

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No.: 26433/2020

In the matter between:

**KINGSGATE CLOTHING (PTY) LIMITED** First Applicant

**CLEMATIS TRADING (PTY) LIMITED** Second Applicant

and

**PIERS MICHAEL MARSDEN** First Respondent

**LANCE SCHAPIRO** Second Respondent

**EDCON LIMITED (IN BUSINESS RESCUE)** Third Respondent

**THE COMPANIES AND INTELLECTUAL  
PROPRIETIES COMMISSION** Fourth Respondent

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FIRST TO THIRD RESPONDENTS' ANSWERING AFFIDAVIT

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I, the undersigned,

**LANCE SCHAPIRO,**

do hereby make oath and state that:

*ms*  
*ms*

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 second respondent herein.
2. The first respondent and I are cited herein in our capacities as the joint business rescue practitioners ("**practitioners**") of the third respondent ("**Edcon**"). The practitioners have taken full management control of Edcon since our appointment and have been involved almost exclusively with Edcon's business rescue proceedings.
3. The first respondent supports the opposition to the application brought by the applicants under the above case number ("**application**") and has authorised me to depose to this affidavit on his behalf.
4. 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.
5. I have read the founding affidavit deposed to by Yusuf Ahmed Sadek Vahed on behalf of the applicants on 19 June 2020 ("**founding affidavit**") in support of the application. The application was emailed to the practitioners between 15h26 and 16h11 on Friday, 19 June 2020. In terms of the notice of motion, the applicants required the respondents to file their answering affidavit by 09h00 on Sunday, 21 June 2020.
6. I note upfront that the applicants did not obtain the permission of the practitioners to institute these proceedings and have failed to seek the leave of this Honourable Court to institute these proceedings in terms of section 133 of the Companies Act,

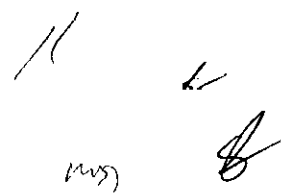
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71 of 2008 ("**Companies Act**"). It is submitted that the application should fail for this reason alone.

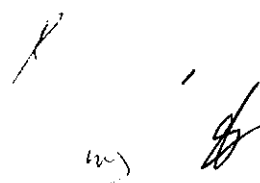
7. The application has been brought as one of extreme urgency. It has been necessary to work on the weekend under extreme pressure to get these papers before this Honourable Court.
8. The application is an abuse of this Honourable Court's process and has been brought in order to steal a march upon the practitioners, in the hope that the practitioners will not be able to file our answering affidavit in time and deal with all of the allegations contained in the founding affidavit. Moreover, the application is littered with factual inaccuracies in regard to the practitioners' purported conduct, failure to produce documents and/or to respond to the applicants' queries and/or requests.
9. I set out briefly the chronology leading up to the application:
  - 9.1. 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.
  - 9.2. The business rescue plan was duly published. Simultaneously with the publication of the business rescue plan, a notice of the meeting to determine the future of Edcon in terms of section 151 of the Companies Act ("**section 151 meeting**") was delivered to all affected persons. A copy of the notice is attached as "**AA1**".
  - 9.3. 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.

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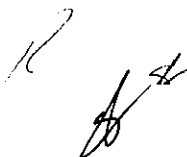
- 9.4. In terms of the notice of the section 151 meeting, the practitioners set out the date of 22 June 2020 for the section 151 meeting, thereby providing affected persons with the opportunity to consider the business rescue plan within the statutory timeframe of 10 business days from the publication date.
- 9.5. 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). A copy of the minutes to this meeting is attached as "AA2".
10. The applicants have shown a complete disregard for the requirements set out in Rule 6(12) of the Uniform Rules of Court, the practice of this Honourable Court, our rights as litigating parties and the rights of other affected persons of Edcon.
11. In particular, the applicants have not set out any reason why they could not, and did not, comply with the practice directives of this Honourable Court by having papers finalised by a Thursday for a Tuesday. In addition, the applicants have not advanced any reason why redress cannot be obtained in the ordinary course. On the contrary, on the applicants' own version they acknowledge that they have alternative remedies.
12. The applicants' remedies are self-contained in the Companies Act:
- 12.1. they can attend the section 151 meeting and motion an amendment of the business rescue plan and/or adjournment of the section 151 meeting; and/or

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- 12.2. they can apply to court after the adoption of the business rescue plan to set aside the adoption of the business rescue plan.
13. In addition, the applicants have failed to join or give any consideration to the other affected persons, such as the majority of creditors and employees, who have a clear interest in the section 151 meeting and whether it proceeds on 22 June 2020 or not. I point out that the business rescue plan, as published, contemplates amongst others the saving of thousands of jobs, which are at risk if the section 151 meeting does not proceed on 22 June 2020 and/or the business rescue plan is not adopted.
14. As will be set out below, contrary to the impression created throughout the founding affidavit, the applicants do not represent the concurrent creditors as a body. The applicants' claims comprise less than 0.6% of Edcon's creditors' voting interests. Even if the claims of the additional eleven creditors alluded to in the founding affidavit are taken into account (i.e. with a total value of R200 million), such creditors' claims comprise less than 2.5% of Edcon's creditors' voting interests.
15. The moment that the practitioners convened the meeting as statutorily required and gave notice of the section 151 meeting, other parties gained statutory rights for the section 151 meeting to be held, to be present at the section 151 meeting and to exercise their statutory rights at such meeting. These other parties are the employees' representative/s (having a statutory opportunity to address the meeting) and the other creditors, secured and unsecured creditors, whose number and value are far greater than the applicants.
16. Once other parties have acquired such statutory rights, they are interested parties and should have been joined.

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17. The applicants cannot circumvent the provisions of the Companies Act by approaching this Honourable Court for the relief sought to the exclusion of all of the other affected persons.
18. The motive of the applicants in bringing the application on unreasonable time frames, is also an aspect of concern. I point out that on 17 June 2020, the applicants' attorney addressed several letters to the practitioners. In terms of the 21 page letter attached as YV4 to the founding affidavit, the applicants' attorney provided for a deadline of 16h00 on Friday, 19 June 2020, for the production of documents. Despite the aforesaid deadline, the applicants issued and served the application well before their aforesaid deadline.
19. Evidently, the applicants were intent on bringing this application irrespective of the practitioners' response to their aforesaid letter, which, contrary to the allegations in the founding affidavit, was indeed sent before the deadline at 15h33 on Friday, 19 June 2020. The response is attached as "AA3".
20. Due to the extreme time constraints, the practitioners do not have time to deal with every allegation contained in the founding affidavit and all of the practitioners' rights to do so in a further affidavit are reserved. In this regard, it is submitted that most of the founding affidavit contains defamatory and emotive allegations designed to sensationalise the applicants' case and mislead this Honourable Court. Numerous attacks are made on the practitioners and their motives. This will be required to be dealt with fully in due course by the practitioners. In the interim, the practitioners record that such allegations are without merit, irrelevant to this application and denied.

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21. 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.
22. For the purposes of this answering affidavit, it is imperative for the practitioners to deal with the section 151 meeting and same proceeding on 22 June 2020.
23. The section 151 meeting must statutorily proceed and the applicants, together with all of the other affected persons, can exercise their statutory rights in terms of section 152 of the Companies Act during the section 151 meeting. In this regard, the applicants have been advised that affected persons will be afforded an opportunity to make motions in terms of section 152 of the Companies Act in writing during the section 151 meeting (annexure AA3). Such motions include motions to amend and adjourn the section 151 meeting.
24. The applicants cannot take the stance that because they are not satisfied with the information provided, they are therefore entitled to demand an adjournment of the section 151 meeting to the exclusion of the rights and interests of every other affected person in the section 151 meeting proceeding.
25. As set out above, although repetitive use of the term "*Concurrent Creditors*" is made throughout the founding affidavit, such reference is not to Edcon's general concurrent creditors or creditors' committee. It is limited to the applicants. Although vague reference is made in paragraph 19 of the founding affidavit to eleven concurrent creditors being represented by the first applicant on the creditors' committee (with claims allegedly comprising approximately R200 million, including the applicants' claims of approximately R42.5 million), no supporting affidavits have been filed by such other creditors in support of the application. The applicants cannot allege, as they did in paragraph 21 of the founding affidavit, that latitude in regard to hearsay

evidence in urgent applications relating to supporting and/or confirmatory affidavits of the other creditors can be afforded in this instance.

26. The use of the term "*Concurrent Creditors*" by the applicants is misleading in that it creates the impression that the entire body of concurrent creditors hold the same views as the applicants and/or support the application. This is simply not the factual position.
27. The total amount owed to Edcon's creditors is approximately R8.1 billion, comprising secured creditors' claims of approximately R3.8 million and concurrent creditors' claims of approximately R4.3 billion. The applicants' claims comprise approximately R42.5 million. Even if the other concurrent creditors vaguely referred to in the founding affidavit did support the application, they represent less than 2.5% of the total creditors' voting interests.
28. The proxy forms received to date reflect an overwhelming support for the adoption of the business rescue plan (over 85% of the proxy forms received are in favour of the adoption of the business rescue plan). Ultimately the decision for or against the adoption of the business rescue plan will be influenced by what is motioned and discussed during the section 151 meeting.
29. The applicants show a disregard for the statutory requirements and restrictions of time for the section 151 meeting and peremptory provisions of section 152 of the Companies Act.
30. Notwithstanding the personal attacks on the practitioners, the applicants do not take issue with the fact that Edcon is in business rescue, that we have been appointed as the practitioners and that we have to act in accordance with the provisions of the Companies Act. They also do not take issue with the publication of the business

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rescue plan, the timeous notification of the section 151 meeting and that the business rescue plan complies with the provisions of the Companies Act (other than making a vague and unsubstantiated reference to a "*host of irregularities*").

31. The applicants effectively take issue with the information provided to them, or purported lack thereof, and the time that they contend they require to consider the business rescue plan.
32. The practitioners, having published the business rescue plan in terms of section 150 of the Companies Act, in respect of which no issue has been taken by the applicants, are obliged to follow the prescripts of section 151 of the Companies Act, which says that the practitioners must convene the section 151 meeting within 10 business days of publication of the business rescue plan, and deliver a notice of such meeting at least 5 business days before the section 151 meeting is held.
33. This was done and the section 151 meeting has been convened for 22 June 2020.
34. Insofar as the applicants request a postponement, it is completely improper to agree to such postponement in the context of section 152 of the Companies Act and the statutory requirements. Nothing stops the applicants from seeking the adjournment at the section 151 meeting. They may persuade the other holders of voting interests or they may not.
35. The appropriate forum to raise a request for information and to discuss the contents of the business rescue plan is at the section 151 meeting. At the section 151 meeting, the practitioners are present, other affected persons are present and a fair and pragmatic process is provided for affected persons to deal with any issues in the business rescue plan. This allows for other affected persons to be involved and provide their input, and for the practitioners to deal with and explain any

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repercussions of motions to amend the business rescue plan and/or adjourn the section 151 meeting. Ultimately, the section 151 meeting allows for an informed decision to be made by affected persons. It is inappropriate for the applicants to expect this Honourable Court, on an extremely urgent basis, to consider and understand what exactly is required within the context of Edcon's business rescue proceedings, to the exclusion of all other affected persons and in circumvention of the statutory provisions.

36. 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 Companies Act. It is not just a question of the interests of a limited number of affected persons, it is all affected persons.
37. It is for all of the creditors to decide if they want to adopt or reject the business rescue plan, or if they want it to be amended. Employees must also have their opportunity to make a presentation at the section 151 meeting.
38. The practitioners have been working under enormous pressure to get to the point of the publication of the business rescue plan. It is necessary to reiterate what has been advised to affected person, including the creditors committee, throughout the business rescue process and in the business rescue plan:
  - 38.1. Edcon does not have any post-commencement finance. To this extent, stock has been purchased on a cash on delivery basis. Edcon also has to pay for other operational and employment costs. Edcon can only continue with this model for a short period and no further due to it not being sustainable.
  - 38.2. Any proposal to rescue Edcon would have to be implemented without delay. It is imperative that the accelerated sales process proposed in the business

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rescue plan yields a favourable result prior to the end of June 2020 in order to provide sufficient lead time for supplier negotiations to be finalised and for summer stock to be purchased.

- 38.3. If stock is not purchased, Edcon will run out of inventory and its businesses are likely to fail in the summer season due to a lack of product to sell. This will completely jeopardise any prospect of selling the businesses as going concerns and will result in thousands of employees facing the risk of losing their employment.
- 38.4. There is accordingly a very small window period for the sales to be concluded. If no offers are received or the businesses are not sold in July 2020, then all affected persons will be prejudiced with less value being received and tens of thousands of employees facing the risk of retrenchment (Edcon has already started with the consultation process in terms of section 189 of the Labour Relations Act).
- 38.5. Edcon does not have the luxury of time for an adjournment for a week, without addressing any other questions or motions which other affected persons may have and statutorily entitled to make, and then the possibility of another adjournment during the section 151 meeting due to questions or motions made by other affected persons to amend the business rescue plan. If this were to happen, interested purchasers will not proceed further (i.e. without an adopted business rescue plan, alternatively, if there is a failed business rescue plan).
39. The applicants, together with all other affected persons, will be afforded an opportunity to raise questions and make motions in terms of section 152 of the



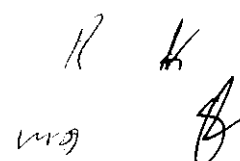
Companies Act during the section 151 meeting. There is nothing that stops the applicants from asking for an adjournment during the section 151 meeting.

40. From the practitioners' side, it would be preferable to proceed with the vote on the adoption or rejection of the business rescue plan, but this is something which is up to the creditors to decide during the section 151 meeting, after having fully dealt with the questions raised and being fully informed of the repercussions of any motions.
41. Insofar as the applicants take 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.
42. In addition, the applicants fail 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):
  - 42.1. A further document explaining the business rescue dividend calculation prepared by the practitioners (not by Deloitte as alleged in the founding affidavit). This document, together with the cash flow forecast, contains the calculation of the anticipated business rescue dividend and the anticipated costs of business rescue;
  - 42.2. Edcon's income statement and balance sheet for the 2016 to 2020 financial years (Edcon's financial year end is March); and
  - 42.3. Edcon's balance sheet for April 2020, with supporting schedules thereto. In this regard, and as recorded in annexure AA2, the creditors' committee was

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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.

43. The applicants were also advised in annexure AA3 that the practitioners will furnish the following additional documents:
- 43.1. minutes of the other committee meetings, where taken; and
  - 43.2. the report prepared by Deloitte in respect of the liquidation calculation upon signature of a document.
44. The practitioners never provided the advice referred to in paragraph 2.1 of the notice of motion and it is also denied that there was any form of embarrassment in regard to the question raised during the creditors' committee on 15 June 2020 as to whether the offices of Matuson & Associates had any prior involvement in Edcon. The prior involvement of the offices of Matuson & Associates is recorded in annexure AA2 and raises no concerns with regard to the independence and appointment of the practitioners, same being appointments in their personal capacities.
45. It is also submitted that the historical information has no impact on the decisions to be made on the business rescue plan. The applicants were advised in annexure AA3 that the practitioners will 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.
46. It is submitted that the further information is not reasonably required to facilitate affected persons in deciding whether or not to accept or reject the business rescue plan.

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

### CONCLUSION

48. The practitioners are statutorily obliged to proceed with the section 151 meeting on 22 June 2020.
49. Other affected persons have a statutory right to attend the section 151 meeting and exercise their rights in terms of section 152 of the Companies Act.
50. The applicants' remedies are self-contained in the Companies Act in that they will be entitled to raise their questions and make motions in terms of section 152 of the Companies Act during the section 151 meeting.
51. The applicants have also failed to set out any basis for the granting of the relief referred to in paragraph 3 of the notice of motion.
52. It is accordingly respectfully submitted that the application should be dismissed with costs, including those consequent upon the employment of two counsel.

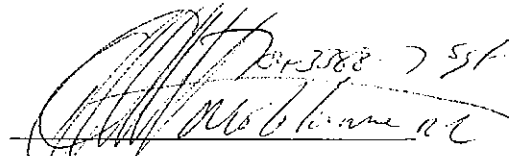
  
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 LANCE SCHAPIRO

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 21 June 2020.

  
COMMISSIONER OF OATHS

SOUTH AFRICAN POLICE SERVICE
CLIENT SERVICE CENTRE
21 JUN 2020
CSC ROSEBANK
SUID-AFRIKAANSE POLISIEDIENS



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

Case no: 26433/20

In the matter between:

**KINGSGATE CLOTHING (PTY) LTD**

First Applicant

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Second Applicant

and

**PIERS MICHAEL MARSDEN**

First Respondent

**LANCE SCHAPIRO**

Second Respondent

**EDCON LTD IN BUSINESS RESCUE**

Third Respondent

**THE COMPANIES AND INTELLECTUAL PROPERTY**

**COMMISSION**

Fourth Respondent

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**FILING NOTICE**

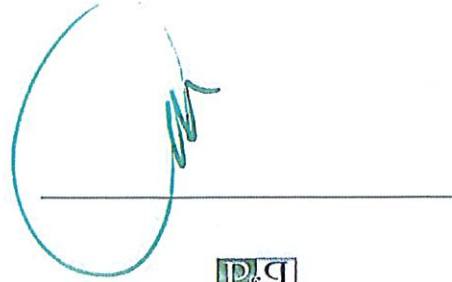
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**KINDLY TAKE NOTICE** that the above mentioned first and second applicants file evenly herewith their replying affidavit in the above matter.

DATED AT DURBAN THIS 21<sup>ST</sup> DAY OF JUNE 2020.

2020  



**PATHER AND PATHER ATTORNEYS INC.**  
APPLICANTS' ATTORNEYS  
3 NOLLSWORTH CRESCENT  
NOLLSWORTH PARK  
LA LUCIA

**REF: SIVI PATHER/rg/**

TEL: 031 3044 212

FAX: 031 3044 208

E-MAIL: [sivi@patherandpather.co.za](mailto:sivi@patherandpather.co.za)

c/o MacRoberts Inc.

MacRobert Building

cnr. Justice Mahomed & Jan Shoba Streets

Brooklyn

**PRETORIA**

Tel: (012) 425 3451

Ref: AVN/sg

TO: THE REGISTRAR OF THE ABOVE HONOURABLE COURT  
PRETORIA

AND TO: PIERS MICHAEL MARSDEN and  
LANCE SHAPIRO  
BUSINESS RESCUE PRACTITIONERS FOR EDCON LIMITED  
EDCON LIMITED IN BUSINESS RESCUE  
Per E-mail: [creditors@edconbr.co.za](mailto:creditors@edconbr.co.za)

AND TO: THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION  
THE DTI CAMPUS  
BLOCK F  
77 MEINTJIES STREET  
SUNNYSIDE  
PRETORIA



IN THE HIGH COURT OF SOUTH AFRICA  
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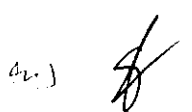
APPLICANT'S REPLYING ARGUMENT

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I, the undersigned,

**YUSUF AHMED SADEK VAHED**

do hereby make oath and state:-



**INTRODUCTION**

1. I deposed to the founding affidavit in this urgent application.
2. The facts deposed to herein fall within my personal knowledge and are, to the best of my knowledge, true and correct.
3. Where I make submissions, I rely on advice duly received.

**REPLYING AFFIDAVIT**

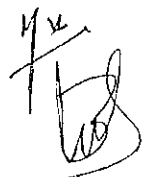
4. In accordance with the practice in this Division, the respondents were given until midday on Saturday, 20 June 2020, by when to file notice of opposition. Marsden and Schapiro did so.
5. They were also required to deliver their answering papers by 09h00 on Sunday, 21 June 2020, but failed to do so. I am advised that while it is open to a respondent to argue the question of urgency, he or she ignores the requirement to deliver answering papers by a set deadline at his or her own peril.
6. Instead, their attorney sent an email on Sunday, 21 June 2020, advising that their papers will be delivered during the course of the day. Annexed hereto marked "YV13" is a copy of that email.



7. It is simply not practical, in the circumstances of this matter, for the applicants to await delivery by Marsden and Schapiro of their answering papers.
8. However, after this urgent applicant was launched on Friday, 19 June 2020, Marsden and Schapiro's attorney emailed a detailed letter a copy of which is annexed hereto marked "YV14".
9. In the circumstances, the applicants are preparing this replying affidavit based on the contentions, assertions and allegations contained in "YV14" and will deliver this reply soon after receipt of any answering papers.
10. Just as the applicants foreshadowed their application in "YV4", the applicants can only assume that Marsden and Schapiro are doing likewise with "YV14".
11. In any event, if their position shifts seismically between "YV14" and their answering papers, they will have a great deal of explaining to do.

**RUBRICS UNDER WHICH REPLY TO BE DELIVERED**

12. In keeping with the structure of the founding affidavit, the applicants, in this reply, will maintain the broad pattern of the various headings found in that affidavit.



Issues Relating Personally to Marsden and Schapiro

13. Marsden and Schapiro adopt the position that the physical location of Marsden is not germane to his alleged ability to discharge his responsibilities and obligations as joint BRP. They base this contention on the assertion that he, despite being in Canada, is in receipt of all information.
14. This betrays a total lack of understanding of what the statutory role of a BRP is.
15. A BRP is required to take over the active management of a company in distress. In fact, the directors and executives of the company in rescue have to report to the BRPs in their roles *qua* management. The BRPs effectively take over the running of the company and its business.
16. Whilst the law does allow a measure of delegation, it certainly does not countenance an abrogation of responsibility.
17. It is instructive that Marsden is not able to take this Honourable Court into his confidence in regard to how it is that he is managing a company as massive as Edcon from halfway across the world.
18. The appointment of Marsden as a joint BRP to Edcon is a shocking travesty given the fact that he is situate in Canada.




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19. This only serves to exacerbate the concerns of the applicants as to exactly what Marsden's role in this matter is. More so considering that the firm of which he is a member or partner advised Edcon on liquidation during 2019.
20. This might also possibly explain the inability of Marsden and Schapiro to supply information.
21. It is either that they have the information but do not want to share it because they are hiding something *alternatively*, they simply do not know. The applicants are not sure which is worse!
22. A business rescue is a notion that has been introduced into our law as something that lies in between solvency and liquidation. At the heart of both are the interests of the creditors.
23. With a liquidator, creditors are aware that there is a tariff and have a fairly clear idea of what the liquidator's fees would amount to.
24. By comparison, the legislature has created a different structure for the remuneration of BRPs who are compensated at an hourly rate. There is no magic to this. The reason is quite simply that it is hoped and anticipated that a company in distress can be saved, that its assets will not be realised and therefore there is no tariff against realisation of assets.



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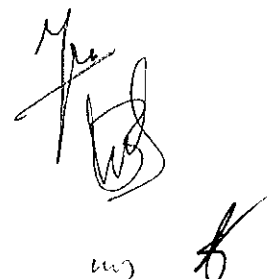


25. It is not at all clear to the applicants where the respondents get the notion that they may, with impunity, refuse to disclose what it is that they have earned and what it is that they anticipate earning in a rescue. After all it is the creditors' money that is paying those fees.
26. In "YV14", they offer the explanation that their fees have been taken into account in calculating the possible dividends!
27. This can never be countenanced in law.
28. It is, *inter alia*, for these reasons that the applicants ask for the relief set out in paragraph three of the notice of motion which provides leave for them to approach this Court again, on these papers, supplemented insofar as it may be necessary, for an order, *inter alia*, removing Marsden and Schapiro as BRPs to Edcon.
29. Without making too fine a point of it, the applicants feel constrained to draw attention to the fact that they are not acting in this regard with any sense of indecent haste. In other words, whilst they seek to have the Court grant that relief to them, they have not, at this stage, sought the removal of Marsden and Schapiro.



Enquiries/Information Sought/Documents

30. Here again, the applicants cannot divine whether Marsden and Schapiro genuinely do not understand the Act or whether they pretend not to do so.
31. The first point worth making in regard to the position of Marsden and Schapiro in "YV14" is that they say they have ticked all the boxes as required by Section 150 of the Act.
32. Not only is this entirely incorrect, but they also palpably fail to deal with what the legislative framework requires antecedent to the publication of a rescue plan.
33. Because it respectfully makes more sense to do so, I will deal with the antecedent issues first and then cryptically demonstrate why there has not been compliance with Section 150 of the Act.
34. In terms of Section 141 of the Act, the BRPs are required to form a view on whether rescue is possible. Even at this stage, they are required to consult with creditors.
35. Moving on from there, under Section 141 of the Act, creditors are given the express right to participate in the development of a business plan.

The block contains several handwritten signatures and initials. At the top right, there is a large, stylized signature that appears to be 'Marsden'. Below it, there are several smaller initials and marks, including what looks like 'WS' and some scribbles.



36. Marsden and Schapiro record in "YV14" that the applicants have not explained why they require financial information. That is a startling statement seeking as it does to render nugatory the afore stated rights of the applicants.

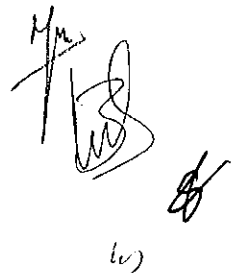
37. The simple questions have to be asked as to how would it be possible for the applicants to meaningfully and substantively participate in any discussion as to whether Edcon can be rescued and as to how it would be possible for them to meaningfully and substantively engage in the development of a rescue plan unless they are furnished with the information and documents specified in the notice of motion, to wit:-

37.1 The delivery to the applicants by the first and second respondents of the following information and/or documents:-

37.1.1 A copy of the advice provided to Edcon Limited in 2019 by the first and second respondents in regard to a possible winding up of the company.


37.1.2 A copy of the exercise in terms of which Deloitte calculated the anticipated dividend or lack thereof on liquidation.

37.1.3 A copy of the audited financial statements of Edcon Limited as at March 2018 and March 2019.

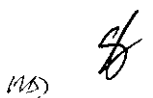
Handwritten signatures and initials at the bottom right of the page. There are three distinct signatures: one at the top right, one below it, and one further down and to the right. The top signature appears to be 'M.M.' followed by a large flourish. The middle signature is a large, stylized 'S'. The bottom signature is a smaller, more compact flourish.

- 37.1.4 A copy of the unaudited financial statements of Edcon Limited as at end March 2020.
  - 37.1.5 A detailed itemisation of how the R2.7-million which was raised by Edcon Limited in 2019 was utilised.
  - 37.1.6 The revenue generated for the month of May 2020 by Edcon Limited as well as the breakdown of the expenses met by this revenue.
  - 37.1.7 A balance sheet for the third respondent as at 8 June 2020.
  - 37.1.8 The fees earned by the first and second respondents to date hereof as well as their anticipated fees in the entire Business Rescue of the third respondent.
  - 37.1.9 An explanation of why there is such a material difference between the figures furnished by the first and second respondents and the audited financial statements for the years 2016 and 2017 of Edcon Limited.
38. It is for this reason also that the applicants seek an order directing Marsden and Schapiro to substantively engage with the applicants as contemplated in the Act.



(u) 

39. "YV4" contains a whole series of enquiries directed at Marsden and Schapiro which they simply refused to respond to meaningfully in "YV14".
40. They simply refuse to answer, for example, as to why the Rescue Plan reflects liabilities of R6-billion whilst the balance sheet as at 30 April 2020 (drawn from management accounts apparently and unaudited) reflects liabilities of R11-billion. That is almost double and does not fall under *de minimus*.
41. Annexed hereto marked "YV15" is a copy of the balance sheet of Edcon as at 30 April 2020. This has now become germane because of the position adopted by Marsden and Schapiro in "YV14".
42. In similar vein, their failure and refusal to make available to the creditors the trading of Edcon from 1 May 2020 to 7 June 2020 is absolutely inexplicable.
43. At the expense of repetition, the applicants again ask the question as to how it is that they are supposed to exercise these statutory rights unless they are furnished with the necessary information. This has already been referred to earlier but is raised in the present context on the basis that the applicants have calculated that there is some R800-million that is unaccounted for. Marsden and Schapiro fail and refuse to explain this. On what lawful basis can they do so?



44. I also refer to annexure "YV7" which shows a startling discrepancy between the figures provided by Marsden and Schapiro for the financial years 2016 and 2017 when those figures are compared to the audited financial statements of Edcon for the same period. These differences range from hundreds of millions into billions, raising the question as to whether Marsden and Schapiro have done their calculations on correct figures?
  
45. I indicated earlier that I would return to the issue of Section 150. This is the Section of the Act which Marsden and Schapiro rely upon in "YV14" in support of their assertion that they have complied with their obligations to provide information in the Rescue Plan.
  
46. I have already demonstrated how the Rescue Plan is the culmination of a process and is not an isolated event.
  
47. But even with the Rescue Plan, what Marsden and Schapiro have done is sought to suggest that they have ticked the boxes as it were, as aforesaid.
  
48. But that is not what Section 150 requires. Each one of Sections 150(2) (a)(b)(c) say that the three parts in the Business Plan must "*at least include*".
  
49. What the Act says is that what is set out in Section 150(2) is the minimum that must be contained in the Plan. The items catalogued under that Sub-Section are not exhaustive.

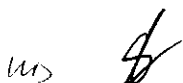


50. Here again, Marsden and Schapiro betray a fatal lack of understanding of the very statutory framework that governs them in law.
51. The overall position in the Plan is that Edcon cannot be saved and that a better dividend will allegedly be yielded upon a sale and wind down process.
52. That notwithstanding, the Rescue Plan records the following at Clause 17.3 on page 41 of the Plan:-

*"17.3 This Business Rescue Plan seeks to:*

*17.3.1 Rescue the company by implementing the proposal set out herein."*

53. What the applicants point out to this Honourable Court is that Marsden and Schapiro are simply attempting to tick the boxes as it were. It is plain that they have used a template from previous matters and have not even bothered to edit the template properly to cater for the particular factual matrix of this matter.
54. Quite apart from this being impermissible, it is also shocking given the amount of monies earned by BRPs from rescuing companies.
55. In regard to reservation of ownership, they say that they have asked creditors to submit claims. This in "YV14".




56. Annexed hereto marked "YV16" is a letter that I sent on behalf of Kingsgate to Schapiro setting out its reservation of ownership. The letter is dated 8 June 2020. To date thereof there has not even been an acknowledgement to that letter.
57. In the circumstances, the pretence by Marsden and Schapiro that they are in fact dealing with this issue in a *bona fide* manner, is simply untrue.
58. Many of the other Concurrent Creditors that Kingsgate represents on the Creditors Committee have had exactly the same experience with the issue of reservation of ownership of their goods.
59. In "YV14" they say that they are busy investigating the serious alleged misrepresentation made by executives at Edcon. But they have never once, over the meetings held with them, ever suggested that they were doing so. This is a rear guard response and is palpably hollow.

Irregularities Attendant Upon the Convening of the Meetings

60. In "YV14", Marsden and Schapiro assert that the manner in which they have convened the meetings on 22 June 2020 are entirely in keeping with their obligations under the Act.

A handwritten signature in black ink, appearing to be 'Ym' followed by a stylized flourish.Handwritten initials 'WJ' and a large, stylized mark resembling a signature or a checkmark.

61. It grieves the applicants to repeat that this again betrays a total lack of understanding on the part of Marsden and Schapiro to their obligations under the Act.
62. In the founding affidavit, I alluded to the fact that what Marsden and Schapiro have done is that they have adopted the expedient of proxy forms for purposes of voting by the creditors on 22 June 2020.
63. Annexed hereto marked "YV17" is a copy of the proxy form circulated by them.
64. At the meeting of Concurrent Creditors on 15 June 2020, they advised that they would review the form to make it more user friendly. In passing, I mention that the form has not been amended whatsoever. I mention this not because the proxy form expedient has any efficacy in law but rather to support applicants' contention in the founding affidavit that Marsden and Schapiro are doing this deliberately so that Concurrent Creditors, who are obviously very aggrieved as the notion of a dividend of 4 cents in the rand, remain confused and do not vote.
65. The genesis for the alleged review of the proxy form were complaints by Concurrent Creditors, during the meeting of 15 June 2020 that they found the forms to be confusing.

A large, stylized handwritten signature in black ink, appearing to be the initials 'MS' or similar, written in a cursive style.Two smaller handwritten initials or marks in black ink, one resembling 'MS' and the other a stylized 'S'.

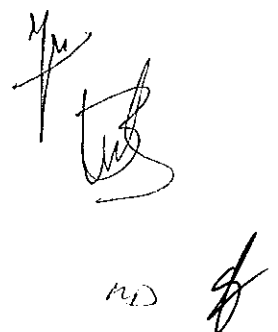
66. What other explanation can there be for Marsden and Schapiro not simplifying the form as they undertook to do?
67. More importantly, the law is not entirely clear as to whether it is lawful for proxies to be used for purposes of voting at creditor meetings.
68. That said, however, there is no doubt that in practice that such proxies are indeed used.
69. What makes the expedient adopted by Marsden and Schapiro to be entirely irregular and unlawful, is their insistence that these forms must be filled out and returned to them, with the vote indicated thereon, by no later than 17h00 on Friday, 19 June 2020, as recorded in "YV9" attached to the founding affidavit.
70. Section 152 of the Act provides for a presentation by the practitioners of the proposed Plan, a discussion together with a consideration of any proposed amendment to the Plan or postponement of the meeting.
71. This is just like a meeting of directors where there is a discussion that is held after which a resolution is tabled for adoption or rejection.
72. What Marsden and Schapiro have done is that they have made a mockery of Section 152 of the Act.




11) 



73. The equivalent of what they have done is to ask for a vote on a resolution, for which here we can read Business Plan, and to then have a discussion. That is an absurdity.
74. What it does demonstrate, however, is that there is no substance or integrity in their assertion, in "YV14", that the applicants must table whatever they want to do at the meeting. It will make no difference because Marsden and Schapiro already have votes in favour of adopting the plan.
75. What is note worthy from "YV14" is that they now appear to have moved from the Webinar platform to a more interactive one but nowhere in that letter do they say that voting will be permitted at the meeting itself. The fact of the matter is that they have made no practical arrangements for any such voting at the meeting.
76. This begs the question then as to how any notion to postpone the meeting is going to be voted on if there is no facility to vote on the day? They cannot deprive the applicants of rights that the law specifically grants to them and to other creditors.
77. It is also no answer to say, even assuming that voting was made possible on 22 June 2020, that if a majority of creditors vote against any postponement or revision of the Plan, the applicants and the Concurrent Creditors that they represent must accept the outcome of that vote.

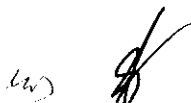
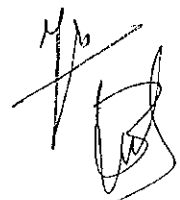
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78. There are circumstances under both Business Rescue as well as under Liquidation where a minority of creditors can be bound by the decision of the majority, but this is not such an instance.
79. Section 145 of the Act says that “each” creditor has the right to participate in the development of the Plan. No majority can take that right away and the applicants have simply been denied that right in the present matter.
80. In all the circumstances, this Honourable Court, simply cannot, with respect, permit these meetings to proceed in some kind of truncated, irregular, illegitimate and illogical manner. To do otherwise would be a travesty.
81. Furthermore, given the lack of *bona fides* of Marsden and Schapiro the applicants and the parties that they represent are simply not prepared to accept their word on the outcome of the voting. Neither are they prepared to accept that the so-called independent Chairperson will verify the voting as she is anything but independent. It is critical that an independent third party with integrity be appointed to do so and be appointed by the creditors and not by Marsden and Schapiro.



Issues of Labour

82. The applicants understand that the potential retrenchment of employees by Marsden and Schapiro has not been met with favour by the employees of Edcon.
83. The notional retrenchment is to the understanding of the applicants to be the biggest in South African history. This at a time of a pandemic where the economy is in dire straits.
84. The potential loss of jobs is not limited to Edcon with its seventeen thousand full time employees and five thousand casual workers.
85. Concurrent Creditors wrote to Marsden and Schapiro setting out the impact that this Business rescue and the measly dividend of four cents in the rand would have on them, their employees and the supply chain downstream.
86. Annexed hereto marked "YV18" is a copy of such a letter addressed by me on behalf of Kingsgate to Marsden and Schapiro. This letter is dated 4 June 2020.
87. To date there has been no response or acknowledgment of this.



88. In the respectful view of the applicant this particular Plan has the potential of loss of jobs running into the hundreds of thousands and we have a BRP sitting in a first world country in Canada deciding the fate of these workers based on information that he is receiving electronically!
89. How can this ever be countenanced in law or in fact?
90. The applicants reiterate their concern that either the management of Edcon or the shareholders sitting in the new company or some third party is going to be delivered an Edcon without debt and with only a limited number of employees being effectively retained, with loss making stores being gotten rid of and all at the expense of people such as the Concurrent Creditors and employees who are being made the sacrificial lambs at the altar of commercial avarice and expediency.

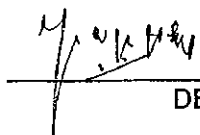
**SLIGHTLY AMENDED RELIEF**

91. The applicants humbly apologise for their omission of something in their relief sought in the notice of motion. They pray that the court overlooks this omission because of the time constraints under which this application was drafted.

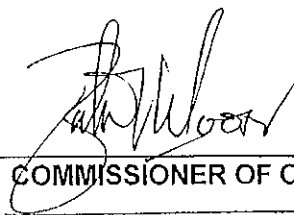
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92. If this Honourable Court is amenable, then, they would ask that the meetings also be postponed subject to satisfactory arrangements be made for the convening and conducting of audio-visual meetings in accordance with the Act.
93. Annexed hereto marked "YV19" is a copy of the amended notice of motion in this regard.

Wherefor applicants persist with the relief sought in this matter.

  
DEPONENT

I hereby certify that the deponent has acknowledged that he knows and understands the contents of this Affidavit which was signed and sworn before me at Durban on this the 21<sup>st</sup> day of **JUNE 2020**, the regulations contained in government notice no. 1258 of 21 July 1972, as amended, and government notice no. R1648 of 19 August 1977, as amended, having been complied with.

  
COMMISSIONER OF OATHS

<p><b>ZAHIR MOOSA</b> COMMISSIONER OF OATHS ATTORNEY R.S.A. 242 MATHEWS MEYIWA ROAD DURBAN, 4001</p>
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