IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO.: 19064/2021

In the matter between:

KINGSGATE CLOTHING (PTY) LTD t/a MAJESTIC CLOTHING MANUFACTURERS, PRINCETON SCHOOLWEAR MANUFACTURERS AND STAR CLOTHING MANUFACTURERS	First Applicant
MAYTEX LINEN CC	Second Applicant
SUPER OCEAN TRADING CC	Third Applicant
MAYTEX CARDING CC	Fourth Applicant
CRUISE COLLECTIONS CC	Fifth Applicant
TWIN CLOTHING MANUFACTURERS (PTY) LTD	Sixth Applicant
APPAREL INDUSTRIES (PTY) LTD	Seventh Applicant
CLEMATIS TRADING (PTY) LTD	Eighth Applicant
GLOBAL SOURCE (PTY) LIMITED	Ninth Applicant
SUNNINGDALE TRADING (PTY) LIMITED	Tenth Applicant
and	
EDCON LIMITED (IN BUSINESS RESCUE)	First Respondent
PIERS MARSDEN (JOINT BUSINESS RESCUE PRACTITIONER)	Second Respondent
LANCE SCHAPIRO (JOINT BUSINESS RESCUE PRACTITIONER)	Third Respondent

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THE FIRST TO THIRD RESPONDENTS' ANSWERING AFFIDAVIT

I, the undersigned,

LANCE SCHAPIRO,

do hereby make oath and say:

1. I am an adult male practising as a business rescue practitioner at Matuson & Associates (Pty) Limited at Building 2, Oxford & Glenhove, 114 Oxford Road, Houghton Estate, Johannesburg. I am the third respondent herein.

2. The facts deposed to in this affidavit are within my personal knowledge and belief, save where the context indicates to the contrary, and are furthermore true and correct. Where I refer to information conveyed to me by others, I verily believe such information to be true. Where I make submissions of a legal nature, I do so on the advice of our legal representatives.

3. The second respondent and I are cited herein in our capacities as the joint business rescue practitioners ("**practitioners**") of the first respondent ("**Edcon**"). The practitioners have taken full management control of Edcon since our appointment.

4. The second respondent supports the opposition to the application instituted by the applicants under the above case number ("**leave application**") and has authorised me to depose to this affidavit on his behalf.

5. I have read the founding affidavit deposed to by Yusuf Ahmed Sadek Vahed on behalf of the applicants on 12 August 2021 ("**founding affidavit**") in support of the leave application.

6. The primary relief sought in terms of the leave application is to obtain the leave of this court in terms of section 133(1)(b) of the Companies Act, 71 of 2008 ("**Companies Act**") to institute action proceedings against Edcon ("**contemplated action proceedings**"), and to do so within 30 days of the grant of the order sought. The remaining relief sought relates to the joinder of Edcon's creditors and substituted service.

7. The draft contemplated action proceedings is not attached to the application. The applicants do not define the relief that would be sought in the contemplated action proceedings, or the exact facts that ground a cause of action, to allow the respondents and affected persons, who were provided with notice of the leave application, to consider the leave application, the implications of same and to make a decision on whether to oppose the relief sought.

8. Instead, the applicants have broadly referred and/or "*alluded*" to the following relief which they will seek in the contemplated action proceedings:

   8.1. to set aside the "*instruments of security*" entered into by Edcon and its "*shareholder creditors*" (paragraph 195);

   8.2. to set aside the transaction whereby the "*Hollard Joint Venture*" was purportedly moved from Edcon to a different company within the Edcon Group (paragraph 196);

8.3. to force the practitioners to account for stock of approximately R800 million, which the practitioners purportedly cannot explain (paragraph 197); and

8.4. to challenge and deal with the manner in which monies and/or proceeds of the business rescue proceedings are apportioned and allocated to the different categories of Edcon's creditors (paragraphs 202 and 205).

9. If this is what they seek, the contemplated relief is incompetent legally and factually.

10. The applicants also allege in paragraph 200 of the founding affidavit that they intend pursuing additional relief in the contemplated action proceedings, in respect of which they do not require the leave of this court as it is not sought against Edcon. This additional relief has not been disclosed.

11. The stated reason furnished by the applicants for seeking to institute the contemplated action proceedings is set out in paragraph 193 of the founding affidavit. In this regard, the applicants purport in paragraph 193 that the contemplated action proceedings have been "*necessitated by the abject failure of the... [practitioners] to make information and documents available to the applicants*".

12. The applicants have failed to make a full and proper disclosure to this Court of the factual position. As will become evident from what is set out herein, the founding affidavit contains numerous factual inaccuracies in regard to the practitioners' purported conduct, failure to produce documents and/or to respond to the applicants' queries and/or requests. In fact, as I will demonstrate below, most, if not all of the "*complaints*" raised by the applicants, have already been dealt with by or on behalf of the practitioners, but the applicants have chosen to ignore the practitioners' responses as it does not suit their narrative.

13. In paragraph 54 of the founding affidavit, the applicants allege that it is not their intention to seek the setting aside the business rescue plan, but "*merely record what the applicants contend is the continuation of the corporate damage which has been perpetrated on the concurrent creditors*". In paragraph 204 of the founding affidavit, the applicants repeat that they are not seeking to set aside the business rescue plan, which they conceded has "*in any event, been largely implemented*".

14. It is clear from the founding affidavit that the true intention of the applicants is to challenge what is legally beyond challenge, i.e. what is referred to as the "*2019 restructure*" of Edcon, the adopted business rescue plan and the implementation of same.

15. Edcon's business rescue plan was adopted on 22 June 2020 and is statutorily binding on all affected persons. As conceded by the applicants in paragraph 204, the business rescue plan has been largely implemented.

16. The business rescue plan *inter alia* details, by way of background, the 2019 restructure and related transactions, and provides for the proposal to rescue Edcon as well as the apportionment and allocation of proceeds to different categories of creditors. This is what the applicants are ultimately seeking to challenge, which is impermissible.

17. What the applicants fail to disclose to this court is that most of the issues raised by the applicants in support of the relief sought in the leave application were also raised by the first and eight applicants in support of the leave sought in the urgent application which they instituted on 19 June 2020 and which was heard on 22 June 2020 ("urgent application"), being the date of the section 151 meeting.

18. I attach hereto, marked "**AA1**", a copy of the urgent application and the affidavits (without annexures) filed therein.

19. The relief sought in the urgent application was as follows:

    19.1. The postponement of the section 151 meeting convened for 22 June 2020, pending further consultation with the applicants and the delivery of documents and an explanation; and

    19.2. That the applicants be granted leave to approach this court on the urgent papers, supplemented insofar as may be necessary, for an order setting aside the business rescue plan published on 8 June 2020 and/or setting aside the business rescue proceedings and/or removing the practitioners and/or placing Edcon into liquidation.

20. The urgent application was struck for lack of urgency. However, during the hearing, the court reiterated what was recorded by the respondents in the answering affidavit in the urgent application, being that the applicants' remedies were self-contained in the Companies Act. The urgent application was not prosecuted, nor was it withdrawn, and is pending.

21. In this regard, the applicants were entitled, along with every other affected person, to raise their questions and make motions in terms of section 152 of the Companies Act during the section 151 meeting (i.e. motions to amend the business rescue plan and/or for the section 151 meeting to be adjourned).

22. On 22 June 2020, the applicants had an opportunity to exercise their rights in terms of the Companies Act:

22.1. numerous questions were raised by creditors, including the applicants, and answered by the practitioners during the section 151 meeting;

22.2. the practitioners entertained and conducted a vote on the motions contemplated in section 152(1)(d) of the Companies Act.

22.3. the practitioners thereafter called for a vote of preliminary approval of the business rescue plan.

23. The business rescue plan was duly adopted on 22 June 2020. In this regard, I attach hereto, marked "**AA2**", a copy of the results of the voting published by the practitioners. As will be noted from AA2, the value of the creditors' claims which were voted exceeded R6 billion (based on the calculation used in respect of the value of the votes cast and referred to in AA2).

24. I point out that the applicants' use of the term "*concurrent creditors*" in the founding affidavit is misleading in that it creates the impression that the entire body of concurrent creditors and/or the other members of the creditors' committee hold the same views as the applicants and/or support the leave application. This is simply not the factual position. Edcon has over 3 000 creditors. The amount owed to Edcon's creditors exceeds R6.4 billion. The applicants' have submitted claims totalling approximately R109 million. This represents less than 2% of the total creditors' claims.

25. After the adoption of the business rescue plan, the applicants took no further steps in regard to challenging the adopted business rescue plan and/or seeking further information.

26. Instead, the applicants changed tack, with the first to eight applicants proceeding with the dispute resolution provisions provided for in the business rescue plan in regard to a purported reservation of ownership over the stock supplied by them to Edcon. The parties agreed to the appointment of Retired Judge Brand as the expert to determine the dispute. Retired Judge Brand held that the applicants did not have any reservation of ownership.

27. Despite the business rescue plan providing that, save for any manifest error on the part of the expert, the determination would be final and binding and would not be subject to review or appeal, the first to eighth applicants instituted an application out of this court to set aside the determination made by retired Judge Brand and for the dispute, based on the same record, to be determined afresh by another retired judge ("**review application**").

28. As a further display of their conduct, the first to eighth applicants deliberately failed to file their heads of argument (for more than six months) as, according to them, they were purportedly contemplating the leave application. The respondents were not advised of the aforesaid contemplated proceedings and were forced to file their heads of argument and to institute an application to compel the applicants to file their heads of argument so that the review application could be allocated for hearing. Although the applicants initially opposed the application to compel and filed a counter-application seeking for the review application to be stayed pending the outcome of the leave application or the action proceedings, whichever is the latter, the applicants capitulated and agreed to an order for the delivery of their heads of argument in the

review application and later tendered to withdraw the counter-application, with each party to pay their own costs.

29. Clearly, the applicants are seeking as many avenues as possible to abuse this court's process in an impermissible attempt to obtain more money than what they are entitled to in terms of the statutorily binding business rescue plan and binding expert determination. It appears to the respondents that the ulterior motive of the applicants in launching all of these proceedings is an attempt to delay the finalisation of Edcon's business rescue proceedings in the hope that the respondents will settle with the applicants. The respondents cannot and will not agree to any preferential treatment of the applicants by paying the applicants more than what they are entitled to in terms of the statutorily binding business rescue plan and expert determination.

30. In this regard, it is noteworthy that the applicants have failed to produce any evidence demonstrating an advantage to Edcon and its affected persons should the leave application be granted and the contemplated action proceedings be successful.

31. This is because there will be no advantage if the 2019 restructure and/or related security instruments are set aside:

31.1. The status *quo* (i.e. prior to the 2019 restructure) would have to be restored (which, it is submitted, is in itself an impossibility legally and factually), resulting in *inter alia*:

31.1.1. Edcon still having indirectly-secured creditors (as per the prior restructures and inter-creditor agreements) exceeding the value of Edcon's assets;

31.1.2. the restructure of R10 billion of existing financier debt, either through recapitalisation or through refinance as convertible indirectly-secured guaranteed instruments, reverting to claims against Edcon;

31.1.3. the capitalisation of R9.3 billion of intra-group debt falling away and reverting to claims against Edcon; and

31.1.4. the R2.7 billion of additional cash financing that was provided in terms of the 2019 restructure will still be a claim against Edcon.

31.2. The total creditor claims and the concurrent creditor base will accordingly increase substantially, thereby materially reducing the dividend payable to concurrent creditors.

32. Moreover, the applicants do not show that they have *locus standi* effectively to set aside the adopted business rescue plan and the payment allocations in terms thereof. The first to eighth applicants also cannot be allowed to take up two contradictory positions during the business rescue process, shifting between the two whenever it suits. I submit that the doctrine of peremption finds application here and further legal argument will be advanced in this regard at the hearing of the matter.

33. There is accordingly no legal basis upon which the applicants are entitled to the relief that they seek in the leave application. The applicants are impermissibly seeking to circumvent the consequences of the adoption and implementation of the business rescue plan, in complete disregard of all other stakeholders.

34. If the applicants were aggrieved by the outcome of the vote and the adoption of the business rescue plan, they should have interdicted the implementation of the

business rescue plan. They failed to do so. The applicants were also updated on the progress made by the practitioners in regard to the sale of Edcon's assets, pursuant to the adopted business rescue plan. The applicants had the option of interdicting such sales, pending their challenge of the adoption of the business rescue plan. They failed to do so.

35. Moreover, in accordance with the provisions of the adopted business rescue plan, on 23 February 2021, the respondents paid the secured proceeds received in terms of the sale of Edcon's secured second look book, in the amount of approximately R438 million, to the security administrator for distribution to the Intercreditor Secured Creditors.

36. Similarly, on 18 December 2020, the proceeds from the sale of the shares held by K2019216440 (South Africa) Limited ("**K2019**") in Hollard Business Associates Proprietary Limited ("**HBA**"), in the amount of approximately R384 million, were also paid directly by the purchaser to the security administrator for distribution to the Intercreditor Secured Creditors. As dealt with below, the shares in HBA were not held by Edcon and therefore did not form part of its assets. These shares, however, were indirectly-secured in favour of the Intercreditor Secured Creditors.

37. I am advised that the following factors are relevant to this court in determining whether it is appropriate to uplift the moratorium provided for in the Companies Act:

37.1. The effect that the grant or refusal of leave would have on the applicants' rights as opposed to other affected persons and relevant stakeholders:

37.1.1. I point out that nowhere in the founding affidavit do the applicants attempt to explain how the relief that they seek will impact on the

rights of other affected parties, including, *inter alia*, the purchasers of Edcon's assets, Edcon's employees etc.

37.1.2. If leave is granted for action proceedings to be instituted by the applicants, it will take years for same to be finalised, thereby hamstringing the business rescue process and affecting thousands of employees and creditors.

37.1.3. It is not sufficient to simply state that, if the applicants are successful in the action proceedings, the concurrent creditors will be paid a higher dividend. To the contrary, the contemplated action proceedings would result in concurrent creditors receiving a lower dividend. Moreover, the action proceedings will be detrimental to the business rescue proceedings.

37.2. The impact that the proposed legal proceedings would have on the wellbeing of Edcon:

37.2.1. Action proceedings are costly and time consuming. It would adversely delay the finalisation of Edcon's business rescue proceedings and incur unnecessary costs to the determinant of all creditors.

37.2.2. As mentioned above, the proposed action proceedings will introduce great uncertainty to Edcon's business rescue process, which will severely hamper the practitioners' ability to finally implement the adopted business rescue plan.

37.3. Whether the grant of leave would be inimical to the object and purpose of business rescue proceedings as set out in sections 7(k) and 128(b) of the Companies Act:

37.3.1. I submit for the reasons set out herein that granting the applicants leave to institute action proceedings against Edcon for the undefined relief will certainly be inimical to the object and purpose of business rescue proceedings.

37.3.2. In relation to the business rescue plan, the practitioners are seeking to rescue Edcon by achieving a better return and balancing the interests of all affected persons, as contemplated in section 7(k) of the Act. This has been accomplished by the specific payment allocation provided for in the adopted business rescue plan.

37.3.3. It is not just a question of the interests of a select few creditors. The applicants seem to be of the impression that the Intercreditor Secured Creditors are in a much better position than concurrent creditors. However, none of the creditors will be repaid in full, not even the Intercreditor Secured Creditors.

38. In all of the circumstances, it is submitted that the applicants have failed to make a case for the relief sought in the leave application.

THE FOUNDING AFFIDAVIT

39. I now turn to deal with the allegations made in the founding affidavit *ad seriatim*, to the extent necessary. Consequently, to the extent that I do not deal with any

allegation contained in the founding affidavit, if it is inconsistent with what is stated herein, same is denied.

Ad paragraph 2 of the founding affidavit

40. It is denied that the contents of the founding affidavit are all true and correct for the reasons set out herein.

Ad paragraph 4 thereof

41. The applicants are no longer suppliers of merchandise to Edcon. The applicants supplied merchandise to the Jet and/or Edgars businesses previously owned and operated by Edcon, which businesses were sold and transferred to the respective purchasers after Edcon commenced business rescue and as far back as September 2020.

42. The respondents note the applicants' concession that they are all concurrent creditors of Edcon.

43. I reiterate that the applicants comprise less than 2% of the total creditors of Edcon.

Ad paragraphs 14 and 15 of the founding affidavit

44. The correct business address is Building 2, Oxford & Glenhove, 114 Oxford Road, Houghton Estate, Johannesburg.

Ad paragraphs 18 to 26 thereof

45. The contents of these paragraphs are irrelevant for the purposes of the leave application, as well as the contemplated action proceedings.

Ad paragraph 27 thereof

46. Edcon commenced business rescue proceedings on 29 April 2021.

47. As is evident from the list of creditors attached to the business rescue plan, it was not just concurrent creditors but also the Intercreditor Secured Creditors who were unpaid and owed billions of Rands as at the date of Edcon's business rescue.

48. The applicants further fail to disclose that:

48.1. had it not been for the business rescue plan and the specific payment allocation provided for therein, concurrent creditors would not have received any dividend (with no dividend being payable in a liquidation); and

48.2. Intercreditor Secured Creditors are also not being paid in full.

Ad paragraph 28 thereof

49. The applicants comprise 10 out of over 3 000 creditors of Edcon. Moreover, and as has already been stated herein, the applicants' claims comprise less than 2% of the total claims of Edcon's creditors.

50. The applicants fail to disclose that, throughout the many years of merchandise supply referred to in the founding affidavit, Edcon paid hundreds of millions of Rands to the applicants.

51. In particular, Edcon paid over:

51.1. R606.7 million to the applicants since the 2019 restructure (June 2019) until the commencement of Edcon's business rescue proceedings (29 April 2020); and

51.2. R95 million to the applicants after the commencement of Edcon's business rescue proceedings (29 April 2020) until the Jet and Edgars businesses were sold to the respective purchasers (during September 2020).

52. Moreover, the respondents understand that all of the applicants have continued supplying to at least one of the purchasers since the aforesaid businesses were sold in September 2020.

Ad paragraphs 29 to 31 thereof

53. It is denied that the review application referred to in paragraph 29 is related to this application or the contemplated action proceedings. The allegations contained in this paragraph are also misleading as the issue in the review application is discreet - whether the expert determination made by Retired Judge Brand (which determined that the applicants did not have a reservation of ownership over the good supplied by them to Edcon) should be set aside and determined by another retired judge. That issue is completely independent and separate to any of the issues in this application and the contemplated action proceedings.

54. The review application is also not capable of being heard together with the contemplated action proceedings. The review application concerns aspects about which a final and binding determination has been made. It was after an agreed process of filing affidavits. No evidence may be received, nor may the record be enlarged, to determine the issue in the review application, that is, whether the determination in the dispute resolution should be set aside. Even if the applicants are successful in the review application, it is also not possible for any fresh determination of the dispute, based on the same record that was before Retired

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Judge Brand, being heard together with the contemplated action proceedings as such fresh determination will not be before this court but a retired judge.

55. The applicants have also misrepresented the factual position to this Court.

56. Contrary to what is asserted in these paragraphs, the respondents have been attending to the finalisation of the applicants' claim amounts, as well as all of Edcon's creditors' claims. The correspondence addressed to certain of the applicants regarding their claim amounts commenced as early as May 2020. In addition, the correspondence addressed to the applicants regarding their claim amounts largely predates the founding affidavit, which was deposed to on 12 August 2021, and the failure to disclose this in the founding affidavit is telling.

57. Evidently, the allegations relating to the respondents' conduct are, simply put, false and a deliberate attempt to mislead this Court.

58. In addition, the dispute on the reservation of ownership was not heard by an arbitrator in terms of arbitration proceedings but was determined in accordance with the dispute resolution mechanism provided for in paragraph 39 of the business rescue plan (annexure FA9). In terms of paragraph 39.3.7 of the business rescue plan, save for any manifest error, the expert's determination is final and binding and will not be subject to any subsequent review or appeal application / procedure / process.

Ad paragraphs 32 and 33 thereof

59. It is denied that the applicants are entitled to the relief sought for the reasons set out herein. In addition, there is a material non-joinder of affected persons.

60. As demonstrated herein, the applicants have failed to demonstrate a *prima facie* case against the respondents in respect of the contemplated action proceedings and have

inter alia failed to give any valid reasons why the action proceedings are necessary and appropriate. Simply put, the applicants have failed to make averments or present evidence which reveal a cause of action or triable issue.

61. Contrary to what is alleged by the applicants, the contemplated action proceedings is an abuse of process and is an impermissible challenge on Edcon's statutorily binding business rescue plan.

62. It is respectfully submitted that it is also in the interests of justice that this court exercises its judicial discretion not to grant the leave sought by the applicants. Contrary to what the applicants allege, the contemplated action proceedings and contemplated leave that will be sought therein (which, in itself, is not fully disclosed) will prejudice Edcon's affected persons and its business rescue proceedings.

63. Evidently, the leave sought by the applicants will result in a hardship to Edcon and all of its affected persons, and will be inimical to the objects of Edcon's business rescue proceedings.

Ad paragraphs 34 to 50 thereof

64. The allegations contained in these paragraphs, in particular, extracts from interviews and a journalist's comments, are irrelevant.

65. The 2019 restructure was a complicated group-wide debt restructuring, which took over 13 months to negotiate and finalise. It is summarised in paragraph 5.3 of the business rescue plan (FA9 to the founding affidavit).

66. As is evident from paragraph 5.3.3 of the business rescue plan, the 2019 restructure involved *inter alia*:

66.1. The capitalisation of R9.3 billion of intra-group debt.

66.2. The restructure of R10 billion of existing financier debt, either through capitalisation or refinance as convertible indirectly-secured guaranteed instruments;

66.3. The sourcing of R2.7 billion of additional cash financing from existing financiers; the UIF (represented by the PIC); and Participating Landlords:

66.3.1. the additional funding was sourced through the issuance by Edcon of instruments, and shares issued by the newly-incorporated holding company, with such shares and instruments being stapled; and

66.3.2. the successful issuance required negotiation of the instrument terms with a consortium of South African and international banks and funds who were lenders to Edcon (referred to as the "**OpCo Lenders**"); the UIF (represented by the PIC); and approximately twenty six Landlord groups (who became the Participating Landlords).

66.4. The issuing of the following instruments:

66.4.1. Tranche A Instruments (comprising Tranche A1 Instruments and Tranche A2 Instruments) - issued to the Opco Lenders to Edcon to refinance their existing secured debt and as consideration for the provision of new money;

66.4.2. Tranche B1 Instruments - issued to the UIF (represented by the PIC) in consideration for the provision of new money;

1.1.1. Tranche C Instruments - issued to the Participating Landlords in exchange for (i) an upfront cash subscription, (ii) periodic/monthly cash subscriptions or (iii) periodic / monthly rent reductions, each in accordance with the Landlords Agreement; and

1.1.2. Tranche D Instruments - issued to the Tip-Offer Subscribers pursuant to the Tip-Offer.

66.5. The issuing of the following conditional instruments to the UIF (represented by the PIC) to provide downside protection in an enforcement scenario:

66.5.1. Tranche B2 Instruments, which would entitle the UIF (represented by the PIC) to a conditional claim and associated rights against Edcon. Such claim is conditional upon an acceleration event occurring which has not been rescinded. At all other times, the Tranche B2 Instruments would not constitute an obligation of Edcon.

66.5.2. This claim, however, has arisen by virtue of Edcon's business rescue.

66.6. As mentioned above, the instruments were issued by Edcon and were "*stapled*" to ordinary shares issued by K2019.

66.7. Other than the Tranche B2 Instruments, the instruments are convertible into ordinary shares in K2019 should certain conversion triggers be met. These were not met.

66.8. The instruments are indirectly-secured (using the standard South African security SPV structure) and guaranteed by K2019 and certain subsidiaries. The instruments are English law governed.

67. The 2019 restructure provided a lifeline to Edcon to continue trading and benefitted concurrent creditors far more than what it benefited the Intercreditor Secured Creditors, who were the parties who provided billions of Rands to finance Edcon's businesses.

68. The reasons for Edcon becoming financially distressed are set out in paragraphs 5.3.8 to 5.3.10 of the business rescue plan:

68.1. The recession in the South African economy, which coincided with load-shedding, disrupting purchasing patterns.

68.2. Poor sales as a result of the only partially-completed repositioning of its credit and product offering.

68.3. The advent of the COVID-19 pandemic which resulted in the Government of South Africa announcing and implementing measures, including an initial 45 day social distancing and lockdown period (which lasted longer than the initial 15 day period initially communicated). This resulted in a further trading slump and Edcon immediately experiencing a loss of R2 billion in sales.

68.4. The loss of sales, and consequently Edcon's failure to meet the March 2020 and April 2020 sales targets, as well as the decline in collections of the debtors' book due to the lockdown resulted in Edcon only having sufficient liquidity to pay salaries for March 2020 and for April 2020, with the latter

payment being in terms of the agreed banded reduction. Edcon was unable to honour all of its contractual obligations with suppliers.

69. Evidently, the 2019 restructure was not the cause of Edcon's financial distress.

70. It is noteworthy that the applicants continued to supply goods to Edcon after it commenced business rescue proceedings and received over R95 million from Edcon for such supplies.

71. To the extent that any allegation contained in these paragraphs has not been addressed, it is denied.

Ad paragraphs 51 to 59 thereof

72. The allegations contained in these paragraphs are without merit and denied for the reasons set out herein.

73. As is the case with the other proceedings instituted by the applicants, the allegations contained in the founding affidavit, and in particular these paragraphs, contain defamatory and emotive allegations designed to sensationalise the applicants' case and mislead this court. Numerous attacks are made on the practitioners and their motives. Such allegations are without merit, irrelevant to this application and denied.

74. It is denied that the "*entire business rescue proceedings have resulted in a travesty of justice for the unpaid concurrent creditors*". It is evident from this statement alone that the applicants are, in truth, impermissibly seeking the "*setting aside of the Business [Rescue] Plan*".

75. Section 7(k) of the Companies Act has been achieved as the business rescue proceedings and plan have resulted in the rights and interests of all relevant stakeholders being balanced. Any allegation to the contrary is denied.

76. The applicants seem to forget that creditors are not the only relevant stakeholders in a business rescue. The relevant stakeholders are all affected persons, being employees, creditors and shareholders.

77. What the applicants fail to disclose is that:

77.1. Had it not been for the business rescue proceedings, Edcon would have been placed in liquidation and:

77.1.1. the employment contracts of over 17 000 employees would have immediately been suspended and employees' claims would have been limited to a maximum amount of R32 000.00; and

77.1.2. concurrent creditors would have received zero cents in the Rand.

77.2. Had it not been for the specific payment allocation provided for in the business rescue plan, concurrent creditors would still have received zero cents in the Rand if the proceeds were to be applied in accordance with the ordinary allocation.

78. Moreover, the applicants fail to disclose that they instituted the urgent application, which contained virtually identical allegations and complaints as those contained in the founding affidavit.

79. As set out above, the urgent application was struck for lack of urgency, however, the court specifically advised the applicants during the hearing that they had their remedies in terms of the Companies Act, being that they were entitled to raise their questions and make motions in terms of section 152 of the Companies Act during the section 151 meeting, which they did.

80. The business rescue plan was adopted and the applicants took no further steps to set aside any votes in favour of the business rescue plan.

81. The respondents have been transparent and have provided affected persons with Edcon's financial position. The respondents have also provided affected persons with material updates in terms of Edcon's business rescue proceedings in the monthly update reports, as contemplated in section 132(3) of the Companies Act.

82. For the reasons set out herein, it is denied that there has been any "*corporate damage... perpetrated on the concurrent creditors*". It is also denied that the "*process of business rescue undertaken by the... [respondents] breached numerous provisions of the [Companies] Act*" or that "*requirements of the [Companies] Act were not followed*". The applicants have failed to demonstrate any such breach and/or failure to comply in the founding affidavit.

Ad paragraphs 60 to 64 thereof

83. The allegations contained in these paragraphs are without merit, irrelevant and denied.

84. Again, these allegations were raised as far back as June 2020, during the creditors' committee meeting held on 15 June 2020, as well as in the urgent application.

85. As recorded in the answering affidavit to the urgent application, the prior involvement of the offices of Matuson & Associates was openly disclosed at the creditors' committee meeting and recorded in paragraph 51 of the minutes thereof (annexure FA8 to the founding affidavit). Such prior involvement raises no concerns with regard to the independence and appointment of the practitioners, same being appointments in their personal capacities.

86. The practitioners are, and have always been, independent and have looked after the interests of all stakeholders. The applicants have failed to produce any evidence to the contrary.

87. The consultancy fees for work performed by Matuson & Associates prior to Edcon's business rescue proceedings are also irrelevant and merely an attempt to create atmosphere.

88. Moreover, no application has been brought to remove the practitioners.

Ad paragraphs 65 to 81 thereof

89. The allegations contained in these paragraphs are without merit, irrelevant and denied. The applicants have also failed to produce any evidence demonstrating any "*partiality*" of the chairperson or any adverse consequence of her appointment. In this regard, the applicants maintained their statutory rights to raise motions and vote on the business rescue plan in terms of section 152 of the Companies Act.

90. The applicants' unfounded concerns relating to the independence of the practitioners and the chairperson of the creditors' committee were raised in a letter addressed by the applicants' attorneys to the respondents' attorney on 17 June 2020 ("17 June 2020 letter") and the urgent application. A copy of the 17 June 2020 letter is attached hereto, marked "**AA3**".

91. On 19 June 2020, the respondents' attorneys responded to the 17 June 2020 letter ("19 June 2020 letter"), which response is attached as FA12 to the founding affidavit.

92. As indicated in paragraph 21 of the 19 June 2020 letter:

92.1. the involvement of the offices of Matuson & Associates in another matter as well as the chairperson's involvement in another matter are irrelevant;

92.2. the practitioners are appointed in their individual representative capacities as the business rescue practitioners of Edcon, not their offices;

92.3. the applicants' allegations challenge the appointment of the independent chairperson based on a perception of the applicants, however, the applicants failed to set out any facts justifying their perception, or whether the same perception is held by other members of the committee; and

92.4. the practitioners would address this issue at the next creditors' committee meeting to ascertain if the committee wanted to appoint another chairperson.

93. The applicants wrongly allege in paragraphs 67 and 81 that the chairperson "*had, and continues to have, an ongoing business relationship with the… [practitioners] in other major business recue proceedings, such as the business rescue proceedings of South African Airways*" and that the chairperson "*will accordingly not adopt a position which will not align with the interests of the …[practitioners]*".

94. Firstly, the practitioners were not appointed as the business rescue practitioners of SAA. Secondly, SAA is no longer in business rescue. Thirdly, the chairperson has not been appointed in other business rescue proceedings where the practitioners have been appointed as the business rescue practitioners. Fourthly, the position adopted by the chairperson in terms of her personal views does not affect the factual and /or legal position or the rights of affected persons in a business rescue.

95. It is denied that the chairperson is, or was, "*beholden*" to the practitioners or that she lacked transparency.

96. The reference to "*the concurrent creditors*" in paragraph 70 is incorrect, misleading and denied.

97. As set out above, what the applicants fail to understand is that if the 2019 restructure is set aside, Edcon would not be in a better position (it is submitted, it would be far worse) as the position would revert to the status quo in regard to the prior structure and financially distressed position. The creditors' claims (both Intercreditor Secured Creditors and concurrent creditors) will increase drastically, which will only be detrimental to the concurrent creditors.

Ad paragraphs 82 to 90 thereof

98. The allegations contained in these paragraphs are without merit, irrelevant and denied for the reasons already set out herein.

99. These paragraphs contain sweeping allegations without any evidence demonstrating same.

100. Again, the applicants raised similar allegations in their 17 June 2020 letter and in the urgent application, which were dealt with in the 19 June 2020 letter and in the respondents' answering affidavit in the urgent application. The applicants took no steps to remove the practitioners.

101. The practitioners have at all times exercised their statutory duties and obligations, and have acted in the interests of all affected persons.

102. As is evident from the contents of the business rescue plan and the minutes of the creditors' committee meetings (annexure FA8 to the founding affidavit), the

practitioners have not been partial to the Intercreditor Secured Creditors and provided for an allocation mechanism to achieve an equitable sharing of the costs incurred and the proceeds generated during the business rescue proceedings. Any allegation to the contrary is denied.

Ad paragraphs 91 to 125 thereof

103. The complaints raised by the applicants in these paragraphs are irrelevant, without merit and denied.

104. As is evident from these paragraphs, the applicants are, in truth, impermissibly seeking to challenge the business rescue plan, fifteen months after it has been adopted and almost substantially implemented.

105. The complaints relating to the furnishing of documents were raised in the 17 June 2020 letter as well as the urgent application.

106. As pointed out in paragraphs 41 to 47 of the answering affidavit in the urgent application:

106.1. Insofar as the applicants took issue with the information provided and further information sought, the business rescue plan complies with the provisions of section 150 of the Companies Act and affected persons have been provided with all of the information reasonably required to facilitate them in deciding whether or not to accept or reject the business rescue plan.

106.2. In addition, the applicants failed to disclose that the practitioners have in fact provided the following additional information (i.e. in addition to what is required to be contained in the business rescue plan):

106.2.1. A further document explaining the business rescue dividend calculation prepared by the practitioners. This document, together with the cash flow forecast, contained the calculation of the anticipated business rescue dividend and the anticipated costs of business rescue;

106.2.2. Edcon's income statement and balance sheet for the 2016 to 2020 financial years (Edcon's financial year end is March); and

106.2.3. Edcon's balance sheet for April 2020, with supporting schedules thereto. In this regard, and as recorded in annexure AA2, the creditors' committee was advised that the annual financial statements for March 2019 and the draft annual financial statements for March 2020 were available, however, the April 2020 balance sheet would be more accurate as it was more recent.

106.3. The applicants were also advised in the 19 June 2020 letter that the practitioners will furnish the following additional documents:

106.3.1. minutes of the other committee meetings, where taken; and

106.3.2. the report prepared by Deloitte in respect of the liquidation calculation upon signature of a document.

106.4. The practitioners never provided advice to Edcon during 2019 on the possible winding-up of Edcon. The prior involvement of the offices of Matuson & Associates was recorded in the minutes to the creditors' committee meeting (annexure FA8 to the founding affidavit) and raised no concerns with regard

to the independence and appointment of the practitioners, same being appointments in their personal capacities.

106.5. The historical information also has no impact on the decisions to be made on the business rescue plan. The applicants were advised in the 19 June 2020 letter that the practitioners would conduct the necessary and statutory investigations in regard to Edcon's affairs, business, property and financial position and take the necessary steps pursuant to same.

106.6. The further information was not reasonably required to facilitate affected persons in deciding whether or not to accept or reject the business rescue plan.

106.7. Notwithstanding the aforesaid, to the extent that the applicants maintained the view that the additional information sought was necessary, this could be raised during the section 151 meeting, during which all affected persons would be afforded an opportunity to make motions and submit questions in terms of section 152 of the Companies Act in writing.

107. Evident from the aforesaid, the applicants were furnished with sufficient financial information relating to Edcon and its business rescue proceedings and were provided with further explanations during the creditors' committee meeting held on 15 June 2020 (annexure FA8 to the founding affidavit).

108. It is noteworthy that the applicants fail to attach a copy of the urgent application, which provided for relief in addition to the adjournment of the section 151 meeting, being that the applicants be granted leave to approach this court on the same papers for an order setting aside the business rescue plan and/or setting aside the business

rescue proceedings and/or removing the practitioners and/or placing Edcon in liquidation.

109. The urgent application was struck for lack of urgency. The applicants concede that the court specifically noted during the hearing that the applicants remedies are self-contained in the Companies Act. As stated herein, the applicants exercised their rights at the section 151 meeting and the business rescue plan was ultimately adopted. The applicants took no further steps to challenge the business rescue plan or the appointment of the practitioners thereafter.

110. In regard to paragraph 107, the Intercreditor Secured Creditors will not receive "*nearly all their monies back*".

111. It is denied that the has been a "*veil of secrecy and silence*" or that there has been an "*abstract lack of transparency*". The practitioners have not concealed anything.

112. The fact that the applicants' did not want to sign a "*no harm document*", which was a requirement by Deloitte in terms of their policies, does not amount to any irregularity or lack of transparency on the part of Deloitte and/or the practitioners. Any affected person who wanted the calculation received same upon the signature of the document.

113. In regard to paragraphs 122 and 123:

113.1. the applicants do not speak for the concurrent creditors as a whole;

113.2. the applicants fail to disclose that suppliers were fully paid for the stock supplied during the business rescue proceedings (as mentioned above, the applicants alone received over R95 million from Edcon for stock supplied during the business rescue proceedings);

113.3. the sale of the businesses resulted in all of the affected persons benefitting, not just one category; and

113.4. it is denied that concurrent creditors have been treated with "*disrespect bordering on contempt*".

114. It is denied that the practitioners adopted a "*cavalier attitude*", as alleged in paragraph 124. Evidently, the practitioners were willing to make corrections where necessary and did so in favour of the concurrent creditors. The applicants have also not correctly reflected the recording of the minutes and the context in which the correction was made. In this regard, the following is stated in paragraphs 22 and 23 thereof:

"*22. In response to question 2.2 Marsden confirmed that the apportionment was pari passu and therefore concurrent creditors would get a proportionately great[er] allocation than the secured creditors. Wiggett requested an explanation as to why a pari passu approach had been adopted. Why had secured creditors been allocated any of these funds? Marsden explained that if the secured creditors had perfected their GNB they would have a right to all the proceeds of these assets. As they had not perfected it, they rank equally with the concurrent creditors in regard to these assets. The negotiation with secured creditors in this regard was as a result of the fact that they wanted to claim a disproportionate share of these assets. The practitioners pushed back on this and would not agree. It should be noted that in a liquidation scenario the secured creditors would be preferent in respect of the GNB assets even if they had not perfected the GNB. In a liquidation scenario the concurrent creditors would not receive anything. Marsden clarified that the amount of approximately 19c in the Rand to be paid to secured creditors was a result of approximately 4c being received in respect of the GNB assets and a further approximately 16c in respect of other assets secured in their favour.*

*23. Gideon Bochedi (**Bochedi**) asked whether certain assets described as "Properties, fixtures, equipment and vehicles" did not also fall under the GNB and therefore should be shared amongst secured and unsecured creditors in the same manner. (This question was asked at point 2.3 of annexure A). Marsden confirmed that this was the case and that the waterfall calculation would be revised. [This revised calculation was then shared with creditors after the meeting and is mentioned below]."*

115. The remaining allegations contained in these paragraphs have already been dealt with herein. To the extent that anything contained in these paragraphs is inconsistent with what is stated in this affidavit, or in the answering affidavit to the urgent application, same is denied.

Ad paragraphs 126 to 134 thereof

116. The allegations contained in these paragraphs are irrelevant to the application and the contemplated action proceedings.

117. It is denied that the respondents failed to consult with the affected persons and that they breached their statutory obligations in this regard.

118. Again, these paragraphs:

118.1. demonstrate that the applicants are impermissibly attempting to challenge the statutorily binding business rescue plan; and

118.2. raise the same issues which were raised in the 17 June 2020 letter and the urgent application.

119. As set out in paragraph 9 of the answering affidavit in the urgent application:

119.1. After the first meeting of creditors on 18 May 2020, the practitioners consulted with the creditors' committee on the business rescue proceedings and development of the business rescue plan on 28 May 2020 and 4 June 2020.

119.2. The business rescue plan was duly published. Simultaneously with the publication of the business rescue plan, notice of the section 151 meeting was delivered to all affected persons. A copy of the notice is attached hereto, marked "**AA4**".

119.3. In terms of section 151 of the Companies Act, the practitioners must convene and preside over the section 151 meeting within 10 business days after publishing the business rescue plan.

119.4. In terms of the notice of the section 151 meeting, the practitioners set out the date of 22 June 2020 for the section 151 meeting, thereby providing affected persons with the opportunity to consider the business rescue plan within the statutory timeframe of 10 business days from the publication date.

119.5. On 15 June 2020, the practitioners convened another creditors' committee meeting to discuss the business rescue plan and the dividend calculation provided therein, and had a detailed answer and question session with the creditors' committee. This meeting lasted for 2 ½ hours and further financial information was provided to the creditors' committee afterwards (despite allegations to the contrary in the founding affidavit).

120. It is denied that the applicants have demonstrated an "*absolute failure and refusal of the… [practitioners] to meaningfully consult with the concurrent creditors*".

121. It is also denied that the practitioners "*admonished*" the applicants. The 19 June 2020 letter simply recorded the statutory provisions relating to the rights of and participation by creditors.

122. As is evident from what has been set out herein, the applicants have properly consulted with all affected persons and provided additional information and documentation, over and above what was reasonably required to facilitate affected persons in deciding whether or not to accept or reject the business rescue plan. Any allegation to the contrary is denied.

Ad paragraphs 135 to 149 thereof

123. The allegations contained in these paragraphs are irrelevant, without merit and denied.

124. Again, these paragraphs:

124.1. demonstrate that the applicants are impermissibly attempting to challenge the statutorily binding business rescue plan and/or business rescue proceedings; and

124.2. were raised in the 17 June 2020 letter and urgent application.

125. It is denied that the meeting of creditors was a "*catastrophe*":

125.1. The section 151 meeting was convened for 14h00 in the afternoon, not "*very late in the day South African time, and in tranches*", as alleged by the applicants in paragraph 136. There was accordingly no prejudice, let alone "*extreme*" prejudice to concurrent creditors due to the timing of the section 151 meeting.

125.2. The respondents were obliged to hold an electronic meeting due to the COVID-19 restrictions. The electronic meeting was as good, if not better than, a physical meeting:

125.2.1. No concerns were raised by Chinese suppliers. In addition, proxy forms were received from Chinese suppliers.

125.2.2. The issue of when votes were cast by proxy is irrelevant and without merit. Affected persons were afforded an opportunity during the section 151 meeting to change any votes which they may have submitted by proxy prior to the convening of the section 151 meeting. It is accordingly denied that the outcome of the vote was, in effect, concluded prior to the commencement of the section 151 meeting. The practitioners published the results of the voting that took place by way of proxy (annexure AA2).

125.2.3. Numerous questions were raised (largely in an obstructive manner by the applicants) and answered by the practitioners. The section 151 meeting was only concluded at around 19h30 on 22 June 2020. There was ample constructive debate in preparation of a considered vote as required by the Companies Act.

125.2.4. Affected persons were invited to conduct a vote on any motion to amend the proposed business rescue plan or direct the practitioners to adjourn the meeting in order to revise the plan for further consideration. The majority of creditors did not support any motion to adjourn the section 151 to another day.

125.3. Given the number of affected persons, questions and motions were submitted in writing to avoid any confusion, to ensure that questions answered were clearly read out to all affected persons and to avoid parties talking over each other. As stated above, numerous queries were raised (often dealing with the same issues) and the section 151 meeting had been ongoing for several hours. It came to a point where the practitioners had to conduct a vote on any motions to amend the business rescue plan or adjourn the section 151 meeting. There was no stifling of debates and affected persons were afforded the opportunity to cast their votes, which they did. It is accordingly denied that there was any breach by the business rescue practitioners of the provisions of the Companies Act.

126. The allegations in paragraph 148 are also without merit and misleading. The practitioners provided all affected persons with the same opportunity to attend and participate in the section 151 meeting, and to cast a vote in terms of the business rescue plan. Any allegation to the contrary is denied. The applicants conveniently fail to disclose that the total value of the claims of the 468 creditors who cast votes on the plan exceeded R6 billion (based on the calculation used in respect of the value of the votes cast and referred to in AA2).

127. The allegations in paragraph 149 are also without merit and irrelevant. The practitioners confirm that the voting was correctly calculated.

Ad paragraphs 150 to 157 thereof

128. These paragraphs, in effect, impermissibly seek to challenge the statutorily binding business rescue plan.

129. In this regard, it is evident from paragraphs 153 to 157 that the applicants are challenging the payment allocation provided for in the business rescue plan on the assumption that the Intercreditor Secured Creditors would not be entitled to receive payment as provided for in the business rescue plan due to purported subordination agreements.

130. The allegations contained in paragraph 153 to 157 are without merit, irrelevant and denied:

130.1. The details relating to Edcon's background and the 2019 restructure are set out in paragraph 5 of the business rescue plan.

130.2. The Intercreditor Secured Creditors' claims were not subordinated in favour of Edcon's concurrent creditors. This was not necessary given the repayment terms of the notes / instruments issued by Edcon to the Intercreditor Secured Creditors.

130.3. The business rescue plan correctly reflects the security position and entitlement to proceeds.

131. The fact remains that Edcon was placed in business rescue, not due to the 2019 restructure, but due to the reasons set out in paragraph 70 above. Moreover, setting aside the 2019 restructure is not going to improve Edcon's position or the position of concurrent creditors – it will only worsen same.

132. The practitioners note from paragraphs 150 to 153 that the applicants have made selective extracts from the minutes of the creditors' committee meeting held on 15 June 2020 (annexure FA8 to the founding affidavit).

133. The correct recordal of the allegations in paragraph 151 is contained in paragraph 10 of the minutes as follows:

*"Marsden was asked about representations made by Grant Pattison (**Pattison**) on 26 March 2020 to the effect that Edcon held R3.2 billion in stock. Marsden was asked how R800 million of this had disappeared by the time the practitioners took over given that there was no trading due to lockdown. Lance Schapiro (**Schapiro**) confirmed that the R2.4 billion reflected on the balance sheet is cost value. He was not able to comment in regard to Pattison's alleged representation to the effect that R3.2 billion in stock was held. Marsden confirmed that the intention was to sell this stock / inventory in an accelerated sale process. They would not be able to sell the full range of stock and therefore the recovery would be lower than the R2.4 billion set out in the balance sheet."*

134. The practitioners cannot opine any further on allegations made by other parties regarding the financial position of Edcon prior to its business rescue. They can only comment on and work off of the factual and financial position of Edcon as from the commencement date of its business rescue proceedings, and on the financial information of Edcon (as per its systems) and what is conveyed by its employees.

135. To the extent that I have not dealt with any allegation in these paragraphs, same is denied.

Ad paragraphs 158 to 169 thereof

136. The allegations contained in these paragraphs are without merit and denied.

137. The Intercreditor Secured Creditors' claims were not subordinated in favour of Edcon's creditors. Consequently, the "*reasons*" contained in paragraphs 160 to 163 are irrelevant, without merit and denied.

138. I reiterate the following:

138.1. the respondents have been transparent;

138.2. the respondents have acted in the best interests of all affected persons, not just the Intercreditor Secured Creditors, and have not preferred any category of creditors above another;

138.3. there was no impropriety in regard to the 2019 restructure, including in regard to the security instruments; and

138.4. even if the 2019 restructure is set aside, the assets will still remain secured given the security arrangements which were in place.

139. Consequently, it is misleading for the applicants to allege in paragraph 169 that if "*these instruments of security are set aside, then all of the allegedly secured assets come back and are available for distribution to meet, inter alia, the claims of the concurrent creditors*". This is incorrect and denied for the reasons already set out herein.

140. The repeated allegations relating to the partiality of the chairperson are denied for the reasons already set out herein.

141. To the extent that I have not dealt with any allegation contained in these paragraphs, same is denied.

Ad paragraphs 170 to 184 thereof

142. The allegations contained in these paragraphs are irrelevant, without merit and denied.

143. The shares in HBA is dealt with in paragraph 5.3.4.4 of the business rescue plan.

144. The 2019 restructure and the transactions relating to the shares in HBA were valid.

145. The reference to "*Edcon's share in the joint venture*" is misleading. Immediately prior to the 2019 restructure, the shares in HBA were held by Edcon Acquisition Proprietary Limited, not Edcon. Pursuant to the 2019 restructure, the shares in HBA were acquired by K2019.

146. Given that the shares in HBA was not an asset of Edcon, the proceeds from the sale of such shares would not be paid to Edcon or be made available for distribution to the general body of concurrent creditors. The shares in HBA, however, were ultimately secured in favour of the Intercreditor Secured Creditors, and as such, the proceeds from the sale of these shares flowed to the Intercreditor Secured Creditors via the security administrator.

Ad paragraphs 185 to 207 thereof

147. It is denied that the applicants are entitled to the leave sought in terms of section 133 of the Companies Act.

148. I reiterate that the applicants have failed to establish a *prima facie* case against the respondents in respect of the contemplated action proceedings.

149. The applicants have also failed to give any valid reasons why the action proceedings are necessary and appropriate.

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150. In this regard, the only reason provided by the applicants is that stated in paragraph 193, being that "*the action proceedings in contemplation have been necessitated by the abject failure of the second and third respondents to make information and documentation available to the applicants*":

150.1. Even if this was correct, which is denied, it does not amount to a valid reason to institute the contemplated action proceedings; and

150.2. The respondents provided sufficient information and documentation to the applicants prior to the adoption of the business rescue plan.

151. In regard to the contemplated relief that will be sought:

151.1. Contrary to what is alleged by the applicants, the applicants are effectively seeking to impermissibly challenge the business rescue plan. The applicants unsuccessfully attempted to challenge the business rescue plan and postpone the section 151 meeting by way of the urgent application. The applicants thereafter failed to take any steps after the section 151 meeting was held and the business rescue plan was adopted. Over 15 months have passed since the adoption of the business rescue plan, which is almost substantially implemented. The contemplated action proceeds is nothing more than an abuse of process.

151.2. The 2019 restructure and related transactions were validly concluded. The setting aside of the 2019 restructure and/or related transactions will not result in a better outcome for concurrent creditors – it will only worsen the position and lower the concurrent dividend that will be made available. As stated herein, if the 2019 restructure and/or related transactions are set aside, the status quo would be restored and the new financiers in terms of the 2019

restructure would still have a claim against Edcon for the monies advanced to it. The status *quo* entailed a security structure in favour of the indirectly-secured creditors at the time. The recapitalisation of the debt at the time would also fall away and revert back to claims against Edcon.

151.3. The "*accounting for stock of approximately R800 million which the... [practitioners] say they cannot explain*" is also without merit and denied. The applicants create the impression that R800 million in stock was not accounted for in the business rescue. This is not correct. The R800 million referred to is the difference between the alleged representation made by the former CEO that there was approximately R3.2 billion in stock on 26 March 2020, and the amount of R2.4 billion reflected on Edcon's balance sheet as at the commencement of its business rescue proceedings a month later on 29 April 2020. The respondents advised that the R2.4 billion reflected on the balance sheet was cost price and that they cannot comment further on the alleged representation made by the CEO. The alleged representation is irrelevant for the purposes of the factual and financial position of Edcon as at the commencement of its business rescue. There is accordingly nothing to account for in terms of the alleged R800 million difference – the practitioners have accounted for the stock as at the commencement of Edcon's business rescue.

152. As is evident from paragraphs 202 and 205, and contrary to what is alleged in paragraph 204, the applicants are effectively challenging the business rescue plan and the payment allocation provided for therein. It is an indirect attempt to set aside the business rescue plan.

153. In fact, paragraph 205 specifically states that the contemplated action proceedings are "*designed in challenging the manner in which monies are to be apportioned and allocated to the different categories of creditors*" (i.e. as provided for in the business rescue plan).

154. This is impermissible.

155. The allegations contained in paragraphs 201, 203 and 206 are also denied. These allegations will be dealt with further in legal argument.

156. It is accordingly denied that the applicants have established a *prima facie* case, have set out a triable issue or are entitled to the leave sought.

157. To the extent that I have not dealt with any allegation, same is denied.

Ad paragraphs 208 to 223 thereof

158. It is denied that affected persons are not required to be joined in these proceedings, as opposed to the contemplated action proceedings. Both proceedings impact affected persons and what is to be expected, or already received, in terms of the adopted business rescue plan.

159. For the reasons set out herein, it is denied that the applicants are entitled to the leave sought. These paragraphs will become irrelevant should this court dismiss this application.

Ad paragraph 224 thereof

160. The respondents note that the applicants have confirmed the allegations contained in the founding affidavit, despite same not making a proper disclosure and/or misleading this court in regard to the factual position, as has been set out herein.

Ad paragraphs 225 to 227 and the concluding paragraph thereof

161. It is submitted that no case is made by the applicants for the relief sought in this application.

162. The applicants are impermissibly seeking to challenge and effectively set aside the statutorily binding business rescue plan, 15 months after its adoption.

163. The applicants will accordingly seek that the application be dismissed, with costs on the scale of attorney and client, including the cost of two counsel. These costs are to be paid jointly and severally by the applicants.

164. This answering affidavit is not to be construed as a complete response to the allegations contained in the founding affidavit and the rights of the respondents to supplement in these proceedings and in any contemplated or further proceedings are expressly reserved.

LANCE SCHAPIRO

I certify that:

I. the Deponent acknowledged to me that :
   a. he knows and understands the contents of this declaration;
   b. he has no objection to taking the prescribed oath;
   c. he considers the prescribed oath to be binding on his conscience.

II. the Deponent thereafter uttered the words, "I swear that the contents of this declaration are true, so help me God".

III. the Deponent signed this declaration in my presence at the address set out hereunder on 13 September 2021.

COMMISSIONER OF OATHS

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