IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No: 19064/21

In the matter between:

KINGSGATE CLOTHING (PTY) LIMITED 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) LIMITED	Sixth Applicant
APPAREL INDUSTRIES (PTY) LIMITED	Seventh Applicant
CLEMATIS TRADING (PTY) LIMITED	Eighth Applicant
GLOBAL SOURCE (PTY) LTD	Ninth Applicant
SUNNINGDALE TRADING (PTY) LTD	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

NOTICE OF MOTION

BE PLEASED TO TAKE NOTICE that the applicants intend making application to the above Honourable Court for an order in the following terms:-

1. The applicants are given leave to institute action proceedings against the first respondent in terms of Section 133(1)(b) of the Companies Act of 2008 ("the Act") and are directed to do so within thirty days of the grant of this order.

2. The applicants are given leave to join the creditors of the first respondent, in the action proceedings, as a group to be referred to as "*the Creditors of Edcon Limited in Business Rescue*".

3. The applicants are given leave to serve the action proceedings on the Creditors of Edcon Limited in Business Rescue by way of substituted service via the provisions of Section 145(1)(a) of the Act.

4. The second and third respondents are directed to serve the action proceedings on the Creditors of Edcon Limited in Business Rescue, within five days of receipt of same from the applicants, in accordance with the provisions of Section 145(1)(a) of the Act, and to forthwith deliver an affidavit in confirmation of the fact that they have done so.

5. The applicants are directed to pay to the second and third respondents all the reasonable costs incurred by the second and third respondents in giving effect to the order in paragraph four.

6. Alternatively to paragraphs three, four and five, it is declared that notice by the second and third respondents as contemplated in Section 145(1)(a) of the Act will constitute substantial compliance with the requirement to serve the action proceedings on the Creditors of Edcon Limited in Business Rescue and will be sufficient to satisfy such requirement.

7. There be no order as to costs save in the event of one or more of the respondents opposing this application in which event such respondent or respondents be directed to pay the costs of the application with such costs to include those consequent upon the employment of two counsel.

8. Further and/or alternative relief.

TAKE NOTICE FURTHER that the founding affidavit of YUSUF AHMED SADEK VAHED, with supporting annexures, will be used in support of this application.

TAKE NOTICE FURTHER that the applicants have appointed the address of their undersigned attorneys as the address at which they will accept notice and service of all process in these proceedings.

TAKE NOTICE FURTHER that if you intend opposing this application you are required to:-

a. within five days after receipt of the notice of motion, to deliver to the applicants written notice of your intention to oppose and in such notice to appoint an address within fifteen kilometres of the office of the Registrar at which you will accept notice and service of all documents in these proceedings; and

b. within fifteen days after filing your intention to oppose deliver your answering affidavits, if any.

If no notice of intention to oppose be given, then application will be made to the above Honourable Court on _____2021 for the relief sought herein

KINDLY ENROL THE MATTER FOR HEARING ACCORDINGLY.

Dated at _____ on this the ____ day of AUGUST 2021.

Krumbadjong

PATHER AND PATHER INC.
Durban
c/o MACROBERT INC
Applicants' Attorneys
MacRobert Building
Corner Justice Mahomed and
Jan Shoba Streets
Brooklyn, Pretoria
Tel: 012 425 3451
Ref: Adriaan van Niekerk

To: The Registrar of the High Court
PRETORIA

And to: First Respondent
EDCON LIMITED (IN BUSINESS RESCUE)

And to: Second Respondent
PIERS MICHAEL MARSDEN
Suite 231, Building 2
Oxford at Glenhove.

And to: Third Respondent
LANCE SCHAPIRO
114 Oxford Road, Houghton Estate
Johannesburg

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and

EDCON LIMITED (IN BUSINESS RESCUE)	First Respondent
PIERS MARSDEN (Joint business rescue practitioner)	Second Respondent
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FOUNDING AFFIDAVIT

I, the undersigned,

YUSUF AHMED SADEK VAHED

do hereby make oath and say:

INTRODUCTION

1. I am a Director and the Chief Executive Officer of Kingsgate (Kingsgate Clothing (Pty) Ltd t/a Majestic Clothing Manufacturers, Princeton Schoolwear Manufacturers and Star Clothing Manufacturers – "Kingsgate"). Kingsgate is a company duly registered and incorporated under the laws of South Africa and has its principal place of business at 240/242 Mathews Meyiwa Road, Durban. I am duly authorised to depose to this affidavit and to bring this application on its behalf.

2. The facts deposed to herein fall within my personal knowledge and are, to the best of knowledge, true and correct.

3. Where I make submissions, I rely on advice duly received.

THE PARTIES

4. The applicants are all suppliers of merchandise to Edcon Limited, now in Business Rescue ("Edcon"), and are all concurrent creditors in Edcon.

5. The second applicant is Maytex Linen CC, a close corporation, duly registered and incorporated under the laws of the Republic of South Africa and which has its principal place of business at 148/154 Lansdowne Road, Jacobs, Durban.

6. The third applicant is Super Ocean Trading CC, a close corporation, duly registered and incorporated under the laws of the Republic of South Africa and which has its principal place of business at 148/154 Lansdowne Road, Jacobs, Durban.

7. The fourth applicant is Maytex Carding CC, a close corporation, duly registered and incorporated under the laws of the Republic of South Africa and which has its principal place of business at 148/154 Lansdowne Road, Jacobs, Durban.

8. The fifth applicant is Cruise Collection CC, a close corporation, duly registered and incorporated under the laws of the Republic of South Africa and which has its principal place of business at 39 Churchill Road, Stamford Hill, Durban.

9. The sixth applicant is Twin Clothing Manufacturers (Pty) Limited, a private company, duly registered and incorporated under the laws of the Republic of South Africa and which has its principal place of business at 858 Umgeni Road, Durban.

10. The seventh applicant is Apparel Industries (Pty) Limited, a private company, duly registered and incorporated under the laws of the Republic of South Africa and which has its principal place of business at 8 Columbus Road, Verulam, Durban.

11. The eighth applicant is Clematis Trading (Pty) Limited, a private company, duly registered and incorporated under the laws of the Republic of South Africa and which has its principal place of business at 218 Mathews Meyiwa Road, Stamford Hill, Durban.

12. The ninth applicant is Global Source (Pty) Ltd, a private company, duly registered and incorporated under the laws of the Republic of South Africa and which has its principal place of business at 10 Corobrik Place, Riverhorse Valley, Durban.

13. The tenth applicant is Sunningdale Trading (Pty) Ltd, a private company, duly registered and incorporated under the laws of the Republic of South Africa and which has its principal place of business at 10 Corobrik Place, Riverhorse Valley, Durban.

14. The first respondent is Edcon Limited ("Edcon") which is a juristic entity which is duly incorporated and registered in terms of South African law.

15. The second respondent is Piers Michael Marsden ("Marsden"), an adult male business rescue practitioner carrying on business at Suite 231, Building 2, Oxford at Glenhove. Applicants understand that Marsden is one of the principals of Matuson and Associates who specialise in Business Rescue Practice.

16. The third respondent is Lance Schapiro, an adult male business rescue practitioner carrying on business at 114 Oxford Road, Houghton Estate, Johannesburg. Applicants understand that Schapiro is employed by Matuson and Associates who specialise in Business Rescue Practice.

17. The second and third respondents are the duly appointed joint Business Rescue Practitioners to Edcon.

OVERVIEW

18. Edcon, as constituted from time to time, has conducted business as a retailer of merchandise since or about 1929, having first opened its doors in Johannesburg on Joubert Street, by two brothers Morris and Eli Ross.

19. Kingsgate, as constituted from time to time, has been in existence since 1955 and has been conducting business with Edcon, as constituted from time to time, for over 50 years.

20. The second to fourth applicants have been in business for approximately 23 years and have conducting business with Edcon, as constituted from time to time, for a period of approximately 16 years.

21. The fifth applicant has been in business since 2004 and has conducted business with Edcon, as constituted from time to time, for a period of 9 years.

22. The sixth applicant has been in business since 1966 and has conducted business with Edcon, as constituted from time to time, for approximately 17 years.

23. The seventh applicant has been in business since 1971 and has conducted business with Edcon, as constituted from time to time, for approximately the same period of time.

24. The eighth applicant has been in business since 2012, with its chief executive officer having dealt with Edcon, as constituted from time to time, for a period of 35 years.

25. The ninth applicant has been in business since 1999 and has been conducting business with Edcon, as constituted from time to time, for approximately 19 years.

26. The tenth applicant has been in business since 2010 and has been conducting business with Edcon, as constituted from time to time, for approximately 11 years.

27. As is well known, and it is respectfully submitted the above Honourable Court may take judicial cognizance thereof, Edcon was placed under voluntary business rescue on or about 30 April 2020, leaving behind a trail of unpaid concurrent creditors anywhere between R2.5-billion to R4.3-billion (the exact amount has never been made clear) being due to receive the sum of 4 cents to 6 cents in the Rand.

28. The applicants constitute a number of these unpaid concurrent creditors of Edcon, in the total sum of R109'989'002.35, in the circumstances outlined herein below. ("***the applicants' unpaid debt***")

29. In the not unrelated application brought by the applicants against Edcon in terms of which the applicants rely upon their reservation of ownership of the goods supplied by them to Edcon, and in regard to which the applicants intend to make application for that proceeding, after its referral to oral evidence or trial, to be heard together with the action proceedings in contemplation, the applicants set out the details as well as all the documents and other evidence furnished by them to the Business Rescue Practitioners in support of the applicants' unpaid debt.

30.

30.1 This information was furnished to the Business Rescue Practitioners by no later than 11 August 2020. To date hereof, the Business Rescue Practitioners have not reverted with any substantive dispute or challenge in regard to the applicants' unpaid debt with respect to whether or not applicants did supply merchandise to that value to Edcon for which the applicants have not been paid. That claim was referred to arbitration and the result went against the applicants (on the finding that there had been no

reservation of ownership) who have sought to review the finding of the Learned Arbitrator.

30.2 Up until the arbitration, the Business Rescue Practitioners had not reverted with regard to the quantum of the applicants' unpaid debt nor have they done so to date hereof. (It does not behove the second and third respondents to assert that they were not required to deal with the quantification because the review went against the applicants. Even for purposes of the 4-cents to 6-cents in the Rand, the second and third respondents would have to undertake a quantification exercise.).

31. This is consistent with the conduct of the Business Rescue Practitioners who, in the respectful view of the applicants, appear to have focussed their energies on securing maximum benefit for the secured creditors of Edcon. In their monthly statutory reports, the Business Rescue Practitioners' constant refrain, up until the present time, is that they are still busy reconciling the claims of concurrent creditors.

RELIEF SOUGHT

32. The applicants seek an order in the following terms:-

32.1 Leave is granted to the applicants to institute action proceedings against Edcon in terms of Section 133(1)(b) of the *Act*;

32.2 Leave is granted to the applicants to join the creditors of Edcon, in the contemplated action proceedings, as a grouping to be referred to as "*the Creditors of Edcon Limited in Business Rescue*";

32.3 Leave is sought to serve the action proceedings by way of substituted service on all of the creditors of Edcon by directing the second and third respondents to effect such substituted service in the manner as contemplated in Section 145(1)(a) of the Act and the regulations thereto;

32.4 An order directing applicants to pay all the reasonable costs incurred by the second and third respondents in effecting such service in the manner contemplated;

32.5 Alternatively to paragraphs 32.2, 32.3 and 32.4 it be declared that the notice to be given by the Business Rescue Practitioners under the provisions of Section 145(1)(a) of the Act be considered substantial compliance with the applicants' obligation to serve the action

proceedings on the Creditors of Edcon Limited in Business Rescue and be regarded as sufficient compliance therewith.

33. This affidavit will address the following topics for the ease of reading and benefit of the above Honourable Court:-

33.1 Edcon's reassurances regarding its financial well-being;

33.2 The June / July 2019 re-structuring;

33.3 The March 2020 lockdown

33.4 The onset of business rescue proceedings in respect of Edcon:

33.4.1 The Business Rescue Practitioners' historical relationship with relevant parties;

33.4.2 Partiality of the so-called Chairperson of the Creditors' Committee;

33.4.3 Partiality of the Business Rescue Practitioners to the interests of the secured creditors of Edcon;

33.4.4 Furnishing of documentation reasonably required;

33.4.5 Failure to consult;

33.4.6 The Section 151 Meeting convened to Adopt the Business Rescue Plan;

33.5 The Subordination agreements;

33.6 Instruments of security;

33.7 The Hollard transaction;

33.8 Leave to sue in terms of Section 133(1)(b) of the *Act*;

33.9 Leave to join the creditors of Edcon;

33.10 Leave to serve on the Creditors of Edcon Limited in Business Rescue by way of substituted service; and

33.11 Costs.

EDCON'S REASSURANCES REGARDING ITS FINANCIAL WELL-BEING

34. Pattison, the Chief Executive Officer of Edcon, gave public interviews, towards the end of 2018, of and concerning the financial position of Edcon and the plan to recapitalise Edcon.

35. In this regard, I refer the above Honourable Court to annexures ***FA1*** and ***FA2*** being the transcriptions of an interview that Pattison had on 21 December 2018. The above Honourable Court is referred to the transcribers' confirmation, being a sworn transcriber of the above Honourable Court, that the transcription is a true and accurate reflection of the interview, as recorded in ***FA3*** hereto.

36. As recorded in video 1, Pattison was requested to put a total value on the proposed recapitalisation plan for Edcon. Pattison responded in the following terms:-

> ***"Yes, thank you for having me. It's probably in the order of about R3 billion, the current plan as it is written, and that amount of money, with the conversion of all our existing debt into equity means that Edcon will have a good runway, such that management and staff can focus on fixing the business rather than worrying about the sustainability of the business."***

37. He confirmed that the restructuring involved "***debt to be converted into shares***".

38. In video 2, the interviewer enquired "***so, obviously, you are saying in your statement that details are very thin at the moment. But, can you tell us how far, what components of that restructuring plan goes to recovery here, Grant Pattison***?

39. Pattison's response was:-

> "*The business needs to convert its debt to equity, make sure it's got enough Capital i.e. cash and that to operate for the next few years, not just the next few months as we have been doing recently. This allows management and employees to be able to concentrate, not so much on the security of the business but concentrate on customers and restoring the customer confidence in the business.*"

THE JUNE / JULY 2019 RE-STRUCTURING

40. It would appear that the contemplated restructuring of the Edcon Group was finally consummated during June/July 2019 as was widely reported in the media.

41. In this regard, I refer the above Honourable Court to annexure ***FA4*** hereto, being a report of an Interview, held with Pattison, by Adele Shevel in the BL Premium. I set out relevant extracts therefrom:-

41.1 *"Edcon, the 90-year-old retail colossus which last year came within an inch of collapsing into the scrap heat like rival Stuttafords, has been saved-for now, at least".*

41.2 *"It's a verdict that has been out till now but last week, the R2.7bn for Edcon's "restructuring" landed in its bank account. It was touch and go for a while but it's fair to say that the rescue deal for SA's largest clothing retailer can be deemed a success".*

41.3 *"Edcon, which first opened its doors at It goes in Joburg's Joubert Street in 1929 thanks to brothers Morris and Eli Ross, is still alive is chiefly due to one man: Grant Pattison;"*

41.4 *"But banks and landlords said that they would only support the deal if it included the Public Investment Corp (PIC), the state-owned company which manages pensions of government employees. Given the PIC's own internal ructions, that was never certain."*

41.5 *"In the end, the state-owned Unemployment Insurance Fund (UIF), whose money is managed by the PIC, agreed to put in cash. Pattison's pitch to them was, if you don't help us, you have 140,000 extra people claiming from the fund."*

41.6 *"In the end, the final plan was sealed in December: 21 landlords agree to inject R1 bn into the company in exchange for 5% and 10% of Edcon's shares, the UIF would get 19% of the shares, and the banks, investors and staff hold the rest."*

41.7 *"But perhaps the main lesson we learnt was that a company needs to ensure it can keep its independence, otherwise the banks take control. You have to pay for advisers who act against you, and you have to pay for them, monthly, in pounds."*

41.8 Presciently, Pattison is recorded as stating:" ***I will always be checking in with myself if this is the best thing for the company, not just for shareholders... It's quite hard to figure out what part of capitalism you believe in. If you just think about shareholders, the Bain deal was a great deal. If you think about just the company, it wasn't.***"

42. The restructuring that took place in the middle of 2019 must be seen against the backdrop of what Pattison said at the end of 2018, namely that the object was to convert debt into equity and that Edcon was looking for not just a short-term solution.

MARCH 2020 LOCKDOWN

43. From about June/July 2019 and thereafter, the applicants continued servicing and supplying merchandise to Edcon.

44. The applicants felt reassured with regard to Edcon's financial well-being and they continued supplying goods to Edcon believing it to be debt free.

45. Various orders for merchandise were in fact placed with the applicants as late as in March 2020 by Edcon as recorded in the detailed information submitted

to the Business Rescue Practitioners. This was one month prior to Edcon being placed in business rescue.

THE ONSET OF BUSINESS RESCUE PROCEEDING IN RESPECT OF EDCON

46. On 31 March 2020 the Edcon Group Chief Executive Officer tweeted:-

> "***Also no need to speculate how we we (sic) doing before the President's announcement on the 15th, you just had to ask. In January/Feb we increased sales relative to over 6%. In March we were doing even better, before the announcement.***"

47. I attach hereto marked annexure ***FA5***, a copy of the aforementioned tweet.

48. Accordingly, the applicants were in shock when Edcon went into voluntary business rescue on 30 April 2020 in circumstances where the Edcon Group Chief Executive Officer had tweeted that Edcon was actually doing better in 2020 than the previous year.

49. Needless to say, if Edcon had advised the applicants, during the early part of 2020, that Edcon was in a financially difficult situation they would have reduced their exposure or stopped selling goods to it completely.

50. In any event I refer the above Honourable Court to annexure ***FA6*** hereto which records the resolution passed by a meeting of the board of directors and more particularly Pattison recording the voluntary placing into business rescue of Edcon that:-

> ***"as the company is unable to pay certain of its debts and as it appears to be reasonably unlikely that the Company will be able to pay all of its debts as they become due and payable within the immediately ensuing six months, the Company is therefore financially distressed within the meaning of section 129 (1) (a) of the Companies Act 71 of 2008, as amended ("the Act").***
>
> 2. ***As there appears to be a reasonable prospect of rescuing the Company in terms of section 129 (1) (b) of the Act and/or if it is not possible for the Company to so continue in existence, there exists a reasonable prospect that Business Rescue Proceedings will result in a better return for the Company's creditors or shareholders, then would result from the immediate liquidation of the Company, the Company should begin voluntary business rescue proceedings in terms of section 129 of the Act."***

51. I deal with the business rescue proceedings in order to provide background and in order to contextualise the relief that the applicants will seek in the action proceedings.

52. In this regard, the entire business rescue proceedings have resulted in a travesty of justice for the unpaid concurrent creditors, including the applicants, which is dealt with more fully hereunder.

53. The entire business rescue proceedings have been epitomised by a lack of financial transparency, has been shrouded in secret, and critically there has been an abject refusal to "**come clean**" to the body of the unsecured concurrent creditors with regard to the entire financial picture of the Edcon Group.

54. It is not the intention of the applicants to seek the setting aside of the Business Plan but to merely record what the applicants contend is the ***continuation of the corporate damage*** which has been perpetrated on the concurrent creditors.

55. Section 7(k) of the Companies Act of 2008 ("the Act") sets out that the purpose of the Act is to "***provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders***". This was infringed and the only

parties whose interests were served and catered for, by the Business Rescue Practitioners, were the secured creditors.

56. We say so for the reasons that follow.

57. The Business Rescue Practitioners were clearly conflicted when regard be had to what is herein set out below.

58. The process of business rescue undertaken by the Business Rescue Practitioners breached numerous provisions of the Act.

59. The requirements set out in the Act were not followed as will be outlined hereunder.

The Business Rescue Practitioners Historical Relationship with all Relevant Parties

60. On 16 December 2018 (*some fifteen months before Edcon was placed into voluntary business rescue*), a few days before the interviews aforesaid, the Sunday Times recorded that Edcon bosses met with major landlords on 7 December 2018 at law firm ENS Africa's offices in Sandton (*the first, second*

and third respondents' attorney of record) to discuss a proposal (***FA7***). Although this is hearsay, the applicants do not believe that this is in dispute.

61. The high-level meeting was chaired by former Investec Bank Chief Executive Officer, Stephen Koseff, ENS Africa chair, Michael Katz and Matuson & Associates. Matuson & Associates were tasked with arranging the restructuring of Edcon and all the secured creditors had to sign non-disclosure agreements to literally "***gag them***" from revealing the terms thereof.

62. In this regard, and as recorded in the minutes of the Creditors' Committee meeting dated 15 June 2020 (***para 51 of FA8***), Marsden ***attempted to minimise and dilute*** the role that Matuson & Associates had played at the time, by contending that all that they had attended to was to do a liquidation calculation to see what the lenders would receive in a liquidation scenario as well as to liaise with certain of the landlords in order to obtain a rental reduction.

63. Even if that was all they undertook, which is disputed, one still had ***the exact same firm*** which was integrally involved in certain aspects of the restructuring of Edcon some fifteen months before it was placed into voluntary business rescue.

64. It is respectfully submitted that Business Rescue Practitioners are obliged to be independent and at the very least have the aura of independence, which, from the onset of the business rescue proceedings, was clearly missing.

The basic requirement of a business rescue practitioner looking after the interests of ***all stakeholders*** from inception, was lacking. And one can only speculate as to the quantum of the consultancy fees Matuson & Associates' generated from that task, which, as set out below, the Business Rescue Practitioners refuse to disclose.

Partiality of the so-called Chairperson of the Creditors' Committee

65. The Business Rescue Practitioners imposed one Juliette de Hutton ("***de Hutton***") as a so-called independent attorney to assist the concurrent creditors in the Creditors Committee by serving as its Chairperson.

66. De Hutton was most certainly not independent despite the recordal of this in the Business Rescue Plan attached hereto marked annexure ***FA9*** ("***the Plan***") and more particularly paragraph 7.3.2.2 wherein it is recorded that she "***was appointed as the independent chairperson of the Creditors' Committee***".

67. In fact, de Hutton has had, and continues to have, an ongoing business relationship with the current Business Rescue Practitioners in other major business rescue proceedings, such as the business rescue proceedings of South African Airways.

68. Accordingly, it would seem that she is beholden to them.

69. This is not the only ground upon which this contention is made.

70. At all material times the concurrent creditors wished to see the security instruments that had been concluded between the secured creditors and Edcon, because ***it was on the strength of these secured instruments*** that secured many of Edcon's assets, that it was determined by the Business Rescue Practitioners that the concurrent creditors would only receive 4-cents to 6-cents in the Rand. The lion's share accruing to the secured creditors.

71. In this regard, I refer the above Honourable Court to paragraph 5.3 of the Plan wherein the background to Edcon's alleged financial distress is set out. What is noteworthy is that the picture that Pattison painted of a debt-free first respondent, as aforesaid, was clearly untrue.

72. Of critical importance is the allegation in paragraph 5.3.2 in the Plan which records that "***the 2019 Restructuring was a Group-wide debt restructuring and refinancing in order to ensure the continued operation of the largest retailer in sub- Saharan Africa and the retention of tens of thousands of jobs***".

73. Accordingly, the Business Rescue Practitioners recognise that there was a restructuring of the Group debt *albeit* only one company in the Group was placed in business rescue, that being Edcon.

74. In this regard the Plan contained the following averments of and concerning the issue of the secured instruments:-

74.1 the allegation is made in paragraph 5.3.3.2 that the 2019 restructuring involved "***the restructure of R10 billion of existing financiers' debt, either through capitalisation or refinance as convertible indirectly-secured guaranteed instruments***".

74.2 in paragraph 9 the security of Edcon is recorded as being that which is set out in annexure **B**. Accordingly, annexure **B** was alleged to be a complete list of all the material assets of the Company at book value, as well as an indication as to which assets were held as security by Creditors as at the Commencement Date.

74.3 upon a perusal of annexure B, attached to the Plan, the assets, which were alleged to be the subject to the security of Creditors, were not listed.

74.4 paragraph 13 of the Plan recorded that Edgars was the "***sole holder of the Company's issued securities***".

75. It was in those circumstances that the concurrent creditors requested to see these instruments of security in order to ascertain their terms, the legality thereof and the like. These instruments have never been made available to the concurrent creditors.

76. Instead, what happened, was that Marsden said he would make it available to de Hutton and de Hutton undertook to consider them as recorded in the minutes of the meeting of concurrent creditors on 4 June 2020. A copy of which is annexed hereto marked (***para 15.11 of FA10***).

77. De Hutton apparently had regard to the instruments and advised that they could not be set aside.

78. Evidence of de Hutton's lack of transparency in regard to the instruments of security is evident in the same minutes of the Creditors Committee (***para 15.10 of FA10***) where it is recorded that after she offered to review the instruments of security, her knee-jerk immediate comment was that she "***confirmed that there was unlikely to have been any impropriety in the process.***"

79. Furthermore, de Hutton addressed annexure ***FA11*** to the members of the Concurrent Creditors Committee on 20 July 2020, of which I was a member, recording the following:-

> "*My personal views, again not the views of the committee, are:*
>
> - *that the BRPs inherited a very difficult set of facts and circumstances not of their making;*
> - *They have done their best under challenging circumstances to balance the rights of all stakeholders;*
> - *The situation that concurrent creditors find themselves in is extremely unpleasant and I have huge sympathy for them;*

- ***The BRPs cannot change the facts and have tried to ensure the best possible outcome for all stakeholders.***"

80. It is respectfully submitted that whether or not the Business Rescue Practitioners inherited a difficult scenario is irrelevant. Her statement to this effect betrays a fundamental failure to appreciate that almost every Business Rescue Proceeding is difficult and challenging and is no excuse for any shortcomings on the part of Business Rescue Practitioners.

81. As aforesaid, de Hutton has an ongoing business relationship with the Business Rescue Practitioners, which one must assume must be lucrative, and will accordingly not adopt a position which will not align with the interests of the Business Rescue Practitioners and is accordingly unlikely to adopt a position which does not align with the interests of the Business Rescue Practitioners.

Partiality of the Business Rescue Practitioners to the interests of the secured creditors of Edcon

82. In terms of section 138(1)(d) of the Act, it is clear that the purpose of this provision is to ensure that the business rescue practitioner has not had any

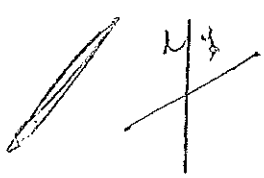
prior dealings with the company in which he is appointed that would place his independence and impartiality in doubt.

83. I have alluded to hereinabove, under the rubric "*the business rescue practitioners', historical relationship with all relevant parties*" to the prior dealings that the Business Rescue Practitioners had with Edcon which clearly placed their independence and partiality in serious question.

84. Despite the statutory obligation resting on the Business Rescue Practitioners to balance the interests of all relevant parties in the business rescue proceedings, as with de Hutton, the Business Rescue Practitioners appeared, at all times, to be overtly partial towards the interests of the secured creditors to the detriment of the concurrent creditors.

85. As recorded hereinabove under the rubric "*the business rescue practitioners' historical relationship with all relevant parties*" it bears mention that the contents of the meetings held in December 2018 were never voluntarily disclosed by the Business Rescue Practitioners to the concurrent creditors.

86. This gives rise to the question as to why this was not so disclosed? By not doing so, they have succeeded in creating a suspicion that at the relevant time what happened was that the secured creditors were afforded protection to allow for the eventuality of a failure and in the event of such a failure the



concurrent creditors would be the sacrificial lambs at the altar of commercial expediency and avarice.

87. This prior association alone contaminates the appearance of any impartiality, integrity and objectivity.

88. The fees generated in a business rescue of this nature stand to run potentially into the tens of millions of Rand. It is common knowledge that Matuson & Associates together with de Hutton and ENSAfrica (*the identical team*) are involved in the business rescue proceedings currently being undertaken by SA Airways and where the fees raised by the Business Rescue Practitioners have been called into question by the Minister of State-owned Enterprises.

89. Additionally, one of the Business Rescue Practitioners, Marsden is resident in Canada in circumstances where a business rescue practitioner is obliged to step into the shoes of the managing director of the company under business rescue in order to conduct the business.

90. In any event, their partiality and abject failure to meet their statutory obligations is manifest in the respects set out hereunder.

Furnishing of Documentation Reasonably required

91. In terms of section 150 of the *Act*, the business rescue plan proposed by the Business Rescue Practitioners must contain all the information reasonably required to facilitate the various stakeholders in deciding whether or not to accept or reject the proposals made in the plan.

92. Accordingly, affected parties are entitled to documentation "***reasonably required***" to facilitate them in deciding whether or not to accept or reject the business rescue plan in due course.

93. Under the Act, any person armed with a judgement is entitled to a copy of the financials of a company. In the present circumstances, it beggars belief that the Business Rescue Practitioners could on any conceivable basis withhold pertinent financial information from concurrent creditors, who have an admitted indebtedness of R2.3-billion, as recorded in the Plan.

94. Until about 2017, the financial statements for Edcon and for the Edcon Group were posted on the Edcon website and were freely accessible and available to any member of the public. This although Edcon is not a listed public company. Inexplicably, this stopped being available coinciding with the time of the restructuring giving rise to the question as to what it is that Edcon wants to conceal.

95. The second and third respondents simply refuse to make these financial statements available asserting that it contains historical information which is of no value going forward. But that is not for the Business Rescue Practitioners to decide. Surely if there was nothing to conceal, those financial statements would be made readily available. Why are they not so made available to the applicants and all the other concurrent creditors? What is it that they do not want the applicants to see?

96. This gives rise to the anomaly of someone with a judgment of R1'000.00 against Edcon being able to demand a copy of the financial statements against payment of a nominal fee but concurrent creditors owed at least R2.3-billion are not entitled to have sight of same according to the Business Rescue Practitioners.

97. This more so, bearing in mind the principles of proper governance and transparency which was explicitly recognised by the Department of Trade and Industry, which published a Policy Paper titled South African Company Law Reform ("***Policy Paper***") and did so in Government Gazette 26493 of 23 June 2004.

98. It envisaged that company law should promote the competitiveness and development of the South African economy by, *inter alia,* encouraging transparency and high standards of corporate governance.

99. The Policy Paper also stated that the framework of company law should be such that it reflects the recognition that a company is a social as well as an economic institution and accordingly that a company's pursuit of economic objectives should be constrained by social and environmental imperatives.

100. In light thereof, it is respectfully submitted that this Honourable Court should have regard to the fact that the Company is both a social as well as an economic institution and that it is no longer acceptable to view a company, under our law, as being an entity, which is entitled to devote itself purely to mercantile and economic objectives. Such objectives must be constrained by social imperatives.

101. The Business Rescue Practitioners furthermore failed to provide the applicants with all documentation reasonably required in order to enable them to decide whether or not to accept or reject the business rescue plan. The applicants were prejudiced in this regard and on this ground, amongst others, in fact launched an urgent application seeking the adjournment of the meeting that had been set down for the adoption of the Plan.

102. The urgent court, adjudicating upon the matter, determined that in the event that the applicants required further information and documentation, they could seek an adjournment of the meeting that had been set down for the adoption of the Plan and accordingly removed the urgent application from the roll.

103. The Business Rescue Practitioners, displaying their partiality towards the secured creditors, have refused to produce the following categories of critical information to the concurrent creditors.

104. Given the historical business relationship between the Business Rescue Practitioners and the prescripts of section 138(1)(d) of the *Act* which demands impartiality and independence on the part of the Business Rescue Practitioners, sight was required of their past consultancy fees/mandate agreement that had been concluded between the Edcon Group and the Business Rescue Practitioners. This might have dispelled all notions of partiality.

105. The Business Rescue Practitioners refused to produce this category of documentation.

106. The Business Rescue Practitioners refused to divulge Edcon's cash, inventory levels and financials, as dealt with more fully hereunder, being a simple matter of financial transparency, and being open with the parties who have been affected the most.

107. As aforesaid, there was the ***blanket refusal*** to furnish the documentation pertaining to the instruments of security which Edcon concluded with its creditors, ***securing assets of Edcon***, which is likely to result in the receipt of 4-cents to 6-cents in the Rand by the concurrent creditors, once all the secured creditors have been paid. (As compared to this, when Marsden was asked at the meeting held to adopt the Plan whether the secured creditors would receive nearly all their monies back, that is not only from Edcon but from the entire Edcon Group, Marsden confirmed that that was correct).

108. The Business Rescue Practitioners have simply refused to make available Edcon's annual financial statements or the Edcon Group's consolidated annual financial statements to enable the concurrent creditors to investigate what the true financial position is. This in order to properly consider whether the Edcon Group annual financial statements as well as the annual financial statements of Edcon present a true and fair view of the overall position of Edcon.

109. The applicants required sight of the annual financial statements because this would have contained the following critical financial information:-

109.1 the directors' report;

109.2 the going concern principles;

109.3 the audit committee reports including but not limited to the going concern principles which govern it;

109.4 the audit committee report in regard to the solvency and liquidity review; and

109.5 any independent's auditors' report.

110. It is respectfully submitted that a company the size of Edcon, and given its public interest score, would have been required to have audited financial statements even though it is a subsidiary.

111. More fundamentally, the Business Rescue Practitioners calculated the eventual dividend that would be generated by the Business Rescue.

112. In this regard the attorneys of the Business Rescue Practitioners recorded in correspondence addressed to the applicants' attorney of record on 19 June 2020 in terms of annexure ***FA12*** that (FA-ENS correspondence dated 19 June 2020 addressed to the applicants' attorney of record):-

> "***16.2 Notwithstanding this, the liquidation calculation was prepared by Deloitte, which, despite being Edcon's auditors, remains an external and independent third party.***
>
> *16.3. The anticipated business rescue dividend was calculated by our clients.*
>
> *16.4 Our clients have carefully considered the asset and liability position of Edcon and are satisfied with the probable dividend indicated in the business rescue plan to be received by creditors if Edcon were to be placed in liquidation.*

113. Accordingly, it is very unsatisfying that the anticipated business rescue dividend was calculated by the Business Rescue Practitioners and not independent auditors. Additionally, and as is readily apparent here from, the asset and liability position of only Edcon was taken into account in determining the probable dividend to be received by the creditors if Edcon was placed into liquidation.

114. The veil of secrecy and silence, apart from the abject lack of transparency which was supposed to permeate the conduct of the business rescue proceedings, was also very much evident in the conduct of Deloitte.

115. Deloitte refused to "***put their money where their mouth is***" in regard to the provision of financial information sought from them, to demonstrate the manner in which they arrived at the dividend that would be achieved by the potential liquidation of Edcon.

116. In this regard Deloitte insisted that a "***No Harm***" document be signed, absolving them from all liability as recorded in ***FA12*** (ENS correspondence dated 19 June 2020 addressed to the applicants' attorney of record).

117. De Hutton likewise, to the knowledge of the applicants, made no effort to obtain the annual financial statements of Edcon nor the Edcon Group consolidated annual financial statements in the circumstances outlined herein above.

118. Four creditor committees were set up by the Business Rescue Practitioners under the Business Rescue, these being for the landlords, the secured creditors, the concurrent creditors and the employees.

119. The Business Rescue Practitioners have failed to make available to the concurrent creditors, including the applicants, the minutes of the meetings that they have held with the secured creditors and with the landlords.

120. It does not behove the Business Rescue Practitioners to assert any kind of confidentiality with regard to the minutes of the meetings held with the landlords and the secured creditors.

121. It is quite plain that the Business Rescue Practitioners are determined not to be transparent and not to share with the concurrent creditors anything to do with the landlords and the secured creditors. The question is why? What are they concealing?

122. What exacerbates the matter is that the goods supplied by the concurrent creditors, including the applicants, to Edcon, is what made it possible for Edcon to continue trading during the Business Rescue such that the Business Rescue Practitioners were able to dispose of the Edgars Chain Stores and the Jet Chain Stores to third parties.

123. However, it appears to the concurrent creditors that their goods, unpaid for, is what has made it possible for the secured creditors, presumably including the landlords, to benefit the most out of those dispositions. Despite that being so,

the concurrent creditors have been treated with disrespect bordering on contempt.

124. That the Business Rescue Practitioners have adopted a cavalier attitude towards the concurrent creditors, including the applicants, is further supported by the fact that at the meeting of 15 June 2020 (***FA8 – para 23***) the representative of Credit Guarantee queried with Marsden as to why certain assets, which did not fall under a general notarial bond, should not be shared amongst all the creditors.

125. In response, Marsden confirmed, in effect, that the Business Rescue Practitioners had made an error and those assets, valued at approximately R75-million, should indeed be available to all creditors. This resulted in a recalculation of the dividend payable to concurrent creditors from the Business Rescue which had the effect of taking the dividend up from 4-cents in the Rand to 6-cents in the Rand.

Failure to Consult

126. The *Act* prescribes that during the business rescue process, all affected parties are entitled to participate in the development of the Business Plan and be consulted and their views be considered.

127. This was also breached by the Business Rescue Practitioners.

128. It has authoritatively been held that the meaning of "***consult***" means that there must be sufficient information available for the affected parties and that they must actually be consulted. As aforesaid, vital information was deliberately withheld from the concurrent creditors.

129. Furthermore, and at a substantive level, consultation entails a genuine invitation to provide input and a genuine receipt of that input. Consultation is not to be treated perfunctorily or as a mere formality.

130. Additionally, engagement after a decision-maker has already reached his decision or once his mind has already become "*unduly fixed*" is not comparable with true consultation.

131. In the absence of sufficient and adequate financial information, the concurrent creditors could not even begin to "*consult*" with the Business Rescue Practitioners in the manner required by the *Act*.

132. In fact, the Business Rescue Practitioners admonished the applicants for adopting the robust position that they did, given the supine and inert position adopted by de Hutton. ***FA12*** (ENS correspondence dated 19 June 2020 addressed to the applicants' attorney of record). It recorded the following:-

> "***Section 149 of the Companies Act sets out the functions, duties and membership of committees of affected persons, which is limited to consultation and the receipt and consideration of reports. Notably, this section specifically prohibits the committees from directing or instructing the business rescue practitioners.***"

133. The applicants at no stage had any intention of instructing the Business Rescue Practitioners to do anything. All they wanted was a proper opportunity to be informed so that they could decide whether to support the Plan or not.

134. In all the circumstances, this serves to demonstrate the absolute failure and refusal of the Business Rescue Practitioners to meaningfully consult with the concurrent creditors to improve their 4-cents to 6-cents in the Rand dividend.

The Section 151 Meeting convened to Adopt the Business Rescue Plan

135. The eventual section 151 meeting ("***the meeting***") that had been convened to adopt the business rescue plan on 22 June 2020 was a catastrophe.

136. ***Firstly***, and given that Marsden resides in Canada, the meeting only started very late in the day South African time, and in tranches, obviously to suit his convenience, which could only operate to the extreme prejudice of the R2.3 billion concurrent creditors.

137. ***Secondly***, as recorded in ***FA12*** (ENS correspondence dated 19 June 2020 addressed to the applicants' attorney of record), the Business Rescue Practitioners determined to have the meeting held electronically and alleged that it would attempt "***to make the section 151 meeting as accessible as possible (arguably more accessible than in person meetings***)".

138. Whilst the *Act* countenances meetings by audio-visual means, they must approximate, as far as possible, to physical meetings.

139. However, and more fundamentally, because the process for the discussion of, voting on and possible amendment of the Plan has the potential to be a long and convoluted process, and such an important step in the business rescue process, the subsections in section 152 and 153 of the *Act* provide for

the meeting to be adjourned from time to time without the need to reconvene and deliver notice of the meeting each time.

140. Additionally, the meeting was conducted via the platform called Microsoft Teams, which platform has been banned for use in China. This entails the Chinese suppliers being precluded from participating during the meeting.

141. What is furthermore of great significance is that the substantial portion of the voting took place before the meeting by means of the filling out of a form which was required to be emailed to the Business Rescue Practitioners. During the course of the meeting, the Business Rescue Practitioners did indicate that they would still permit voting whilst the meeting was in session as well as after the meeting. However, they have never furnished any feedback as to how many votes were cast during and after the meeting.

142. The issue with this is that it would have been better for the voting to have taken place after contemplation and consideration of what was discussed and raised in the meeting for the adoption of the Plan and not prior to the convening of the meeting. In effect, the Business Rescue Practitioners expected the concurrent creditors, amongst others, to vote on the Plan even before the Business Rescue Practitioners had explained the Plan at the meeting!

143. The outcome of the vote was, in effect, concluded prior to the commencement of the meeting, which begs the question as to why there was even the necessity of a meeting if not to merely go through the motions as required in the Act? It would appear that the meeting was undertaken only to tick the box as it were rather than for the purpose of constructive debate in preparation of a considered vote as required by the Act.

144. ***Thirdly,*** as recorded in annexure ***FA12*** (ENS correspondence dated 19 June 2020 addressed to the applicants' attorney of record), it was noted that the creditors would be afforded an opportunity to address any queries and submit any motions contemplated in terms of section 151 of the *Act* in writing during the meeting.

145. It is respectfully submitted that with today's technology, there could have been direct engagement by the Business Rescue Practitioners of questions posed to them; but virtual engagements and debates were disallowed. Questions had to be typed in and were responded to by the second respondent who, as aforesaid, resides in Toronto, Canada.

146. At some point during the course of the meeting, Marsden simply stopped dealing with the typed questions. I attended the meeting and was able to witness this myself. I can confirm that a number of written requests were made to the second respondent which were not responded to by him at all.

147. At a more fundamental level, the methods adopted by the Business Rescue Practitioners stifled possible debates that could have taken place during the course of the meeting. In those circumstances, this is yet another breach by the Business Rescue Practitioners of the provisions of the *Act* which provides for discussion and proper debate at the meeting by all interested parties.

148. On the applicants' calculation, only 468 creditors out of the potential 3018 creditors actually cast a vote during the meeting in circumstances where there are 87 secured creditors and 2931 concurrent creditors. Accordingly, this entails that only 15.5% of the creditors voted, which raises concerns of how hard the Business Rescue Practitioners pushed to involve all the concurrent creditors in the process.

149. In fact, as recorded in ***(para 44 of FA8)*** (15 June 2020 creditors' committee meeting) I specifically raised the fact that an independent third-party ought to be appointed to review the calculation of the vote to approve the Plan. All that Marsden responded was that he would be happy to utilise De Hutton to independently review the calculation of the votes and the examination of proxies. We were never advised as to whether or not this was undertaken and, in any event, as aforesaid, de Hutton's impartiality is not beyond question.

THE SUBORDINATION AGREEMENTS

150. The Business Rescue Practitioners advised the Creditors Committee on 15 June 2020, in terms of annexure ***(paras 4–10 of FA8)***, that although the balance sheet of Edcon reflected assets of almost R11-billion, this was misleading. Marsden said, for instance, that the right of use to assets, reflected as R4.1-billion, should be ignored. Furthermore, that properties, fixtures, equipment and vehicles would not realise anything close to the R1.1-billion reflected for those assets in the balance sheet. At the end of the day, it appeared that whilst Edcon had liabilities of about R12-billion to R13-billion, the only real asset was the stock in trade supplied by the Concurrent Creditors.

151. At the same meeting, Marsden was asked as to why Pattison had said on 26 March 2020 that Edcon held R3.2-billion in stock whereas when the Business Rescue Practitioners took over, they could only find stock in the amount of R2.4-billion. Marsden was asked about the missing R800-million worth of stock which had disappeared over the period of the lockdown when Edcon was not trading.

152. Disturbingly, Schapiro said that he could not comment in regard to what Pattison had said!

153. Applicants understand that Edcon entered into inter-creditor agreements regarding the inter-company loans that were concluded between K201 and Edgars, being the two companies immediately above Edcon within the Group, of and concerning Edcon. This leads to the conclusion that the non-disclosure agreements on or about 7 December 2018 as alluded to under the rubric "*the business rescue practitioners' historical relationship with all relevant parties*", must have resulted in the subordination of the shareholder's loans to that of the concurrent creditors, in order to ensure that Edcon could continue trading in a solvent manner.

154. If there was no such subordination of the shareholder creditors' loans, Edcon could not have traded lawfully.

155. However, and as aforesaid, the Business Rescue Practitioners have done everything to avoid delivering up these documents which would have demonstrated the inter-company loans and inter-creditor loans within the Edcon Group including the Subordination Agreements.

156. If the agreements concluded between the creditors and the respondents were above board, then there would simply be no objection to delivering them up to the applicants.

157. According to the Business Rescue Practitioners and the Plan, most of the assets of Edcon have been secured to the shareholder creditors. This makes a mockery of the subordination of their loans. It amounts to the shareholder creditors saying that they will only receive payment of their loans after all creditors have been paid whilst at the same time asserting that the assets of Edcon are pledged to them! That is perplexing in the extreme and is a fundamental violation of the whole notion of subordination.

INSTRUMENTS OF SECURITY

158. In the event that the shareholder creditors of Edcon subordinated their loans, the instruments of security that were concluded, affording the secured shareholder creditors preferential claims, would amount to sham transactions which require to be set aside.

159. We say so for the reasons that follow.

160. ***Firstly***, subordinating your loan in order to restore the company to solvency, is in order. However, once you enter into instruments of security over the assets of the company you are seeking to restore to fictional solvency, and register notarial bonds in respect thereof, this makes a mockery and a sham of the act of subordination in the first instance.

161. ***Secondly,*** if the instruments of security were undertaken in terms of the *Act*, there would simply be no reason to refuse to disclose same. As alluded to hereinabove, when these instruments of security arrangements were concluded between the end of 2018 and the middle of 2019, the secured creditors were all bound to secrecy and compelled to sign non-disclosure agreements. This gives rise to feelings of gross discomfort about the legitimacy of these agreements.

162. ***Thirdly***, it is repeated what has hereinbefore been stated, regarding the reason why the instruments of security were so vital to the applicants, in the circumstances such as the present, which resulted in the concurrent creditors, including the applicants, receiving crumbs after the secured creditors' interests had been catered for.

163. ***Fourthly***, it begs the question why the Business Rescue Practitioners refused to be transparent in regard to these instruments of security, in circumstances where the Edcon Group CEO had recorded in various media outlets that after the 2019 Edcon Group restructuring, Edcon was debt free.

164. The secured assets that the secured creditors hold are:-

164.1 property, plant, equipment and vehicles;

164.2 investments in subsidiaries and associated companies;

164.3 trade receivables;

164.4 amounts owed by related parties;

164.5 sundry receivables and prepayments;

164.6 derivative financial instruments; and

164.7 cash and cash equivalents.

165. The applicants maintain their view that the Business Rescue Practitioners have primarily acted in the interests of the secured creditors, a relationship which commenced in December 2018 when they met with them, and the nondisclosure agreements were concluded with them which in all likelihood resulted in the encumbrances and securing of all of Edcon's assets.

166. Effectively, the Business Rescue Practitioners appear to have preferred the secured creditors over the concurrent creditors in the circumstances outlined hereinabove.

167. As recorded hereinabove, de Hutton was the only party who might have had regard to the instruments of security. And she advised that "*there was unlikely to have been any impropriety in the process*" (it is entirely unclear whether the statement was made before or after seeing the instruments of security). What does that even mean? The question is, was there any impropriety or not?

168. The applicants have set out all of their concerns of and concerning the partiality of de Hutton, hereinabove, and most particularly that she was appointed by the Business Rescue Practitioners at a fee and has an ongoing relationship with them, which she would obviously not actively seek to disrupt in any manner or form.

169. 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.

THE HOLLARD TRANSACTION

170. The most valuable asset within the Edcon Group, and more particularly Edcon, was in regard to the joint venture arrangement concluded with The Hollard Insurance Company Limited. The applicants place a value of approximately R9-billion as being Edcon's share in the joint venture ("***the Hollard joint venture***").

171. It is respectfully submitted that this asset is what permitted the Edcon Group to allow Edcon to continue trading.

172. In this regard Edcon conducted a 50-50% split with Hollard in terms of the Hollard joint venture. Hollard brought the product and the compliance, and Edcon supplied the data base. In terms thereof, Edcon sold insurance to the stores' customers.

173. Edcon was generating R700-million a year nett out of this venture.

174. This "*asset*" was taken over by means of an agreement in terms of which the Edcon Group determined that this asset, which was held by Edcon, would be housed in K201, being the holding company for Edgars, with Edgars being the holding company for Edcon. The amount allegedly paid to Edcon for this asset of approximately R9-billion was in the region of approximately R300-million.

175. Considering that the Business Rescue Practitioners will not disclose the relevant financial statements and other documents, applicants allow for the fact that the balance of a fair market price for relocating the Hollard Investment in K201 might have been settled in terms of reducing shareholder creditors loans in Edcon.

176. If that is how the balance of the market price was settled this also would have the effect of violating, fundamentally, the notion of subordination because it effectively allowed the shareholder creditors to remove or withdraw their loan accounts in circumstances that would render same unlawful.

177. The applicants determined the fair value of the Edcon 50% in the Hollard Joint Venture as being in the region of R9-billion utilising the standard price per earnings ratio which is the normal method employed by the Johannesburg Stock Exchange to value a business.

178. Furthermore, and given the fact that there are overlapping directors, and sitting on both boards, they allowed an asset to be sold or otherwise transferred from Edcon to K201, either at a nominal sum alternatively in violation of subordination.

179. I set out hereunder a list of some the directors of K201 (*FA13*) and the list of some of the directors of Edcon as recorded in *FA14* hereto as they were at the material times (the applicants have not cited the two foreign based directors as this will unnecessarily and unduly complicate this application).

180. The directors of Edcon were:-

180.1 Charles Mzwandile Vikisi, ID number 750814 5347 089, company secretary;

180.2 Grant Michael Pattison, ID number 710325 5765 088, director;

180.3 Richard Vaughan, ID number 700429 5198 084, director;

180.4 Abigail Rachel Bisogno, ID number 570915 0154 087, non-executive director;

180.5 Rhidwaan Gasant, ID number 591020 5214 088, non-executive director;

180.6 Daphne Motsepe, ID number 570424 0789 083, non-executive director;

180.7 Mncane Esau Mthunzi, ID number 720316 5933 089, director;

180.8 Nigel Brian Palmer, ID number 309763411, non-executive director;

181. The directors of K201 were:-

181.1 Charles Mzwandile Vikisi, ID number 750814 5347 089, company secretary;

181.2 Mncane Esau Mthunzi, ID number 720316 5933 089, director;

181.3 Grant Michael Pattison, ID number 710325 5765 088, director;

181.4 Abigail Rachel Bisogno, ID number 570915 0154 087, non-executive director;

181.5 Rhidwaan Gasant, ID number 591020 5214 088, non-executive director;

181.6 Daphne Motsepe, ID number 570424 0789 083, non-executive director;

181.7 Take Boas Seruwe, ID number 660307 5930 086, non-executive director.

182. Accordingly, the following directors were directors of both entities ("***the overlapping directors***"):-

182.1 Grant Michael Pattison, ID number 710325 5765 088;

182.2 Charles Mzwandile Vikisi, ID number 750814 5347 089;

182.3 Abigail Rachel Bisogno, ID number 570915 0154 087;

182.4 Rhidwaan Gasant, ID number 591020 5214 088;

182.5 Daphne Motsepe, ID number 570424 0789 083;

182.6 Take Boas Seruwe, ID number 660307 5930 086.

183. In the event of the above Honourable Court granting the applicants leave to institute proceedings, the Business Rescue Practitioners will be obliged to provide the requisite resolution confirming that the necessary solvency and liquidity test required to be carried out in terms of the Act prior to the approval of a transaction of this kind, was carried out. Additionally, Deloitte, *qua*

Edcon's auditors, would likewise have been obliged to assess the validity of the solvency and liquidity test that was required to be carried out by Edcon and the applicants will oblige the Business Rescue Practitioners to make this assessment available to them as well.

184. If this transaction is valid, which the applicants dispute, the Business Rescue Practitioners should have no difficulty or reluctance to make all these documents available.

LEAVE TO SUE IN TERMS OF SECTION 133(1)(B) OF THE ACT

185. Under the Act, the applicants require either the leave of the Business Rescue Practitioners alternatively of this Honourable Court to institute proceedings against Edcon.

186. The received wisdom is that, on a correct interpretation of the Act, the applicants to do have to first seek the consent of the Business Rescue Practitioners for leave to sue before approaching this court for such consent.

187. The applicants have come to this court to seek such leave because they have no confidence that the second and third respondents will grant them the leave to do so.

188. The applicants are required to make out a *prima facie* case in their application to this court to seek such leave.

189. It is for that reason that the applicants have set out above the detail which they have.

190. The purpose of that detail is not to found any substantive relief in this application.

191. It is simply to establish a *prima facie* case.

192. This court has to make no finding in regard to what is then set out herein other than whether it establishes a *prima facie* case.

193. The action proceedings in contemplation have been necessitated by the abject failure of the second and third respondents to make information and documents available to the applicants.

194. In this application, in order to demonstrate a *prima facie* case, the applicants have alluded to relief which they will seek which and which will affect Edcon.

195. More particularly, applicants are intent on having the instruments of security, entered into by Edcon with its shareholder creditors and which instruments of security make a mockery of the subordination of the loans advanced to Edcon by the shareholder creditors, set aside as being invalid.

196. They are also intent on setting aside the transaction whereby the approximately R9-billion investment in the Hollard Joint Venture, which several years ago sat in Edcon, was moved to a company above Edcon within the Edcon Group for a nominal sum relative to the value of that investment or interest alternatively unlawfully permitted the shareholder creditors to withdraw a substantial portion of their loans to Edcon.

197. The applicants are also determined to have the Business Rescue Practitioners account for stock of approximately R800-million which the Business Rescue Practitioners say they cannot explain.

198. It is respectfully evident that the aforegoing relief impacts Edcon directly because it is a party to those transactions and therefore the leave of this court has to be obtained in order to institute those proceedings.

199. The applicants have elected to go by way of action proceedings for substantive relief because it is plain that there are going to be disputes of fact which can only be resolved through *viva voce* evidence in due course.

Furthermore, it is evident that discovery will be required for a proper adjudication of the matter.

200. However, applicants take this Honourable court into their confidence by mentioning that they intend pursuing additional relief in the action proceedings for which they do not need leave of this Honourable Court as that additional relief is not, *inter alia*, sought as against Edcon.

201. Applicants understand that all that is required of them in this application is to establish a *prima facie* case. To put it in language that the court is more accustomed to, applicants are required to set out a triable issue and they respectfully submit that they have done so. It is a low threshold that the applicants are required to meet.

202. In addition, applicants also allude to the fact that this leave is sought, *inter alia*, in order to deal with the manner in which the proceeds of the Business Rescue Proceedings are to be allocated and apportioned to the different categories of creditors of Edcon.

203. To put it differently, it is respectfully submitted that the need for the leave of the court to institute proceedings is really intended to safeguard, amongst other things, parties suing for debts whilst the rescue proceedings are being dealt with because this will disrupt the Business Rescue Proceedings

fundamentally. In addition, it is to avoid disgruntled parties from seeking to challenge the orderly dealings that are part and parcel of Business Rescue.

204. As indicated earlier, the applicants are not seeking to set aside the Business Rescue Plan which Plan has, in any event, been largely implemented.

205. They are also not seeking to pursue a claim in the ordinary sense of obtaining judgment against the company but rather the proceedings, as referred to in this application, are designed in challenging the manner in which monies are to be apportioned and allocated to the different categories of creditors.

206. Applicants submit that any refusal by this Honourable Court to grant to them the leave as sought will amount to a fundamental violation of their constitutional right to approach a court of competent jurisdiction in regard to the dispute that they allege they have.

207. For all the reasons aforesaid, applicants would ask that they be given the necessary leave.

JOINDER OF CREDITORS

208. Quite evidently, the relief which the applicants have described as part of the action proceedings in contemplation will also have a direct impact upon all the creditors of Edcon.

209. It is accordingly only correct that the creditors be joined to the action proceedings.

210. To applicants' understanding, there are in excess of three thousand creditors of Edcon. Given that number it is a logistical impossibility for each creditor to be cited individually. A requirement that this be done would render nugatory the constitutional right to approach the court on the dispute at hand.

211. To cater for this, our courts have permitted the citation of that number of persons in a form of a grouping.

212. It is for this reason that the applicants seek relief whereby they be permitted to join and cite the creditors of Edcon as "*the Creditors of Edcon in Business Rescue*".

213. It is submitted that this is the only reasonable and practical expedient in all the circumstances and that this relief also be granted to the applicants.

SERVICE ON THE CREDITORS OF EDCON

214. In similar vein, there is an impossible logistical challenge if the applicants were obliged to serve on every creditor of Edcon. This is simply not practicable.

215. In order to address this challenge, our courts have countenanced substituted service.

216. This is what the applicants also seek in the present application.

217. Under the provisions of Section 145(1)(a) of the Act, read together with the regulations thereto, the Business Rescue Practitioners are required to give notice to all affected parties (which includes creditors) of any legal proceeding brought against the company in Business Rescue.

218. In order to discharge their obligations in the present matter, the second and third respondents have a database of all affected persons and, to the applicants' understanding, the second and third respondents have the electronic mail contact details for each such person. If they did not then they would not be able to comply with the Act. In any event, the applicants receive regular monthly reports and the like from the second and third respondents.

219. Here again, the only practical expedient for serving on the creditors of Edcon in Business Rescue is by the applicants asking this court to allow that service via the second and third respondents and through an order directing them to do so and to file an affidavit with this court in confirmation of the fact that they have done so.

220. The applicants understand that the cost of doing so is absolutely nominal in that all that it will require is a scanning of the action proceedings and the dispatching of same by the depressing of a single key on a keyboard.

221. That notwithstanding, it is only fair and just that even if the cost is nominal, the applicants be directed to pay those costs to the second and third respondents.

222. Alternatively thereto, the applicants have provided for relief whereby the court declares that the notice which the second and third respondents will, in any event, be required to send out to all affected persons, be considered to be substantial compliance with the requirement to serve and that such notice be regarded as being sufficient.

223. As to which expedient to adopt, the applicants are in the hands of this Honourable Court.

CONFIRMATORY AND SUPPORTING AFFIDAVITS

224. Confirmatory and supporting affidavits of second to tenth applicants will be filed together with my affidavit.

COSTS

225. The applicants are content that there be no cost order for this application.

226. However, if any one or more of the three respondents cited in this application elects to oppose it then the applicants will ask for costs against such respondent or respondents with such costs to include those consequent upon the employment of two counsel.

CONCLUSION

227. In all the circumstances it is respectfully submitted that a proper case has been made out for the relief sought.

WHEREFORE the applicants pray for an order in terms of the notice of motion to which this affidavit is attached.

DEPONENT

The deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn to before me at DURBAN on this the 12 day of **AUGUST 2021**, the regulations contained in the Government Gazette Notice No R1258 of 21 July 1972, as amended, and Government Gazette Notice No R1648 of 19 August 1977, as amended, having been complied with.

COMMISSIONER OF OATHS

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CONVEYANCER & NOTARY PUBLIC
COMMISSIONER OF OATHS