantee is neither negotiable nor transferable is limited to the payment of money only and is governed by the laws of the Republic of South Africa.
- (8) Notwithstanding anything to the contrary contained herein, the Bank reserves the right to withdraw from this Performance Guarantee by giving the *Employer* 30 (thirty) days written notice of its intention to do so. The Bank shall not be relieved of any of its obligations under this Performance Guarantee until the expiry of the 30 (thirty) days notice period. All claims should have been received at the Bank's address as stated below on or before the expiry of the 30 (thirty) days notice period and any claims received thereafter shall not be considered.

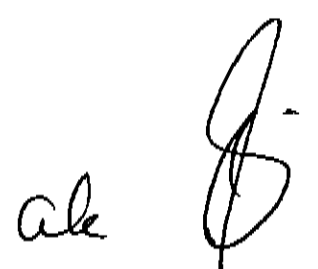
For and on behalf of FirstRand Bank Limited



Greg Patrick Hill
Relationship Manager



Washeala Price
Relationship Manager



A&G ABRAHAMS & GROSS INC. "GER 3"

ATTORNEYS, NOTARIES & CONVEYANCERS

1st Floor, 56 Shortmarket Street, Cape Town, 8001 P.O. Box 1661, Cape Town, 8000 Website : www.abgross.co.za
Tel : (021) 422-1323 Fax : (021) 422-1406 Docex 61 E-mail : info@abgross.co.za

First National Bank
Attention: Mr. Greg Hill

Per email: greg.hill@fnbcommercial.co.za
Per telefax: (021) 685 4578

Your Ref :

Our Ref : JS/gn/

Ext No : 209/215

Date : 10 February 2009

Dear Sir,

T.R. MECHANICALS 786 CC (REG NO. CK2001/067239/23)

1. We act for Combustion Technology (Pty) Ltd and are instructed by its managing director, Grant Renecke ("Renecke").
2. We are further instructed that our client concluded an agreement with T.R. Mechanicals 786 CC ("T.R. Mechanicals") in respect of a contract between T.R. Mechanicals and the Department of Public Transport and Works: Chief Directorate Capital Works of the Gauteng Provincial Government to convert our industrial coal. Fired steam boilers to natural gas firing and to upgrade the boiler house at Johannesburg Hospital.
3. In this regard it was agreed between our client and T.R. Mechanicals that our clients Renecke be the sole authorised signatory on the following account:

Account No: 62169062727
Branch Code: 201109
Branch Name: Plumstead
Type: Business Account

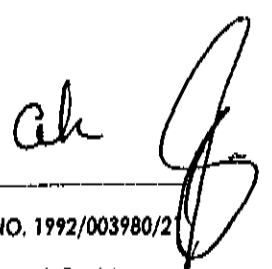
as well as a linked call account in the name of T.R. Mechanicals.

4. In order to secure the aforementioned contract with the relevant government department our client was obliged to put up a guarantee (which it did through your good offices) in respect of 5% of the contract sum.
5. Furthermore in terms of our client's agreement with T.R. Mechanicals our client would, after receipt of payment from the relevant government department into the bank account referred to hereinabove release 5% thereof to T.R. Mechanicals with the balance of 95% being paid to our client.
6. Unbeknown to our client the aforementioned government department in error failed to retain 5% of the payments made in respect of the works detailed hereinabove. As a result of this error Renecke overpaid T.R. Mechanicals.

7. This led to a dispute between our client and T.R. Mechanicals pursuant to which we are instructed that T.R. Mechanicals revoked Renele's authority as sole signatory on the abovementioned bank account. This has resulted in an untenable situation where our client is not only exposed in respect of the guarantee furnished by it on behalf of T.R. Mechanicals but furthermore T.R. Mechanicals have, since their representatives are in control of the bank account, failed to settle our client's invoices despite having received payment in respect thereof from the government department.
8. We must accordingly request that you forthwith freeze both the abovementioned business cheque account and call account as all of the funds held therein are due to our client in terms of its agreement with T.R. Mechanicals.
9. Our client is in the process of preparing urgent papers for an application to court in order to immediately restore Renele as sole signatory.
10. We thank you for your assistance.

Yours faithfully
ABRAHAMS & GROSS INC.

Per: 
J SIMON (MR)



Geraldine Nieuwenhuys

From: Grant Renecke [grant@rielloburners.co.za]
Sent: 11 February 2009 10:47 AM
To: 'Hill, Greg'; 'Natasia'
Cc: Geraldine Nieuwenhuys
Subject: RE: Combustion Technology - T.R. Mechanicals

Hi Greg,

Thanks for your email, much appreciated!

Regards
Grant

Grant Renecke

Managing Director

Cell: +27 (0) 82 568 4012
Ph: +27 (0) 21 715 3171
Fax: +27 (0) 21 715 6297

-----Original Message-----

From: Hill, Greg [mailto:greg.hill@fnbcommercial.co.za]
Sent: 11 February 2009 10:45 AM
To: Natasia
Cc: Grant Renecke
Subject: RE: Combustion Technology - T.R. Mechanicals

Hi Natasia

Thank you for your letter of 10th February 2009.

We have referred the matter to our Legal Department. Whilst we fully understand the position that Grant and Combustion are in we are legally bound in terms of the banking mandate which is in place.

We urge you to obtain a Court Order on an urgent basis. We can then place a freeze on the account once we are in receipt thereof.

Regards

Greg Hill
Relationship Manager

Analyst: Zarinah Cassim Tel: 021 681 4055

Commercial Banking
2nd Floor, Great Westerford, 240 Main Road, Rondebosch Tel (021) 681 4054, Fax (021) 681 4200, Cell 083 707 0686 e-mail ghill@fnb.co.za

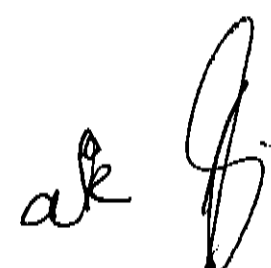
First National Bank - a division of FirstRand Bank Limited.
An Authorised Financial Services and Credit Provider. (NCRCP20)

-----Original Message-----

From: Natasia [mailto:natasiav@law.co.za]
Sent: 10 February 2009 03:37 PM
To: Hill, Greg
Subject: Combustion Technology - T.R. Mechanicals

Herewith letter for your attention.

Regards
Fred Sievers



Natasia Galvin
Secretary to Adv. Fred Sievers
6th Floor, 56 Keerom Chambers
Keerom Street
Cape Town
Tel: (021) 4249786
Fax: 086 670 6717
Cell: 078 186 2717

To read FirstRand Bank's Disclaimer for this email click on the following address or copy into your Internet browser:
<https://www.fnb.co.za/disclaimer.html>

If you are unable to access the Disclaimer, send a blank e-mail to firststrandbankdisclaimer@fnb.co.za and we will send you a copy of the Disclaimer.

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