34.1 granting them leave to appeal to this Honourable Court *alternatively* the Full Court of the Gauteng Division, Pretoria, against the van der Schyff judgment and order of 15 November 2021; and

34.2 directing that the costs of this application be costs in the appeal.

THE CRISP ISSUE

35. Bearing in mind the provisions of clause 39.3.7 of the Business Rescue plan which provides for the setting aside of an award in the event of a manifest error, the *Media24* judgment[1] provides guidance as to the definition of manifest error:-

"***[13] A manifest error is an error that is 'plain and indisputable and that amounts to a complete disregard of the controlling law or the credible evidence on record.' See Winfield v Dimension Data Holdings Limited & others 2004 JDR 0307 (T) para 25: 'What does "manifest error" really mean? According to Black's Law Dictionary 7th ed at 563, "manifest error" means "an error that is plain and indisputable" . . . In the Chancery Division of Northern Ireland, Bowsher J in Dixon Group plc v John Andrew Murray-Oboynkski 86 BLR 32, held that a manifest error was an error that may easily be seen by the eye or perceived by the mind. The learned Judge adopted the approach of Potter J in Healds Food Ltd v Hide Davies Ltd (1 December 1994, unreported): 'By the use of the word manifest it is plain that the parties do not thereby intend to widen the area of the court's***

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1 *Media24 (Pty) Ltd v Estate Late Du Plessis* [2017] ZASCA 168 at para [13].

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investigation beyond the ambit of the determination itself and any reasoning within it or discernible on its face.'"

36. The crisp issue then for determination is whether or not the fourth respondent committed manifest errors which would trigger the fresh determination of the dispute between the parties *viz* whether or not there was a reservation of ownership in the agreement concluded between the applicants and the first respondent.

BASIS FOR THE RELIEF SOUGHT BY THE APPLICANTS

37.

37.1 As aforesaid, the applicants supplied and delivered goods to the first respondent.

37.2 The first respondent required its suppliers such as the applicants are, to conclude a written Merchandise Supply Agreement ("***the Supply Agreement***").

37.3 The Supply Agreement did not contain payment terms and records at clause 8.9 that payment is based on the first respondent's terms as agreed to formally, in writing, with each supplier.

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37.4 Clause 30.6 of the Supply Agreement provides that in all instances the Supply Agreement is to be governed, construed and interpreted in accordance with the laws of the Republic of South Africa.

38. The main dispute before the fourth respondent in determining whether or not there was a reservation of ownership, required the interpretation of the word "***title***" in clause 9.4 of the Supply Agreement which recorded the following:-

"***unless otherwise specified, title to and risk in the Ordered Products shall pass to Edcon upon delivery by the Supplier, save in the case of consignment stock, in which case risk remains with the Supplier.***" ("Clause 9.4")

39.

39.1 The Supply Agreement provides no definition for the word "***title***".

39.2 The Supply Agreement, on its terms, draws a clear distinction between the words "**title**" and "***ownership***".

40. The applicants contend that the fourth respondent committed a number of manifest errors in his interpretation of the Supply Agreement in the main and in regard to whether or not there was a reservation of ownership in place between the parties, triggering the setting aside of the fourth respondent's award.

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DISREGARD OF THE CONTROLLING LAW AND CREDIBLE EVIDENCE

41. The first manifest error committed by the fourth respondent was his failure to follow the controlling law in regard to the interpretation of contracts.

42. In this regard, the Learned Judge erred in failing to find that the fourth respondent had clearly failed to have regard to the ***Endumeni*** judgement.[2]

43. The ***Endumeni*** judgement, which remains good law,[3] peremptorily directs a grammatical reading within the context of any document and the fourth respondent clearly failed to apply any grammatical interpretation within the context of the document when the fourth respondent interpreted the meaning of the word "***title***" in clause 9.4 of the Supply Agreement.

44. Having interpreted the word "***title***" to mean "***ownership***", in clause 9.4 of the Supply Agreement, the anomaly that immediately arises is that ownership could not be ascribed to consignment stock where the question of ownership never rears its head. This, it is respectfully submitted, evidences a plain failure to interpret the clause grammatically and therefore a reasonable prospect exists that another court could find differently from that of the Learned Judge.

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2 *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

3 *University of Johannesburg v Auckland Park Theological Seminary and Another* 2021 (6) SA 1 (CC) cited the *Endumeni* judgement with approval at para [64].

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45. But the further manifest error committed by the fourth respondent in regard to his interpretation of the word "***title***" was that in interpreting and ascribing a meaning of ownership to the word "***title***", such meaning had to meet all the different clauses wherein such word appeared in the Supply Agreement, which involved a contextual reading of Clause 9.4 of the Supply Agreement. The fourth respondent disregarded the credible evidence on record that when the Supply Agreement wanted to refer specifically to ownership, it did so by using the word "***ownership***".

46. Again, it is respectfully submitted that a reasonable prospect exists that another court could find differently from that of the Learned Judge.

47. The next manifest error committed by fourth respondent was the failure by him to have regard to the controlling law in regard to redacted information when interpreting a document. This in circumstances where the law was specifically brought to his attention during the course of argument.

48. The fourth respondent relied upon and drew inferences from a letter which was exchanged between the first applicant and the first respondent regarding trading terms. The letter contained certain deletions. ("***the redacted information letter***")

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49. In this regard, the fourth respondent failed to have regard to the ***Pritchard*** judgment[4] handed down by the then Appellate Division which held as follows:

> "***With reference to the deleted words, ... When those words were removed from the paper which had presented the full contract between the parties, they ceased to exist to all intents and purposes; and whether it was possible, as in point of fact it was, still to read them, in consequence of the simply having a line drawn through them, or whether they had been absolutely obliterated, appears to me not to make the smallest difference. The contract was complete after the deletion.***"
>
> ... "***in my view the clear and uncontradicted circumstance which emerges from the writing itself is that the parties by the deletion of the word and initialling of the deletion indicated unequivocally that the word deleted was to form no part of this contract and that the clause should be so construed. To draw any further inference from the word an installation would be erroneous. The fact that the word can still be deciphered cannot affect the clear and unmistakable indication of the parties' agreement and attention, namely that the word had been expunged and formed no part of the contract.***"

50. The fourth respondent clearly had regard to the deletions and recorded in his award that "***but the deletion in the letter puts paid to this argument. It shows that the first claimant tried to contract on its usual terms but that Edcon pertinently refused to do so***".

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[4] *Prichard Properties (Pty) Ltd v Koulis* 1986 (2) SA 1 (AD) at 9A-10A.

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51. Accordingly, and despite the prescripts of the ***Pritchard*** judgment, the fourth respondent drew specific inferences from the deletion.

52. Van der Schyff J, erroneously so it is respectfully submitted, drew the very same inference in regard to the deletion[5] and opined that "***the reason*** [for the fourth respondent] ***for the finding, cannot be faulted***".

53. It is submitted that there is a reasonable prospect that another court could find differently as to whether or not the ***Pritchard*** judgment still constitutes good law in South Africa.

54. In support of the Learned Judge's view that the deletion was relevant, the Learned Judge referred to the decision of the Constitutional Court in the matter of ***University of Johannesburg v Auckland Park Theological Seminary and Another***[6] which emphasised the importance of context and the admissibility of contextual evidence.

55. It is respectfully submitted that even if the redacted information letter could be considered as part of negotiations and therefore appropriate material to be taken into account in the exercise of interpretation, that general proposition in ***University of Johannesburg v Auckland Park Theological Seminary and Another*** could never overrule the specific principle that redactions can never be taken into account.

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5 Paragraph [13] of the judgment.
6 [2021] ZACC 13.

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56. The rationale for the rule, as pronounced by the then Appellate Division in ***Pritchard*** is that sometimes the redacted portion can be read despite the redaction and other times it cannot. The Appellate Division opined and held that one could not have a principle whereby regard can be had to a redacted portion of the document where it is still legible whilst at the same time regard cannot be had, when it is impossible to do so, simply because the redacted portion of the document is not legible.

57. It is a principle that applies wherever a redaction is found.

58. However, inherent in the Learned Judge's reliance on the ***University of Johannesburg v Auckland Park Theological Seminary and Another*** matter was her implicit finding that it must have overruled the ***Pritchard*** judgment.

59. This has given rise to the applicants' contention that a compelling reason exists warranting the granting of leave to appeal to them.

60. This on the basis that commercial certainty ought to be furnished by the above Honourable Court or a full bench, as to whether or not the ***University of Johannesburg v Auckland Park Theological Seminary and Another*** matter has overruled the ***Pritchard*** judgement which has been the prevailing law for almost 40 years in regard to the law applicable to interpreting documents which contain redacted information.

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61. The ***Independent Advisory (Pty) Ltd*** matter[7] held that compelling reasons for granting leave to appeal include the fact that the decision sought to be appealed against involves an important question of law.

62. The fourth respondent in his award, attributed his finding and inferences which he drew from the redacted information letter to the second to eighth respondents, in circumstances where the redacted information letter only pertained to the first applicant and the first respondent.

63. The Learned Judge erred in failing to find that this constituted a manifest error despite the fact that this amounted to a complete disregard of the credible evidence on record. In those circumstances a reasonable prospect exists that another court could find differently in this regard.

64. The further manifest error committed by the fourth respondent was his failure to have regard to credible evidence on record, *viz* that pertaining to the expert evidence of Mr Baard, in regard to the meaning to be ascribed to the word "***title***".

65. As aforesaid, the Supply Agreement expressly enjoined any interpretation of the document to take place in accordance with the manner in which the words in the document are given the usual meaning in South Africa.

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7 2020 (5) SA 35 (SCA) at para [2].

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66. In the matter of ***KPMG Chartered Accountants (SA) v Securefin Ltd***[8] the SCA held that an expert "***is entitled to explain the meaning of any technical terms used in the art***."

67. Mr Baard's evidence ought to have been utilised by the fourth respondent to assist the fourth respondent in interpreting the term "***title***", in the clothing trade in South Africa.

68. In this regard the Learned Judge erred in failing to find that the fourth respondent was not entitled to disregard Mr Baard's evidence and a reasonable prospect exists that another court could find differently from the Learned Judge in this regard.

69. The Learned Judge erred in finding as a matter of law that the fourth respondent legitimately relied upon the provisions of section 134(3) of the *Companies Act* of 2008 ("***Companies Act***") and that the section gave meaning to the word "***title***" in the Supply Agreement.

70. There is simply no legal or factual correlation between section 134(3) of the *Companies Act* and Clause 9.4 of the Supply Agreement.

71. Section 134 (3) of the *Companies Act* simply deals with the position that if a company wishes to dispose of any property during its business rescue proceedings which is the subject of security or a title interest, the business rescue practitioner can make payment of the proceeds or, alternatively, provide

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[8] 2009 (4) SA 399 (SCA) at para [40].

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security for the amount of those proceeds to the reasonable satisfaction of the security or title interest holder. This section merely preserved the applicants' rights.

72. Therefore, finding some correlation between the word "***title***" in the section and in Clause 9.4 is inexplicable and amounts to a manifest error on the part of the fourth respondent. Again, it is respectfully submitted a reasonable prospect exists that another court may find differently to that of the Learned Judge in this regard.

CONCLUSION

73. In all the circumstances, it is respectfully submitted that a proper case has been made out for the relief that is being sought by the applicants on any number of the aforementioned grounds upon which leave to appeal is being sought.

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

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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 **1st** day of **APRIL 2022**, 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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