

**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA**

Case No: 19064/21

In the matter between:

**KINGSGATE CLOTHING (PTY) LIMITED** First Applicant  
**t/a MAJESTIC CLOTHING MANUFACTURERS,  
PRINCETON SCHOOLWEAR MANUFACTURERS  
AND STAR CLOTHING MANUFACTURERS**

**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) LIMITED** Ninth Applicant

**SUNNINGDALE TRADING (PTY) LIMITED** Tenth Applicant

and

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

**PIERS MARSDEN** Second Respondent  
(Joint business rescue practitioner)

**LANCE SCHAPIRO** Third Respondent  
(Joint business rescue practitioner)

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**FILING NOTICE**

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**SIRS**

**KINDLY TAKE NOTICE THAT** the Applicants file evenly herewith their Replying Affidavit.

Dated at DURBAN on this the 1<sup>st</sup> day of October 2021.



**PATHER & PATHER**  
ATTORNEYS

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**TO : THE REGISTRAR OF THE ABOVE HONOURABLE COURT  
PRETORIA**

**AND TO : ENS AFRICA INCORPORATED**  
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*Service per email as agreed*

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**GLOBAL SOURCE (PTY) LTD** Ninth Applicant

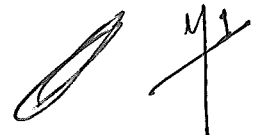
**SUNNINGDALE TRADING (PTY) LTD** Tenth Applicant

and

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

**PIERS MARSDEN** Second Respondent  
(Joint business rescue practitioner)

**LANCE SCHAPIRO** Third Respondent  
(Joint business rescue practitioner)



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**APPLICANTS' REPLYING AFFIDAVIT**

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I, the undersigned,

**YUSUF AHMED SADEK VAHED**

do hereby make oath and say:

**INTRODUCTION**

1. I deposed to the founding affidavit in this application on behalf of all the applicants.
2. The applicants have read and had regard to the answering affidavit and wish to respond thereto as hereinafter set out.
3. This being a replying affidavit, the applicants do not wish to burden this court any more than it already is with paper such that I confirm that I depose to this affidavit for, on behalf of, with the authority, mandate and support of all the applicants, without filing affidavits from the other applicants. In the extremely unlikely event of the Business Rescue Practitioners making an issue of this, the applicants



respectfully reserve their rights to deliver confirmatory and supporting affidavits from the other applicants in due course.

4. The facts deposed to herein fall within my personal knowledge and are true and correct.
5. Where I make submissions, I rely on advice duly received.

**APPROACH ADOPTED IN THIS REPLY**

6. I will only deal with the answering affidavit to the extent strictly necessary. All averments, assertions, allegations and contentions in the answering affidavit which are not specifically canvassed herein must be deemed to be disputed or denied.
7. Rather than deal *seriatim* with the answering affidavit, I find it more convenient to reply to the principal issues raised by the Business Rescue Practitioners.

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## PRELIMINARY OBSERVATIONS

8. Regrettably the answering affidavit is full of invective, is emotive and highly repetitive. I would go so far as to say its tenor is one bordering on hysteria and comes across as the Business Rescue Practitioners doth protest too much.
9. It is devoid of substance and has been drafted simply to create atmosphere.
10. Most notably, it is replete with bald allegations which are unsupported by any factual evidence. It is trite that applications contain both pleadings as well as evidence. Furthermore, that bald allegations do not amount to evidence.
11. Where the Business Rescue Practitioners make submissions, these are not based on any cognisable principles of law.

## THE TEST IN LAW IN AN APPLICATION FOR LEAVE TO SUE UNDER SECTION 133(1) OF THE ACT

12. It has been held that:-
  - 12.1 An applicant under Section 133(1) of the Act is only required to make out a *prima facie* case.



- 12.2 In motion proceedings this is determined on a consideration of the founding affidavit without regard to any evidence in answer.
- 12.3 It is sufficient if it is shown that the averments made, if unchallenged, establish a cause of action or demonstrate the existence of a triable issue.
- 12.4 The fact that averments made are contradicted or the probabilities are against the version advanced, would not disentitle an applicant to relief.
- 12.5 It is inappropriate for an applicant, at this stage, without the procedural advantages of a trial, including proper discovery, to show that he will necessarily succeed in the proposed action.
- 12.6 It is undesirable that the court be required, at this stage, to evaluate the inherent probabilities as they emerge from the conflicting affidavits of the parties.
- 12.7 The court should consider what effect the grant or refusal of leave would have on the applicants' rights as opposed to other affected persons.

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- 12.8 Also, the impact that the proposed legal proceedings would have on the wellbeing of the company and its ability to regain its financial health.
- 12.9 Further, whether the grant of leave would be inimical to the object and purpose of Business Rescue Proceedings.
- 12.10 It is not only in exceptional circumstances that leave is granted.

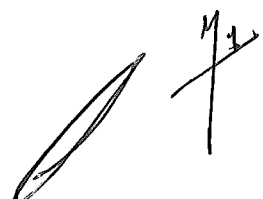
**PRINCIPAL ISSUES RAISED IN ANSWER**

Assertion by the Business Rescue Practitioners that notice of this application must be given to all affected parties

13. The Business Rescue Practitioners make a cryptic and glib assertion that besides notice of any summons following from leave granted by the court, all affected persons should be given notice of this application.
14. Insofar as the contemplated summons is concerned, there is no question simply of notice, but the affected persons will have to be joined.

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15. It has never hitherto been suggested by our courts that notice of an application for leave has to be given to all affected persons. There are many judgments dealing with leave under Section 133(1) of the Act and in none of those has it ever been (even) hinted at that notice must be given to affected persons.
16. It is trite that seeking leave is a procedural step which precedes any proceedings. Much like a party seeking leave from the court to sue by way of edictal citation. There is no requirement in edictal citation for notice to be given to the respondent.
17. If Business Rescue Practitioners' assertion is taken to its logical conclusion, before any suit the respondent or defendant will have to be given notice that the applicant or plaintiff intends to sue, and the views of the respondent or defendant will then have to be considered before a court gives leave to the applicant or plaintiff to sue! That would lead to an absolutely chaotic and overburdened court system. That is overburdened more that it is right now. It will add an entirely new layer that the courts are ill-equipped to deal with. In any event, this is not the correct position in law when leave to sue is sought.
18. This explains why it has been held that regard should be had to the founding affidavit only. There is accordingly no substance in the assertion of the Business Rescue Practitioners in this regard.

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Applicants' Urgent Application on 22 June 2020

19. The relevance of the undue reference to applicants' urgent application is difficult to understand other than it being introduced for purposes of atmosphere.
  
20. The position was simply that:-
  - 20.1 Applicants were dissatisfied with the information and documents made available to them by the Business Rescue Practitioners.
  
  - 20.2 They wanted the meeting scheduled to adopt the Plan to be postponed and for them to be furnished with information.
  
  - 20.3 As the record will show, the court had sympathy for the position of the applicants but simply felt unpersuaded on the grounds of urgency.
  
  - 20.4 It is for this reason that although the court struck the matter from the roll for want of urgency, the court declined to make any cost order which is quite unusual when a matter is struck from the roll for want of urgency.

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- 20.5 The court did indicate that the applicants should attend the meeting and if they were dissatisfied, they could always come back to court seeking relief.
- 20.6 Once the court declined to postpone the meeting, it really rendered the urgent application academic.
- 20.7 The leave which the applicants had sought to approach the court again with the papers supplemented to the extent necessary, was premised on the court granting the postponement of the meeting scheduled for that day and directing the Business Rescue Practitioners to make information and documents available to the applicants.
- 20.8 It is not understood what the Business Rescue Practitioners are contending when they say that the applicants did not pursue that application further. Pursue it to what end? Had they sought to pursue that application on the grounds of information only, the Business Rescue Practitioners would no doubt have responded by saying that the purpose for the information was so that the applicants could arrive an informed view as to the suitability of the Plan being proposed, the Plan had, however, been adopted thus rendering the information and documents sought by the applicants academic.


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20.9 In the circumstances, their present stance is opportunistic, self-serving and disingenuous.

20.10 It should be plain from this application that the applicants are no longer interested in information for purposes of considering the Plan. Instead, they want leave to institute proceedings for the relief referred to in the founding affidavit.

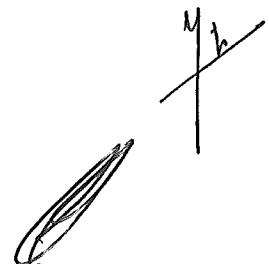
21. The Business Rescue Practitioners assert that the applicants constitute no more than R109-million of the unpaid creditors.

22. What the Business Rescue Practitioners omit to tell the court is that they raised the same argument before the urgent court and this was given short shrift by the court which made it abundantly clear to the Business Rescue Practitioners that that submission made no impression on the court whatsoever and that even if a single creditor, of whatever size, had a legitimate complaint he, she or it was perfectly entitled to come to court to assert that right. It is to be regretted that despite the court's admonishment on the day in question, the Business Rescue Practitioners repeat that assertion herein in total disregard of the court's admonishment and guidance to the Business Rescue Practitioners in this regard.

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Assertion that Applicants have no support

23. The Business Rescue Practitioners assert that the applicants have no support in this matter.
24. This assertion demonstrates that the Business Rescue Practitioners are clutching at straws.
25. Surely if the dividend improves for the applicants as concurrent creditors, it will have the same impact on all the other concurrent creditors.
26. Are the Business Rescue Practitioners seriously suggesting that the other concurrent creditors are indifferent to the notion of an improved dividend? The impact of the Business Rescue coupled with the non-payment to the concurrent creditors has been disastrous on suppliers to Edcon. It stands to reason that the vast majority of such concurrent creditors are unlikely to invest further monies in litigation against Edcon. That is assuming that they even have such monies after the Edcon debacle.

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Continuing Failure by Business Rescue Practitioners to Explain How Many Concurrent Creditors Voted in Favour of the Plan

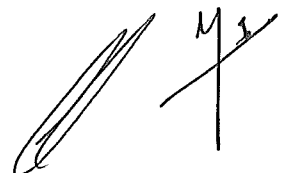
27. The Business Rescue Practitioners assert that creditors to the value of R6-billion voted in favour of the Plan.
28. However, they have never disclosed what value of concurrent creditors constitute part of that R6-billion and fail to do so even in these papers as well.
29. Why this omission?
30. If the secured creditors are going to receive a very substantial dividend from the Edcon Group, why would they not vote in favour of the Plan?
31. The critical question is as to what value of concurrent creditors, who are to receive not more than four to six cents in the Rand, voted in favour of the Plan?

Failure by the Business Rescue Practitioners to Disclose what Dividend the Secured Creditors Expect to Receive

32. The answering affidavit is more noteworthy by what it does not say rather than by what it does.

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33. The Business Rescue Practitioners assert, several times, that the secured creditors are not going to receive all their monies back.
34. But the Business Rescue Practitioners do not say how much the secured creditors will receive.
35. Why this glaring omission?
36. The Business Rescue Practitioners assert that the concurrent creditors are not the only affected parties.
37. That may well be true but why is it acceptable that the dividend to be received by the concurrent creditors of four to six cents in the Rand is public knowledge and available to all and sundry while all we know about the secured creditors is that they will receive nineteen cents in the Rand from Edcon and a vast improvement on that from the Group without being told what that improvement amounts to.
38. Why the failure to disclose what overall dividend the secured creditors will receive?
39. It is not as if the companies in the Group are not incestuously connected.

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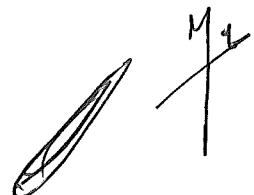
40. Even by their own convoluted explanation, the Business Rescue Practitioners make it plain that there was a close interconnection between the other companies and Edcon. Surely, in those circumstances, the applicants are entitled to know what that overall dividend to the secured creditors will be?

Applicants' Proceedings Premised on Reservation of Ownership

41. The Business Rescue Practitioners make liberal and gratuitous reference to the proceedings premised on reservation of ownership.
42. They assert that in pursuing a claim based on such reservation of ownership, the applicants are somehow abusing court process.
43. The Business Rescue Practitioners adopt the view that there is something irregular and perverse about creditors seeking to recover monies that are due, owing and payable to them.
44. At the heart of any system based on the rule of law, it is a fundamental right of a creditor to pursue a debtor under any circumstances permitted in law.

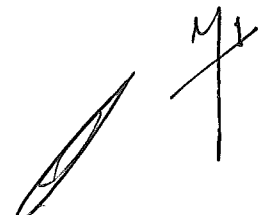
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45. How the Business Rescue Practitioners can consider that to be perverse is startling to say the least.
46. So too is the assertion that because the applicants have proceedings based on reservation of ownership, it is somehow impermissible for them to seek relief on alternative bases if such bases are available to the applicants. This is all that the applicants are seeking to do.
47. It was easier for the applicants to institute their claim based on reservation of ownership because the law is well settled that a vindicatory claim does not fall under the purview of what is contemplated in Section 133(1) of the Act in having to obtain leave to sue.
48. The Business Rescue Practitioners devote an inordinate portion of their answering affidavit to the assertion that whilst the applicants had originally intended to ask that the ownership proceedings (after a referral to trial), be heard together with the action proceedings contemplated in this application, they changed stance and have now resolved to have that application determined separately.
49. This is indeed what the applicants had originally contemplated doing and for the reasons set out in the founding affidavit relating to the fact that the Business Rescue Practitioners had done nothing for over a year to settle the question of

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quantum with the applicants. It is clear from the founding affidavit that the Business Rescue Practitioners failed to revert to the applicants with regard to their position with respect to quantum despite undertaking to do so at the time of arbitration of the ownership claim.

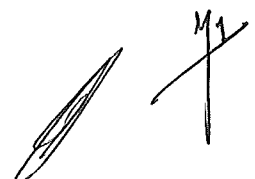
50. It must be appreciated that the applicants have lost an enormous amount of money albeit that the Business Rescue Practitioners seek to dismiss the applicants' quantum as being nothing more than a minor or trifling irritation for the Business Rescue Practitioners in the greater scheme of things. It might well be that given the size of businesses with regard to which the Business Rescue Practitioners are involved as Business Rescue Practitioners, the applicants' unpaid debt might pale into insignificance. Maybe even in comparison to the kind of fees that the Business Rescue Practitioners generate from acting as Business Rescue Practitioners. But for the applicants, their unpaid debt is a fortune.
51. When it became evident to the applicants that the action proceeding contemplated in this application was going to take time before it could be instituted, the applicants resolved, for better or for worse, to uncouple the ownership proceeding from the summons contemplated in this application.
52. There is nothing untoward or unduly complicated regarding why applicants altered their approach.

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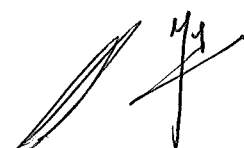
53. If this was so offensive to the Business Rescue Practitioners, the question arises as to why they agreed to the applicants withdrawing their counterapplication for a consolidated hearing with each side to pay its own costs?

Failure by the Business Rescue Practitioners to put up Relevant Documents

54. The Business Rescue Practitioners' conduct is characterised, in this application, by a continuing failure to take anyone into their confidence, be it this court or the applicants, as to what is contained in the documents that they refuse to disclose.
55. If the documents are as innocuous as the Business Rescue Practitioners allege, then why do they not simply put up those documents as annexures to their answering affidavit? Surely, that would have been the simplest thing to do?
56. Why this continuing subterfuge?
57. It is blatantly untrue that the Business Rescue Practitioners made available the financial statements for Edcon for the period 2016 to 2020.
58. All that the Business Rescue Practitioners made available is a document, a copy of which is annexed hereto marked "RA1". This is simply inadequate regard being had to what is said in paragraph 109 of the founding affidavit.


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59. Based on the analysis provided by the Business Rescue Practitioners, Edcon, which was put into business rescue, had assets of R3- to R4-billion with liabilities of about R12-billion, leaving a deficit of about R8-billion.
60. Edcon could only have continued trading as a going concern, under the Companies Act, if it were relying upon a consolidation of the financial position of the Edcon Group.
61. The effect of what was done was that one entity, the operating company, Edcon, was saddled with all the debt, whilst the assets were retained in other companies within the Group. Then Edcon in isolation was placed into business rescue. It is essential that the applicants have sight of the Group financials. The same Group that was restructured in 2019. Why will the Business Rescue Practitioners not make the Group financials available to the applicants?
62. Why will they not put up the security instruments? Why must the applicants accept the say so of the Business Rescue Practitioners with regard to the effect of those security instruments? Surely, the applicants are entitled to consider those instruments themselves?
63. It is arrant nonsense for the Business Rescue Practitioners to say that they furnished to the applicants all information reasonably required by them.

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The Missing R800-Million of Stock

64. The statement in regard to the value of stock on hand at the relevant time was a statement made by none other than the Chief Executive Officer of the Edcon Group. If one cannot rely on what the Chief Executive Officer says, then who does one rely upon?
65. What is the retort of the Business Rescue Practitioners to this?
66. They say that they cannot comment on a statement made by the Chief Executive Officer. All that they can do is to work with what they have factually in front of them. It is quite plain that the Business Rescue Practitioners either do not understand their responsibilities as Business Rescue Practitioners or pretend that they do not understand.
67. How preposterous for the Business Rescue Practitioners to say that that is the extent of their responsibilities.
68. Surely the least they could have done was to say that they would enquire from the Chief Executive Officer as to where he derived his stock figure from and would revert to the applicants? Why did they not do so? Are they suggesting that they had no contact with the Chief Executive Officer throughout the business rescue process? In circumstances where the law requires them to work with that

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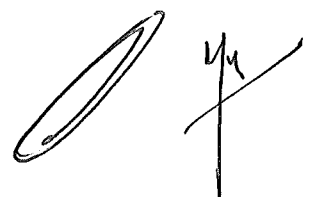
person during the process. At the rate of four cents in the Rand against R2.3-billion of concurrent creditors, no more than about R100-million is being allocated for concurrent creditors.

As against that, missing stock of R800-million is exponentially higher. What steps have the Business Rescue Practitioners taken to establish the veracity of the assertion made by the Chief Executive Officer? It is to be noted that they do not deny or dispute what was said by the Chief Executive Officer nor do they suggest that his statement was wrong. Clearly, they have not even bothered to raise the matter with him. Alternatively, they have but the answer was not palatable enough to be disclosed. A classic example of smoke and mirrors.

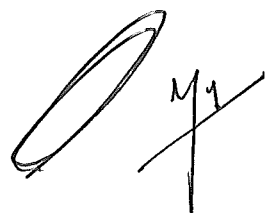
69. This, without more, conclusively demonstrates why it is imperative that the applicants be given leave to institute proceedings.

#### The Hollard Investment

70. With regard to the Hollard investment, the first issue is that it is notable that the Business Rescue Practitioners limit themselves to a bald denial of the Edcon Group's valuation of that investment as amounting to R9-billion.

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71. In the circumstances of the present application, it is simply not good enough for the Business Rescue Practitioners to fail to tell the court and the applicants what the value of that investment is if it is not R9-billion.
72. In addition, what this denial, coupled with the related averments thereto, demonstrates is that the Business Rescue Practitioners are au fait not only with the company Edcon in Business Rescue but indeed with the entire Edcon Group.
73. Secondly, what they conveniently omit to disclose to the court is that as at 2013, both Edcon Limited (the company now in Business Rescue) as well as Edcon Acquisition (Proprietary) Limited, were subsidiaries of Edcon Holdings Limited. This is plain from a page of the annual financial statements of Edcon Holdings Limited as at March 2013, a copy of which is annexed hereto marked "RA2". It will be recalled that the financial statements of Edcon and the Edcon Group were freely available on the Edcon Group website until about 2017.
74. What "RA2" also reflects is that on 2 January 2013, Edcon Limited (the company now in Business Rescue) sold the Hollard Investment shares to Edcon Holdings Limited for only R367-million. It also reflects that Edcon Holdings Ltd did not pay any monies for those shares but simply created a loan account in favour of Edcon Limited to the same value of R367-million.

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75. It would appear that Edcon Holdings Limited then “transferred” the Hollard Investment Shares to its other subsidiary being Edcon Acquisition (Pty) Ltd for only R245-million. This occurred on 31 January 2017. According to the relevant 2017 financial statements, the consideration for “transferring” this investment to Edcon Acquisition (Pty) Ltd was that Edcon Acquisition (Pty) Ltd issued and allotted shares in itself to Edcon Holdings Ltd, resulting in an asset for shares transaction.
76. The Hollard Investment Shares then found their way into K201.
77. In any event, the relevant Edcon financial statements reveal that the Hollard investment after tax profits for the Edcon Group in 2013 was R666-million, that for 2014 it was R739-million, for 2015 it was R747-million, for 2016 it was R725-million and for 2017 it was R784-million.
78. For the five years aforesaid, the after-tax profit for the Edcon Group was R3,661-billion.
79. The Business Rescue Practitioners have refused to disclose the annual financial statements for the Edcon Group for 2018, 2019 and 2020. Multiplying the R784-million profit for 2017 by three, to cater for those years, will yield a further profit of R2,352-billion.

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80. For the period 2013 to 2020 (with 2018 to 2020 being estimated), this will give a total share of after-tax profits for the Edcon Group of R6,013-billion.
81. This from an investment which Edcon Holdings Ltd acquired from Edcon Limited (the company in Business Rescue) for R367-million in 2013!
82. That investment now sits in K201, as aforesaid, being the holding company of Edgars Consolidated which is the holding company of Edcon Limited (the company in Business Rescue) ostensibly out of reach of the concurrent creditors of Edcon in Business Rescue.

Assertion by the Business Rescue Practitioners that if transactions are challenged by the Applicants the overall Position will not Improve but will become possibly worse

83. The Business Rescue Practitioners assert that if certain transactions are challenged by the applicants, the overall position will not improve but will become worse.
84. They make a series of bald allegations in this regard.

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85. But what is more perplexing about this is that they assert that they had a very limited role in 2019. If that were so, then how are they in a position to know what the state of play would have been if the restructuring had not taken place in 2019? Or that the effect of a successful challenge by the applicants will result in a situation akin to what Edcon found itself confronted with in 2019?
86. That aside, quite apart from not sharing information and documents but really relying on bald allegations, the Business Rescue Practitioners have not even made the effort of putting up, for the benefit of this court and the applicants, the two scenarios of before and after the 2019 restructuring. On what conceivable basis must the applicants, in law, be required to accept the simple say so of the Business Rescue Practitioners? Particularly of Business Rescue Practitioners who plead very limited involvement at the time in question?
87. Why are the applicants not entitled to consider this issue for themselves?
88. It is not a question, in any event, of whether the situation would have been any different.
89. As set out in detail in the founding affidavit, the applicants were assured by the Chief Executive Officer of the Edcon Group that Edcon, in early 2020, was trading better than the year before. Furthermore, that Edcon was debt free when

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that was not true. Were it not for that, the applicants would not have supplied further goods to Edcon and these proceedings would not be necessary.

90. Much rather than, that Edcon had closed its doors in 2019 after fair warning to all its suppliers such as the applicants that it was in financial distress rather than continuing on its course only to prejudice concurrent creditors to the value of billions of Rand.

91. In addition, what the Business Rescue Practitioners appear to be saying, if applicants understand the answering affidavit, is that the instruments in question by which security was provided to the shareholder creditors did not violate the subordination of the loans of the shareholder creditors in Edcon because the security was contingent upon the happening of some event, the event being business rescue, at which point the security came into effect. If that is indeed so, then that must be unlawful because, at that point, it has the effect of violating the subordination and rendering it nugatory.

With the limited snippets of information at their disposal, it appears to the applicants that the overall position developed as follows:-

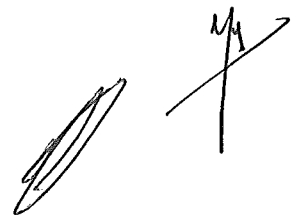
91.1 Edcon found itself in financial distress around 2018/2019.

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- 91.2 It engaged with a host of consultants, including the Business Rescue Practitioners in this matter.
- 91.3 The lenders of money to the Edcon Group were persuaded to continue their association with the Group by those lenders becoming shareholders to some extent and against the provision to them of security in respect of the balance of their lending in regard to which they remained creditors.
- 91.4 The restructuring was arranged on the basis that if Edcon met certain revenue and profit targets, those shareholder lenders would convert some or all of their lending into equity. On the other hand, if those targets were not met, the contingent security that they had been provided with would ripen into unconditional security.
- 91.5 This is what led the Chief Executive Officer of the Edcon Group to announce to the public that Edcon was debt free. This was not true because it all depended upon the performance of Edcon.
- 91.6 Rather than achieve the targets, Edcon, for whatever reason or reasons, failed to do so.

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- 91.7 As a result, Edcon went into Business Rescue and that was one of the events that would bring about the coming into force of the security.
- 91.8 In order to meet statutory and accounting requirements, the shareholder lenders did subordinate their loans during the time when the performance of Edcon was being monitored to see whether it achieved the required targets or not.
- 91.9 The targets were not achieved and the security instruments came into force.
- 91.10 This is the applicants' surmise with the drips of information at their disposal.
- 91.11 If this is indeed what transpired, then applicants will assert that this entire structure and arrangement was unlawful because it contemplated rendering nugatory the subordination of the shareholder lender loans.

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Purchases by Edcon from the Applicants both before and after Business Rescue

92. The relationship between suppliers, like the applicants, and parties such as Edcon, is symbiotic.
93. Chain stores cannot function without suppliers.
94. Suppliers need customers like Edcon.
95. Neither party is doing the other any favours.
96. Despite that, the Business Rescue Practitioners, at a level of haughtiness which borders on the arrogant, set out what Edcon purchased from the suppliers for a period before business rescue and then during business rescue.
97. What is the relevance of that to this application?
98. That information is provided in a tenor that suggests that the applicants should be ever so grateful that they received this business from Edcon!
99. Without those purchases Edcon could not have traded. Edcon was doing no favour to the applicants.

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100. The Business Rescue Practitioners appear to suggest that the applicants must take their losses on the chin considering the amount of business that they have done over the years with Edcon. A most extraordinary business proposition!
101. Insofar as the trading with Edcon during business rescue is concerned, this was against a guarantee of payment by the Business Rescue Practitioners.
102. It was plain to all and sundry that unless the Business Rescue Practitioners purchased stock from suppliers such as the applicants and unless the Business Rescue Practitioners were able to trade whilst they attempted to dispose of the two chains of retail stores, Edcon would have collapsed into insolvency.
103. The upshot is that the Business Rescue Practitioners did the applicants no favours in trading with them on guarantee during the period of the business rescue.
104. At the same time, as offended and as prejudiced as the applicants were by their unpaid debt, they had no option but to trade with the Business Rescue Practitioners in order to mitigate their severe losses.

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Complaint about Possible Delays

105. The Business Rescue Practitioners complain about possible delays.
106. Even in regard to the ownership claim, the applicants proposed to the Business Rescue Practitioners that the review could be referred to private arbitration, but the Business Rescue Practitioners declined to agree to that. Annexed hereto marked "RA3" and "RA4" are copies of the relevant correspondence in this regard.
107. In the circumstances, it does not lie in the mouth of the Business Rescue Practitioners to complain about possible delays.
108. The Business Rescue Practitioners assert that if the applicants were to be granted leave, it would delay the finalisation of the business rescue.
109. Here again, it is open to the Business Rescue Practitioners to agree to refer applicants' claims to private arbitration. They cannot have it both ways. That is refusing to go to private arbitration whilst at the same time seeking to deny to the applicants their rights under Section 34 of the Constitution. If they are insistent that the matter must remain at court, then they must live with any consequent delays attendant thereon.

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110. In any event, it is not clear what delays are being referred to.
111. The substance of the Plan has been implemented.
112. The contemplated suit is only in respect of the allocation of monies for the payment of dividends.
113. But even that should pose no challenge to the Business Rescue Practitioners whatsoever.
114. If regard is had to the answering papers, it is plain that the Business Rescue Practitioners are contemptuous of applicants' complaints asserting that those complaints are entirely without substance.
115. If that is their *bona fide* view, they should have no reservation whatsoever in making payment in accordance with the Plan. (The applicants seek no interdict against the Business Rescue Practitioners in this regard). If they hesitate to do so, that must then clearly convey that they are not as confident of their position as they would like the court to believe.
116. If they pay in accordance with the Plan, the result will be that, for all practical intents and purposes, the business rescue process will come to an end. As a matter of law they will not be able to bring it to a formal end until such time as

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the contemplated litigation has been completed. But that should not affect them or the business rescue because they will have carried out their mandate in accordance with the Plan and in the firm belief that the applicants will fail in their suit against Edcon in Business Rescue and following on that failure they will then formally bring the process to an end.

117. In the event of the applicants succeeding in their suit, then surely the Business Rescue Practitioners have the necessary resources to satisfy applicants' claim for the unpaid debt. After all, from their own papers the Business Rescue Practitioners consider the amount in question to be a trifling nuisance.

118. There is clearly no merit whatsoever in the hysterical assertion of the Business Rescue Practitioners that there is some prejudice that will be occasioned as a result of a suit at the instance of the applicants.

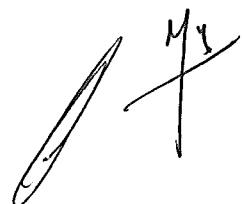
Assertion that applicants should have interdicted implementation of the Plan

119. The Business Rescue Practitioners assert that the applicants are actuated by an intention of challenging the Plan. Further that they should have sought to interdict its implementation.

120. It is apparent that the Business Rescue Practitioners are all at sea in this regard.

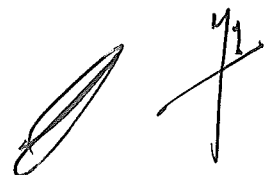
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121. The applicants were unhappy regarding the Plan and continue to believe that the concurrent creditors were made the sacrificial lambs as detailed in the founding affidavit.
122. However, the applicants do not operate on the principle that it is only their interests that count despite assertions to the contrary by the Business Rescue Practitioners.
123. As unhappy as the applicants were, they resolved to permit the Plan to be implemented so that if the stores trading as Edgars and if the stores trading as Jet could be sold and jobs saved, that would be a good thing.
124. Their primary concern, from the outset, has been the shocking dividend of four to six cents to the Rand that they have been advised they will receive.
125. They have only been actuated by a concern that the dividend paid to them should be improved.
126. The lack of information and of transparency caused them to believe, as they continue to do, that all was not well in the State of Denmark. Furthermore, that the entire structure was so designed, impermissibly, to serve the interests of the secured creditors. This is what they seek to challenge. They seek to challenge

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the value of dividends to be paid to the secured creditors on the one hand and to the unsecured on the other.

127. Whilst it is legitimate to have regard to the finalisation of a business rescue, at the level of pure logic this relates to either saving the business or improving the dividend for the creditors. The law permits such saving of the business to include its disposal. No difficulty with that. Once that has been accomplished, as is the case in the present matter, the urgency is no longer there. What the Business Rescue Practitioners assert is finalisation for the sake of finalisation. What is the urgency other than to seek closure such that any irregularity is not exposed?
128. The Business Rescue Practitioners could have assuaged all the applicants' concerns had they provided the requested information and documents. They have failed to do so and continue in the same vein. This only serves to strengthen the applicants' concerns that there is indeed something that the Business Rescue Practitioners are withholding.
129. Let us assume that all is not well with the transactions in question. Let us assume that a fraud might have been perpetrated on the concurrent creditors. The court knows only too well that fraud unravels all in our law. Surely in weighing up the rights under Section 34 of the Constitution with the need for finality, the court has to bear in mind:-

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129.1 That if there is fraud it unravels all.

129.2 Any and all urgency has now disappeared and it is only a question of the allocation or distribution of dividends that is at issue.

130. The foregoing also disposes entirely of the assertion made by the Business Rescue Practitioners in regard to applicants' locus with respect to challenging the transactions in question. It has long been established that the *Actio Pauliana* is available to creditors before sequestration. This on the basis that the insolvency machinery in law is at the disposal of a liquidator on the winding up of a company and it is expected of a liquidator to utilise that machinery to set aside transactions that are, *inter alia*, *contra bonos mores*. It is furthermore evident that where a Trustee (liquidator) declines to do that which he is expected to do, a creditor must be suited to a direct claim under the *Actio Pauliana*.

#### CONCLUSION

131. It is respectfully plain that the requirements in sub-paragraphs 12.1, 12.2, 12.3, 12.4, 12.5, 12.6 and 12.10, are satisfied by the applicants alternatively are in the applicants' favour in the present matter.

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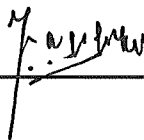
132. As to sub-paragraph 12.7, should this court not grant to the applicants leave it would be denying the applicants their rights under Section 34 of the Constitution and would be limiting their rights of recourse for appropriate relief in this matter. As opposed to that, the only effect on the other creditors will be a possible delay (that is if the Business Rescue Practitioners elect to delay payment) in their receipt of dividends. Such delay can hardly justify denying to applicants their right to pursue their claims. Furthermore, if there was indeed any fraud involved, then surely the court is not going to lend any legal imprimatur or credence to same? To put it differently, the legitimate rights of the applicants must trump what, at the present time, appear, on the face of it, to be doubtful rights of secured creditors.
133. As to sub-paragraph 12.8, as already indicated earlier there is no impact on the well-being on the company and its ability to regain its financial health. That has all been dealt with and is now in the past. The only issue at stake is the appropriate distribution of dividends.
134. As to sub-paragraph 12.9, here again the object of Business Rescue has been accomplished. The glib assertions that seventeen thousand jobs will be at stake is misleading. The two chains have been sold and delivered, with monies received or being received. Those jobs have been protected. The only issue is what proportion of the monies should go to the secured creditors and what

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proportion of the monies should go to the concurrent creditors. That can hardly be an object inimical to Business Rescue.

135. In those circumstances, surely this court's discretion must fall in favour of the applicants who have demonstrated a *prima facie* case at the very least.

**WHEREFORE** the applicants persist in the relief sought in this application.

  
\_\_\_\_\_  
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 1<sup>st</sup> day of **OCTOBER 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

**Gareth Marc Leigh Peters**  
10 Derby Place, Derby Downs  
Westville, Durban, RSA  
PRACTISING ATTORNEY  
CONVEYANCER & NOTARY PUBLIC  
COMMISSIONER OF OATHS



"RAI"

**BALANCE SHEETS - EDCON LIMITED**

|  | Mar-20<br>Rm   | Mar-19<br>Rm    | Mar-18<br>Rm    | Mar-17<br>Rm  | Mar-16<br>Rm    |
|--|----------------|-----------------|-----------------|---------------|-----------------|
| <b>ASSETS</b>  |                |                 |                 |               |                 |
| <b>Non-current assets</b>                            |                |                 |                 |               |                 |
| Properties, fixtures, equipment and vehicles         | 1 139          | 1 318           | 1 628           | 2 144         | 2 327           |
| Right of use assets                                  | 4 380          | 208             | 293             | 304           | 247             |
| Intangible assets                                    |                |                 |                 | 8 714         | 11 011          |
| Investment in subsidiaries and associates            | 369            | 868             | 909             | 1 009         | 1 009           |
| Deferred taxation asset                              | -              | -               | -               | -             | -               |
| Employee benefit asset                               | 6              | 3               | 43              | 47            | 96              |
| <b>Total non-current assets</b>                      | <b>5 894</b>   | <b>2 397</b>    | <b>2 873</b>    | <b>12 218</b> | <b>14 690</b>   |
| <b>Current assets</b>                                |                |                 |                 |               |                 |
| Amounts owing by group companies and related parties | 128            | 169             | 234             | 405           | 1 668           |
| Inventories  | 2 559          | 2 941           | 3 283           | 3 647         | 3 933           |
| Trade receivables                                    | 817            | 772             | 691             | 395           | 159             |
| Sundry receivables and prepayments                   | 568            | 729             | 508             | 856           | 747             |
| Derivative financial instruments                     | 38             | 4               |                 |               |                 |
| Cash held in Escrow on Legit sale                    |                |                 |                 | 477           |                 |
| Cash and cash equivalents                            | 354            | 565             | 1 153           | 1 707         | 1 495           |
| <b>Total current assets</b>                          | <b>4 464</b>   | <b>5 180</b>    | <b>5 869</b>    | <b>7 487</b>  | <b>8 002</b>    |
| <b>Total assets</b>                                  | <b>10 358</b>  | <b>7 577</b>    | <b>8 742</b>    | <b>19 705</b> | <b>22 692</b>   |
| <b>EQUITY AND LIABILITIES</b>                        |                |                 |                 |               |                 |
| <b>Equity attributable to shareholders</b>           |                |                 |                 |               |                 |
| Share capital  | -              | -               | -               | -             | -               |
| Share premium  | 26 688         | 9 033           | 9 033           | 9 033         | 5 429           |
| Contributed capital                                  | 444            |                 |                 |               |                 |
| Other reserves                                       | 3              | 3               | 3               | 3             | 3               |
| Retained loss  | (29 990)       | (27 556)        | (21 689)        | (9 516)       | (36 912)        |
| Amounts owing to group company - equity              |                |                 |                 |               | 6 398           |
| <b>Total shareholder's deficit</b>                   | <b>(2 855)</b> | <b>(18 520)</b> | <b>(12 653)</b> | <b>(480)</b>  | <b>(25 082)</b> |
| <b>Non-current liabilities</b>                       |                |                 |                 |               |                 |
| Interest-bearing debt                                |                |                 |                 | 2 116         | 26 300          |
| Interest-free debt                                   | 3 384          |                 |                 |               |                 |
| Amounts owing to group companies and related parties |                | 9 679           | 7 547           | 7 673         | 9 608           |
| Finance lease liability                              | 3 634          | 171             | 200             | 258           | 303             |
| Lease equalisation                                   |                | 466             | 609             | 633           | 598             |
| Onerous leases                                       |                | 353             | 299             | 231           | 103             |
| Employee benefit liability                           | 85             | 88              | 90              | 104           | 125             |
| Deferred revenue                                     | 15             | 15              | 32              | 29            | 34              |
| <b>Total non-current liabilities</b>                 | <b>7 118</b>   | <b>10 772</b>   | <b>8 777</b>    | <b>11 044</b> | <b>37 071</b>   |
| <b>Current liabilities</b>                           |                |                 |                 |               |                 |
| Amounts owing to group companies and related parties | 264            | 397             | 855             | 671           | 4 003           |
| Interest-bearing debt                                | 13             | 9 848           | 7 305           | 3 605         |                 |
| Finance lease liability                              | 1 826          | 38              | 60              | 45            | 35              |
| Onerous leases                                       |                | 207             | 163             | 127           | 52              |
| Current taxation liability                           | -              | -               | -               | 1             | 4               |
| Deferred revenue                                     | 135            | 158             | 97              | 83            | 87              |
| Option liability                                     |                |                 |                 |               | 41              |
| Derivative financial instruments                     |                |                 | 40              | 26            | 16              |
| Provisions   | 30             | 42              | 60              | 42            | 98              |
| Trade and other payables                             | 3 827          | 4 635           | 4 038           | 4 541         | 6 367           |
| <b>Total current liabilities</b>                     | <b>6 095</b>   | <b>15 325</b>   | <b>12 618</b>   | <b>9 141</b>  | <b>10 703</b>   |
| <b>Total equity and liabilities</b>                  | <b>10 358</b>  | <b>7 577</b>    | <b>8 742</b>    | <b>19 705</b> | <b>22 692</b>   |
| <b>Check</b>   | -              | -               | -               | -             | -               |

**INCOME STATEMENTS - EDCON LIMITED**

|   | Mar-20  | Mar-19   | Mar-18   | Mar-17   | Mar-16   |
|---|---------|----------|----------|----------|----------|
|   | Rm      | Rm       | Rm       | Rm       | Rm       |
| Retail sales                                    | 16 110  | 18 754   | 20 866   | 21 969   | 23 519   |
| Cost of sales                                   | (9 979) | (12 034) | (13 350) | (14 139) | (14 469) |
| <b>Gross profit</b>                             | 6 131   | 6 720    | 7 516    | 7 830    | 9 050    |
| Other income <sup>1</sup>                       | 1 716   | 2 173    | 1 740    | 1 627    | 1 639    |
| Store costs                                     | (4 489) | (5 580)  | (5 964)  | (5 894)  | (5 612)  |
| Other operating costs <sup>2</sup>              | (3 889) | (4 317)  | (5 156)  | (4 187)  | (4 561)  |
| <b>Trading (loss)/profit</b>                    | (531)   | (1 004)  | (1 864)  | (624)    | 516      |
| Abnormal/non-recurring costs                    | (402)   | (2 739)  | (8 889)  | 25 051   | (10 809) |
| <b>(Loss)/profit before net financing costs</b> | (933)   | (3 743)  | (10 753) | 24 427   | (10 293) |
| Finance income                                  | 41      | 60       | 140      | 140      | 291      |
| <b>(Loss)/profit before financing costs</b>     | (892)   | (3 683)  | (10 613) | 24 567   | (10 002) |
| Financing costs                                 | (1 545) | (1 962)  | (1 555)  | (3 573)  | (4 517)  |
| <b>(Loss)/profit before taxation</b>            | (2 437) | (5 645)  | (12 168) | 20 994   | (14 519) |
| Taxation  | (19)    | (58)     | (14)     | (19)     | (335)    |
| <b>(Loss)/profit for the period</b>             | (2 456) | (5 703)  | (12 182) | 20 975   | (14 854) |


<sup>1</sup> Includes finance income on trade receivables.

<sup>2</sup> Includes loss allowances for expected credit losses and bad debts.



## Notes to the Company Financial Statements (continued)

|  | 2013<br>30 March<br>Rm | 2012<br>31 March<br>Rm |
|--|------------------------|------------------------|
| <b>11. NON-CURRENT INTEREST-BEARING DEBT</b>   |                        |                        |
| Senior floating rate notes issued  | 3 606                  | 3 606                  |
| Foreign currency on senior floating rate notes   | 846                    | 259                    |
| Fees capitalised on senior floating rate notes   | (46)                   | (63)                   |
|  | <u>4 406</u>           | <u>3 802</u>           |
| <b>11.1 Reconciliation of non-current interest-bearing debt:</b>   |                        |                        |
| Balance at the beginning of the period   | 3 802                  | 3 527                  |
| Foreign currency movement on senior floating rate notes  | 587                    | 261                    |
| Fees amortised on senior floating rate notes   | 17                     | 14                     |
| Balance at the end of the period   | <u>4 406</u>           | <u>3 802</u>           |
| Foreign exchange loss on notes issued  | (587)                  | (261)                  |
| Release from other comprehensive income  | 116                    | 51                     |
| Total  | <u>(471)</u>           | <u>(210)</u>           |
| Fees amortised recognised in financing costs (note 15.2)   | <u>17</u>              | <u>14</u>              |
| <p>The senior floating notes of €378 million are issued by the Company and guaranteed on a senior subordinated basis and secured by a third ranking pledge of the proceeds of the loan between the Company and Edcon Limited. Interest is payable quarterly in arrears at a rate of three month EURIBOR, reset quarterly, plus 5.5%. The notes mature on 15 June 2015.</p> <p>There have been no defaults or breaches of the principal or interest during the period. The market value of the senior floating rate notes at 30 March 2013 was R4 059 million (2012: R3 200 million).</p> |                        |                        |
| <b>12. CURRENT LOANS OWING TO SUBSIDIARIES</b>   |                        |                        |
| Edcon Acquisition Proprietary Limited  | 1                      | 1                      |
| Edcon Limited  | 367                    |                        |
|  | <u>368</u>             | <u>1</u>               |
| <p>On 2 January 2013, a loan was granted to the Company by Edcon Limited for the purchase of the HBP shares sold by Edcon Limited to the Company. The loan bears interest at a rate determined by the board of the Company (currently 0%) and is repayable as cash is available. The Company shall utilise any distributions received on or disposed of the HBP shares towards repayment of the loan.</p> <p>The loan with Edcon Acquisition Proprietary Limited is interest-free and payable on demand.</p>   |                        |                        |
| <b>13. SUNDRY PAYABLES</b>   |                        |                        |
| Sundry payables  | -                      | -                      |
| Interest accrued on senior floating notes  | 18                     | 17                     |
|  | <u>18</u>              | <u>17</u>              |
| <p>The sundry payables are interest-free and mature no later than one year. Interest accrued is settled quarterly.</p>   |                        |                        |





"RA3"

# PATHER & PATHER

ATTORNEYS, NOTARIES & CONVEYANCERS

DATE: 23 September 2020

OUR REF: KUBEN MOODLEY/LG/K793

YOUR REF: L Field

ENS Africa Incorporated  
Attention: Ms Letitia Field

Per E-mail: [lfield@ENSAfrica.com](mailto:lfield@ENSAfrica.com)

Dear Letitia

## DISPUTE RESOLUTION – VARIOUS SUPPLIERS / EDCON LIMITED (IN BUSINESS RESCUE)

The award from Learned Justice Brand, delivered yesterday, refers.

Our clients are of the respectful view that the Learned Justice committed one or more manifest errors in coming to the conclusion that he did and are resolved to take the matter further.

The matter can be taken further either by a process of arbitration appeal alternatively via a review application to the High Court. Our clients are content to adopt either expedient. However, it occurs to them that a review application would take some years to be finally determined and this would, in the interim, hold up the finalisation of the Business Rescue process.

Pather & Pather Attorneys Incorporated (Registration No: 2015/051010/21) Attorneys, Notaries and Conveyancers

DURBAN: 3 Nollsworth Crescent, Nollsworth Park (off Armstrong Avenue), La Lucia Ridge ▪ P.O Box 55, Umhlanga, 4319 Docex 373, Durban

JHB: First Floor, Block A, 66 Rivonia Road, Sandton, Johannesburg, 2146

National Contact Details: Telephone: (+27-31) 3044212 ▪ Fax: (+27) (0) 86 649 6222

Email: [mail@patherandpather.co.za](mailto:mail@patherandpather.co.za) Website: [www.patherandpather.co.za](http://www.patherandpather.co.za)

Directors: Sivi Pather ▪ Edward Christopher Abraham ▪ Kassim Suliman ▪ Kuben Moodley

Senior Associates: Raeesa Cassim (Notary Public) ▪ David Grey ▪ Tina Kalideen ▪ Wynand Nortjé (Conveyancer)

Associates: Sisanda Khayelihle Linda ▪ Xolile Desree Nhlapho ▪ Krishnaveni Pillay (Conveyancer)

Consultants: Irfaan Abdulla (Notary Public) ▪ Josan Bhavani Chetty (Conveyancer & Notary Public) ▪ Bhauna Hansjee Nirvana Mootilal Oodith

In the circumstances, we are instructed to ask that you please establish from your clients as to whether they are prepared to agree that the matter can be taken to appeal under arbitration. If your clients are so agreeable, our clients would be content to take the matter on appeal before a single arbitrator and would propose the name of Justice Nugent for this purpose.

Should your clients not be so agreeable for the matter to proceed to arbitration appeal, then please be advised that our clients will deliver a review application on your clients shortly. Please let us know whether, in that eventuality, you will receive service of this application on behalf of your clients. Furthermore, kindly advise whether, in that eventuality, your clients would have any objection to our clients not citing Justice Brand, as a respondent in the review application, by agreement with the Justice, coupled with a notice from Justice Brand waiving his right to be joined and indicating that he will abide the decision of the Court.

Needless to say, whether the matter proceeds to appeal or review, it will be open to your clients to contend, as they no doubt will, that Learned Justice Brand did not commit any manifest error or errors in determining the matter.

Yours Faithfully

**PATHER AND PATHER ATTORNEYS INC.**

*"Kuben Moodley"*

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**PLEASE DIRECT ALL RESPONSES TO:**

[kuben@patherandpather.co.za](mailto:kuben@patherandpather.co.za)



**PATHER & PATHER**  
ATTORNEYS, NOTARIES & CONVEYANCERS

**RE: KINGSGATE CLOTHING (PTY) LTD & 7 OTHERS // EDCON LIMITED (IN BUSINESS RESCUE) ("Edcon") & 2 OTHERS - RESERVATION OF OWNERSHIP DISPUTE**

**Letitia Field** <lfield@ensafrica.com>  
28/09/2020 at 11:17:12

**From:** Letitia Field <lfield@ensafrica.com>  
**Sent:** 28/09/2020 at 11:17:12  
**To:** Kuben Moodley <Kuben@patherandpather.co.za>  
**Cc:** Sache Cassan <sache@patherandpather.co.za>, Lynell Ganesan <lynell@patherandpather.co.za>, Gary Oertel <goertel@ensafrica.com>

Dear Sirs

We refer to your letter of 23 September 2020.

We do not propose dealing herein with the allegations contained in your letter, save to record that we do not agree with same.

In terms of paragraph 39.3.7 of the adopted business rescue plan, the expert's determination is final and binding on your clients, Edcon and the business rescue practitioners, and will not be subject to any subsequent review or appeal application / procedure / process.

Our respective clients are statutorily bound by the provisions of the adopted business rescue plan.

Our clients are also statutorily obliged to implement the provisions of the adopted business rescue plan, which they will continue doing.

All of our clients' rights are reserved.

Regards

**Letitia Field**

Director  
Insolvency, Restructuring and Business Rescue

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