IN THE HIGH COURT OF SOUTH AFRICA

(KWAZULU-NATAL DIVISION, DURBAN)

Case number: D1103/2024

In the matter between:

MOHINI SINGARI NAIDOO t/a POWERTRANS SALES AND SERVICES	Applicant

and

TONGAAT HULETT LIMITED (IN BUSINESS RESCUE)	First Respondent
TREVOR JOHN MURGATROYD N.O.	Second Respondent
PETRUS FRANCOIS VAN DEN STEEN N.O.	Third Respondent
GERHARD CONRAD ALBERTYN N.O.	Fourth Respondent
TERRIS AGRIPRO (MAURITIUS)	Fifth Respondent
REMOGGO (MAURITIUS) PCC	Sixth Respondent
GUMA AGRI AND FOOD SECURITY LTD (MAURITIUS)	Seventh Respondent
ALMOIZ NA HOLDINGS LIMITED	Eighth Respondent
THE AFFECTED PERSONS IN THE FIRST RESPONDENT'S BUSINESS RESCUE	Ninth Respondent

---

CONSOLIDATED INDEX

ITEM	DESCRIPTION	PAGES
	VOLUME 1	
1.	**Notice of Motion**	1 – 6
2.	**Founding Affidavit**	7 - 42
3.	Annexure **"FA 1":** Adopted amended business rescue (Vision Transactions) (Marked up version)	43 - 100
	VOLUME 2	
3.	Annexure **"FA 1"** continued	101 - 200
	VOLUME 3	
4.	Annexure **"FA2":** Business Rescue Plan prepared by the Joint Business Rescue Practitioners (31 MAY 2023)	201 - 300
	VOLUME 4	
5.	Annexure **"FA2"** continued	301 - 400
	VOLUME 5	
6.	Annexure **"FA2"** continued	400 – 406
7.	Annexure **"FA3":** Announcement of strategic equity partner	407
8.	Annexure **"FA4":** Article titled "Robert Gumede's consortium tales control of Tongaat Hulett". Published in City Press on the 5th of November 2023.	408 – 418
9.	Annexure **"FA5":** Article titled "Tongaat rescue plan: 'Creditors have the final say.'". Published in Moneyweb on the 8th of November 2023.	419 – 426

10.	Annexure "**FA6**": Update regarding status of business rescue plan and recent media articles	427
11.	Annexure "**FA7**" Business Rescue Plan (Vision Transactions) prepared in terms of s150 of the Companies Act 71 of 2008 in relation to Tongaat Hulett Limited (in Business Rescue) prepared by the Joint Business Rescue Practitioners (29 November 2023)	428 - 500
	VOLUME 6	
12.	Annexure "**FA7**" continued	501 - 600
	VOLUME 7	
13.	Annexure "**FA7**" continued	601 - 700
	VOLUME 8	
14.	Annexure "**FA7**" continued	701 - 800
	VOLUME 9	
15.	Annexure "**FA7**" continued	801 - 900
	VOLUME 10	
16.	Annexure "**FA7**" continued	900 - 1004
	VOLUME 11	
17.	Annexure "**FA8**" Business Rescue Plan (RSG Group) prepared by the Joint Business Rescue Practitioners (29 November 2023)	1005 - 1100
	VOLUME 12	
18.	Annexure "**FA8**" continued	1101 – 1200

	VOLUME 13	
19.	Annexure "**FA8"** continued	1201 - 1300
	VOLUME 14	
20.	Annexure "**FA8"** continued	1301 - 1400
	VOLUME 15	
21.	Annexure "**FA8"** continued	1401 - 1500
	VOLUME 16	
25.	Annexure "**FA8" continued**	1501 – 1582
26.	Annexure "**FA9"** Transfer certificate agreement (execution version)	1583 - 1608
	VOLUME 17	
27.	Annexure "**FA10":** Notice of Motion in December 2023 application	1609 - 1638
28.	Annexure "**FA11":** Founding affidavit of Mukesh Kalidas Trikam on behalf of South African Sugar Association	1639 - 1688
29.	Annexure "**FA12"** Supporting Application to Intervene and Answering Affidavit in the Application - The Industrial Development Corporation of South Africa Limited.	1689 - 1700
	VOLUME 18	
30.	Annexure "**FA12" continued**	1701 - 1734
31.	Annexure "**FA13"** Court order handed down on the 13th of December 2023 in Durban by Honorable Mr Justice Vahed.	1735 - 1736

32.	Annexure **"FA14":** Amended business rescue plan (Vision Transactions) (29 November 2023)	1737 - 1800
	VOLUME 19	
33,	Annexure **"FA14"** continued	1801 – 1900
	VOLUME 20	
34.	Annexure **"FA14"** continued	1901 - 2000
	VOLUME 21	
35.	Annexure **"FA14"** continued	2001 - 2100
	VOLUME 22	
36.	Annexure **"FA14"** continued	2101 - 2200
	VOLUME 23	
37.	Annexure **"FA14"** continued	2201 - 2300
	VOLUME 24	
38.	Annexure **"FA14"** continued	2301 – 2330
39.	Annexure **"FA15":** Amended business rescue plan (RGS Transactions) (29 November 2023**)**	2331 - 2400
	VOLUME 25	
40.	Annexure **"FA15"** continued	2401 - 2500
	VOLUME 26	
41.	Annexure **"FA15"** continued	2501 - 2600

VOLUME 27		
42.	Annexure “**FA15”** continued	2601 - 2700
VOLUME 28		
43.	Annexure “**FA15”** continued	2701 – 2800
VOLUME 29		
44.	Annexure “**FA15”** continued	2800 – 2860
45.	Annexure **“FA16”:** Proposal Consideration (Vision Group vs RGS Holdings)	2861 - 2864
46.	Annexure **“FA17”:** Notice to the affected parties of Tongaat Hulett Limited (in Business Rescue) in respect the meeting of affected persons from the joint Business Rescue practitioners of Tongaat Hulett Limited (in business rescue).	2865 - 2866
47.	Annexure **“FA18”:** Article titled ‘RGS abandons Tongaat Hulett bid, claims business rescue is rigged.’ Published in the Mail & Guardian on the 9th of January 2024.	2867 - 2869
48.	Annexure **“FA19”:** Notice to affected parties of Tongaat Hulett Limited (in business rescue) regarding the outcome of the vote on the business rescue plan of the company. From joint Business Rescue Practitioners of Tongaat Hulett Limited (in business rescue)	2870 - 2872
49.	Annexure **“FA20”:** Update of disposal of lenders claims transaction and update on status of business rescue plan published and produced by JSE SENS department, dated 21 November 2023.	2873 - 2874

Note:

FILE	VOLUME
A	1 – 4
B	5 – 8
C	9 – 12
D	13 – 16
E	17 – 20
F	21 – 24
G	25 - 29

IN THE HIGH COURT OF SOUTH AFRICA
(KWAZULU-NATAL DIVISION, DURBAN)

Case number:

In the matter between:

MOHINI SINGARI NAIDOO **t/a POWERTRANS SALES AND SERVICES**	Applicant
and	
TONGAAT HULETT LIMITED **(IN BUSINESS RESCUE)**	First Respondent
TREVOR JOHN MURGATROYD N.O.	Second Respondent
PETRUS FRANCOIS VAN DEN STEEN N.O.	Third Respondent
GERHARD CONRAD ALBERTYN N.O.	Fourth Respondent
TERRIS AGRIPRO (MAURITIUS)	Fifth Respondent
REMOGGO (MAURITIUS) PCC	Sixth Respondent
GUMA AGRI AND FOOD SECURITY LTD (MAURITIUS)	Seventh Respondent
ALMOIZ NA HOLDINGS LIMITED	Eighth Respondent
THE AFFECTED PERSONS IN THE FIRST RESPONDENT'S BUSINESS RESCUE	Ninth Respondent

---

INDEX – FILE A (VOLUME 1 – 4)

ITEM	DESCRIPTION	PAGES
VOLUME 1		
1.	**Notice of Motion**	1 – 6
2.	**Founding Affidavit**	7 - 42
3.	Annexure **"FA 1" :** Adopted amended business rescue (Vision Transactions) (Marked up version)	43 - 100
VOLUME 2		
3.	Annexure "**FA 1"** continued	101 - 200
VOLUME 3		
4.	Annexure "**FA2" :** Business Rescue Plan prepared by the Joint Business Rescue Practitioners (31 MAY 2023)	201 - 300
VOLUME 4		
5.	Annexure "**FA2"** continued	301 - 400

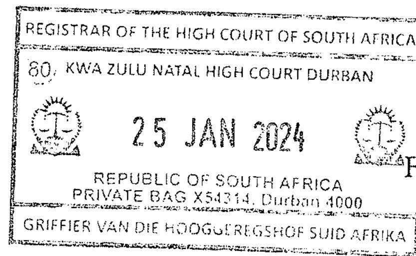
IN THE HIGH COURT OF SOUTH AFRICA

(KWAZULU-NATAL DIVISION, DURBAN)

Case number: D1103/2024

In the matter between:

MOHINI SINGARI NAIDOO	Applicant
t/a POWERTRANS SALES AND SERVICES	
and	
TONGAAT HULETT LIMITED	First Respondent
(IN BUSINESS RESCUE)	
TREVOR JOHN MURGATROYD N.O.	Second Respondent
PETRUS FRANCOIS VAN DEN STEEN N.O.	Third Respondent
GERHARD CONRAD ALBERTYN N.O.	Fourth Respondent
TERRIS AGRIPRO (MAURITIUS)	Fifth Respondent
REMOGGO (MAURITIUS) PCC	Sixth Respondent
GUMA AGRI AND FOOD SECURITY LTD (MAURITIUS)	Seventh Respondent
ALMOIZ NA HOLDINGS LIMITED	Eighth Respondent
THE AFFECTED PERSONS IN THE FIRST RESPONDENT'S BUSINESS RESCUE	Ninth Respondent



NOTICE OF MOTION

PART A

TAKE NOTICE THAT the aforesaid applicant intends making application on **Friday, 2 February 2024** at **09h30** or so soon thereafter as counsel may be heard for an order in the following terms:

1. That the applicant's non-compliance with the Uniform Rules of Court relating to service, time periods and forms be condoned, and that the applicant be permitted to bring this application as a matter of urgency in terms of Rule 6(12).

2. To the extent necessary, granting the applicant leave to bring this application against the First Respondent in terms of section 133(1)(*b*) of the Companies Act 71 of 2008 ("*the Companies Act*").

3. That the First to Fourth Respondents be interdicted from implementing / taking any further steps relating to the implementation of the business rescue plan adopted in relation to the First Respondent at the meeting of creditors held on 11 January 2024 pending the final determination of the relief sought in Part B of this notice of motion.

4. That the costs of Part A, including the costs of two counsel, be paid by the First to Fourth Respondents as well as any other party who opposes Part A jointly and severally, the one paying the other to be absolved.

5. Further and/or alternative relief.

PART B

TAKE NOTICE THAT the aforesaid applicant intends making application to this Honourable Court on an expedited date to be arranged with the Registrar and/or the Honourable Judge President, on papers duly supplemented if necessary, for an order in the following terms:

1. That the business rescue plan adopted in relation to the First Respondent at the meeting of creditors held on 11 January 2024 be declared unlawful.

2. That the business rescue plan adopted in relation to the First Respondent at the meeting of creditors held on 11 January 2024 be set aside.

3. That the costs of Part B, including the costs of two counsel, be paid by the First to Fourth Respondents as well as any other party who opposes Part B jointly and severally, the one paying the other to be absolved.

4. Further and/or alternative relief.

TAKE NOTICE FURTHER THAT the accompanying affidavit of MOHINI SINGARI NAIDOO shall be used in support of this application.

TAKE NOTICE FURTHER THAT the applicant has appointed the offices of the undersigned attorneys as the place at which she will accept notice and service of all process filed in these proceedings.

TAKE NOTICE FURTHER THAT the applicant agrees to accept service of all process filed in these proceedings by email at : devin@dmiatt.co.za & shelin@dmiatt.co.za & shreya@dmiatt.co.za

TAKE NOTICE FURTHER THAT any party who intends to oppose this application must:

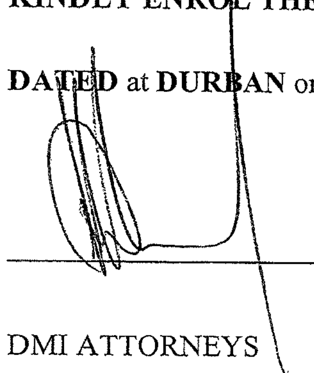
(a) notify the applicant's attorneys in writing by no later than 17h00 on Monday, 29 January 2024;

(b) deliver their answering affidavits, if any, by no later than 17h00 on Wednesday, 31 January 2024;

(c) should the above timeframes be observed, the applicant will file its replying affidavit by 17h00 on Thursday, 1 February 2024.

KINDLY ENROL THE MATTER FOR HEARING ACCORDINGLY.

DATED at **DURBAN** on this 26th day of **JANUARY 2024**.



DMI ATTORNEYS

1ST FLOOR

94 FLORIDA ROAD

MORNINGSIDE

DURBAN

TEL: 031 – 301 8623

REF: D MOODLEY

EMAIL: devin@dmiatt.co.za

shelin@dmiatt.co.za

shreya@dmiatt.co.za

CELL: DEVIN MOODLEY – 083 – 459 3311

SHELIN GATHIRAM – 082 – 888 9979

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

Durban

AND TO: **WERKSMANS ATTORNEYS**

Attorneys for the First to Fourth Respondents

11th Floor, The Central

96 Rivonia Road

Sandton

Tel: 011 535 8248

Email: dandropoulos@werksmans.com / TBoswell@werksmans.com / DHertz@werksmans.com / sgast@werksmans.com

Ref: Mr D Andropoulos / Mr T Boswell / Mr D Hertz / Ms S Gast

c/o EVH INC ATTORNEYS

Unit 4, Holwood Crescent, Holwood Park

La Lucia Ridge, Umhlanga, 4319

Tel: 031 492 7971

Email: erik@evhinc.co.za

Ref: W2409/0005

AND TO: **STEIN SCOP ATTORNEYS INC.**

Attorneys for Fifth to ~~Sixth Respondents~~ EIGHT RESPONDENT

Second Floor, Capital Hill

6 Benmore Road, Morningside, Sandton

Tel: (011) 380 8081

Mobile: 072 587 6361

Email: bradley@steinscop.com ; alexandra@steinscop.com ; brookeb@steinscop.com

Ref: TER2/0004/B Scop

c/o GOODRICKES ATTORNEYS

1 Nollsworth Park, Nollsworth Crescent, La Lucia Ridge

Tel: 031 301 6211

Email address: legal2@goodrickes.co.za

casper@steinscop.com;

AND TO: **GARLICKE AND BOUSFIELD INCORPORATED**

Attorney for the ~~Eight Respondent~~ NINTH RESPONDENT

7 Torsvale Crescent

La Lucia Ridge Office Estate

Tel: 031 570 5408

Email: howard.stephenson@gb.co.za

Ref: H Stephenson

IN THE HIGH COURT OF SOUTH AFRICA

(KWAZULU-NATAL DIVISION, DURBAN)

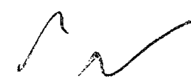
Case number:

In the matter between:

MOHINI SINGARI NAIDOO **t/a POWERTRANS SALES & SERVICES**	Applicant
and	
TONGAAT HULETT LIMITED **(IN BUSINESS RESCUE)**	First Respondent
TREVOR JOHN MURGATROYD N.O.	Second Respondent
PETRUS FRANCOIS VAN DEN STEEN N.O.	Third Respondent
GERHARD CONRAD ALBERTYN N.O.	Fourth Respondent
TERRIS AGRIPRO (MAURITIUS)	Fifth Respondent
REMOGGO (MAURITIUS) PCC	Sixth Respondent
GUMA AGRI AND FOOD SECURITY LTD (MAURITIUS)	Seventh Respondent
ALMOIZ NA HOLDINGS LIMITED	Eighth Respondent
THE AFFECTED PERSONS IN THE FIRST RESPONDENT'S BUSINESS RESCUE	Ninth Respondent

---

FOUNDING AFFIDAVIT



I, the undersigned,

MOHINI SINGARI NAIDOO

do hereby make oath and say that:

1. I am an adult female businesswoman and the sole proprietor of the entity Powertrans Sale and Services. I am duly authorised to institute these proceedings on behalf of Powertrans Sales & Services and to depose to this affidavit on its behalf.

2. The facts contained in this affidavit fall within my personal knowledge, save where the context indicates to the contrary and are, to the best of my belief, both true and correct.

3. Where I make submissions of a legal nature, I do so on the advice of the applicant's legal representatives, which advice I accept.

THE PARTIES

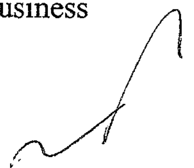
4. The applicant is Powertrans Sales & Services, which has its principle place of business at 14-16 Blue Street, Isithebe, KwaZulu-Natal.

5. The applicant is a creditor in the business rescue of the first respondent by virtue of its claim against the first respondent in the amount of R1958245.40 which claim was duly accepted by the second to fourth respondents.

6. The first respondent is **TONGAAT HULETT LIMITED (IN BUSINESS RESCUE)**, a public company duly incorporated in terms of the company laws of the Republic of South Africa, with registration number 1892/000610/06, currently in business rescue, having its principal place of business at Amanzimnyama Hill Road, Tongaat, KwaZulu-Natal. I refer to the first respondent below as "***THL***".

7. The second respondent is **TREVOR JOHN MURGATROYD N.O.**, an adult male director of Metis Strategic Advisors (Pty) Ltd which has its principal place of business at Jindal Africa Building, 22 Kildoon Road, Bryanston, Johannesburg. Mr Murgatroyd is one of the three duly appointed joint business rescue practitioners of THL.

8. The third respondent is **PETRUS FRANCOIS VAN DEN STEEN N.O.**, an adult male director of Metis Strategic Advisors (Pty) Ltd which has its principal place of business



at Jindal Africa Building, 22 Kildoon Road, Bryanston, Johannesburg. Mr van den Steen is one of the three duly appointed joint business rescue practitioners of THL.

9. The fourth respondent is **GERHARD CONRAD ALBERTYN N.O.**, an adult male director of Metis Strategic Advisors (Pty) Ltd which has its principal place of business at Jindal Africa Building, 22 Kildoon Road, Bryanston, Johannesburg. Mr Albertyn is one of the three duly appointed joint business rescue practitioners of THL.

10. For ease of reference, I refer to the second to fourth respondents collectively below as "***the BRPs***".

11. The fifth respondent is **TERRIS AGRIPRO (MAURITIUS)** (registration number 171903GBC), a company duly registered and incorporated in accordance with the laws of the Republic of Mauritius.

12. The sixth respondent is **REMOGGO (MAURITIUS) PCC** (registration number 117836 C1/GBL), a fund registered and incorporated in accordance with the laws of the Republic of Mauritius.

13. The seventh respondent is **GUMA AGRI AND FOOD SECURITY LTD (MAURITIUS)** (registration number: C192979), a company duly registered and incorporated in accordance with the laws of the Republic of Mauritius.

14. The eighth respondent is **ALMOIZ NA HOLDINGS LTD** (registration number: 67410836), a company registered and incorporated in accordance with the laws of the United Arab Emirates.

15. For ease of reference, I refer to the fifth to eighth respondents collectively below as "***the Vision Parties***".

16. The ninth respondent is **THE AFFECTED PERSONS IN THE FIRST RESPONDENT'S BUSINESS RESCUE**. These parties are joined in this application insofar as they are interested in the outcome of these proceedings. No relief is sought against the ninth respondent save in the event of opposition.

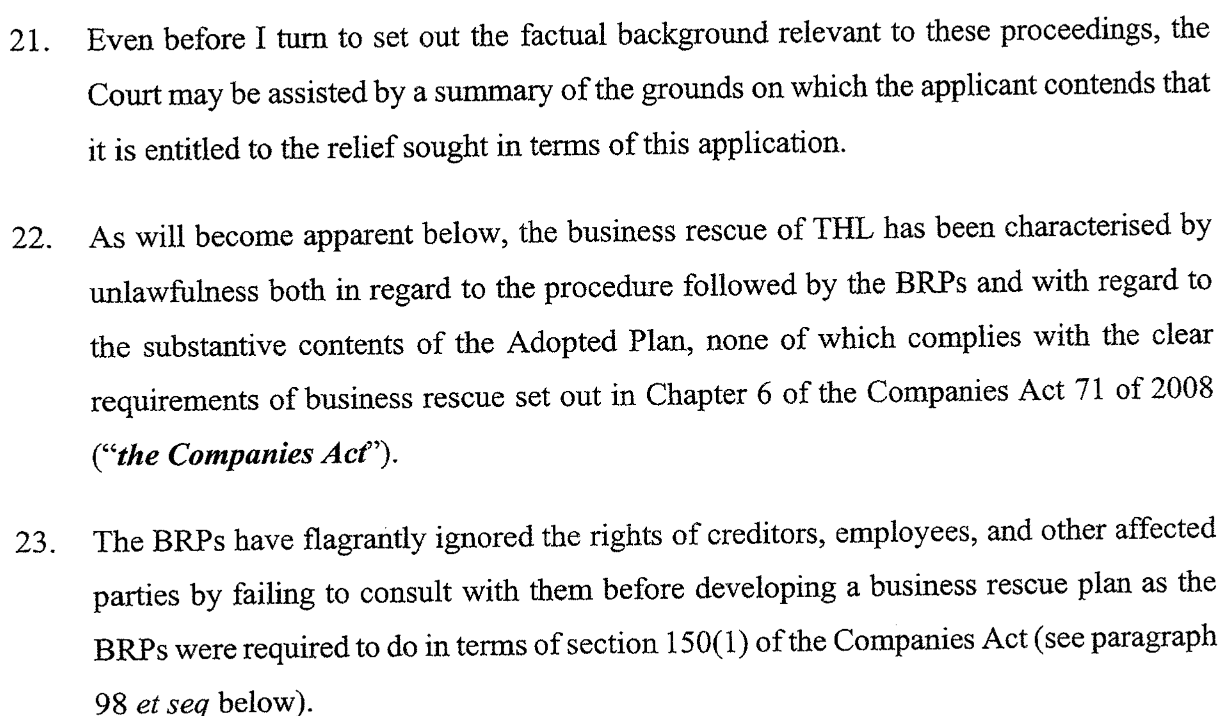
NATURE OF THIS APPLICATION

17. This application is brought in two parts. In terms of Part A, the applicant seeks urgent relief in the form of an interim interdict preventing the BRPs from taking any further steps to implement the business rescue plan that was adopted in the business rescue of THL at a meeting of creditors on 11 January 2024 ("***the Adopted Plan***"). A copy of the Adopted Plan is annexed, marked "**FA1**".

18. The Vision Parties proposed the transactions on which the Adopted Plan is premised.

19. The interim interdict contemplated in Part A is sought pending the determination of Part B of this application in terms of which the applicant seeks orders (i) declaring the Adopted Plan to be unlawful, and (ii) setting it aside on that basis.

20. Given the extremely limited time available to the applicant to consider the Adopted Plan in the form in which it was adopted on 11 January 2024 and prepare and file this application, the applicant reserves its right to file a supplementary founding affidavit in due course in relation to the relief sought under Part B.



OVERVIEW

21. Even before I turn to set out the factual background relevant to these proceedings, the Court may be assisted by a summary of the grounds on which the applicant contends that it is entitled to the relief sought in terms of this application.

22. As will become apparent below, the business rescue of THL has been characterised by unlawfulness both in regard to the procedure followed by the BRPs and with regard to the substantive contents of the Adopted Plan, none of which complies with the clear requirements of business rescue set out in Chapter 6 of the Companies Act 71 of 2008 ("***the Companies Act***").

23. The BRPs have flagrantly ignored the rights of creditors, employees, and other affected parties by failing to consult with them before developing a business rescue plan as the BRPs were required to do in terms of section 150(1) of the Companies Act (see paragraph 98 *et seq* below).

24. Consequently, affected parties that have no voting rights or where whose voting rights are too small in value to have any impact on the outcome of the business rescue process have effectively been excluded from participating in the business rescue of THL and have been denied the right to have their rights and interests taken into account by the BRPs in the business rescue plan so that the rights and interests of all stakeholders can be balanced.

25. The balancing of the rights and interests of all affected persons in business rescue proceedings is one of the central tenets of business rescue and should be a key objective of any business rescue process as is evident from section 7(*k*) of the Companies Act.

26. Instead of pursuing this objective the BRPs have been beholden only to the interests of the group of banks and financial institutions defined as "***the Lender Group***" in paragraph 3.1.41 of the Adopted Plan and to the interests of the Vision Parties who have consistently attempted to acquire the claims of the Lender Group but have as yet failed to do so despite their efforts.

27. The BRPs mistakenly adopted the aforesaid approach on the basis that since the Lender Group's voting rights are so large in value that no other creditors, whether individually or acting as a group, could outvote them when a business rescue plan is tabled for adoption, it made no sense to develop a business rescue plan that did not carry the support of the Lender Group and/or the Vision Parties who were to acquire their claims and thus be in a position to vote accordingly.

28. The Vision Parties have, however, on two previous occasions concluded agreements with the Lender Group to purchase the latter's claims, which agreements were conditional on the Vision Parties making payment of the purchase price. In both instances the Vision Parties failed to raise the funds necessary to make payment and the agreements therefore lapsed in circumstances where the BRPs do not appear to have done any diligence whatsoever to verify that the Vision Parties had funding available, see paragraphs 88.3 and 110 – 114 below.

29. At any rate, the BRPs consulted only with the Lender Group and the Vision Parties in any meaningful way, to the exclusion of other affected parties who have been left entirely in the dark. This is, however, antithetical to the express consultation requirements contained in various provisions of Chapter 6 of the Companies Act as well as to the

overarching objective of business rescue, i.e. to balance the rights and interests of all affected persons.

30. The imperative of the balancing exercise is especially important in that it is the only mechanism by which parties without voting rights or whose voting rights are incapable of affecting the outcome of the business rescue proceedings can be taken into account.

31. The Adopted Plan moreover fails to set out a viable prospect of rescuing THL and patently does not maximise the prospects of THL continuing in solvent existence since the financial projections contained in the Adopted Plan forecast that THL will be both commercially and factually insolvent post implementation of the Adopted Plan (see paragraph 118 *et seq* below).

32. The BRPs have also adopted an unlawful procedure by publishing two business rescue plans instead of the single plan contemplated in section 150 of the Act. Both of the published plans contained transactions proposed by bidders seek to acquire THL out of business rescue (i.e. the Vision Parties and RGS Group Holding Limited ("***RGS***") and the BRPs shirked their primary statutory obligation to develop a plan themselves (which could have been achieved by endorsing one of the transactions proposed by the bidders and publishing that as the definitive business rescue plan supported by the BRPs). The BRPs did not even express a preference or recommend one plan above the other (see paragraph 129 *et seq* below).

33. Furthermore, the Adopted Plan does not contain such information as is reasonably necessary to facilitate creditors in deciding whether or not to vote for or against the plan, which is contrary to the requirements of section 150(2) of the Companies Act. This is, amongst other things, due to the fact that the Adopted Plan does not explain how THL's post-commencement finance ("***PCF***") debt will be settled or where THL will find money to fund its working capital requirement post implementation of the Adopted Plan (see paragraph 144 *et seq* below).

34. Finally, the Adopted Plan does not in fact constitute a business rescue plan as contemplated in section 150 of the Companies Act at all since it is premised on the Vision Parties acquiring the Lender Group's claims, but such acquisition is only to occur after the adoption of the Adopted Plan and on terms extraneous thereto.

35. The Adopted Plan simply records that the Vision Parties and the Lender Group will conclude an agreement to this effect which amounts to no more than the recordal of an agreement to agree. The acquisition of the Lender Group's claims by the Vision Parties, without which the Adopted Plan will fail, therefore remains an uncertain future event which cannot be elevated to amount to a business rescue plan (see paragraph 158 *et seq* below).

FACTUAL BACKGROUND

36. THL was placed under voluntary business rescue supervision on 27 October 2022. The BRPs were appointed on the same day.

37. The BRPs created a dedicated business rescue section on THL's website and have used this as the principal means of communicating with THL's creditors and other affected persons. All of the communications issued by the BRPs to creditors and affected persons are posted on the THL business rescue website.

38. The BRPs first published a "proposed" business rescue plan on 31 May 2023, a copy of which is annexed marked "**FA2**" ("***the First Plan***").

39. The First Plan described various vaguely defined processes that the BRPs intended to follow in facilitating the rescue of THL. Most notably the First Plan indicated that the BRPs were in the process of "sourcing" strategic equity partners ("***SEPs***") to acquire and/or invest in the business of the THL Group (see paragraph 1.2 of the First Plan).

40. The BRPs referred to the First Plan as being "conditional" and explained the rationale for the plan as follows at paragraph 1.9 thereof:

> "Ideally, the BRPs would have preferred to publish a Business Rescue Plan that contained details relating to the outcomes of specific transactions, which had been agreed to, subjected to the approval of a business rescue plan. However, due to certain Creditors placing pressure on the BRPs to publish a business rescue plan detailing processes rather than detailed outcomes (by being unwilling to extend the Publication Date), the BRPs have had little alternative but to provide this somewhat "conditional" plan. For the same reasons the BRPs are not in a position to provide any estimates of the anticipated Distributions,

measures in cents in the Rand, that are likely to be received by the various classes of Creditors in accordance with this Business Rescue Plan if successfully implemented."

41. The First Plan was published without the BRPs having consulted creditors other than those creditors who according to the BRPs pushed for the publication of a conditional plan, which appears to be a reference to the Lender Group who together hold by far the largest claim in the THL business rescue (no other group of creditors let alone single creditor could possibly have exerted that measure of pressure on the BRPs).

42. The First Plan self-evidently did not contain all the information reasonably required to facilitate affected persons in deciding whether or not to accept or reject the plan as required in terms of section 150(2) of the Companies Act.

43. On 21 July 2023 the BRPs announced that they had identified their preferred SEP in Kagera Sugar Limited ("***Kagera***"). A copy of the relevant announcement posted by the BRPs in this regard is annexed, marked "**FA3**".

44. In the period between 21 July 2023 and 5 November 2023 the BRPs published no updates relating to the negotiations with Kagera and/or the Lender Group on the THL business rescue website and no consultation with the general body of creditors occurred in relation to the development of a business rescue plan.

45. On 5 November 2023 *City Press* published an article titled "Robert Gumede's consortium takes control of Tongaat Hulett" a copy of the article is annexed marked "**FA4**". The article reported that:

    45.1. Mr Gumede's Terris Consortium had "outwitted competitors" by "buying out 12 banks that had a combined claim of R8 billion against cash-strapped multinational sugar company, Tongaat Hulett" and that "Terris now owns" THL (referred to below as "***the Terris Transaction***");

    45.2. Kagera's bid had been mired in a scandal relating to a false promise of funding that had been provided to Kagera by an IDC official and on strength of which Kagera had convinced the BRPs to select it as the preferred SEP. The

implication of the aforesaid being that Kagera did not in fact have the funds necessary to fulfil the obligations expected from it as the preferred SEP.

46. As will become apparent from what is set out below, the Terris Consortium is a moniker previous used by the Vision Parties (i.e. the fifth to eighth respondents).

47. On 9 November 2023 an article appeared on *Moneyweb* titled "Tongaat rescue plan: 'Creditors have the final say' – current preferred bidder status means nothing." In terms of this article, a copy of which is annexed marked "**FA5**" it was in summary reported that:

47.1. the BRPs had been asked about the relevance of "preferred bidder status" (i.e. SEP status) in the THL Business Rescue in the light of reports that (i) the Terris Transaction had been concluded, and (ii) Kagera could not secure funding;

47.2. the BRPs had indicated that they could neither confirm nor deny any of the above and that they would only communicate via the JSE Stock Exchange News Service ("**SENS**");

47.3. the BRPs did however indicate that they were considering the impact of the Terris Transaction and that their initial views were that it was a positive development;

47.4. a shareholder activist contended that (i) since creditors must approve any business rescue plan proposed by the BRPs, the Terris Transaction means that "Mr Gumede" already has that (i.e. creditors approval) "wrapped up", and (ii) the Terris Transaction was an extraordinary deal in that the deal did not allow "a value creative disposal process."

48. Also on 9 November 2023, the BRPs issued a SENS announcement referring to recent media reports and confirming that the Lender Group had informed the BRPs that it had "entered into" the Terris Transaction which entailed the disposal of the Lender Group's claims and security to the Terris Consortium. The BRPs further indicated that the Terris Transaction was subject to payment of the purchase price for the Lender Group's claims but that they had been informed that payment is "expected to happen in the very near term." A copy of the SENS announcement is annexed, marked "**FA6**".

49. In the period between 9 November 2023 and 29 November 2023 the BRPs issued no updates relating to (i) the status of the intended Kagera transaction, or (ii) the negotiations between the Terris Consortium and/or the Lender Group on the THL business rescue website and no consultation with the general body of creditors occurred in relation to the development of a business rescue plan.

50. On 29 November 2023 the BRPs published two business rescue plans: one titled "Vision Transactions" and the other titled "RGS Transactions" (referred to below as "***the Vision Plan***" and "***the RGS Plan***" respectively). Copies of the Vision and RGS Plans are annexed, marked "**FA7**" and "**FA8**".

51. The BRPs expressed no opinion regarding which plan was better suited to facilitate the rescue of THL nor did they provide creditors with any comparative information regarding the relative pros and cons of the two plans.

52. The Vision Plan defines "Vision Parties" at paragraph 3.1.77 as being a group made up of Terris Agripro (Mauritius), Remoggo (Mauritius) PCC, Guma Agri and Food Security Ltd (Mauritius), and Almoiz NA Holdings Ltd, being the fifth to eighth respondents to this application and the same parties that were previously referred to as the Terris Consortium.

53. The BRPs record the following at pages 43 – 44 of the Vision Plan:

> "Subsequent to the conclusion of the SEP process, the BRPs were advised by the Vision Parties and the Lender Group that the Vision Parties were to acquire the significant (from a Voting Interest perspective) secured Claims of the Lender Group. The Vision Parties have made clear to the BRPs that subsequent to completion of the acquisition of the Claims of the Lender Group they would not vote such Claims in favour of a business rescue plan predicated on any alternative proposal received by the BRPs, but would only support the Proposals agreed with the BRPs and put forward in this Business Rescue Plan.
>
> It is noted that as at the Publication Date, the acquisition of the Claims of the Lender Group by the Vision Parties have not been completed."

54. It is therefore evident that the Vision Parties had not made payment in the Terris Transaction of the purchase price of the Lender Group's claims between 9 November 2023 when the BRPs first announced the proposed sale (see paragraph 48 above) and the date on which the Vision Plan was published, i.e. 29 November 2023, and that the Vision Parties' undertaking to pay the purchase price in the "very near term" had therefore not come to pass.

55. Subsequently, during or about late November or early December 2023 THL creditors received a copy of a new agreement concluded between the Vision Parties and the Lender Group during November 2023 (***the Vision Agreement***), a copy of which is annexed marked "**FA9**".

56. It is evident from clause 6.2 of the Vision Agreement that the Vision Parties were contractually obligated to make payment of the consideration payable for the purchase of the Lender Group claims by no later than noon on 6 December 2023 failing which the Vision Agreement would terminate.

57. The abovementioned payment deadline of 6 December 2023 was a day and a half ahead of the creditors meeting in terms of section 151 of the Companies Act at which the Vision Plan and the RGS Plan were scheduled to be put to a vote.

58. The Vision Plan stated at paragraph 2.2. that the "key feature" thereof was the acquisition by the Vision Parties of the claims and security held by the Lender Group, which acquisition was "anticipated to have been completed by the date of" the meeting in terms of section 151 of the Companies Act on 8 December 2023, and the subsequent conversion by the Vision Parties of a material portion of such claims into new equity in THL. These proposed transactions were defined in the Vision Plan as "***the Vision Transactions***".

59. It is evident from what is set out above that the Vision Plan was premised on the Vision Parties acquiring the Lender Group's claims and security *prior* to the adoption of the Vision Plan (i.e. that the Vision Parties would acquire the Lender Group's claims and then vote those claims in favour of the Vision Plan, see paragraph 53 above).

60. The RGS Plan on the other hand was premised on RGS acquiring the Lender Group's claims *in terms of and pursuant to* the transactions proposed in the RGS Plan (see paragraph 2.2. thereof).

61. Before the Vision and RGS Plans could be put to a vote both RCL Foods Sugar & Milling (Pty) Ltd ("***RCL***") and the South African Sugar Association ("***SASA***") filed urgent applications in this Court on 5 December 2023 ("***the RCL Application***" and "***the SASA Application***" respectively). Copies of the RCL and SASA Applications, excluding annexures, are annexed marked "**FA10**" and "**FA11**" respectively.

62. The RCL and SASA Applications were precipitated by prior litigation that had been launched by the BRPs in this Court in terms of which the BRPs had sought *inter alia* an order declaring that they were entitled to suspend THL's financial obligations to SASA in terms of section 136(2) of the Companies Act.

63. The BRPs had purportedly suspended THL's obligations as aforesaid from 28 October 2022 until April 2023 when THL resumed payments. The payments that had been suspended during the aforesaid period amounted to R1.1 billion which according to SASA constituted post-commencement debt which had to be incorporated as such in any business rescue plan published by the BRPs.

64. Justice Vahed handed down judgment on 4 December 2023 in terms of which he rejected the BRPs' arguments thereby holding that THL was indebted to SASA in the aforesaid amount which constituted a post-commencement debt ("***the Vahed Judgment***").

65. Given the findings contained in the Vahed Judgment and the fact that neither the Vision nor the RGS Plans took account of SASA's claim in the manner contemplated in the Vahed Judgment, RCL and SASA therefore launched their applications on 5 December 2023 seeking to interdict the creditors meeting that was scheduled for 8 December 2023 pending the subsequent adjudication of relief sought by RCL and SASA to have the Vision and RGS Plans declared unlawful and set aside.

66. The RCL and SASA Applications came before Justice Vahed on 7 December 2023 when they were postponed, along with the creditors meeting that was scheduled for 8 December 2023, to 13 December 2023. Various other parties intervened and/or filed further applications, none of which are directly relevant presently.

67. At the hearing on 7 December 2023, Justice Vahed enquired from Vision's counsel whether Vision had paid the purchase price for the acquisition of the Lender Group's claims and security. The court was informed that this had not occurred. It therefore

follows that the Vision Agreement must have lapsed due to non-payment (see paragraph 56 above).

68. The IDC intervened in the RCL and SASA Applications and filed an affidavit in support of its intervention application which doubled as its answering affidavit to the RCL and SASA Applications (*"the IDC Affidavit"*). A copy of the IDC Affidavit excluding annexures is annexed, marked "**FA12**".

69. The IDC advanced a PCF facility to THL on or about 23 December 2022 with an initial principal value of R1.2 billion (*"the IDC PCF Facility"*) (see paragraph 3.1.36. of the Amended Vision Plan and paragraph 3.1.41 of the Amended RGS Plan referred to in paragraph 77 below).

70. The IDC PCF Facility provided the essential working capital requirement that THL needed to remain a going concern after being placed under business rescue supervision.

71. On 5 October 2023 the IDC PCF Facility was increased to R2.3 billion with an option of increasing the principal amount further to R2.6 billion. The duration of the availability of the IDC PCF Facility was extended several times, latterly to 13 December 2023 in order to accommodate the RCL and SASA Applications.

72. In terms of the IDC Affidavit, the IDC indicated that any further extension of the IDC PCF Facility beyond 13 December 2023 would only be granted if the IDC was provided with additional security to its satisfaction failing which THL would face substantial cash flow shortages and be unable to fund its operations (paragraphs 45.3 and 53 – 55 of the IDC Affidavit).

73. Given the imperative for terms to be reached relating to the extension of the IDC PCF Facility, the IDC's position with regard to the RCL and SASA Applications was that the Vision and RGS Plans had to be put to a vote on or before 14 December 2023 in order to allow the IDC, the BRPs and THL (newly under control of the successful bidder) to work towards addressing (i) the additional security required by the IDC to prevent the facility from being limited and THL running out of funds, and (ii) THL's significant working capital requirements going into the next sugar crushing season (i.e. the IDC PACF Facility would remain essential to the survival of THL even after the successful adoption of a business rescue plan, see paragraphs 57 and 62 of the IDC Affidavit).

74. When the RCL and SASA Applications came before Justice Vahed on 13 December 2023 the learned judge ultimately issued an order in terms of which *inter alia* (i) the creditors meeting in terms of section 151 of the Companies Act that had been scheduled for 8 December 2023 was postponed to "a date no later than 11 January 2024", (ii) it was declared that the Vision and RGS Plan published on 29 November 2023 could not be voted on in their unamended form (i.e. without taking account of THL's debt to SASA as per the Vahed Judgment). A copy of the aforesaid court order is annexed, marked "**FA13**".

75. In the light of the abovementioned court order, and also on 13 December 2023, the IDC further extended the IDC PCF Facility to 28 February 2024.

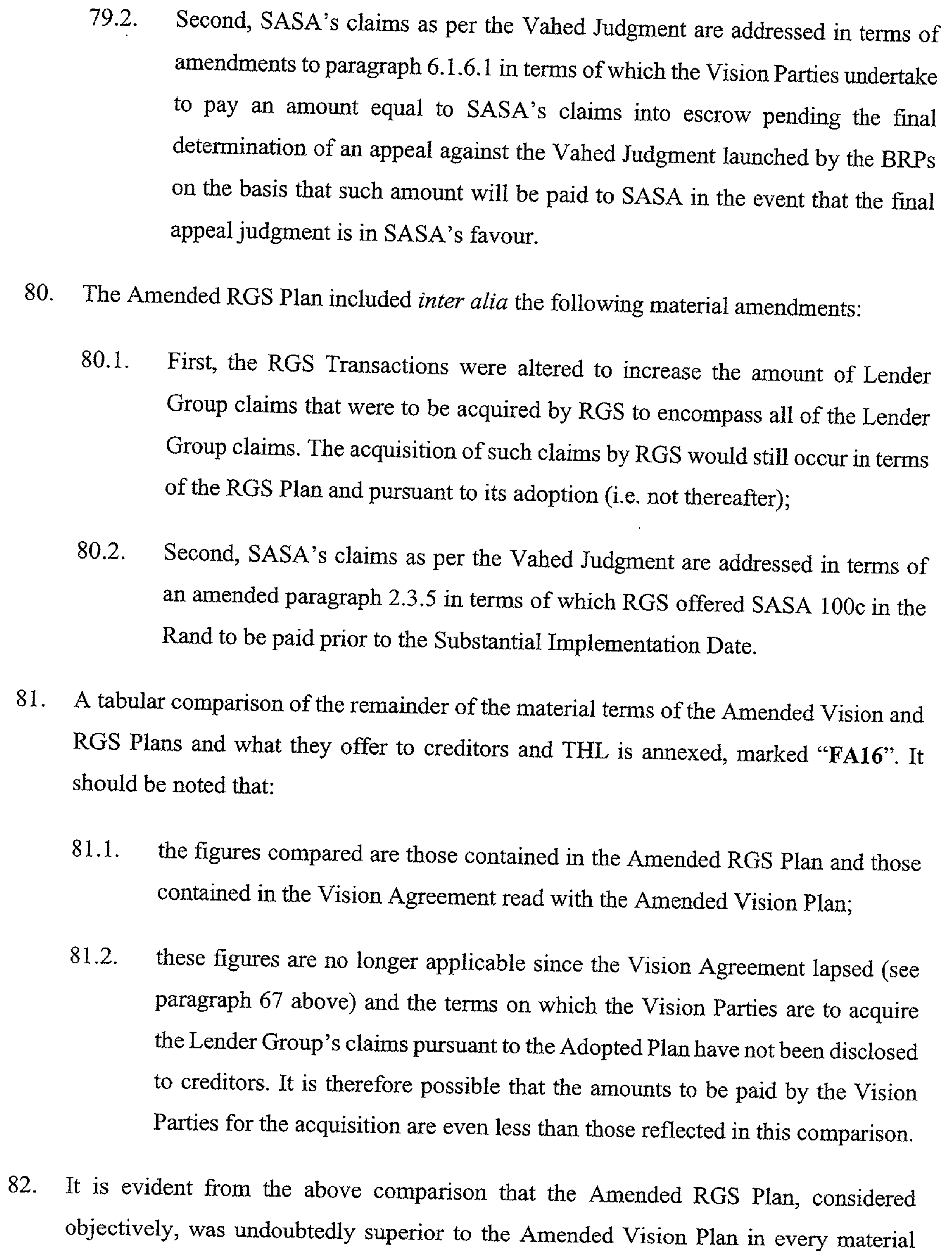
76. On 30 December 2023, the BRPs posted a notice on the THL business rescue website informing affected persons that the creditors meeting in terms of section 151 of the Companies Act would be convened on 10 January 2024.

77. Pursuant to the order issued by Justice Vahed on 13 December 2023, both the Vision and RGS Plans were amended to cater for SASA's claim against THL. Amended versions of the Vision and RGS Plans were posted on the THL business rescue website by the BRPs on 2 January 2024 ("***the Amended Vision Plan***" and "***the Amended RGS Plan***" respectively). Copies of the Amended Vision Plan and the Amended RGS Plan with the relevant amendments in track are annexed, marked "**FA14**" and "**FA15**" respectively.

78. Once again, the BRPs failed outright to consult with the general body of creditors – save presumably the Lender Group – in relation to the development of the Amended Vision and RGS Plans, the contents of which first came to the applicant's attention upon being posted on the THL business rescue website.

79. The Amended Vision Plan included *inter alia* the following material amendments:

79.1. First, the Vision Transactions were altered to state (at paragraphs 2.2 – 2.3) that the acquisition by the Vision Parties of the Lender Group's claims and security would now occur "upon the adoption of" the Vision Plan and that the Vision Parties will finalise the acquisition of the Lender Group claims "if" the Vision Plan is approved, i.e. the acquisition of the Lender Group's claims and the terms of such acquisition will only be finalised and concluded after the adoption of the



Vision Plan in terms of a separate agreement to be concluded between Vision and the Lender Group;

79.2. Second, SASA's claims as per the Vahed Judgment are addressed in terms of amendments to paragraph 6.1.6.1 in terms of which the Vision Parties undertake to pay an amount equal to SASA's claims into escrow pending the final determination of an appeal against the Vahed Judgment launched by the BRPs on the basis that such amount will be paid to SASA in the event that the final appeal judgment is in SASA's favour.

80. The Amended RGS Plan included *inter alia* the following material amendments:

80.1. First, the RGS Transactions were altered to increase the amount of Lender Group claims that were to be acquired by RGS to encompass all of the Lender Group claims. The acquisition of such claims by RGS would still occur in terms of the RGS Plan and pursuant to its adoption (i.e. not thereafter);

80.2. Second, SASA's claims as per the Vahed Judgment are addressed in terms of an amended paragraph 2.3.5 in terms of which RGS offered SASA 100c in the Rand to be paid prior to the Substantial Implementation Date.

81. A tabular comparison of the remainder of the material terms of the Amended Vision and RGS Plans and what they offer to creditors and THL is annexed, marked "**FA16**". It should be noted that:

81.1. the figures compared are those contained in the Amended RGS Plan and those contained in the Vision Agreement read with the Amended Vision Plan;

81.2. these figures are no longer applicable since the Vision Agreement lapsed (see paragraph 67 above) and the terms on which the Vision Parties are to acquire the Lender Group's claims pursuant to the Adopted Plan have not been disclosed to creditors. It is therefore possible that the amounts to be paid by the Vision Parties for the acquisition are even less than those reflected in this comparison.

82. It is evident from the above comparison that the Amended RGS Plan, considered objectively, was undoubtedly superior to the Amended Vision Plan in every material

metric of comparison and was the only plan in terms of which THL would be restored to solvency.

83. Notably, the Amended RGS Plan appeared to offer R240 million more than the Amended Vision Plan to the Lender Group while at the same time offering in summary the following:

83.1. The IDC R2.65 billion to settle the IDC PCF Facility (being 100c in the Rand) whereas the Amended Vision Plan makes no commitment to either provide the additional security required by the IDC to sustain the IDC PCF Facility or to repay the facility (see paragraph 2.4.7 and 5.3.5.7 of the Amended Vision Plan);

83.2. Unsecured creditors approximately R1,334 billion vs R75 million offered in the Amended Vision Plan (this translates to unsecured creditors receiving either 100 cents or 65 cents in the Rand in terms of the Amended RGS Plan whereas unsecured creditors receive effectively 5 cents in the Rand in terms of the Amended Vision Plan);

83.3. R500 million towards THL's working capital requirement vs R0 offered in terms of the Amended Vision Plan (again subject to negotiation);

83.4. No retrenchment of employees vs an indication that retrenchments are expected in terms of the Amended Vision Plan;

83.5. An equity injection for THL of approximately R4.2 billion with a further amount of R3.5 billion guaranteed by RGS vs no equity offered in terms of the Amended Vision Plan which was premised on debt finance.

84. The Amended RGS Plan moreover projected that THL would be returned to robust solvency in the three financial years from 2025 – 2027 while the Amended Vision Plan projected that THL would remain both factually and commercially insolvent.

85. The BRPs, however, once again expressed no opinion regarding which plan was better suited to facilitate the rescue of THL nor did they provide creditors with any comparative information regarding the relative pros and cons of the two plans.

86. On 9 January 2024, one day before the creditors meeting at which the Amended Vision and RGS Plans were to be put to a vote, RGS withdrew its bid. The BRPs issued a short announcement on the THL business rescue website which simply informed affected persons that the Amended RGS Plan had been withdrawn in its totality by RGS's board of directors and that RGS would therefore no longer be participating as a proposer at the creditors meeting. A copy of this announcement is annexed, marked "**FA17**".

87. On the same day an article appeared in the *Mail & Guardian* in terms of which it was reported that RGS had withdrawn its bid because it believed that the process had been "rigged" in favour of the Vision Parties, a copy of this article is annexed marked "**FA18**". The article further details various issues cited by RGS as reasons for the withdrawal of its bid including that:

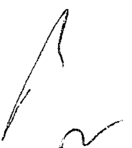
87.1. the BRPs had consistently taken steps to place impediments in the way of RGS's proposals and have been patently biased in favour of the proposals put forward by the Vision Parties;

87.2. the RGS board of directors does not trust that the BRPs are honest independent professionals...and believes that the BRPs will continue to work against RGS even if the RGS plan were to be adopted;

87.3. the BRPs had used confidential information contained in the Amended RGS Plan to assist the Vision Parties in addressing deficiencies in the Vision Plan and had also leaked information to the media to try to discredit RGS and its proposals;

87.4. the RGS board of directors could not risk paying R2 billion to the Lender Group prior to the conclusion of the transaction...[b]ecause of the risk of the Vision Parties going to court if RGS was successful – and the likelihood of the BRPs actively working to assist the Vision Parties or to delay the implementation of the RGS plan – RGS would not make any payment to the Lender Group before the transaction was concluded;

87.5. RGS's executive chairperson stated that "[h]ad the process been run fairly and independently and in the interests of THL and its stakeholders, RGS is firmly of



the view that the RGS BRP plan would have been the only one of the two plans up for consideration at the meeting."

88. The creditors meeting in terms of section 151 of the Companies Act was convened virtually on 10 January 2024. During the meeting:

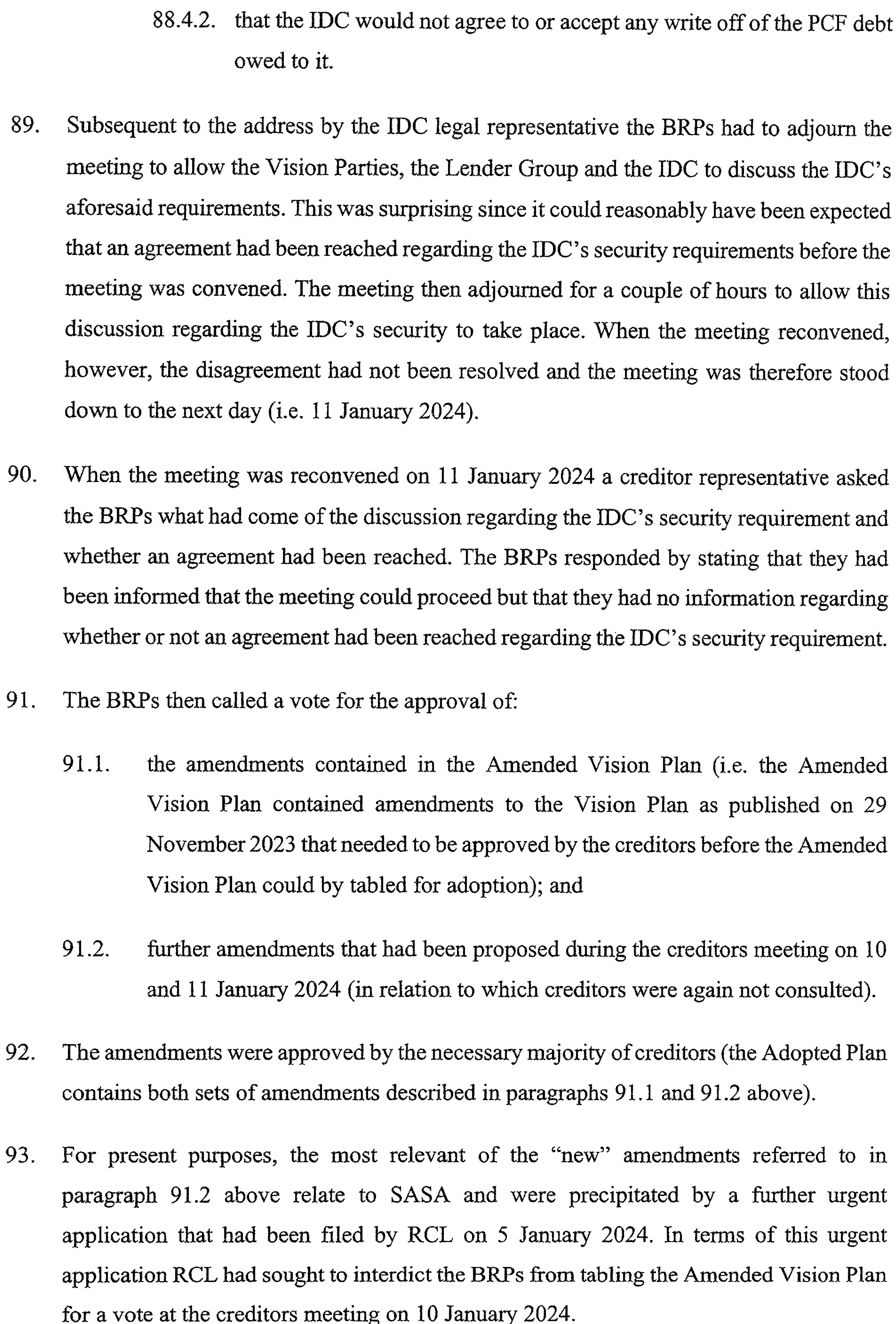
88.1. A creditor asked the BRPs why the Amended RGS Plan had been withdrawn, the BRPs provided no explanation and simply stated that they had discharged their obligations in that they had put forward a plan (i.e. the Amended Vision Plan) that offered a better return to creditors than liquidation;

88.2. A creditor asked whether the Vision Parties could "do better" by offering creditors more and queried why RGS had offered 100 cents in the Rand to some creditors and 65 cents in the Rand to others when Vision was offering only 5 cents in the Rand. The BRPs simply stated in response that there was no point in discussing the Amended RGS Plan since it had been withdrawn and a Vision representative added that the Amended Vision Plan was "the best that Vision could do.";

88.3. A creditor asked the BRPs what financing arrangements were in place with regard to the Vision Parties' proposed acquisition of the Lender Group's claims. The BRPs responded by stating that they had received a letter from Standard Bank, a member of the Lender Group, to the effect that the Lender Group were satisfied that the Vision Parties had the necessary financing available to acquire the Lender Group's claims. That such a letter had satisfied the BRPs is extraordinary since they had been issued with similar letters on the two previous occasions on which the Vision Parties had failed to secure the necessary funding to acquire the Lender Group's claims (see paragraphs 48, 56 and 67 above);

88.4. The IDC's legal representative was invited to make a statement on behalf of the IDC during which he set out what he referred to as the "pillars" of the business rescue plan including:

88.4.1. that arrangements had to be made to extend the IDC PCF Facility on terms acceptable to the IDC including the provision of additional security either by the Vision Parties or THL or both;



88.4.2. that the IDC would not agree to or accept any write off of the PCF debt owed to it.

89. Subsequent to the address by the IDC legal representative the BRPs had to adjourn the meeting to allow the Vision Parties, the Lender Group and the IDC to discuss the IDC's aforesaid requirements. This was surprising since it could reasonably have been expected that an agreement had been reached regarding the IDC's security requirements before the meeting was convened. The meeting then adjourned for a couple of hours to allow this discussion regarding the IDC's security to take place. When the meeting reconvened, however, the disagreement had not been resolved and the meeting was therefore stood down to the next day (i.e. 11 January 2024).

90. When the meeting was reconvened on 11 January 2024 a creditor representative asked the BRPs what had come of the discussion regarding the IDC's security requirement and whether an agreement had been reached. The BRPs responded by stating that they had been informed that the meeting could proceed but that they had no information regarding whether or not an agreement had been reached regarding the IDC's security requirement.

91. The BRPs then called a vote for the approval of:

91.1. the amendments contained in the Amended Vision Plan (i.e. the Amended Vision Plan contained amendments to the Vision Plan as published on 29 November 2023 that needed to be approved by the creditors before the Amended Vision Plan could by tabled for adoption); and

91.2. further amendments that had been proposed during the creditors meeting on 10 and 11 January 2024 (in relation to which creditors were again not consulted).

92. The amendments were approved by the necessary majority of creditors (the Adopted Plan contains both sets of amendments described in paragraphs 91.1 and 91.2 above).

93. For present purposes, the most relevant of the "new" amendments referred to in paragraph 91.2 above relate to SASA and were precipitated by a further urgent application that had been filed by RCL on 5 January 2024. In terms of this urgent application RCL had sought to interdict the BRPs from tabling the Amended Vision Plan for a vote at the creditors meeting on 10 January 2024.

94. RCL was aggrieved *inter alia* by the fact that the Amended Vision Plan still did not take SASA's claim into account in the manner envisaged in the Vahed Judgment. However, over the weekend of 5 January 2024 the BRPs entered into negotiations with RCL and SASA the result of which was (see paragraph 6.1.6 of the Adopted Plan):

94.1. that the Vision Plan would be amended to provide that an amount equal to SASA's claim would be paid into escrow by THL on the basis that the quantum of SASA's claim of R525 956 121 was agreed; and

94.2. that the aforesaid amount would be paid by THL but that if THL was not in funds to do so, the payment would be made by the Vision Parties.

95. The Adopted Plan was then tabled for a vote and approved by the majority of creditors. In a notice issued by the BRPs on 11 January 2024, a copy of which is annexed marked "**FA18**", the BRPs confirmed that:

95.1. for the Adopted Plan to be approved and binding on THL, it must be supported by the holders of more that 75% of the total creditors' voting interests that were voted and the votes in support of the plan must include at least 50% of the independent creditors' voting interests that were voted;

95.2. of the votes cast by creditors 98.51% votes in favour of adopting the plan and 1.49% voted against the plan;

95.3. of the votes cast by independent creditors 98.47% voted in favour of adopting the plan and 1.53% voted against the plan.

96. The above statistics are, however, misleading since they are premised on percentage calculations determined with reference only to the votes that were cast and moreover simply serve to demonstrate the overwhelming value of the Lender Group's voting rights as against the miniscule value of other creditors' voting rights.

97. There have moreover been unconfirmed reports that both the IDC and SASA abstained from voting. If this is true it would be another major contributing factor to the skewed percentage statistics provided by the BRPs.

THE ADOPTED PLAN IS UNLAWFUL

Failure to consult creditors and other affected persons

98. As is evident from what is set out above, the BRPs failed outright to consult with the general body of creditors and affected persons before preparing:

    98.1. the First Plan which was published on 31 May 2023 (see paragraph 38 above);

    98.2. the Vision Plan and the RGS Plan both of which were published on 29 November 2023 (see paragraph 50 above);

    98.3. the Amended Vision Plan and the Amended RGS Plan which were circulated on 13 December 2023 (see paragraph 77 above);

    98.4. the Adopted Plan.

99. I am advised that in terms of section 7(*k*) of the Companies Act, the purpose of Business Rescue is to provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders.

100. It is in the light of the abovementioned objective that the provisions of sections 150(1) must be considered. The peremptory duty on the BRPs to consult with creditors and other affected persons is crucial to the objective of balancing the rights and interests of all relevant stakeholders, which balancing exercise cannot be achieved in the absence of consultation.

101. It is submitted that the obligation on the BRPs to consult creditors and affected persons takes on particular significance in circumstances such as the present where a small number of creditors (i.e. the Lender Group) hold the overwhelming majority of voting rights and would thus be in a position to unilaterally determine the outcome of the business rescue proceedings were it not for the fiduciary role played by the BRPs, who – as officers of the court – step into the shoes of the directors of the company, and who alone have the power to balance the rights and interests of disenfranchised creditors and affected persons against those of the creditors who are able to enforce their interests through votes.

102. The BRPs presently have often repeated the refrain that the THL business rescue is "creditor driven" but it is in fact glaringly obvious that the BRPs have long since

proceeded on the basis that the THL business rescue is driven by the Lender Group or whomsoever holds the Lender Group's voting rights.

103. This is evident *inter alia* from the manner in which the BRPs conducted the business rescue proceedings after they were informed that the Vision Parties were in the process of purchasing the Lender Group's claims and that the Vision Parties would only support the Vision Transactions as set out in the Vision Plan to the exclusion of any other plan (see paragraph 53 above).

104. Despite the fact that the BRPs had concluded their SEP selection process and chosen Kagera as their preferred bidder, they immediately abandoned the pursuit of a Kagera-based plan in favour of a Vision-based plan upon merely being informed that the Vision Parties had concluded an agreement with the Lender Group and despite the fact that such agreement remained subject to payment of the purchase price.

105. As indicated above, the BRPs in fact went so far as to issue a SENS announcement to the effect that the Terris / Vision Parties were to acquire the Lender Group's claims before such acquisition had even occurred and ostensibly without interrogating the relative merits of a Vision Plan or the likelihood of the acquisition actually occurring as opposed to, for example, the merits of the Kagera or RGS Plans considered holistically from the perspective of the general body of creditors and other affected persons (see paragraph 48 above).

106. However, when the agreement on which the Terris Transaction was premised lapsed due to non-payment (see paragraphs 54 above) the BRPs did not issue a SENS announcement to this effect or provide any updates regarding the status of the Vision Plan despite the fact that the acquisition agreement had lapsed <u>prior</u> to the court order issued by Justice Vahed on 13 December 2023 in terms of which the creditors meeting was postponed and it was ordered that the Vision and RGS Plans could not be voted on in unamended form (see paragraph 74 above).

107. It is submitted that the BRPs' conduced in this regard was unlawful. Their failure to disclose the fact that the acquisition agreement on which the Vision Plan was premised had lapsed amounts to a flagrant abuse of the BRPs duties as officers of the Court as well as their statutory obligation to consult creditors and keep them informed of material developments in the business rescue process. The BRPs clearly had an obligation to

disclose this information to (i) the Court in their affidavits filed in the RCL and SASA Applications and, (ii) to affected persons and creditors by way of a SENS announcement and an announcement on the THL business rescue website.

108. In keeping with this curious selectiveness regarding the disclosure of material information, the BRPs again issued a SENS announcement on 21 November 2023 in terms of which they stated that they had "received confirmation from" the Lender Group that the latter had entered into "an updated transaction" for the disposal of the Lender Group's claims, which transaction as before remained subject to payment of the purchase price. A copy of this SENS announcement is annexed, marked "**FA19**".

109. The "updated transaction" referred to in the abovementioned SENS announcement was a reference to the Vision Agreement (paragraph 55 above) and to refer to it as "an updated transaction" was therefore disingenuous since the BRPs had not disclosed the fact that the Terris Transaction had failed due to the lapsing of the agreement on which it was premised (on account of non-payment). The Vision Agreement was in fact an entirely new agreement and payment by the Vision Parties was due in terms thereof by 6 December 2023.

110. Given the fact that the first acquisition agreement (i.e. the Terris Transaction) had lapsed and that the Vision Agreement constituted a new agreement, the Vision Plan as published on 29 November 2023 in fact no longer existed and the BRPs should have consulted with creditors in this regard and then, if they so wished, published a new Vision Plan incorporating the Vision Agreement. The Amended Vision Plan in fact amounted to a brand new business rescue plan which had not been published within the meaning of section 150(5) of the Companies Act and in relation to which creditors had not been consulted at all.

111. When the Vision Parties failed to make payment by 6 December 2023 the Vision Agreement also lapsed (paragraph 67 above). Once again the BRPs declined to issue a SENS announcement to inform creditors and affected persons of this fact.

112. In summary, Vision Parties did not make payment of the purchase price due for the acquisition of the Lender Group's claims either:

112.1. as the Vision Parties initially promised would occur in the "very near term" when they first informed the BRPs of their intention to acquire the Lender Group's claims shortly after Kagera had been selected as the SEP (see paragraph 48 above); or

112.2. pursuant to the Vision Agreement which lapsed due to non-payment on 6 December 2023 (see paragraphs 56 and 67 above).

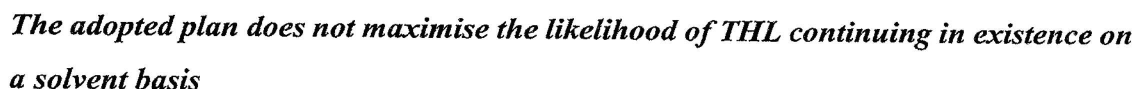
113. In fact, as canvassed in more detail below, the Vision Parties have to date still not acquired the Lender Group's claims given that the Adopted Plan is to the effect that such acquisition is to occur subsequent to the adoption of and outside the parameters of the Adopted Plan (see paragraph 79.1 above).

114. As indicated above, the BRPs appear to have taken the Vision Parties and the Lender Group at their word with regard to the availability of financing for the acquisition of the Lender Group's claims pursuant to the Adopted Plan despite the fact that the Vision Parties had twice failed to raise the necessary funds. On the BRPs' own version the only proof that they have procured to the effect that financing is in fact available for purposes of the acquisition of the Lender Group's claims pursuant to the Adopted Plan is another letter from Standard Bank (see paragraph 88.3 above), this in circumstances where Standard Bank had issued similar letters previously in relation to the Terris Transaction and the Vision Agreement both of which lapsed due to non-payment.

115. It is on this basis that a reasonable impression has been created that the BRPs are biased in favour of the Lender Group and the Vision Parties.

116. It is indisputable that the general body of creditors and affected persons were not meaningfully consulted by the BRPs in relation to any of the business rescue plans that have been published.

117. I am advised that such failure to consult is *per se* fatal to the validity of the Adopted Plan which should be set aside on this basis alone. Full legal argument will be advanced in this regard at the hearing of this application.



The adopted plan does not maximise the likelihood of THL continuing in existence on a solvent basis

118. The definition of 'business rescue' contained in section 128(1)(*b*)(iii) of the Companies Act provides as follows:

> 'business rescue' means proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for –
>
> ...
>
> (iii) the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis **or, if it is not possible for the company to so continue in existence,** results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company. (emphasis added.)

119. It is evident from a plain reading of the definition of 'business rescue' that business rescue plans must be formulated in a manner that maximises the likelihood of the company continuing in existence on a solvent basis.

120. It is only if and when this objective is unattainable that a business rescue plan may be devised and implemented on the basis that it offers a better return for creditors than would be realised upon immediate liquidation.

121. The BRPs have sought to defend the Adopted Plan, and the fact that it offers unsecured creditors only approximately 5 cents in the rands, on the basis that the Adopted Plan offers a better return for such creditors than they would stand to receive at liquidation i.e. R0 (see pages 70 – 71 of the Adopted Plan).

122. But the BRPs are clearly not at liberty to put up a plan that does not maximise the likelihood of THL continuing in existence on a solvent basis in circumstances where an alternative that would do so exists.

123. As indicated above, the projected income statement at page 127 of the Adopted Plan forecasts losses in the amounts of R830 million, R428 million, and R430 million in

relation to THL's 2025, 2026 and 2027 financial years whereas the projected balance sheet at page 130 of the Adopted Plan discloses the following forecast net asset values.

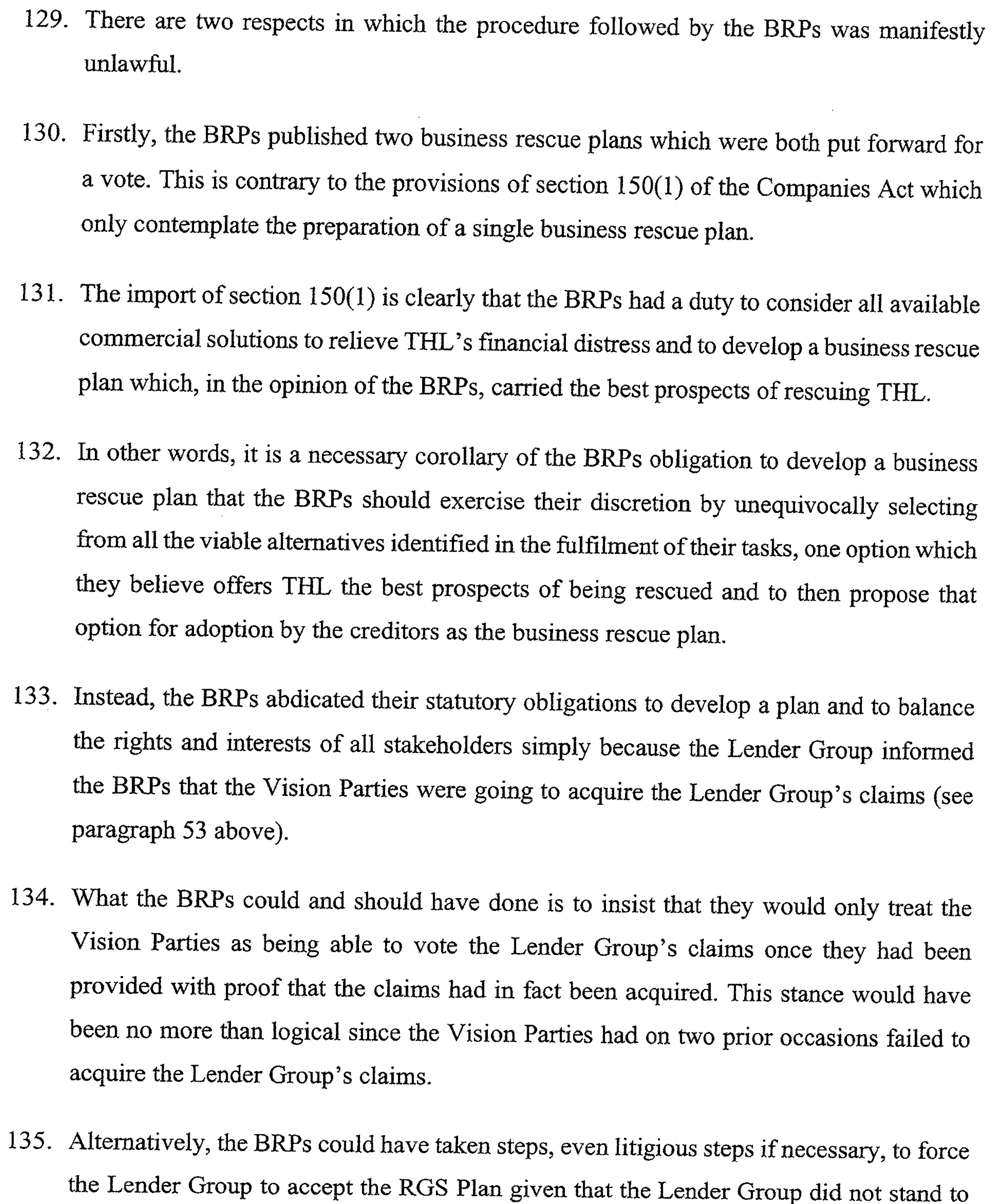
ZAR 'Million	**FY25**	**FY26**	**FY27**
Assets	5 534	5 907	6 109
Equity	-2 426	-2 574	-2 702
Liabilities	7 960	8 480	8 811
• Borrowings	5 741	6 226	6 507
• SASA	526	526	526
• Creditors	580	580	580
Net Assets	**-2 426**	**-2 573**	**- 2702**

124. The Adopted Plan is therefore forecast to leave THL factually and commercially insolvent and it is in fact difficult to discern how THL's position post implementation of the Adopted Plan would be more favourable than THL's position had been before it was placed under business rescue supervision.

125. This result is unconscionable in circumstances where the BRPs proceeded on the basis that (i) all that was required of them was to put up a plan that offered a better outcome than liquidation, and (ii) that there was no point in putting up any plan other than one proposed by the Vision Parties and backed by the Lender Group

126. The RGS Plan in fact offered a real alternative in terms of which THL's likelihood of continued existence on a solvent basis was not only maximised but unsecured creditors and THL stood to benefit significantly more in circumstances where the Lender Group was also to be paid more than it stood to receive in terms of the Vision Plan (see paragraph 83 and annexure "FA16" above).

127. It is inconceivable that the BRPs did not do everything in their power to ensure that the RGS Plan was adopted given that it was clearly and objectively the plan that maximised THL's prospects of continuing in solvent existence.



128. By contrast, far from achieving the holistic objectives of business rescue, the Adopted Plan ostensibly only achieves the private objectives of the Lender Group and the Vision Parties.

Unlawful Procedure

129. There are two respects in which the procedure followed by the BRPs was manifestly unlawful.

130. Firstly, the BRPs published two business rescue plans which were both put forward for a vote. This is contrary to the provisions of section 150(1) of the Companies Act which only contemplate the preparation of a single business rescue plan.

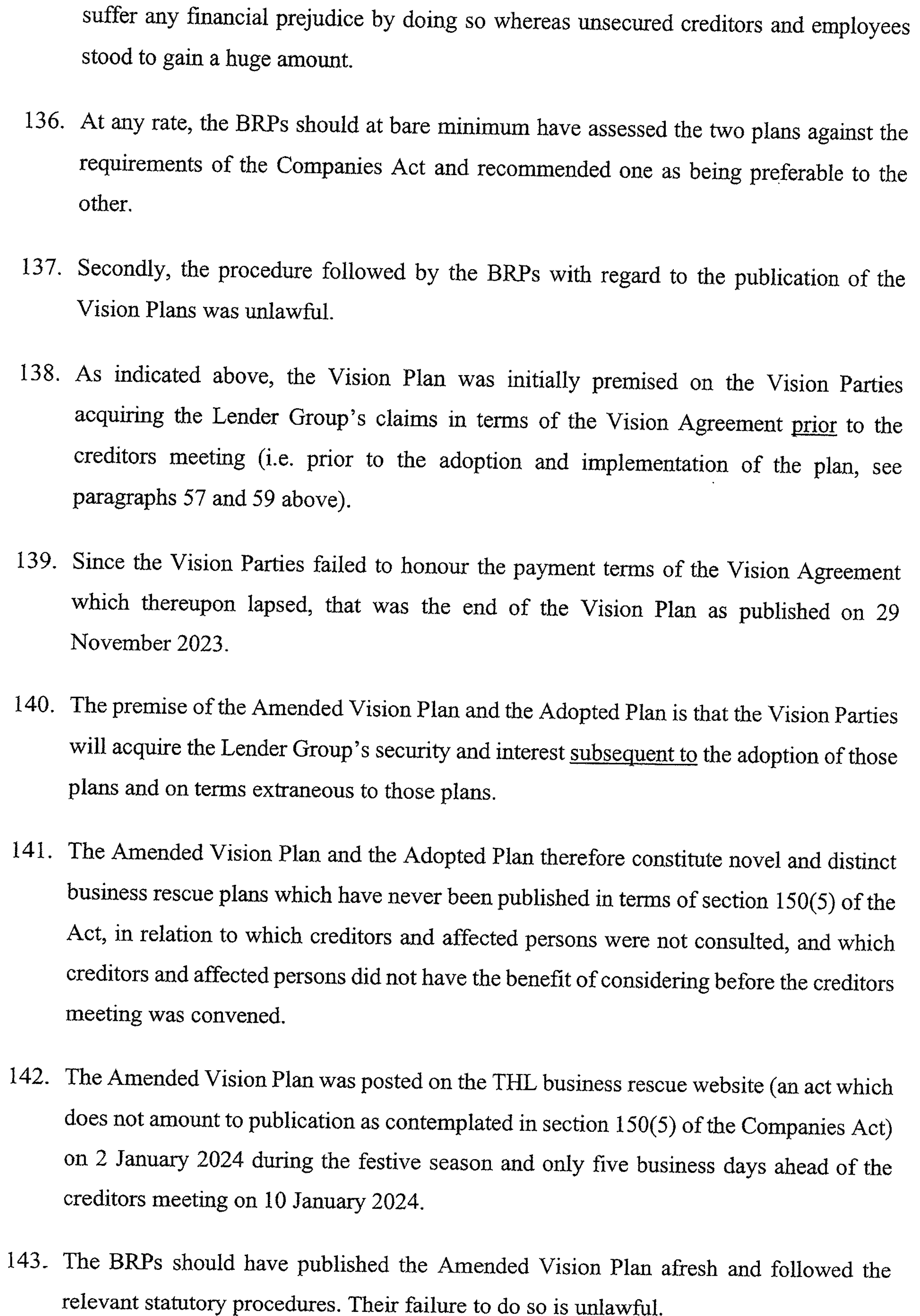
131. The import of section 150(1) is clearly that the BRPs had a duty to consider all available commercial solutions to relieve THL's financial distress and to develop a business rescue plan which, in the opinion of the BRPs, carried the best prospects of rescuing THL.

132. In other words, it is a necessary corollary of the BRPs obligation to develop a business rescue plan that the BRPs should exercise their discretion by unequivocally selecting from all the viable alternatives identified in the fulfilment of their tasks, one option which they believe offers THL the best prospects of being rescued and to then propose that option for adoption by the creditors as the business rescue plan.

133. Instead, the BRPs abdicated their statutory obligations to develop a plan and to balance the rights and interests of all stakeholders simply because the Lender Group informed the BRPs that the Vision Parties were going to acquire the Lender Group's claims (see paragraph 53 above).

134. What the BRPs could and should have done is to insist that they would only treat the Vision Parties as being able to vote the Lender Group's claims once they had been provided with proof that the claims had in fact been acquired. This stance would have been no more than logical since the Vision Parties had on two prior occasions failed to acquire the Lender Group's claims.

135. Alternatively, the BRPs could have taken steps, even litigious steps if necessary, to force the Lender Group to accept the RGS Plan given that the Lender Group did not stand to



suffer any financial prejudice by doing so whereas unsecured creditors and employees stood to gain a huge amount.

136. At any rate, the BRPs should at bare minimum have assessed the two plans against the requirements of the Companies Act and recommended one as being preferable to the other.

137. Secondly, the procedure followed by the BRPs with regard to the publication of the Vision Plans was unlawful.

138. As indicated above, the Vision Plan was initially premised on the Vision Parties acquiring the Lender Group's claims in terms of the Vision Agreement <u>prior</u> to the creditors meeting (i.e. prior to the adoption and implementation of the plan, see paragraphs 57 and 59 above).

139. Since the Vision Parties failed to honour the payment terms of the Vision Agreement which thereupon lapsed, that was the end of the Vision Plan as published on 29 November 2023.

140. The premise of the Amended Vision Plan and the Adopted Plan is that the Vision Parties will acquire the Lender Group's security and interest <u>subsequent to</u> the adoption of those plans and on terms extraneous to those plans.

141. The Amended Vision Plan and the Adopted Plan therefore constitute novel and distinct business rescue plans which have never been published in terms of section 150(5) of the Act, in relation to which creditors and affected persons were not consulted, and which creditors and affected persons did not have the benefit of considering before the creditors meeting was convened.

142. The Amended Vision Plan was posted on the THL business rescue website (an act which does not amount to publication as contemplated in section 150(5) of the Companies Act) on 2 January 2024 during the festive season and only five business days ahead of the creditors meeting on 10 January 2024.

143. The BRPs should have published the Amended Vision Plan afresh and followed the relevant statutory procedures. Their failure to do so is unlawful.

The adopted plan does not contain information reasonably required to facilitate affected persons in deciding whether or not to accept or reject the plan

144. Section 150(2) of the Companies Act provides that the 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.

145. The Adopted Plan fails in this regard on two fronts, firstly with regard to information relating to the IDC's additional security requirement, and secondly in relation to information relating to the funds required to paid into escrow to cover SASA's claim.

146. Firstly, as already indicated above, the Adopted Plan does not contain any terms regarding either the provision of the additional security required by the IDC or the manner in which the IDC PCF Facility will eventually be settled (see paragraph 83.1 above).

147. The absence of clarity in this regard is bizarre given the centrality of PCF in the business rescue proceedings both in the sense that PCF is required to ensure the continued existence of THL even after the adoption and implementation of a business rescue plan, and in the sense that the IDC PCF Facility is secured and therefore must be addressed.

148. The IDC Affidavit made it clear that in the absence of the provision of additional security the IDC PCF Facility would become severely constrained meaning that THL would face substantial cash flow shortages and be unable to fund its operations (paragraphs 45.3 and 53 – 55 of the IDC Affidavit "FA12" above).

149. If the Vision Parties do not settle the IDC PCF Facility the facility will need to be converted to a term loan or otherwise addressed in a manner that is acceptable to the IDC. Should this not be achieved the IDC will inevitably pull the plug on the facility which would bring a definitive end to the Adopted Plan and any prospect of reviving the business rescue proceedings.

150. As indicated above, the question of additional security loomed large at the creditors meeting on 10 January 2024 and resulted in a meeting being stood down to the next day to allow the Vision Parties, the Lender Group and the IDC to discuss the IDC's additional security requirement.

151. The BRPs, Vision Parties and the Lender Group did not however take the meeting into their confidence on 11 January 2024 and no explanation was ever provided regarding what agreement, if any, was reached between those parties in relation to the IDC's additional security requirement in relation to the IDC PCF Facility. The BRPs in fact indicated that the meeting on 11 January 2024 that they did not have any information in this regard (see paragraph 90 above).

152. However, given the fact that the Adopted Plan does not contain any amendments in relation to the IDC's additional security requirement it can only be assumed that no agreement was reached in this regard between the Vision Parties, the Lender Group, and the IDC on 10 or 11 January 2024.

153. This information is obviously essential to enabling any voting creditor to make an informed choice regarding how to vote and its omission from the Adopted Plan is unlawful.

154. Secondly, the Adopted Plan does not explain where THL will find the R525 956 121 that it is required to pay into escrow in relation to SASA's claim nor is there any indication as to whether the Vision Parties have access to the necessary funds to make payment of the aforesaid amount in the event that THL is unable to do so (see paragraph 94 above).

155. The BRPs have given no indication that they have satisfied themselves that the Vision Parties are capable of sourcing these funds or on what basis they are so satisfied.

156. This is extremely concerning as the financial forecasts contained in the Adopted Plan do not reflect the liability in relation to SASA of R525 956 121 and in the absence of that liability already demonstrate an insolvent position.

157. This issue too is obviously essential to enabling any voting creditor to make an informed choice regarding how to vote and its omission from the Adopted Plan is unlawful.

The adopted plan does not constitute a plan as contemplated in section 150

158. A further aspect already alluded to above that is not addressed in the Adopted Plan is the terms of and basis on which the Vision Parties are to acquire the Lender Group's claims.

159. If the Vision Parties are unsuccessful in acquiring the Lender Group's claims the Vision Plan is still born, yet the acquisition of the claims in terms of the Amended Vision Plan / the Adopted Plan occurs only after the adoption of the plan and on terms extraneous thereto that have not been divulged to creditors and affected persons.

160. Paragraph 2.2. of the Amended Vision Plan / the Adopted Plan in fact amounts to no more than a recordal by the BRPs of an agreement to agree allegedly reached between the Vision Parties and the Lender Group and lends credence to allegations made in the media to the effect that the Adopted Plan amounts to a private transaction between the Vision Parties and the Lender Group.

161. The acquisition of the Lender Group's claims has not yet occurred and all that the Vision Parties have done thus far is to pay a deposit in relation to the proposed acquisition which remains a contingent future event.

162. This in circumstances where the Vision Parties have on two prior occasions failed to pay the purchase price required to acquire the Lender Group's claims (see paragraphs 53, 54, 56, and 67 above).

163. Since the acquisition of the Lender Group's claims by the Vision Parties is a condition without which the Adopted Plan cannot subsist, and given that the acquisition remains a contingent future event, it is submitted that the Adopted Plan does not constitute a plan as contemplated in section 150 of the Companies Act for at least the following reasons:

163.1. The BRPs have failed to show either that the Adopted Plan will rescue THL or that it will result in a better return for creditors than at liquidation since neither of these conclusions can be drawn in circumstances where the plan is not yet capable of implementation, which can only occur once the Vision Parties acquire the Lender Group's claims (i.e. should the acquisition of the Lender Group's claims not occur the Adopted Plan will neither rescue THL nor provide creditors with a better return than at liquidation since the plan will then have failed and THL will presumably be placed in liquidation);

163.2. The Adopted Plan does not include a statement of the conditions that must be satisfied for the plan to (i) come into operation, and (ii) be fully implemented as

it is required to do in terms of section 150(2)(*c*)(i) since the conditions relating to the acquisition of the Lender Group's claims have not been disclosed.

URGENCY

164. This application is urgent because the BRPs are in the process of implementing a patently unlawful business rescue plan to the detriment of the applicant, other creditors in the applicant's position, affected persons, THL employees, and the sugar industry.

165. The further that the implementation of the Adopted Plan progresses the greater the likelihood that the implementation steps taken by the BRPs will become impossible to reverse, especially to the extent that such steps involve the execution of commercial transactions involving third parties.

166. The applicant does not therefore stand to receive substantial redress at a hearing in due course.

167. The unlawful infringement and flouting of the applicant's statutory rights (as well as those of other affected persons) detailed above should not be countenanced as to do so would be contrary to the rule of law and make a mockery of the business rescue provisions of the Companies Act.

168. The real impact of the unlawfulness of the Adopted Plan is severe:

168.1. The applicant and thousands of unsecured creditors in its position collectively stand to lose hundreds of millions of Rands in circumstances where the Lender Group will be paid billions of Rands and the Vision Parties will talk away having acquired THL at a staggering discount;

168.2. Many THL employees in rural areas stand to lose their livelihoods.

169. The applicant launched this application as soon as it was possible to do so. The applicant had to first consider the Adopted Plan which, for reasons set out above, is neither conventional nor transparent and required a lot of time to analyse (especially since the Adopted Plan was not published but rather put forward for the first time on 11 January 2024 when it was also adopted).

170. In additional, the applicant was not party to any of the previous litigation relating to the THL business rescue (such as the declaratory application brought by the BRPs, the RCL and SASA applications and all the applications that were filed by various parties in response thereto). This also took significant time to analyse.

171. It is submitted that the applicant acted as swiftly as possible and that the launching of this complex application less than two working weeks after the creditors meeting on 11 January 2024 does not constitute an unreasonable delay.

LEAVE TO INSTITUTE THIS APPLICATION & SERVICE THEREOF

172. To the extent necessary, the applicant seeks leave to bring this application in terms of section 133(1)(*b*) of the Companies Act.

173. This application raises issues which impact directly on the applicant's rights as well as the rights of all other unsecured creditors and affected persons without voting rights.

174. On strength of what has been set out in detail under the preceding sections of this affidavit, it is submitted that it is in the interests of justice that the applicant be granted leave to bring this application.

175. As regards service, the BRPs bear the duty under *inter alia* sections 128, 144 and 145 of the Companies Act to provide notice to creditors, employees and affected persons of "each court proceeding" concerning the business rescue proceedings.

176. The BRPs have consistently observed their duty as aforesaid during the various court applications that preceded the present by posting announcements on the THL business rescue website and uploading copies of the papers filed therein for easy access by affected persons.

177. It is expected that the BRPs will do the same presently and, given what is set out above, that affected persons will consult the THL business rescue website as they have done previously.

178. At any rate, it is impossible for the applicant to effect service on the thousands of affected persons in the THL business rescue and, to the extent necessary, condonation has been

sought for any departure from the ordinary forms and service for which it is submitted that good cause has been shown in the circumstances of this case.

THE REQUIREMENTS FOR INTERIM INTERDICTORY RELIEF

179. It is submitted that the applicant has made out a case for the relief sought in Part A of this application for the following reasons.

Prima facie right

180. The applicant's rights, in its capacity as a creditor of THL, to be consulted in the business rescue proceedings prior to the development and publication of a business rescue plan and its right to be paid for the services rendered to THL, which has been drastically compromised to only 5 cents in the Rand, have clearly been established.

181. In addition the applicant, as a creditor of THL, has a clear statutory right to a lawful business rescue plan that complies with the provisions of the Companies Act.

182. For the reasons already set out above the applicant's aforesaid rights have been breached and it clearly has a right to interdict the implementation of the unlawful Adopted Plan.

Well-grounded apprehension of irreparable harm

183. Not only does the applicant stand to suffer harm in that its claim for services rendered to THL will be reduced to a negligible amount pursuant to an unlawful business rescue process and an unlawful business rescue plan, but the applicant has moreover demonstrated a well-grounded apprehension that its rights under Chapter 6 of the Companies Act, as well as those of other unsecured creditors, employees and affected persons, will be breached in a manner that is unlawful and incapable of future correction.

The balance of convenience

184. Should the implementation of the Adopted Plan progress, the commercial reality is that reversing the implementation thereof will become practically impossible and may moreover adversely affect innocent third parties.

185. The Adopted Plan has not presently been implemented in any material way and the Vision Parties have yet to even acquire the Lender Group's claims.

186. Granting the interdict sought in Part A at this stage will therefore ensure that the applicant and other affected persons in its position will be afforded an opportunity to vindicate their rights which have been ignored and dishonoured by the BRPs ulawfully.

187. The applicant and other affected parties will be denied the opportunity to do so if the implementation of the Adopted Plan is not interdicted at this stage.

188. Conversely, the granting of the interdict at this stage of the business rescue process will have a comparatively minor impact on the Lender Group, Vision Parties and the BRPs. Should they be successful in opposing Part B of this application, in relation to a which an expedited hearing date will be sought, they will be in a position to proceed with the implementation of the Adopted Plan. Any non-compliance with time sensitive clauses in the agreements concluded between them can easily be cured by mutual agreement.

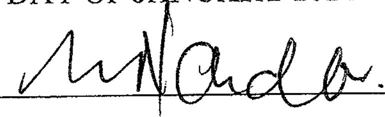
No satisfactory alternative remedy

189. There is no alternative remedy that is capable of addressing the harm that the applicant stands to suffer should the unlawful Adopted Plan be implemented, there is no other remedy that the applicant can invoke which will cure the breaches of its rights under Chapter 6 of the Companies Act and reverse or otherwise remedy the unlawful conduct of the BRPs and the unlawful nature of the Adopted Plan.

CONCLUSION

190. The applicant therefore prays for an order in terms of the notice of motion.

SIGNED AND DATED AT **BALLITO** ON THIS **25TH** DAY OF **JANUARY 2024**



M S NAIDOO