

**IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
BLOEMFONTEIN**

SCA Case No: _____

Gauteng Division, Pretoria Case No: **57045/20**

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

and

EDCON LIMITED (IN BUSINESS RESCUE) First Respondent

PIERS MARSDEN Second Respondent
(JOINT BUSINESS RESCUE PRACTITIONER)

LANCE SCHAPIRO Third Respondent
(JOINT BUSINESS RESCUE PRACTITIONER)

JUSTICE FDJ BRAND Fourth Respondent

**APPLICATION FOR LEAVE TO APPEAL IN TERMS OF RULE 6 OF THE
SUPREME COURT OF APPEAL RULES**

To: **THE HONOURABLE PRESIDENT OF THE SUPREME COURT OF APPEAL**

BE PLEASED TO TAKE NOTICE that the applicants hereby make application to the Honourable President of the Supreme Court of Appeal in terms of section 17(2)(a) and (b) of the Superior Courts Act No. 10 of 2013 for an order in the following terms:-

1. The applicants are granted leave to appeal to the Supreme Court of Appeal *alternatively* the Full Court of the High Court of South Africa, Gauteng Division, Pretoria against the whole of the judgment and order delivered by her Ladyship Justice van der Schyff on 15 November 2021, in the Gauteng Division, Pretoria, under case number 57045/2020.
2. That costs of the application be costs in the appeal.
3. That further and/or alternative relief be granted.

BE PLEASED TO TAKE NOTICE FURTHER that this application will be accompanied by the affidavit of **YUSUF AHMED SADEK VAHED** together with the necessary annexures thereto as prescribed by Rule 6 of the rules regulating the conduct of proceedings of the Supreme Court of Appeal.

TAKE NOTICE FURTHER that the applicants have appointed KM Attorneys, c/o Claude Reid Inc, 165 St Andrew Street, Westdene, Bloemfontein, Docex 14, at which address they will accept notice and service of all processes in these proceedings.

TAKE NOTICE FURTHER that if the respondents intend opposing this application, the respondents must follow the rules prescribed in Rule 6 of the rules relating to the conduct of proceedings of the Supreme Court of Appeal of South Africa and that the respondents will be required to lodge their answering affidavit in triplicate within one (1) month after service of this application.

Dated at DURBAN on this the 1ST day of APRIL 2022.



APPLICANTS' ATTORNEYS
KM ATTORNEYS
153 Eleventh Avenue
Windermere, Durban
Ref: Kuben Moodley/Ig/K3
c/o **CLAUDE REID INC**
165 St Andrew Street
Westdene, Bloemfontein
Docex 4, Bloemfontein
Tel: 051 447 9881
E-mail: thami@claudereid.co.za
alta@claudereid.co.za

To: **THE REGISTRAR**
SUPREME COURT OF APPEAL
BLOEMFONTEIN

And to: **THE REGISTRAR**
OF THE HIGH COURT OF SOUTH AFRICA
PRETORIA

And to: **ENS AFRICA INCORPORATED**
ATTORNEYS FOR FIRST TO THIRD RESPONDENTS
SANDTON
C/O JACOBSON AND LEVY INC.
215 ORIENT STREET
ARCADIA
PRETORIA
PER EMAIL BY AGREEMENT : lfield@ensafrica.com

And to: **COUZYN HERTZOG AND HORAK ATTORNEYS**
FOURTH RESPONDENT'S ATTORNEY
321 MIDDEL STREET
BROOKLYN
0181
PER EMAIL BY AGREEMENT: annaliem@couzyn.co.za

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CLEMATIS TRADING (PTY) LIMITED Eighth 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)

JUSTICE FDJ BRAND Fourth Respondent

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FOUNDING AFFIDAVIT

I, the undersigned,

YUSUF AHMED SADEK VAHED

do hereby make oath and state:

1. I am an adult male, and the Chief Executive Officer of the first applicant.
2. The facts deposed to herein are within my personal knowledge and are true and correct.
3. I deliver this affidavit on behalf of the first applicant as well as the second to eighth applicants and as such I am duly authorised to depose to this affidavit as well as to launch this application for leave to appeal on their behalf.
4. Where I refer to the applicant's collectively, I shall refer to them as "**the applicants**".
5. Where I make submissions of a legal nature, I rely on the advice of the applicants' legal representatives.

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THE PARTIES

6. The first applicant is **KINGSGATE CLOTHING (PTY) LTD**, a company, duly registered and incorporated under the laws of the Republic of South Africa and which has its principal place of business at 240/242 Matthews Meyiwa Road, Durban.
7. 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.
8. 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.
9. 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.
10. The fifth applicant is **CRUISE COLLECTIONS 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, Durban.

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11. The sixth applicant is **TWIN CLOTHING MANUFACTURERS (PTY) LIMITED**, a 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.
12. The seventh applicant is **APPAREL INDUSTRIES (PTY) LIMITED**, a 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.
13. The eighth applicant is **CLEMATIS TRADING (PTY) LIMITED**, a company duly registered and incorporated under the laws of the Republic of South Africa and which has its principal place of business at 218 Matthews Meyiwa Road, Durban.
14. The first respondent is **EDCON LIMITED (IN BUSINESS RESCUE)**. Edcon (Pty) Limited is a company which is duly registered and incorporated under the laws of the Republic of South Africa and which was placed into business rescue on 30 April 2020. Its address is that of the attorneys of record for the second and third respondents.
15. The second respondent is **PIERS MARSDEN**, an adult male business rescue practitioner duly appointed as such to the first respondent in early May 2020. His address is that of his attorneys of record.

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16. The third respondent is **LANCE SCHAPIRO**, an adult male business rescue practitioner duly appointed as such to the first respondent in early May 2020. His address is that of his attorneys of record.
17. The fourth respondent is **THE HONOURABLE JUSTICE BRAND**, a retired justice of the Supreme Court of Appeal. His address is that of his attorneys of record.

DRAMATIS PERSONAE

18. The applicants are all suppliers of merchandise to the first respondent and are all concurrent creditors therein.
19. The fourth respondent was the expert appointed by the applicants and the second and third respondents to adjudicate the dispute which is the subject matter of the present application, between the parties.

BACKGROUND

20. The applicants supplied and delivered goods to the first respondent prior to the first respondent being placed under business rescue on 29 April 2020.

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21. The applicants contend that there was a reservation of ownership over the goods supplied by them to the first respondent in respect of which goods the applicants have not been paid.
22. The second and third respondents, as joint business rescue practitioners, disputed that there was a reservation of ownership in place between the applicants and the first respondent.
23. This dispute between the applicants and the second and third respondents, as joint business rescue practitioners, was referred to the fourth respondent in accordance with clause 39. of the Business Rescue Plan, which provides for the resolution of disputes arising between the business rescue practitioners and creditors concerning their claims.
24. Clause 39.3.7 provides that:-

“the Creditor/s agree/s that, save for any manifest error the determination of the expert will be final and binding on the Creditor/s, the Company and the BRPs and will not be subject to any subsequent review or appeal application/procedure/process.”
25. The fourth respondent published his award on 22 September 2020.
26. The applicants launched an application thereafter seeking the review and setting aside of the award made by the fourth respondent which effectively found that

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the applicants had not established the reservation of ownership of the goods supplied by them to the first respondent.

27. The applicants also sought an order that on such review and setting aside, the matter be referred for determination by Justice Nugent.

BRIEF BACKGROUND TO THE APPLICATION FOR LEAVE TO APPEAL

28.

28.1 Van der Schyff J delivered her judgment ("***the van der Schyff judgment***") and order on 15 November 2021 dismissing the relief sought by the applicants against which the applicants presently seek leave to appeal.

28.2 A copy of the van der Schyff judgment is attached hereto marked annexure "***FA1***".

28.3 A copy of the order made by van der Schyff J is attached marked "***FA2***".

28.4 The applicants launched their application for leave to appeal against the van der Schyff judgment on or about 29 November 2021.

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29.1 The application for leave to appeal was set down for hearing on 21 February 2022, which judgment was reserved.

29.2 Van der Schyff J, on 1 March 2022, delivered her judgment, dismissing the applicants' application for leave to appeal.

29.3 A copy of the judgment in the application for leave to appeal is annexed hereto, marked "**FA3**". A copy of the order made by van der Schyff J is attached marked "**FA4**".

30. I state with respect that the Court *a quo* erred in coming to this decision.

31. I will demonstrate below why it is that the applicants contend that another court having had due regard to the facts of this matter and the relevant legal principles applicable thereto, would have come to a different finding. Such another court would have granted the application.

32. The proposed appeal therefore has reasonable prospects of success.

33. In addition, the issues raised are of sufficient importance and of general importance to justify this Honourable Court's consideration.

34. The applicants therefore seek an order:-

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