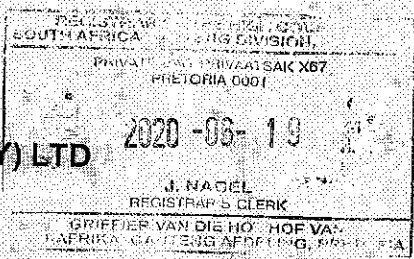


IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

26433 / 20
Case no:

In the matter between:

KINGSGATE CLOTHING (PTY) LTD



First Applicant

CLEMATIS TRADING (PTY) LTD

Second Applicant

and

PIERS MICHAEL MARSDEN

First Respondent

LANCE SCHAPIRO

Second Respondent

EDCON LTD IN BUSINESS RESCUE

Third Respondent

THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION

Fourth Respondent

NOTICE OF MOTION

BE PLEASED TO TAKE NOTICE that the applicants will make application to the above Honourable Court on Monday, 22 June 2020 at 10:00 or so soon thereafter as counsel may be heard for an order in the following terms:-

1. An order dispensing with the normal forms of service and processes and that the application be enrolled as an urgent application in terms of Rule 6(12).

2. The meetings scheduled for 13:45 and 14:00 on Monday, 22 June 2020 to approve the increased remuneration sought by the first and second respondents and to consider the Business Rescue Plan as contemplated in Sections 151 and 152 of the Companies Act 71 of 2008 ("the Act") are postponed pending:-
 - 2.1 Consultation between the first and second respondents and the applicants, as contemplated in Section 150(1) of the Act.

 - 2.2 The delivery to the applicants by the first and second respondents of the following information and/or documents:-
 - 2.2.1 A copy of the advice provided to Edcon Limited in 2019 by the first and second respondents in regard to a possible winding up of the company.

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

A copy of the exercise in terms of which Deloitte calculated the anticipated dividend in a winding down process.

- 2.2.3 Copies of minutes of all meetings of the Landlords' Committee as well as the Lenders'/Secured Creditors Committee.
- 2.2.4 A copy of the audited financial statements of Edcon Limited as at March 2018 and March 2019.
- 2.2.5 A copy of the unaudited financial statements of Edcon Limited as at end March 2020.
- 2.2.6 A detailed itemisation of how the R2.7-million which was raised by Edcon Limited in 2019 was utilised.
- 2.2.7 The revenue generated for the month of May 2020 by Edcon Limited as well as the breakdown of the expenses met by this revenue.
- 2.2.8 A balance sheet for the third respondent as at 8 June 2020.
- 2.2.9 The fees earned by the first and second respondents to date hereof as well as their anticipated fees in the entire Business Rescue of the third respondent.
- 2.2.10 An explanation of why there is such a material difference between the figures furnished by the first and second respondents and the audited financial statements for the years 2016 and 2017 of Edcon Limited.

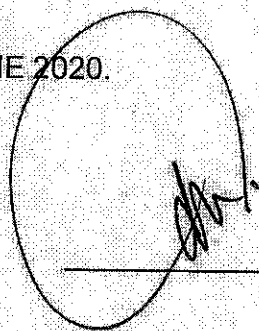
3. The applicants be and are hereby granted leave to approach this court on these papers, supplemented insofar as may be necessary, for relief in the following terms:-
 - 3.1 Setting aside the Business Rescue Plan published on 8 June 2020 and/or setting aside the Business Rescue Proceedings initiated by a resolution of the third respondent on 28 April 2020 and/or removing the first and second respondents as the appointed practitioners to the third respondent and/or to place the third respondent into liquidation.
4. The first and second respondents shall pay the costs of this application to include those costs consequent upon the employment of two counsel, with such costs on a punitive scale.

TAKE NOTICE FURTHER that the affidavits of the first and second applicants annexed hereto will be used in support hereof.

TAKE NOTICE FURTHER that should any of the respondents wish to oppose this application, they are required to deliver their notice of intention to oppose this application by midday on Saturday, 20 June 2020 by way of e-mail to sivi@patherandpather.co.za and to deliver their answering affidavits, if any, by 09:00 on Sunday, 21 June 2020.

Kindly enroll the matter for hearing accordingly.

Dated at DURBAN this the 19th day of JUNE 2020.



PATHER AND PATHER ATTORNEYS INC.
PLAINTIFFS' ATTORNEYS
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PRETORIA
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TO: THE REGISTRAR OF THE ABOVE HONOURABLE COURT
PRETORIA

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

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

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

Case no: **26433/21**

In the matter between:

KINGSGATE CLOTHING (PTY) LTD

First Applicant

CLEMATIS TRADING (PTY) LTD

Second Applicant

and

PIERS MICHAEL MARSDEN

First Respondent

LANCE SCHAPIRO

Second Respondent

EDCON LTD IN BUSINESS RESCUE

Third Respondent

**THE COMPANIES AND INTELLECTUAL PROPERTY
COMMISSION**

Fourth Respondent

APPLICANTS' COUNSEL'S CERTIFICATE

(Paragraph 90 of Consolidated Practice Manual)

I, the undersigned, Omar Aboobaker Moosa SC, hereby certify that this matter is of such urgency that it may be heard during the period of Lockdown, and/or during a period which restrictions are in place relating to the free movement of persons owing to measures to

combat the covid-19 infection pandemic and that it must be heard on Monday, 22 June 2020 and must be heard before Tuesday, 23 June 2020.



ADV OMAR ABOOBAKER MOOSA SC

Tel: 083 326 5226 / 031 307 5226

E-Mail: oamoosa@law.co.za

Durban Society of Advocates

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

Case no: 26433/20

In the matter between:

KINGSGATE CLOTHING (PTY) LTD

First Applicant

CLEMATIS TRADING (PTY) LTD

Second Applicant

and

PIERS MICHAEL MARSDEN

First Respondent

LANCE SCHAPIRO

Second Respondent

EDCON LTD IN BUSINESS RESCUE

Third Respondent

THE COMPANIES AND INTELLECTUAL PROPERTY

COMMISSION

Fourth Respondent

FOUNDING AFFIDAVIT

I, the undersigned,

YUSUF AHMED SADEK VAHED

do hereby make oath and state:-



INTRODUCTION

1. I am the Chief Executive Officer of the first applicant ("Kingsgate"). To the extent necessary I confirm that I am duly authorised to depose to this affidavit and to bring this application on behalf of Kingsgate.
2. The facts deposed to herein fall within my personal knowledge and are, to the best of my knowledge, true and correct.
3. Where I make submissions I rely on advice duly received.

PARTIES

4. Kingsgate is a company duly registered and incorporated in South Africa and for purposes of this urgent application its address is care of its attorney.
5. The second applicant is Clematis Trading (Pty) Ltd ("Clematis") also a company duly registered and incorporated in South Africa and for purposes of this urgent application its address is care of its attorney.
6. The first respondent is Piers Michael Marsden ("Marsden"), an adult male business rescue practitioner carrying on business at Suite 23, Building 2, Oxford at Glenhove, 114 Oxford Road, Houghton Estate, Johannesburg. It appears that Marsden is a partner at the firm Matuson and Associates.

- 7. The second respondent is Lance Schapiro ("Schapiro") an adult male business rescue practitioner carrying on business at Suite 23, Building 2, Oxford at Glenhove, 114 Oxford Road, Houghton Estate, Johannesburg. It appears that Schapiro is a senior associate at this firm.
- 8. The third respondent is Edcon Limited in Business Rescue ("Edcon") and which is now represented by the Marsden and Schapiro.
- 9. The fourth respondent is Companies and Intellectual Property Commission ("CIPC") having its principal place of business at the DTI Campus, Block F, 77 Meintjies Street, Sunnyside, Pretoria. The fourth respondent is cited because of its interest in this matter and no relief is being sought against it.

RELIEF SOUGHT

- 10. The relief sought herein is that as set out in the Notice of Motion prefixed hereto.

URGENCY

- 11. The first issue that the court will want to enquire into is the question of urgency and more particularly as to why this application is being set down on

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Monday morning, 22 June 2020, at 10:00 and not on Tuesday, 23 June 2020, at 10:00.

12. As evident from the Notice of Motion, the urgency is that the applicants seek to postpone the meetings set down by Marsden and Schapiro to be held at 13:45 and 14:00 on Monday, 22 June 2020.
13. This, with respect, explains why this application has to be set down on Monday, 22 June 2020 and cannot wait for a hearing on Tuesday, 23 June 2020 in accordance with the usual practice of this Division.
14. The court will then want to know why the application could not have been brought earlier than Monday, 22 June 2020.
15. The Board of Edcon apparently took a resolution on 28 April 2020 to place Edcon into Business Rescue. I say apparently because I have not seen a resolution to this effect signed by all the Directors of Edcon.
16. Pursuant thereto, Marsden and Schapiro were appointed by Edcon, on 4 May 2020, to serve as the Business Rescue Practitioners ("BRPs") to Edcon.
17. A first meeting of Creditors took place on 18 May 2020. A Creditors Committee was set up for Concurrent Creditors ("Concurrent Creditors Committee") at that meeting.



18. Kingsgate and its associate companies are Concurrent Creditors in Edcon to the value of approximately R24-million.
19. I have served on the Concurrent Creditors Committee on behalf of myself as well as on behalf of 11 [eleven] other Concurrent Creditors of Edcon.
20. Arthur Limbouris ("Arthur") is the Chief Executive of Officer of Clematis, which is also a Concurrent Creditor of Edcon to a value of approximately R18.5-million.
21. Because this application is being brought as a matter of extreme urgency there is simply insufficient time to obtain confirmatory and supporting affidavits from these other Concurrent Creditors. However, I understand that our courts exercise a degree of latitude in regard to hearsay evidence in urgent applications.
22. Concurrent Creditor Committee meetings were held with Marsden and/or Schapiro on 28 May 2020, 4 June 2020 and 15 June 2020. Since this is an urgent application I am not going to burden these papers with copies of the minutes of those meetings but respectfully reserve the right of the applicants to rely on same should it become necessary to do so.
23. During the period from the first meeting of Concurrent Creditors of 18 May 2020 until the Rescue Plan was published by Marsden and Schapiro on 8

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June 2020, Arthur was advised by management at Edcon that we could anticipate a dividend of about 50c in the Rand if a Rescue Plan was adopted.

24. On 8 June 2020, being the peremptory 25th [twenty fifth] day from the date of their appointment, Marsden and Schapiro published a Business Plan.
25. When the Concurrent Creditors saw the plan, they were totally shocked and startled to see that what was being suggested was an anticipated dividend to them of 4c in the Rand.
26. Over the period Monday, 8 June 2020 to Thursday, 11 June 2020 at lunchtime, the Concurrent Creditors discussed the Rescue Plan amongst themselves and tried to understand what it was saying.
27. This Honourable Court must please understand and appreciate that being out of pocket for such substantial sums of money, the Concurrent Creditors were initially not enamoured with the idea of spending more monies on getting expert advice. After all, to their understanding, the role of Marsden and Schapiro is to protect their interests.
28. Finally, on Thursday afternoon, the 11th of June 2020, a first consultation was held with accountants and lawyers in order to obtain expert advice. This because by that time the Concurrent Creditors realised that they really had no option but to bite the bullet and spend additional monies now securing such expert advice.

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29. The accountants and lawyers had to work over the period of Friday, 12 June 2020 up to and including Monday, 15 June 2020, trying to understand and unpack what was going on with the Business Rescue of Edcon.
30. On Monday, 15 June 2020, the attorneys acting for the Concurrent Creditors addressed a letter to Marsden and Schapiro enquiring of them as to whether they had considered saving Edcon on the basis of the swap of debt to equity being one of the expedients contemplated by the Act for purposes of a Company Rescue.
31. Annexed hereto marked "YV1" is a copy of that letter.
32. Marsden responded on Monday night, 15 June 2020 to the attorney by way of a cryptic mail to advise that this expedient had been discussed at the meeting of the Concurrent Creditors Committee that evening and that some information would be made available to the clients of the attorney.
33. Annexed hereto marked "YV2" is a copy of that response.
34. A meeting was held at the offices of Kingsgate on the public holiday, Tuesday, 16 June 2020. This meeting was attended not only by Arthur and myself but also by a host of other Concurrent Creditors.



35. The experts had to explain to all of them what the Rescue was all about and how it was that a dividend to them of 4c in the Rand was being suggested.
36. After several hours, a collective decision was taken to mandate the legal representatives to seek:-
- 36.1 A postponement of the meetings scheduled for 22 June 2020.
- 36.2 All relevant information and documents reasonably required by the Concurrent Creditors in order for them to properly apply their minds to the Rescue Plan.
37. On Wednesday, 17 June 2020, the attorney for the Concurrent Creditors sent a letter to Marsden and Schapiro requesting an adjournment of the meetings.
38. Annexed hereto marked "YV3" is a copy of that letter.
39. Most critically, in that letter, the attorney quoted from the minutes of the meeting of the Concurrent Creditors Committee held on 4 June 2020 that what was urgent was the publication of the plan but not its adoption. Furthermore, that if the Concurrent Creditors required additional time to consider the plan this time would be granted. It is sufficiently important to the germane question of urgency that what is set out in "YV3" be quoted hereunder:-



"15.1 Marsden confirmed that the plan must be published on Monday, 8 June. Creditors will have 5 to 10 business days to consider the plan. They are happy to give Creditors the longest possible period. The main urgency is to publish the plan (not to vote on it) because as soon as there is a published plan they can commence the retrenchment processes."

40. A postponement for only a week was sought, that is until Monday, 29 June 2020. This period was settled upon taking into account the timeline set out by Marsden and Schapiro in the Business Rescue Plan for the process regarding the possible sale of Edcon or one or more of its divisions to a third party.

41. Furthermore, Marsden and Schapiro were asked to confirm by 10:00 on Thursday, 18 June 2020 that this postponement would be agreed to. They were advised that should the attorney not hear from them by then it would be assumed that the request was declined.

42. On the same day, the attorney sent a further letter requesting information and documents from Marsden and Schapiro advising that this was required by 16:00 today, that is Friday, 19 June 2020. Obviously, this timing was to afford the Concurrent Creditors an opportunity of considering the documents and the information over the weekend of 20 and 21 June 2020, as well as the work week starting on Monday, 22 June 2020.

43. A copy of that second letter of 17 June 2020 is annexed hereto marked "YV4".
44. As at the time of the signing and commissioning of this affidavit, there has not even been an acknowledgement from either Marsden or Schapiro to these letters.
45. In all the circumstances, this Honourable Court will note that the Concurrent Creditors have acted with all due and reasonable expedition in this matter.
46. Furthermore, the urgency has been created by Marsden and Schapiro not making good on the unequivocal undertaking given by Marsden on 4 June 2020 to grant to the Concurrent Creditors a brief postponement of the meetings if this was sought by them.
47. If the Rescue Plan were to be adopted on Monday afternoon, 22 June 2020, the Concurrent Creditors will have to bring an application to have it set aside on the grounds of a host of irregularities. This will result in very messy and expensive litigation which is entirely unnecessary. In any event, it is simply wrong in law to force a vote in circumstances where information reasonably sought has not been made available. To hold otherwise would emasculate the entire purpose behind the relevant legislative framework.

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GROUNDS FOR RELIEF SOUGHT

48. In broad brush, the applicants premise their relief on 2 [two] broad grounds:-
- 48.1 They are entitled, as a matter of law, to all reasonable information before they are required to vote on any Rescue Plan.
- 48.2 The alleged procedure for conducting the meetings on Monday, 22 June 2020 are entirely irregular.
- 48.3 I will deal with these in turn.
49. Before doing so, however, in order to contextualise this matter the applicants are constrained to put up a copy of the Rescue Plan itself being the one that was published by Marsden and Schapiro on 8 June 2020 and to comment thereon.
50. In addition, they are constrained to raise certain issues relating to Marsden and Schapiro personally.

Rescue Plan

51. Annexed hereto marked "YV5" is a copy of that Rescue Plan.



52. The applicants do not require this Honourable Court, given the limited time it has to consider these papers, to read the Rescue Plan in any minute detail. Instead, the applicants will comment on the plan to the extent necessary.
53. There is absolutely no question that Edcon is financially distressed and, if it cannot be rescued, it needs to be put into liquidation in the interests of the concursus.
54. What Marsden and Schapiro contemplate doing is not rescuing Edcon at all. Instead, they have concluded that it is not capable of rescue and that the best expedient available is for them to either sell Edcon as a whole or one or more of its Divisions.
55. Whilst this particular expedient is not expressly contemplated in the Act, our appeal courts have said that based on the fact that a winding down process of a company in Business Rescue might yield a better dividend for creditors than would a liquidation, renders such a process acceptable in law.
56. The applicants, with sincere deference and respect, unreservedly accept that this is the position in law.
57. However, they pause to point out that whilst a winding down process is acceptable it is not the default position as such. In other words, practitioners are required to make a *bona fide* attempt at rescuing the company and cannot resort to a winding down process as an option of first resort.



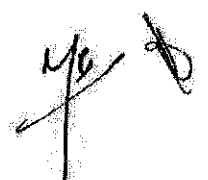
58. From all the discussions with Marsden and Schapiro, they have given very short shrift to any suggestion of a contemplation of converting debt into equity.
59. Speaking, for example, on behalf of Kingsgate which is a family business that has been in existence since 1955 at the latest, it, as constituted from time to time, has dealt with Edcon, as constituted from time to time, for 65 [sixty five] years now. In fact, the Kingsgate Group is one of the largest clothing manufacturers in the country.
60. What is being contemplated in the Rescue Plan is a possible dividend of 4c in the Rand for Concurrent Creditors. This means, for the R24-million of debt owed to Kingsgate and its associated companies, a dividend is contemplated that will amount to R960'000.00.
61. If that is in fact the correct position, then I can say unequivocally that Kingsgate will have a very keen interest in considering a conversion of its debt into equity. This would not only have the advantage of giving it an expectation for a recovery in time to come of the R24-million, but it will also save the company and the tens of thousands of jobs that go with it. It will also serve to preserve a 50 [fifty] year old customer for Kingsgate.



62. That notwithstanding, Marsden and Schapiro appear to have some agenda that they are simply not disclosing to the Concurrent Creditors. They seem hell bent on pushing through an acceptance and approval of the Rescue Plan as they have tendered it. Whose interests are they serving?
63. They say that there are one or more parties interested as buyers for Edcon and/or one or more of its divisions. But they will disclose neither the party nor the amount at which interest is being shown. The ostensible reason for this is that these are public companies. But that is arrant nonsense because if they are public companies the law simply does not allow them to consider a major acquisition without issuing a cautionary on their shares. They have disclosed the party or parties to the Independent Chairperson of the Concurrent Creditors Committee who is anything but independent.
64. In "YV4", Marsden and Schapiro are specifically asked about the so-called Independent Chairperson but they have not responded as aforesaid.
65. Another partner from the Matuson firm, that is Matuson, serves as one of the BRPs in the Business Rescue of South African Airways SOE. It is worth noting that the role of the BRPs in the SAA Business Rescue has been heavily criticised by both the State, as shareholder, and the Unions representing the employees.



66. There too, the BRPs have advanced the notion that a rescue is better than a liquidation. But the Act expressly precludes a BRP of a company from being appointed its liquidator in the event of a winding up. When they make this generic assertion, they are highly conflicted. Whose interests are they looking after?
67. In any event, the same so-called Independent Chairperson of the Concurrent Creditors Committee serves as a so-called Independent Chairperson of one or other Creditor Committee in the SAA Business Rescue.
68. She is clearly beholden to Matuson and Associates and this has been noted in her engagement at meetings. The Concurrent Creditors have found that she seems to be more concerned with protecting Marsden and Schapiro than protecting the interests of the Concurrent Creditors.
69. Like Marsden and Schapiro, she has been patronising and condescending in meetings having little or no interest in assisting the Concurrent Creditors in obtaining information that they are legitimately entitled to.
70. In any event, returning to the principal theme, what Marsden and Schapiro are asking for in the Rescue Plan is for a blank cheque to sell Edcon or one or more of its divisions to an unnamed third party or parties and for an undisclosed amount. To add insult to injury, they want this power in their sole discretion.



71. The Concurrent Creditors find this audacious in the extreme.
72. Not only are Marsden and Schapiro making a mockery of the legislative framework which visits rights on creditors during business rescue, as it does the same during liquidation, but they are arrogating to themselves knowledge and experience that they simply do not possess.
73. The simple question has to be asked as to who is better placed to analyse and to consider an offer that persons such as the Concurrent Creditors who are suppliers to Edcon and in some cases have been suppliers for 50 [fifty] years like Kingsgate?
74. Marsden and Schapiro may have some experience with Business Rescue but that does not give them expertise in every field or industry.
75. There is no explanation of why any such contemplated sale cannot be brought back to the Creditors for approval? This happens all the time in commerce.
76. The other major concern that the Concurrent Creditors have is that they do not believe that any such sale will increase their dividend by an iota, which might explain the reluctance of Marsden and Schapiro to share information.
77. Whilst the schedules reflecting the Secured/Preferred Creditors had been prepared with precision, the schedule for Concurrent Creditors is shoddy to



say the least for reasons set out in "YV4". The contempt with which Marsden and Schapiro have been treating Concurrent Creditors is an enduring theme which even finds its way into their lack of interest in the Concurrent Creditors. Almost as if they are assuming that there will be a very negligible or no dividend to the Concurrent Creditors and why should they bother applying themselves.

78. The Concurrent Creditors are concerned that this entire restructuring of Edcon during 2019 was done in a manner to protect shareholders in the holding company who have lent monies to Edcon through the holding company or companies.
79. The Concurrent Creditors have determined that the investment in Hollard, which now sits at the level of the new holding company, is approximately R4-billion in value. The applicants and the Concurrent Creditors are entitled to know whether this transfer of the Hollard investment to the new holding company took place at fair value or not. In addition, if what was done amounts to financial assistance to shareholders in circumstances where Edcon was insolvent, this would be in contravention of the Act.
80. Furthermore, that many of the assets of Edcon are probably secured in favour of the lenders such that they will end up with a very substantial dividend as compared to the Concurrent Creditors who will get nothing.



81. Many of the Concurrent Creditors have reservation of ownership over their goods and/or who have sold on consignment but none of these are being recognised by Marsden and Schapiro.
82. The abiding sense that the Concurrent Creditors have, in the absence of information and documents, is that Edcon and/or one or more of its divisions is being prepared for a suitor on a silver platter.

Issues Relating to Marsden and Schapiro

83. It appears that Marsden has been in Canada from the date of his appointment up until now.
84. It is clear that the legislative framework envisages that Business Practitioners will take over the running of a company like joint Chief Executive Officers, and that the Directors and Executives are required to assist the BRPs in discharging their obligation.
85. Edcon has well-known and experienced executives at the helm. That notwithstanding, they have palpably failed to save the company from financial distress.
86. The Concurrent Creditors ask the fundamental question as to how, if they are unable to do so, Marsden, who is a partner at Matuson and senior to

MS

Schapiro, can run Edcon, during Business Rescue, sitting literally halfway across the world?

87. It is a question contained in "YV4" which they have elected not to answer.
88. There has been much controversy about the fees earned by Matuson in the SAA Business Rescue.
89. But Marsden and Schapiro will not tell the Concurrent Creditors what fees they have earned thus far nor what fees they anticipate making out of this entire Business Rescue. That notwithstanding they want an increase from the statutory rate without setting out any motivation therefor other than to say that Edcon is a large company. The question is, so what?

Information Reasonably Required

90. It is now settled law that Creditors are entitled to all reasonable information required by them in order to consider whether they should or should not vote in favour of a Rescue Plan.
91. This is dealt with extensively in "YV4", which the applicants rely on its entirety.
92. For this reason, I will briefly set out the need of the applicants for information and documents.

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93. I can say to this Honourable Court that during the course of the meetings and even by way of mail, both Arthur and I have sought information and documents from Marsden and Schapiro which they have simply failed and refused to make available.
94. I put up, simply by way of example, annexure "YV6" a mail which I sent to Marsden and Schapiro on Thursday, 11 June 2020. Needless to say, that information sought has not been provided. Rather, the so-called Independent Chairperson together with Marsden and Schapiro have assumed a God complex and have indicated that they will make available what they consider to be appropriate! They clearly have a contemptuous disregard for the law.
95. Despite repeatedly asking them they will not provide a current inventory or a current cash balance.
96. They steadfastly refuse to provide any information on trading after the initial lockdown. They opened stores on 1 May 2020, but fail and refuse to furnish any detail on this period. Why? Surely this is extremely pertinent to a decision now?
97. The best they do is that at the meeting of 15 June 2020 they flashed a copy of the April 30th balance sheet for Edcon and would constantly take it off the screen. They were asked to provide a copy of this after the meeting which they failed to do. In anticipation of the meeting with all the Concurrent

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Creditors that Arthur and I represent, on 16 June 2020, my office had to literally badger Marsden and Schapiro to make this outdated balance sheet available. What are they hiding?

98. The cash balance as at 30 April 2020 is reflected as approximately R525-million. On annexure "E" to the Business Plan they give an opening cash balance of R900-million. Edcon could not have traded for less than R1.2-billion during May 2020. If that revenue is added to the R525-million we get to a figure of R1.7-billion, at a minimum, as at 8 June 2020. What has happened to the R800-million between the R1.7-billion and the R900-million? The question has been asked but they will not answer. Why? What are they hiding?
99. This court will note that in paragraphs 28 to 38 of "YV4", the Concurrent Creditors raised a host of misrepresentations made by Edcon which were relied upon by the Concurrent Creditors in supplying goods and making credit available to Edcon. Kingsgate, Clematis and the other Concurrent Creditors represented by myself are owed nothing less than in the region of R200-million which was occasioned by these misrepresentations.
100. A full court of this Division has authoritatively held that it is a singular failure of BRPs if they do not investigate this kind of conduct to establish whether any irregularities occurred.



101. Despite this being raised repeatedly at the Concurrent Creditors Committee meetings there has simply been no response from Marsden and Schapiro whatsoever.
102. The applicants also require the workings of Deloitte who are the auditors of Edcon and not independent. Why should these not be made available to them?
103. What is more is that Deloitte's say that they have carried out no independent investigation into information provided to them by management in doing their calculations. If Executives have been misrepresenting to creditors, and if Deloitte are going to rely on the say so of Edcon management, how can anyone expect the applicants to place any store in the calculations done by Deloitte?
104. I asked Marsden, during the course of a Concurrent Creditors Committee meeting, as to whether Matuson and Associates had done previous work for Edcon and he embarrassingly said that they had. He said that Matuson and Associates had advised Edcon of a possible liquidation calculation during or about 2019. The applicants need to see this advice to determine whether Marsden and Schapiro are conflicted alternatively whether this entire Business Rescue has been choreographed for some ulterior purpose.

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105. It is a requirement of law and/or an almost invariable practice that shareholder loans are subordinated. Information in regard to this is sought but is not forthcoming. The question is, why not?
106. The applicants are entitled to consider for themselves whether the security instruments have efficacy in law and have asked for this but it will not be provided. The question is, why not? What is being hidden?
107. After literally having to repeatedly request for financial statements for Edcon, we were eventually constrained to obtain the audited financial statements for Edcon for March 2016 and March 2017 from Edcon's website.
108. We are already in 2020, and there is simply no explanation as to why no audited financial statements exist for at least up until 2019. The applicants are entitled to an explanation in this regard.
109. Even working with the audited financial statements for 2016 and 2017, the applicants have discovered very, very substantial discrepancies between the information contained in those financial statements and information provided by Marsden and Schapiro with regard to those periods.
110. Annexed hereto marked "YV7" is a 1 [one] page simple analysis undertaken by the applicants which demonstrate these material discrepancies.

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111. Surely the applicants are entitled to investigate and to interrogate this because no figures in this entire matter are adding up.
112. Rather it is all a question of smoke and mirrors leaving the applicants with an extremely uncomfortable and disconcerting sense of what it is that is actually transpiring here.
113. Perhaps it might be necessary for a thorough forensic audit to be undertaken for Edcon in Business Rescue.
114. The Act contemplates a Creditors Committee. However, what Marsden and Schapiro did in the present matter was to recommend the creation of a Concurrent Creditors Committee, a Landlords' Committee and a Lenders'/Secured Creditors Committee.
115. Whilst under normal circumstances the applicants might have accepted that there was merit in doing this because of the numbers of creditors involved, in the present matter they have an intense sense of discomfort given the factual matrix of the matter as set out above.
116. They are no longer comfortable that Marsden and Schapiro are saying the same things to each of the Committees and for this reason they require the minutes of the meetings of those Committees.

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117. Surely if Marsden and Schapiro have nothing to hide they will make this readily available to the applicants to assuage their reasonable and legitimate concerns.

Irregular Meeting Procedure

118. I annex hereto marked "YV8" and "YV9" are copies of the notices issued by Marsden and Schapiro convening the meetings for 22 June 2020.
119. In regard to the meeting convened for considering the Rescue Plan, the notice says that the meeting will be held electronically (which is perfectly understandable given the present pandemic) but what is in contemplation is a normal meeting simply by audio-visual means.
120. At the meeting of the Concurrent Creditors Committee of 15 June 2020, Marsden indicated that the meeting would now be convened by way of webinar which is used for conferences and the like and which is not user friendly for an interactive process.
121. Clearly, this is designed to curtail and restrict discussion and debate as specifically provided for in the Act.

M/S

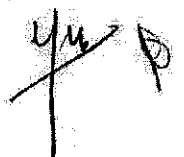
122. Furthermore, what Marsden and Schapiro have been doing is promoting the convoluted notion of proxies made out to them for purposes of approval of the Rescue Plan.
123. On 18 June 2020, applicants' attorney sent a further letter to Marsden and Shapiro enquiring specifically about this issue. A copy of that letter is annexed hereto marked "YV10".
124. Instead of responding to "YV10", what Marsden and Schapiro have done is send out a bulk mail to all creditors, this morning, under a cover of a mail in which they are clearly promoting that creditors must complete the form indicating an approval.
125. It is worth noting that when Arthur wrote to the so-called Independent Chairperson on 18 June 2020 enquiring about the meeting process, she said that she did not know. Annexed hereto marked "YV11" and "YV12" are copies of that exchange.
126. The applicants do not believe that Marsden and Schapiro are just being tardy and remiss in this regard. This is all deliberately done to sow confusion and to ensure that as many concurrent creditors as possible do not actually send in the proxies and will not be given an opportunity to vote on 22 June 2020 such that the plan will be approved.
127. This conduct is repugnant and unlawful.

M4
B

128. A full Court of this Division has stated unequivocally that BRPs should not be driven by a consideration of their fees but by the best interests of the creditors.
129. Those salutary words are entirely apposite to the present matter.
130. In all the circumstances, the applicants submit that Marsden and Schapiro have made such a mockery of the meeting in contemplation as to render their conduct nugatory if regard is had to the peremptory provisions of the Act and the mischief behind it.
131. It is for this reason also that it would be wrong to permit this meeting to proceed.

CONCLUSION

132. In all the circumstances, it is respectfully submitted that the applicants have demonstrated a *prima facie* right to the relief that they seek as affected parties in terms of the Act.
133. The applicants are statutorily entitled to participate in the development of the Business Rescue Plan which, as set out aforesaid, they have been deprived of having not been placed in possession of all of the required information.



Accordingly, they have been precluded from approaching the BRPs with a suggested plan of action that would lead to the development of a Business Rescue Plan which would inure to the benefit of all creditors and not simply the Secured Creditors. This is more so when the Concurrent Creditors were advised on 15 June 2020 of the increase of a proposed dividend of 6c in the Rand up from 4c in the Rand which had been recorded in the Business Rescue Plan. The basis for this increase, for example, has not been properly explained to the Concurrent Creditors at all.

134. The BRPs duty to consult with Creditors in regard to the development of a Business Rescue Plan for the benefit of all the Creditors has also not taken place for the simple reason that all the financial and other information has not been furnished to all of the Creditors.
135. Needless to say, without being placed in possession of all of the financial and other information, the applicants have not been placed in a position to determine whether or not they ought to vote for or against the implementation of the Business Plan or even propose amendments thereto.

COSTS

136. Marsden and Schapiro were cautioned in "YV4" that if the applicants were constrained to approach the court for relief costs would be sought against them personally.

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137. They have treated the applicants with contempt and continue to do so.
138. They are trying to unlawfully steamroll a vote, which is simply untenable and unlawful.
139. They could easily have agreed to a postponement of a week but have elected not to do so.
140. This court has to mark its displeasure by not only ordering costs against them personally such costs to include those consequent upon the employment of two counsel but on a punitive scale as well.

CONFIRMATORY AND SUPPORTING AFFIDAVIT OF ARTHUR LIMBOURIS

141. The confirmatory and supporting affidavit of Arthur Limbouris will be filed evenly herewith.

INDEPENDENT CHAIRPERSON

142. The applicants have not joined the Independent Chairperson as she has no direct or substantial interest in this matter.

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143. However, because her role is referred to in this affidavit, a copy of the application papers will be emailed to her.


DEPONENT

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


COMMISSIONER OF OATHS

OZAYR ISMAIL
Chartered Accountant (SA)
Commissioner of Oaths
Province of Kwazulu Natal
242 Mathews Meyiwa Road
Durban, 4001

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

Case no:

In the matter between:

KINGSGATE CLOTHING (PTY) LTD

First Applicant

CLEMATIS TRADING (PTY) LTD

Second Applicant

and

PIERS MICHAEL MARSEN

First Respondent

LANCE SCHAPIRO

Second Respondent

EDCON (PTY) LTD IN BUSINESS RESCUE

Third Respondent

**THE COMPANIES AND INTELLECTUAL PROPERTY
COMMISSION**

Fourth Respondent

**CONFIRMATORY AND SUPPORTING AFFIDAVIT OF THE
SECOND APPLICANT**

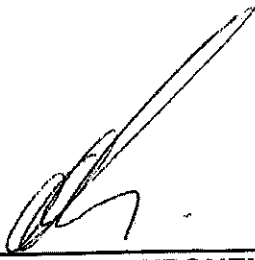
A handwritten signature in black ink, consisting of a stylized name and a set of initials, located in the bottom right corner of the page.

I, the undersigned,

ARTHUR LIMBOURIS

do hereby make oath and state:-

1. I am the Chief Executive Officer of the second applicant herein and to the extent necessary I am duly authorised to depose to this affidavit and to bring this application on its behalf.
2. The facts deposed to herein are within my personal knowledge and are true and correct.
3. I have read the founding affidavit of Yusuf Ahmed Sadek Vahed in this matter and confirm as being correct therein all averments which relate to me and the second applicant.
4. The second applicant makes common cause with the first applicant in this application and seeks the relief set out in the Notice of Motion prefixed to the affidavit of Yusuf Ahmed Sadek Vahed and does so for the reasons and on the grounds as set out in that affidavit.



DEPONENT



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

W. Forbes
 COMMISSIONER OF OATHS

I certify that before administering the oath/affirmation I asked the deponent the following questions:

1. Do you know and understand the contents of the declaration? Answer: Yes

2. Do you have any objection to taking the prescribed oath? Answer: No

3. Do you consider the prescribed oath to be binding on your conscience? Answer: Yes

I certify that the DEPONENT has acknowledged that he/she knows and understands the contents of this declaration. The DEPONENT uttered the following words:
 "I swear that the contents of this declaration are true, so help me God"/ "I truly affirm that the contents of this declaration are true." The DEPONENTS signature/thumbprint/mark was placed thereon in my presence.

At: Dbn on the 19th day of Jun '20 at (time) 1:45pm

Signature: W. Forbes
 COMMISSIONER OF OATHS

9/1/8/2 (r/o) KZN (Dbn)
 Lynette Forbes
 5 Broadlands
 105 Waterkant Rd
 Dbn North, 4052
 Tel: 0632200608

