

**IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

Case No: \_\_\_\_\_

In the matter between:

**THATHA PROJECT RESOURCES (PTY) LTD** First Applicant

**NOMQIBELOTRADING ENTERPRISE CC** Second Applicant

**MPENDULO & SONS (PTY) LTD** Third Applicant

**MALER DYNAMICS (PTY) LTD** Fourth Applicant

**MELJON CONSTRUCTION AND PROJECTS (PTY) LTD** Fifth Applicant

**ZGM CONSTRUCTION AND PROJECTS CC** Sixth Applicant

and

**PHAHLANI LINCOLN MKHOMBO N.O** First Respondent

**ARNOT OPCO PROPRIETARY LIMITED** Second Respondent

(in business rescue)

**NDALAMO COAL PROPRIETARY LIMITED** Third Respondent

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## NOTICE OF MOTION

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**BE PLEASED TO TAKE NOTICE** that the Applicants intend to make application to this Honourable Court, on an urgent basis, on **Friday, 18 August 2023**, at 10h00 or so soon thereafter as counsel may be heard, for an order in the following terms:

1. Directing that the matter be heard as one of urgency and to dispense with the forms and services provided for in the Uniform Rules of Court and allowing the matter to proceed as an urgent application as is provided for in Rule 6(12) of the Uniform Rules of Court as per the directions of the Honourable Court.
2. Declaring that the first to sixth applicants are concurrent creditors of the second respondent.
3. Declaring that the first to sixth applicants, each in their own respective capacity, have, as concurrent creditors of the second respondent, a voting interest to be determined by the value of the amount owed to the second respondent.
4. Declaring the first to sixth applicants rights in business rescue, which *inter alia* includes:

- 4.1 Receive notice of each court proceeding, decision, meeting or other relevant event concerning the business rescue;
  - 4.2 Participate in any court proceeding arising during the business rescue proceedings;
  - 4.3 Make proposals for a business rescue plan to the business rescue practitioner;
  - 4.4 Right to vote to amend, approve or reject a proposed business rescue plan;
  - 4.5 To form a creditor's committee and be consulted, through this committee, by the business rescue practitioner during the development of the business rescue plan.
5. Declaring that no business rescue plan was approved and adopted in terms of section 152 of the Companies Act 71 of 2008 ("**the Act**") at the meeting of 28 July 2023.
  6. In the event of it being found that a plan was adopted on 28 July 2023, declaring that such plan is void and is set aside.
  7. Declaring that there has not been a vote of approval from the holders of voting interests to prepare and publish a plan as contemplated in section 153 (1) (a)

(i) of the Act and that the first respondent is obliged to reconvene the meeting of creditors in terms of section 151 of the Act, once the rights of the first to sixth applicants are recognised, for the purposes of following the processes contemplated in section 153 of the Act.

8. The first respondent is compelled to issue, within 2 court days of this order being granted, a revised list of creditors reflecting the names of the first to sixth applicants as concurrent creditors of the second respondent.
9. Pending the applicant's institution of further proceedings within 1 month from date of compliance with the order granted pursuant to paragraphs 2 – 8 of this application, alternatively, until the dispute with the first respondent is resolved, whereby the rights of the first to sixth applicants are recognised as concurrent creditors of the second respondent, the first respondent is interdicted from:

9.1 Implementing the plan adopted on 28 July 2023; and

9.2 Reconvening any other creditor's meeting to consider a revised business rescue plan and/or taking any further steps in furtherance of business rescue which may be to the detriment of the rights of the applicant's.

10. The first respondent is directed to pay the costs of this application on the attorney and client scale.

11. Such further or alternative relief as the above Honourable Court may deem to be just and equitable.

**FURTHER TAKE NOTICE** that the affidavit of **SIHLE QWABE** together with the annexures thereto will be used in support of this application.

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

- (1) Notify the Applicant's attorneys in writing, in the person of Eric Van Den Berg by way of email sent to [eric.vdberg@outlook.com](mailto:eric.vdberg@outlook.com) by no later than **12:00pm on Wednesday, 16 August 2023**, of such opposition; and
- (2) File your Answering Affidavit, if any, by no later than **12:00pm on Thursday, 17 August 2023**, and
- (3) Appoint in such Notification of Intention to Oppose an address as referred to in Rule 6(5)(b) of the Uniform Rules of Court at which you shall accept notice and service of all documents, processes and pleadings in these proceedings.

**FURTHER TAKE NOTICE** that should no Notice of Intention to Oppose be delivered as stated above, application for the relief set out above shall be made to this

Honourable Court on **18 August 2023** at 10h00 or so soon thereafter as the matter may be called for hearing.

**FURTHER TAKE NOTICE** that the Applicant has appointed the offices of **ERIC VAN DEN BERG ATTORNEYS INC** whose particulars appear below, as the address at which the Applicants will accept notice and service of all process in these proceedings.

**KINDLY** enrol the matter accordingly.

**DATED** at JOHANNESBURG on this the \_\_\_\_\_ day of **AUGUST 2023**.

*evandenber*

**ERIC VAN DEN BERG ATTORNEYS INC**

18 13<sup>th</sup> Avenue

Parktown North

Johannesburg

Cell: 083 228 9802

Email: [eric.vdberg@outlook.com](mailto:eric.vdberg@outlook.com)

**TO:**

**THE REGISTRAR OF THE COURT**

**GAUTENG LOCAL DIVISION**

**JOHANNESBURG**

**AND TO:**

**PHAHLANI LINCOLN MKHOMBO N.O**

First Respondent

Genesis Corporate Solutions

GCS House

61 Akerboom Street

Zwartkop Ext 4

Centurion

c/o **COX YEATS ATTORNEYS**

4 Sandown Valley Cres

Sandown

Sandton, 2196

Ref: Gareth Cremen and Bridget Letsholo

Email: [gcremen@coxyeats.co.za](mailto:gcremen@coxyeats.co.za) and [bletsholo@coxyeats.co.za](mailto:bletsholo@coxyeats.co.za)

**AND TO:**

**NDALAMO COAL PROPRIETARY LIMITED**

Third Respondent

Irenelink Precinct

7 Impala Avenue

Doringkloof

Centurion

c/o **WEBBER WENTZEL**

90 Rivonia Road

Sandhurst

Sandton

2196

Email: [Christopher.holfield@webberwentzel.com](mailto:Christopher.holfield@webberwentzel.com)

**AND TO:**

**AFFECTED PERSONS**

(List in annexure "A" hereto with corresponding email addresses)



**IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

Case No: 2023-081089

In the matter between:

<b>THATHA PROJECT RESOURCES (PTY) LTD</b>	First Applicant
<b>NOMQIBELOTRADING ENTERPRISE CC</b>	Second Applicant
<b>MPENDULO AND SONS TRADING AND PROJECTS (PTY) LTD</b>	Third Applicant
<b>MALER DYNAMICS (PTY) LTD</b>	Fourth Applicant
<b>MELJON CONSTRUCTION AND PROJECTS (PTY) LTD</b>	Fifth Applicant
<b>ZGM CONSTRUCTION AND PROJECT CC</b>	Sixth Applicant
and	
<b>PHAHLANI LINCOLN MKHOMBO N.O</b>	First Respondent
<b>ARNOT OPCO (PTY) LTD</b> (in business rescue)	Second Respondent
<b>AMANDLA TM GROUP (PTY) LTD</b>	Third Respondent
<b>NDALAMO COAL (PTY) LTD</b>	Fourth Respondent

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**FOUNDING AFFIDAVIT**

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I, the undersigned,

**SIHLE QWABE**

do hereby make oath and say that:

**DEPONENT**

1. I am an adult male and a director of the first applicant.
2. I am duly authorised to depose to this affidavit on behalf of the first to sixth applicants.  
I am authorised to act on behalf of the First Applicant by virtue of a duly authorised resolution annexed hereto marked "**SQ 1**".
3. The first to sixth applicants have authorised me to bring these proceedings on their behalf, and to the extent necessary, I confirm that I am duly authorised to depose to this affidavit and launch this application on their behalf. In this regard, confirmatory affidavits of the second to sixth applicants are annexed hereto marked "**SQ 2.1-2.5**".
4. The facts herein contained are, unless the contrary is stated or indicated within my own personal knowledge and are both true and correct.
5. Where I make submissions of a legal nature I do so based on the advice that I have received from the applicant's legal representatives.

6. I make use of headings in this affidavit for the purposes of facilitating the reading thereof but do not thereby intend to limit the allegations stated under any particular heading only to that heading.

## **APPLICANTS**

7. The first applicant is **THATHA PROJECT RESOURCES (PTY) LTD** (“**Thatha**”), a company duly registered and incorporated in terms of the laws of the Republic of South Africa with registration number (2016/408420/07), with its registered office situated at 16 Newquay Road, Alberton, Gauteng.
8. The second applicant is **NOMQIBELO TRADING ENTERPRISE CC** (“**NTE**”), registered and incorporated in terms of the laws of the Republic of South Africa with registration number (2007/166711/23), with its registered address situated at A 107 Extension 12, Kwaguqa, Mpumalanga.
9. The third applicant **MPENDULO AND SONS TRADING AND PROJECTS (PTY) LTD** (“**MAS**”), a company registered and incorporated in terms of the laws of the Republic of South Africa with registration number (2015 / 378908 / 07), with its principal place of business situated at House No 7, Kort Street, Middleburg, Mpumalanga.
10. The fourth applicant **MALER DYNAMICS (PTY) LTD** (“**MD**”), registered and incorporated in terms of the laws of the Republic of South Africa with registration

number (2016/315916/07), with its registered address situated at 35 Karneool Street, Middleburg, Mpumalanga.

11. The fifth applicant is **MELJON CONSTRUCTION AND PROJECTS CC** ("**MCP**"), registered and incorporated in terms of the laws of the Republic of South Africa with registration number (2010/088526/23), with its principal place of business situated at 01 Katoog Street, Extension 18, Middleburg, Mpumalanga.
12. The sixth applicant is **ZGM CONSTRUCTION AND PROJECTS CC** ("**ZGM**"), registered and incorporated in terms of the laws of the Republic of South Africa with registration number (2005/145959/23), with its registered office situated at 31 Impala Street, White River, Mpumalanga.
13. Each of the first to sixth applicants have a substantial interest in the rescue proceedings of the second respondent.
14. I refer to the first to sixth applicants collectively as ("**the applicants**").

## **RESPONDENTS**

15. The first respondent is **PHAHLANI LINCOLN MKHOMBO N.O**, cited in his capacity as the duly appointed Business Rescue Practitioner ("**the BRP**") of

Arnot Opco, an adult male director of Genesis Corporate Solutions, GCS House, 61 Akkerboom Street, Zwartkop, Ext 4, Centurion.

16. The second respondent is **ARNOT OPCO PROPRIETARY LIMITED** (in business rescue) ("**Arnot Opco**" or "**the Company**"), a company under business rescue by order of this Honourable Court granted on 10 October 2022, registered and incorporated in terms of the laws of the Republic of South Africa with registration number (2019/072282/07), with its registered address at Woodmead Business Park Building, Cypress Place South A, 142 Western Service Road, Woodmead, Johannesburg.
17. The third respondent is **AMANDLA TM GROUP (PTY) LTD**, ("**Amandla**") registered and incorporated in terms of the laws of the Republic of South Africa with registration number (2015/345189/07), with its principal place of business situated at Unit 11 & 12, 7 Spring Street, Middleburg, Mpumalanga.
18. **NDALAMO COAL PROPRIETARY LIMITED**, ("**Ndalamo**") registered and incorporated in terms of the laws of the Republic of South Africa with its registered address at Irenelink Precinct, 7 Impala Avenue, Doringkloof, Centurion.
19. No relief is claimed against the fourth respondent who is only cited by virtue of a legal interest it may have in this matter.
20. The Company has a significant amount of persons that are affected by its rescue proceedings. A list of these affected persons is contained in annexure

“A” to the Notice of Motion. I am advised that a copy of this application will be duly served on the affected persons of the Company listed in the aforementioned annexure and a confirmatory affidavit by a representative of the applicants attorney of record shall be filed with this Honourable Court regarding the manner and service of this application.

## **JURISDICTION**

21. This Honourable Court has the necessary jurisdiction to determine this application as:

21.1. The order placing the Company in business rescue was granted by this court; and

21.2. The Company is situated within the area of this court’s geographical jurisdiction.

## **NATURE OF THE APPLICATION**

22. On an urgent basis, a declaratory order is sought to recognize and enforce the applicants as concurrent creditors of the Company.

23. Further, an interdict is sought to restrain the BRP from:

23.1 Adopting and/or implementing the plan proposed on 28 July 2023; and

23.2 Reconvening any other creditor's meeting to consider a revised business rescue plan and/or taking any further steps in furtherance of business rescue which may be to the detriment of the rights of the applicant's.

24. Lastly, ancillary relief seeking compliance with the order is also claimed.

## **RELIEF**

25. The purpose of this application is to seek relief from this Honorable Court in the following terms:

25.1 Directing that the matter be heard as one of urgency and to dispense with the forms and services provided for in the Uniform Rules of Court and allowing the matter to proceed as an urgent application as is provided for in Rule 6(12) of the Uniform Rules of Court as per the directions of the Honorable Court.

25.2 Declaring that the first to sixth applicants are concurrent creditors of the second respondent.

25.3 Declaring that the first to sixth applicants, each in their own respective capacity, have, as concurrent creditors of the second respondent, a voting interest to be determined by the value of the amount owed to the second respondent.

25.4 Declaring the first to sixth applicants rights in business rescue, which *inter alia* includes:

25.4.1 Receive notice of each court proceeding, decision, meeting or other relevant event concerning the business rescue;

25.4.2 Participate in any court proceeding arising during the business rescue proceedings;

25.4.3 Make proposals for a business rescue plan to the business rescue practitioner;

25.4.4 Right to vote to amend, approve or reject a proposed business rescue plan; and

25.4.5 To form a creditor's committee and be consulted, through this committee, by the business rescue practitioner during the development of the business rescue plan.

25.5 The first respondent is compelled to issue, within 2 court days of this order being granted, a revised list of creditors reflecting the names of the first to sixth applicants as concurrent creditors of the second respondent.

25.6 Pending the applicant's institution of further proceedings within 1 month from date of compliance with the order granted pursuant to this application, alternatively, until the dispute with the first respondent is



resolved, whereby the rights of the first to sixth applicants are recognised as concurrent creditors of the second respondent, the first respondent is interdicted from:

25.6.1 Adopting and/or implementing the plan proposed on 28 July 2023; and

25.6.2 Reconvening any other creditor's meeting to consider a revised business rescue plan and/or taking any further steps in furtherance of business rescue which may be to the detriment of the rights of the applicant's.

25.7 The third respondent is interdicted and restrained from exercising any votes at any creditors meetings, or business rescue events, on behalf of the first to sixth applicants.

25.8 The first respondent is directed to pay the costs of this application on the attorney and client scale.

25.9 Such further or alternative relief as the above Honourable Court may deem to be just and equitable.

## **MATERIAL BACKGROUND**

- 26 During November 2021, Arnot entered into a written agreement with Amandla TM Group (Pty) Ltd ("**Amandla**"), wherein Amandla was *inter alia* appointed by Arnot to assist Arnot with the development of its mining infrastructure (**the "Mandate"**). A copy of the agreement is annexed hereto marked "**SQ 3**".
- 27 Thereafter, subcontractors were engaged by Amandla and Arnot for purposes of assisting with the Mandate ("**Appointment**").
- 28 The appointed subcontractors constitute the first to sixth applicants.
- 29 The subcontractors had Purchase Orders with Arnot, however, subsequent to agreement being concluded, the relevant Purchase Orders were transferred to Amandla.
- 30 Pursuant to the appointment, it was agreed by the parties (i.e. Arnot, Amandla and the sub-contractors) that payment for the subcontractors rendering the aforementioned subcontractor services would be made by Amandla on behalf of Arnot ("**Payment Arrangement**").

## **CURRENT DEVELOPMENTS**

- 31 Prior to the placement of Arnot in Business Rescue, Amandla terminated the Payment Arrangement and advised the sub-contractor and Arnot that any

payments for settlement of the subcontractors claims should be submitted to Arnot and made by Arnot. A copy of the termination is annexed hereto marked "SQ 4".

32 Amandla's termination of the Payment Arrangement was acknowledged by the Arnot Board. Acknowledgment can be noted from annexed hereto marked "SQ 5".

33 When the company was placed in Business Rescue, Amandla had spent a total of R26 million on the project and subsequently terminated the agreement, together with the purchase orders and requested that the sub-contractors communicate with the Arnot directly.

34 Arnot was placed in business rescue during October 2022.

35 When Arnot was placed in Business Rescue, it was indebted to the subcontractors in the following amounts:

35.1 Thatha – R 5 816 235.35;

35.2 NTE – R 1 113 991.37;

35.3 MAS - R 8 001 567.01;

35.4 MCP – R 831 112.77;

35.5 ZGM – R 1 123 408.28; and

35.6 MD – R 884 118.77.

- 36 On 14 July 2023, Arnot's Business Rescue Plan was published pursuant to section 150 of the Companies Act 71 of 2008 (as amended) (**the "Plan"**). A copy of the plan is annexed hereto marked "**SQ 6**".
- 37 A list of creditors was published by the BRP, this list is annexed hereto marked "**SQ 7**".
- 38 On the 27<sup>th</sup> July 2023, the evening before the section 151 creditors meeting, an updated creditors list was published where the Amandla claim was increased from R26 202 863,79 to R49 755 155,00. This list of creditors is annexed hereto marked "**SQ 8**".
- 39 The sub-contractors were excluded from this creditors list. This happened without any communication from the BRP nor Amandla to the sub-contractors.
- 40 Relevant communication on this aspect from the first to sixth applicants is annexed hereto marked "**SQ 9**".
- 41 Pursuant to the Plan, a section 151 meeting was convened on 28 July 2023 to consider and approve the Plan ("Business Rescue Meeting"). It has been brought

to the applicants attention that Ndalamo made an offer in the rescue proceedings, which offer was approved at the creditors meeting on 28 July 2023.

42 At the Business Rescue Meeting, Amandla, without any authority or approval from the first to sixth applicants, preceded to vote in favour of the Ndalamo offer on behalf of the subcontractors; this occurred in absence of any authority or proxy for Amandla to vote on their behalf for purposes of the approval of the Ndalamo offer.

43 The first to sixth applicants take exception to Amandla's conduct at the Business Rescue Meeting, as they have substantial claims against Arnot, which if recognised would empower them to make a meaningful contribution to any proposal ultimately approved to rescue Arnot.

44 On 04 August 2023, a circular was published by the BRP in terms of which he advised that he cannot proceed with the implementation of the plan as the threshold for adoption was not met. A copy of the circular is annexed hereto marked "**SQ 10**".

45 On 10 August 2023, a letter of demand was sent on behalf of the applicants to the BRP. In this letter, it was recorded as follows:

*“ We advise you that Our Clients should be recognised as concurrent creditors of Arnot under the Plan and by implication the percentage of its voting interest. We are currently compiling the documentation to support Our Clients’ Claims, which information/documentation will be submitted to you shortly;*

*-request, as we hereby do, for you to defer the publication of any list of concurrent creditors for any subsequent meetings of creditors of Arnot pursuant to the Plan until receipt of documentation from Our Clients to confirm their claims and are recognised as concurrent creditors of Arnot;*

*-obtain an undertaking from yourselves by no later than close of business tomorrow, 11 August 2023 that, no list of creditors will be published until the finalisation of our Clients’ Claims and Our Clients are recognised as concurrent creditors of Arnot (“Undertaking”).*

*Should we not receive any response from you in relation to the request and/or the Undertaking, our instructions are to take all steps necessary to enforce Our Clients’ rights.*

*We are available to meet with you for purposes of discussing the contents of this letter, should you require.*

*Our Clients’ rights are reserved.”*

- 47 Till date, no response (aside from an acknowledgment of receipt) from the BRP has been forthcoming.
- 48 Albeit receipt of the letter, the next day, the BRP proceeded to publish an updated list of creditors, whereby the claims of the first to sixth applicants are still not recognized. A copy of the updated list is annexed hereto marked “**SQ 12**”.
- 49 An urgent application was launched by WesCoal Mining (Pty) Ltd and Salungano (Pty) Ltd against the BRP, to obtain substantiation on whether a plan was approved and adopted on 28 July 2023, as contemplated in section 152 (2) and (3) of the Act, and until then, interdicting the BRP from proceeding with the further creditors meeting to be held on 21 August 2023 for the adoption of a revised plan. This urgent application is set down for hearing on 18 August 2023. A copy of the application was emailed to the applicants on 13 August 2023.

## **FAILURE TO RECOGNISE THE VOTING RIGHTS**

- 50 Despite the applicants reasonable request for recognition of their creditor voting interests, same has not been forthcoming.
- 51 The applicants concerns are exacerbated by the fact that the BRP has failed to recognize their rights as concurrent creditors and Amandla’s conduct in usurping the voting rights of the applicants at the creditors meeting.

- 52 It has come to the applicants notice that the BRP intends to have a revised business plan put to vote at a further creditors meeting which will be held on 21 August 2023, to be convened on in terms of section 151 of the Act.
- 53 The refusal by the BRP to recognize the creditor voting interests of the applicants is unjustified. The rights must be recognized, without which, far reaching prejudice is caused to the applicants.
- 54 The applicants, as affected parties, are entitled to vote on a plan at a creditors meeting. In the event that the exclusion persists, the BRP will fall short of his duty to act in accordance with the Act, which provides for the rights of affected persons to formally participate in business proceedings; the Act also confers on creditors broad rights under section 145, *inter alia*, to be given notice of each court proceeding, decision, meeting or other relevant event concerning the business rescue proceedings and to consult, both formally and informally, with the BRP. In terms of section 150 of the Act a business rescue plan must contain all the information reasonably required to facilitate affected persons in deciding whether or not to accept or reject the plan. The applicants cannot decide whether or not to accept or reject a plan if they are excluded from recognition of the creditors voting interest. They are entitled to exercise their rights. The BRP's failure to provide the undertaking despite demand prevents the applicants from participating in the business rescue proceedings and to vindicate their rights.
- 55 It is imperative to determine exactly why the applicants are being excluded from exercising their voting rights at creditors meetings, the effect of which is that the



majority voting interest is accepted and a plan is adopted in accordance with the majority vote.

56 The applicants in their capacity as affected persons must be afforded an adequate opportunity to consider the plans and vote in accordance with their voting interest in the business rescue of the company the BRP's conduct has led the applicants to the reasonable conclusion that he is not behaving impartially or at the very least is not exercising the proper degree of care in the performance of his duties there is reason to potentially seek his removal as BRP if he persists in such conduct in these circumstances if the meeting proceeds on 21 August 2023 this could lead to an incorrect plan being implemented.

57 All creditors' claims must be calculated correctly and only then can a plan be adopted. It is essential to establish who the affected persons are and what their voting interests are before any further meeting may be convened once the applicants have been provided with the voting rights they can consider the opposition however until such time any further proceedings to the exclusion of the creditors must be declared to be unfair.

## **PREJUDICE**

58 Despite my earlier intention to not have to litigate on this dispute, in view of the situation, I have no other option but to seek relief from the courts, failing which the applicants stand to suffer great prejudice.

- 59 The applicants have no objection to a plan being implemented, however, the exclusion of their voting rights on a plan that they have a substantial interest in, as affected parties, begs an interrogation of the good faith of the BRP.
- 60 Further, his refusal to provide the undertaking suggests that something is wrong. The BRP is a person who occupies a positions of trust and such covetous conduct as demonstrated by him should not be condoned. In fact, in my respectful view, a court should mark its displeasure at his sort of conduct given the office that he occupies.
- 61 All affected persons are entitled to know what the correct position is and are entitled to be provided with the requisite information in order to establish for themselves what the position is so that they may exercise their rights. The refusal to furnish the undertaking constitutes unfair discrimination against the applicants.

## **INTERDICT**

### **Clear /prima facie right**

- 62 Based on the above facts, it is submitted that the applicants, in their capacity as creditors of the company, have a clear/ prima facie right as they are affected persons and have a substantial interest in the financial health of the company and the rescue proceedings.
- 63 Section 152 (4) of the Act affords affected persons a right to vote on a plan, which will ultimately be binding on the Company and on each of its creditors.

- 64 As creditors of the company the applicants have a clear right under sections 145 and 152 to participate in the business rescue proceedings of the company and in the implementation of the adopted business rescue plan. There can be no doubt that the exclusion of the applicants by the BRP is unfounded. He cannot act unilaterally in excluding voting by certain creditors but must act in the interest of all creditors and all affected persons as he is bound by the provisions of the Act, and his failure to act in accordance with the provisions of the Act render him liable for removal from office on the grounds set out in section 139 (2) (a-e).
- 65 The applicants have a right to vote without being excluded, as the first respondent attempts to defeat and obstruct that process. That is unlawful and contemptuous conduct on the part of the first respondent.

### **Apprehension of harm**

- 66 I respectfully refer this Honorable Court to the paragraphs above which states that the BRPs conduct in refusing to recognize the voting rights of the applicants as creditors of the company, and in affording them the requisite voting rights in the creditors meeting, has the effect of excluding the applicants from the rescue proceedings. This has occurred repeatedly, and given the circumstances, it is reasonably apprehended that if the status quo remains, then at the meeting of 21 August 2023, a plan will be adopted, which the applicant's would not have an opportunity to consider and vote upon, in detriment to the rights.
- 67 This is directly prejudicial to the applicants right to participate in the business rescue process and to protect their substantial investment in the company. The

applicants will be severely prejudiced if a plan is adopted without their consideration. They are entitled, as creditors of the company to exercise their voting rights. An exclusion from voting will result in the applicants suffering irreparable harm should the BRP not be interdicted from carrying out his unlawful conduct, especially if the meeting of 21 August 2023 proceeds.

68 I am reasonably apprehensive that should the foregoing eventuate, the applicants claims would be defeated in its entirety.

### **Alternative remedy**

69 There can, with respect, be no justification for the continuance of the BRPs exclusion of the applicants in the list of creditors, and the voting, in these circumstances and Amandla's conduct in usurping the subcontractors votes.

70 The applicants are left with no alternative remedy other than to seek the relief claimed in this application, in order to safeguard their voting rights.

71 The applicants are constrained to turn to this court, having no remedy otherwise. Their voting rights stand to be preserved.

### **Balance of convenience**

72 It is submitted that the applicants would be prejudiced by further delays in this matter as the first respondent has repeatedly demonstrated his willingness to exclude the applicants from the rescue proceedings.

73 The first respondent will suffer no prejudice if the interdict is granted.

74 In light of the aforementioned, the balance of convenience clearly favors the applicants in these proceedings.

### **URGENCY**

75 This application is respectfully inherently urgent as the right to creditors voting in a rescue plan is entrenched in the Act. For this reason alone, the matter is urgent.

76 The refusal to provide the undertaking is without merit and in direct contravention with the functions of his office. Furthermore, I have been advised that the applicants remedy against such conduct lies in obtaining an interdict to refrain further conduct by the BRP to the detriment of the applicants.

77 The applicants first learnt of the impending meeting on 04 August 2023. In an attempt to resolve the dispute, demand was transmitted to the BRP on 11 August; however, this attempt proved futile given the lack of response. When no undertaking was forthcoming, I contacted the applicant's attorneys to obtain advice on legal recourse available in the current situation. Whilst this was underway, the Wescoal application was launched, which is set down for hearing on 18 August 2023. During 15 August 2023, consultations with the applicants attorney and counsel were held to institute urgent proceedings to safeguard the applicants rights. Pursuant thereto, all necessary documentation was collated in support of this urgent application, and the application was launched as soon as possible.

78 I am aware that two proposals are being considered in furtherance of rescue. Wescoal is desirous of implementing the 28 July proposal; and the BRP intends proposing a revised plan at the 21 August plan, which will contain the Mashwayi plan. For this reason, I believe that a plan will be implemented soon.

79 The next creditors meeting is to be convened on 21 August 2023. In light of this timeline, the applicants have no option but to seek to have this urgent application adjudicated upon prior to the meeting on Monday 21 August and the latest opportunity to do so is Friday, 18 August 2023 at 10 am. I understand that the Wescoal urgent application is set down for hearing at the same time.

80 It is respectfully submitted that the relief sought by the applicants is, in the circumstances justified, as it is aimed at preventing the BRP from further excluding the voting rights of the applicants in a business plan and from forging ahead to hold the section 151 meeting on 21 August 2023.

81 The applicants have not delayed in bringing this application; we prepared the application on curtailed time periods when it became evident to us that the BRP would not provide a favorable response to the undertaking sought, in an effort to settle the dispute out of court, however, when this undertaking was not forthcoming a decision was made to launch this urgent application.

- 82 It is envisaged that in the event of opposition, the respondents will be afforded adequate opportunity to respond to this claim. Notably, the curtailed time frames are occasioned by the unreasonable position adopted by the BRP.
- 83 The undertaking was sought for particularly that purpose, to recognize and enforce the voting rights of the creditors.
- 84 His failure to respond has resulted in the launching of this urgent application, however, as at the time of launching this application the rights were not safeguarded, rendering this application urgent and unable to be heard on the next Tuesday, being 22 August 2023, as this will be subsequent to the creditors meeting to be held on 21 August 2023.
- 85 Were the applicants to bring these proceedings in the ordinary course, on an opposed basis, this matter would be in court in roughly 6 months from now, which would leave sufficient time for a plan to be approved and implemented. Even on an unopposed basis, the process would take approximately 2 months, and the applicants would have no recourse for the exclusion of their creditors voting rights. For this reason, the applicants will not obtain substantial redress in due course.
- 86 I have been advised that the courts encourage the resolution of matters prior to resorting to litigation, and that a litigant who attempted to avoid launching an urgent application will not be punished for any delay caused by efforts to resolve a dispute.

87 Despite all the steps taken, the possibility of the first respondent continuing to act in the manner he has demonstrated to in excluding the applicants from voting necessitates this application being heard as one of urgency.

88 If the application were to be heard in the ordinary course, the applicants will, in all likelihood, suffer irreparable damage, as they will be prevent from voting at the impendent creditors meeting.

89 In the circumstances, I submit that this matter does carry with it the requisite urgency.

## **COSTS**

90 I submit that there does exist sufficient grounds to motivate for a costs order against the first respondent, given his obstructive and contemptuous conduct, it would be appropriate that the first respondent be made to bear the costs of this avertable application on the scale between attorney and client.

## **CONCLUSION**

91 I respectfully submit that a proper case has been made out and the applicants are entitled to the relief claimed in the Notice of Motion.

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**SIHLE QWABE**

I hereby certify that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn to before me at \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_ 2023, the regulations contained in Government Notice No R1268 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.

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**COMMISSIONER OF OATHS**

Full Names:

Business Address:

Office: