

In the matter between :

Harrison and White Investments (Pty) Ltd (In Liquidation) First Plaintiff

Cloete Murray N.O. Second Plaintiff

Kgashane Christopher Monyela N.O. Third Plaintiff

[in their capacities as duly appointed joint
liquidators of the First Plaintiff]

and

Johannes Frederick Klopper First Defendant

Cornelius Fourie Myburgh Second Defendant

Diaan Guy Orange Ellis Third Defendant

Michael Trevor Ralston Fourth Defendant

Kevin Christopher Kemp Fifth Defendant

COMBINED SUMMONS

To the sheriff or his deputy:

INFORM

Johannes Frederick Klopper, a major male attorney, business rescue practitioner and insolvency practitioner of BDO at Block 2, Blaauwklippen Office Park, Webersvallei Road, Jamestown, Stellenbosch (hereinafter called the "first defendant")

and

Cornelius Fourie Myburgh, a major male attorney, corporate law adviser and business rescue practitioner of Connie Myburgh and Associates at Ground Floor, Glen Eagles Building, Fourways Golf Park, Roos Street, Fourways (hereinafter called the "second defendant")

and

Diaan Guy Orange Ellis, a major male attorney and director of Faber Goëtz Ellis Austen Incorporated at First Floor, Block D, Saint Andrews Office Park, Meadowbrook Lane, Epsom Downs, Bryanston, Johannesburg (hereinafter called the "third defendant")

and

Michael Trevor Ralston, a major businessman with identity number 611209 5123 086 who resides at 6 The Hamptons, 8 Granville Street, Morningside, Johannesburg (hereinafter called the "fourth defendant")

and

Kevin Christopher Kemp, a major businessman with identity number 570509 5165 08 9 who resides at 74 Greybe Street, Benoni, Gauteng (hereinafter called the "fifth defendant")

that

Harrison and White Investments Pty Limited (in liquidation), a company duly registered and incorporated in accordance with the company laws of the Republic of South Africa with registration number 2000/028373/07 and with its address for purposes of this action at Sechaba Trust (Pty) Ltd at Unit G03, Lady Brooks Office Park, No 14 12th Avenue, Menlo Park, Pretoria (hereinafter called the "the first plaintiff")

Cloete Murray N.O., a major insolvency practitioner of Sechaba Trust (Pty) Ltd at Unit G03, Lady Brooks Office Park, No 14 12th Avenue, Menlo Park, Pretoria (hereinafter called the "the second plaintiff")

Kgashane Christopher Monyela N.O., a major insolvency practitioner of Khaya Trustees (Pty) Ltd at 287 Lynwood Road, Menlo Park, Pretoria (hereinafter called the "the third plaintiff")

hereby institute action against the defendants in which action the plaintiffs claim the relief on the grounds set out in the particulars annexed hereto.

Inform the defendants further that if the defendants dispute the claim and wish to defend the action –

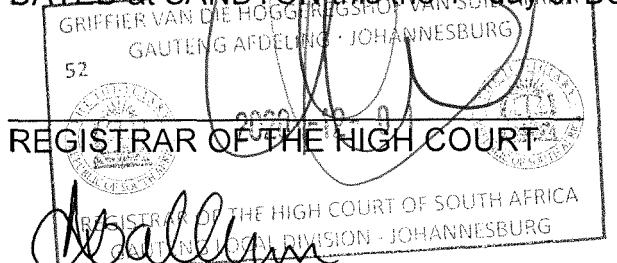
- 1 the first defendant shall within 1 (one) month of the service upon the first defendant of this summons, file with the registrar of this court notice of the first defendant's intention to defend and serve a copy thereof on the plaintiffs' attorneys, which notice shall give an address (not being a post office box or poste restante) within 15 kilometres of the office of the registrar, for service upon the first defendant of all documents in the action;
- 2 the second to fifth defendants shall within 10 (ten) days of the service upon the second to fifth defendants of this summons, file with the registrar of this court notice of the second to fifth defendants intention to defend and serve a copy thereof on the plaintiffs' attorneys, which notice shall give an address (not being a post office box or poste restante) within 15 kilometres of the office of the registrar, for service upon the second to fifth defendants of all documents in the action;
- 3 the defendants shall thereafter, and within 20 days after filing and serving notice of intention to defend as aforesaid, file with the registrar and serve upon the plaintiffs' attorneys a plea, exception, notice to strike out, with or without a counterclaim.

Inform the defendants further that if the defendants fail to file and serve notice as aforesaid, judgment as claimed may be given against the defendants without further

notice to the defendants or if, having filed and served such notice, the defendants fail to plead, except, make application to strike out, or counterclaim, judgment may be given against the defendants.

And immediately thereafter serve on the defendants a copy of this summons and return same to the registrar with whatever you have done thereupon.

DATED at SANDTON this the 1st day of December 2020.



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PARTICULARS OF CLAIM

Annexure A

THE PLAINTIFFS

1. The first plaintiff is Harrison and White Investments (Pty) Limited (in liquidation), a private company with registration number 2000/028373/07 ("H&W") and with address for purposes of this action at Sechaba Trust (Pty) Ltd at Unit G03, Lady Brooks Office Park, No. 14 12th Avenue, Menlo Park, Pretoria.
2. The second plaintiff is Cloete Murray N.O., major male insolvency practitioner of Sechaba Trust (Pty) Limited at Unit G03, Lady Brooks Office Park, No. 14, 12th Avenue, Menlo Park, Pretoria.
3. The third plaintiff is Kgashane Christopher Monyela N.O., a major male insolvency practitioner of Khaya Trustees (Pty) Limited, at 287 Lynwood Road, Menlo Park, Pretoria.
4. The second and third plaintiffs are cited in their capacities as joint liquidators of H&W.
5. The second and third plaintiffs and Hashim Yunus Ismail N.O. ("Ismail") were appointed as joint provisional liquidators of H&W on 15 December 2016 and as joint liquidators on 7 December 2017.
6. Ismail passed away and thereafter the second and third plaintiffs jointly attend to the winding-up of H&W.

THE DEFENDANTS

7. The first defendant is Johannes Frederick Klopper, a major male attorney, business rescue practitioner and insolvency practitioner of BDO at Block 2, Blaauwklippen Office Park, Webersvallei Road, Jamestown, Stellenbosch ("Klopper").
8. The second defendant is Cornelius Fourie Myburgh, a major male attorney, corporate law adviser and business rescue practitioner of Connie Myburgh and Associates at Ground Floor, Glen Eagles Building, Fourways Golf Park, Roos Street, Fourways ("Myburgh").
9. The third defendant is Diaan Guy Orange Ellis, a major male attorney and director of Faber Goëtz Ellis Austen Incorporated at First Floor, Block D, Saint Andrews Office Park, Meadowbrook Lane, Epsom Downs, Bryanston, Johannesburg ("Ellis").
10. The fourth defendant is Michael Trevor Ralston, a major businessman with identity number 611209 5123 086, who resides at 6 The Hamptons, 8 Granville Street, Morningside, Johannesburg ("Ralston").
11. The fifth defendant is Kevin Christopher Kemp, a major businessman with identity number 570509 5165 089, who resides at 74 Greybe Street, Benoni, Gauteng ("Kemp").

THE WINDING UP OF H&W

12. H&W was:

12.1. provisionally wound-up by order of Court on 7 December 2016; and

12.2. finally wound-up by order of Court on 3 February 2017.

13. H&W's winding-up commenced on 25 February 2015 when FirstRand Bank Limited ("FRB") issued an application to court for the winding-up of H&W.

14. H&W is an insolvent company within the meaning of Chapter 14 of the Companies Act 61 of 1973 ("the 1973 Companies Act") read with Item 9 of Schedule 5 of the Companies Act 71 of 2008 ("the 2008 Companies Act").

15. Claims were proved against H&W in the aggregate sum of R70,797,244.70 ("the H&W debts") by:

15.1. Cranes Direct CC, who proved a concurrent claim of R55,031.90;

15.2. FRB, who proved a secured claim of R55,404,291.57;

15.3. The South African Revenue Services ("SARS"), who proved a preferential claim of R15,337,921.21.

16. The final dividends that are to be paid to creditors have not been determined.

17. H&W remains to be a company unable to pay its debts. The H&W debts, after payment of an advance dividend of R5,000,000.00 to FRB, amount to R65,797,244.70.

BACKGROUND AND THE GROUP

18. H&W is a private company which was founded in 2000 by Johnny Zietsman and Gavin Zietsman ("Zietsman").

19. H&W conducted business in the mobile crane industry by letting and hiring cranes, which cranes were owned, leased or purchased by it on instalment sale agreement.

20. H&W formed part of a group of companies ("the Group") consisting of:

20.1. Circle Way Trading 71 (Pty) Limited (in liquidation) ("Circle Way").

Circle Way:

20.1.1. held 69% of the issued share capital in H&W;

20.1.2. had, as its own shareholders, the Falcon Trust (Ralston's Trust) and Josade Trust (Zietsman's Trust).

20.2. Falcon Trust which held 5% of the issued share capital of H&W;

20.3. Harrison and White Imbizo (Pty) Limited ("Imbizo"), which held 16% of the issued share capital of H&W;

- 20.4. AJP Investments (Pty) Limited (in liquidation) ("AJP"), which company conducted business under the name Harrison and White Contractors. H&W held 100% of the issued share capital in AJP. AJP had a loan account claim against H&W of more than R49,000,000;
- 20.5. Imbabala Logistics Management (Pty) Ltd ("Imbabala");
- 20.6. Moya Eco Power (Pty) Limited ("Moya"), a wholly owned subsidiary of H&W;
- 20.7. Glocyn Holdings (Pty) Limited ("Glocyn"). AJP held 60% of the issued share capital in Glocyn;
- 20.8. ISC Matla (Pty) Limited (in business rescue) ("ISC Matla"). AJP held 60% of the issued share capital in ISC Matla;
- 20.9. Falcon Crane Hire (Pty) Limited ("Falcon");
- 20.10. Superlift Crane Hire (Pty) Limited ("Superlift Company").

21. H&W conducted business in three divisions, namely:

- 21.1. Head Office, wherein most of the administrative functions of H&W and the Group were fulfilled;
- 21.2. Superlift Division, wherein H&W conducted its business of letting and hiring cranes under its trade name, Superlift Crane Hire;

- 21.3. Falcon Crane Hire, wherein the services, maintenance and repairs of cranes were done on behalf of H&W.
22. AJP conducted mechanical, electrical, instrumentation and piping work at *inter alia* Sasol and Arcelor Mittal. AJP was placed in business rescue on 3 September 2014.
23. ISC Matla conducted maintenance and project work, mainly as painting contractor at *inter alia* Eskom and Sasol. ISC Matla was placed in business rescue on 5 March 2012 and Myburgh was appointed as its business rescue practitioner.
24. Superlift Company was a property holding entity. H&W conducted business from one of its properties.
25. Moya is a wholly owned subsidiary of H&W. It was intended that Moya would develop a wind energy project in Lesotho, known generally as Breeze Power. H&W paid the expenses of Moya, debited to a loan account in favour of H&W. The project never materialised.
26. The Group was financially inter-dependant. The funds in the separate entities were utilised to pay expenses and liabilities of the entire Group and of all entities therein, irrespective of the source of funds. In the process, loan accounts were created and debited with expenses of the entities, including management fees.
27. The Group was financially distressed as early as the beginning of 2012.

28. The Group failed. H&W, AJP and Glocyn are in final winding-up.
29. ISC Matla is the only company that still conducts business but has been in business rescue since 5 March 2012.

THE PRE-BUSINESS RESCUE PERIOD (MAY 2012 TO 30 JUNE 2013)

30. H&W was financed by FRB, acting through its Rand Merchant Bank ("RMB"), Wesbank and First National Bank ("FNB") divisions. RMB provided working capital by way of loans, FNB provided banking and overdraft facilities and Wesbank financed the purchase of mobile cranes.
31. From prior to May 2012 Ralston and Zietsman were the directors of and controlled H&W.
32. By May 2012:
 - 32.1. Myburgh was the Group's corporate legal adviser and attorney;
 - 32.2. Myburgh was, since March 2012, the appointed business rescue practitioner of ISC Matla;
 - 32.3. H&W had no available capital;
 - 32.4. H&W was overdrawn with FNB;
 - 32.5. H&W had, despite its own financial distress, been paying all the expenses of Moya (a company without a business, assets or income)

for its Breeze Power project, debited to a loan account which at the time had a balance of approximately R95,000,000;

32.6. H&W had used funds which it borrowed from RMB, and for which it was paying interest charges, to pay the expenses of Moya;

32.7. Moya and its Breeze Power project were stillborn and Moya had no assets or income from which to repay the loan account debt due to H&W;

32.8. H&W was in breach of its obligations to FRB as it failed to make repayment as was contractually agreed;

32.9. H&W was commercially insolvent, in that it could not pay its debts as and when it arose;

32.10. H&W was factually insolvent in that its liabilities exceeded its assets, fairly valued;

32.11. H&W, through Ralston and Zietsman, informed FRB that they were negotiating agreements for foreign funding to be provided to H&W;

32.12. the foreign funding would be utilised *inter alia* to repay FRB;

32.13. absent the foreign funding H&W would be unable to pay its debts to FRB;

32.14. Myburgh was aware of the aforesaid facts and of the Group's and H&W's commercial insolvency.

33. The foreign funding did not materialise from May 2012 and H&W remained in breach of its obligations to make payment to FRB.

34. By 17 September 2012:

- 34.1. H&W was factually insolvent;
- 34.2. H&W was commercially insolvent;
- 34.3. the foreign funding had not materialised;
- 34.4. Myburgh had introduced Ellis to the Group;
- 34.5. Ellis was the Group's attorney and came on record as attorney of H&W in its negotiations with FRB in respect of H&W's breach of agreement with FRB and H&W's inability to pay the debts owed to FRB;
- 34.6. Myburgh was the local representative of Global Renewable Energy ("GRE"), a company registered in the Isle of Man.

35. On 17 September 2012 and at Johannesburg, a written restructuring agreement was concluded between FRB, duly represented by Brittany Seabrook and H&W, Circle Way and Josade Trust (all represented by Zietsman) and Zietsman personally.

36. In terms of the restructuring agreement:

36.1. it was agreed that payment would be made to FRB of:

36.1.1. R18,000,000 on 15 November 2012;

36.1.2. R18,000,000 on 7 January 2013;

36.1.3. R16,000,000 on 30 April 2013;

36.1.4. the remainder of the debt on 30 June 2013;

36.2. it was agreed that, in the event of breach, FRB would be entitled to proceed forthwith to claim the accelerated debt.

37. H&W failed to make payment of any of the agreed instalments in accordance with the restructuring agreement.

38. AJP made payment to FRB, in or about November or December 2012, of approximately R40,000,000 from the sale of the Imbambala business which reduced the debt owed to FRB. The payment was made by AJP in respect of its suretyship obligations to FRB and reduced the indebtedness of H&W to FRB.

39. On or about 30 June 2013:

39.1. H&W had failed to pay the debt owed to FRB;

- 41.3. it was contended that business rescue would result in a better return for H&W's creditors than what would have resulted from the immediate liquidation of the company;
- 41.4. business rescue proceedings were also commenced in respect of Circle Way, the major shareholder of H&W;
- 41.5. Klopper was appointed as business rescue practitioner to Circle Way on 10 July 2013;
- 41.6. H&W was factually insolvent;
- 41.7. H&W was commercially insolvent;
- 41.8. H&W had no means of its own with which to pay its creditors;
- 41.9. the shareholders of H&W had no or insufficient capital to finance H&W and the majority shareholder, Circle Way, was financially distressed and business rescue proceedings had commenced in respect of it.

42. At the commencement of the business rescue proceedings, H&W had, according to Ralston, cranes to the value of R108,846,000 and motor vehicles to the value of R7,280,183, totalling R116,126,183.00.

43. In truth:

- 43.1. the business rescue proceedings were commenced to avoid the liquidation of H&W by FRB;

- 43.2. any prospect of business rescue succeeding was dependent on foreign funding which funding was unlikely, considering the financial position of H&W, its factual and commercial insolvency and the fact that it had no equity;
- 43.3. foreign funding to capitalise the Group had not materialised since May 2012;
- 43.4. H&W had no or little cash with which to pay its own expenses and insufficient funds to pay creditors;
- 43.5. H&W used cash from other entities in the Group, including AJP, to pay its expenses and those of the Group;
- 43.6. H&W's loan claim against Moya was not recoverable;
- 43.7. H&W had movable assets, consisting mainly of mobile cranes, and debtors, which served as security for the debts owed to FRB;
- 43.8. no reasonable prospect existed to rescuing H&W;
- 43.9. H&W was trading in insolvent circumstances;
- 43.10. H&W was incurring further debts to *inter alia* SARS which it had no reasonable prospect of repaying.

44. The business rescue proceedings:

- 44.1. were an abuse of the legislative provisions and the moratorium provided by section 133 of the 2008 Companies Act;
- 44.2. served only to protect H&W from legal action by creditors;
- 44.3. ought to, but did not, protect FRB in terms of section 134 of the 2008 Companies Act in respect of the assets and debts which served as security to its claim;
- 44.4. had no benefit for, and were detrimental to, creditors of H&W.

45. Klopper:

- 45.1. despite there being no prospect of rescuing H&W, and despite the refusal of Ralston and Zietsman to provide financial information to Klopper, persisted with the business rescue process;
- 45.2. acted to the detriment of H&W, its creditors and shareholders in that he failed to:
 - 45.2.1. investigate the true state of the financial affairs of H&W;
 - 45.2.2. ensure that he had sufficient information relating to H&W to determine whether H&W was rescuable;
 - 45.2.3. take steps against Ralston and Zietsman for their failure to provide information;

- 45.2.4. appoint a suitable person to take control of management;
- 45.2.5. ensure that the business rescue was not abused by Ralston, Zietsman, Myburgh and Ellis;
- 45.2.6. ensure that the business rescue plan was developed and implemented;
- 45.2.7. discontinue the business rescue in respect of H&W;
- 45.2.8. conclude that there was no reasonable prospect for H&W to be rescued and to so inform the Court, H&W and all affected persons;
- 45.2.9. to apply to Court for an order discontinuing the business rescue proceedings and placing H&W into liquidation;
- 45.2.10. investigate voidable transactions and the failure by the company or any director to perform any material obligation relating to H&W;
- 45.2.11. forward evidence of the reckless trading, fraud and other contraventions by Ralston and Zietsman relating to H&W to appropriate authorities for further investigation and possible prosecution;

45.2.12. direct management to take necessary steps to rectify the contraventions, including recovery of misappropriated assets of H&W;

45.3. maintained that there was a reasonable prospect that H&W could be rescued, based solely on the promise of foreign funding through GRE.

46. From June 2013 Klopper had fiduciary obligations and a duty of care towards H&W, its creditors and its shareholders.

47. In addition, Klopper:

47.1. was, by virtue of section 140(3) of the 2008 Companies Act, an officer of the Court and had to report to the Court in accordance with any applicable rules or orders made by the Court;

47.2. had the responsibilities and duties of a director of H&W set out in section 140 (5) to (7) of the 2008 Companies Act;

47.3. could be held liable for the consequences of any act or admission amounting to gross negligence in the exercise of the powers and performance of the functions as practitioner;

47.4. had the duty, in terms of section 141 of the 2008 Companies Act to investigate H&W's affairs, business, property and financial situation and to consider whether there was any reasonable prospect of H&W being rescued;

47.5. had the duty, upon concluding that no reasonable prospect of rescue existed, to so inform the court, the company and all affected persons in the prescribed manner and to apply to the court for an order discontinuing the business rescue proceedings and placing H&W into liquidation;

47.6. had the duty, upon concluding that there was evidence of voidable transactions or reckless trading, fraud, and other contraventions, to take necessary steps to rectify the matter in terms of section 141(2)(c) of the 2008 Companies Act.

48. Kemp became involved in the management and a director of H&W in August 2014. From August 2014, Kemp owed fiduciary duties and a duty of care towards H&W, its creditors and its shareholders.

THE POST-COMMENCEMENT OF WINDING-UP PERIOD (25 FEBRUARY 2015 TO 6 DECEMBER 2016)

49. On 25 February 2015:

49.1. FRB presented the application to Court to set aside the resolution commencing business rescue proceedings and to place H&W in winding-up;

49.2. Klopper abandoned H&W and the business rescue proceedings;

- 49.3. Klopper, in disregard of the provisions of the 2008 Companies Act, left Ralston to attend to all affairs of H&W;
- 49.4. Klopper failed to take steps against Ralston despite Ralston's failure to provide financial information to Klopper;
- 49.5. Klopper knew that H&W and the Group were factually and commercially insolvent.

50. Ellis opposed the application for winding-up of FRB on 6 March 2015 and delayed the granting of the winding-up, *inter alia* by:

- 50.1. delivering repeated notices in terms of Rule 35(12) on 26 March 2015 and 26 May 2015;
- 50.2. failing to deliver an answering affidavit until FRB set the application down for hearing on the unopposed roll of 31 August 2015.

51. In the answering affidavit in the FRB liquidation proceedings, prepared by Ellis on behalf of H&W, deposed to by Ralston and confirmed by Klopper it was stated:

- 51.1. that H&W was in the process of negotiating and finalising certain agreements relating to a substantial financial transaction that would result in the flow of a substantial amount of money to H&W via GRE, which negotiations had been ongoing for at least two years when, in truth, there was no proof of existence of such agreements;

51.2. it was anticipated that the funds would flow during September 2015 when no such funds were reasonably expected to flow or did flow;

51.3. H&W did not promise the foreign funding as a deliberate delaying tactic, but views were genuinely held during the business rescue period that the funds would flow in the first quarter of 2015, when in truth no reasonable prospect existed for such funds to flow;

51.4. the restructuring agreement was concluded under duress when in truth it had not been and Ellis and Ralston were party to negotiations that lead to the conclusion of the restructuring agreement;

51.5. H&W was not commercially insolvent when in truth, it was;

51.6. H&W was not factually insolvent when in truth, it was;

51.7. recapitalisation of H&W was imminent when in truth it was not;

51.8. H&W owned enough assets that, if sold, would settle the amounts owed to FRB and possibly H&W's remaining creditors when in truth the assets were being sold and the proceeds used to pay expenses and liabilities of H&W;

51.9. the purpose of the business rescue of H&W was to obtain a better dividend for creditors as opposed to placing H&W under liquidation when in truth it was not, but rather it was to avoid liquidation of H&W;

51.10. Ralston and Klopper maintained that H&W would be rescued, when in truth, it was not.

52. Klopper deposed to a confirmatory affidavit to the answering affidavit on 26 August 2015, wherein he confirmed:

52.1. that he had read the founding affidavit of FRB and denied the allegations therein to be true and correct;

52.2. that he denied the correctness of the chronology of the business rescue process as articulated by FRB and that the business rescue process had been terminated;

52.3. that he confirmed the correctness of the allegations contained in Ralston's affidavit in so far as they related to Klopper;

52.4. that he at all material times acted in accordance with the provisions of Chapter 6 of the 2008 Companies Act, when in truth he had not.

53. On 27 August 2015, an application to intervene was served by Ellis, representing:

53.1. Falcon Trust;

53.2. Imbizo;

53.3. Circle Way, with Klopper the appointed business rescue practitioner;

53.4. Rosek Trust;

53.5. AJP, which was in business rescue.

54. Ralston deposed to an affidavit on behalf of the intervening applicants wherein he contended:

54.1. that the consequences of H&W being wound-up would be a massive destruction of value, which would impact on the interests of the intervening applicants, in their capacity as shareholders of H&W when in truth it would not, there being no equity of value in H&W;

54.2. the predominant reason for the delay in finalising the business rescue proceedings was the time it had taken to finalise certain investment agreements which would allow for the introduction of post-commencement funding when in truth, Ralston had not seen any such agreements;

54.3. Ralston had been working in conjunction with Zietsman, who was also the chairman of the boards of directors of H&W and AJP, to finalise the overseas funding when in truth he had relied on Zietsman and on Myburgh, the local representative of GRE, for the statement;

54.4. the fundraising efforts had been spearheaded by Zietsman, who resides in the USA and who was in constant contact with the funders, who also originate from the USA, when in truth this was not known to Ralston;

54.5. Zietsman would be the only person who was able to fully and properly explain the complexities around the proposed funding, explain the delay and give proper comfort that the funding would materialise and needed to be consulted with, and once leave was granted to intervene, the position would be properly documented in affidavits to be filed in the winding-up application and FRB and its representatives would be fully appraised and kept abreast of developments, when in truth no such affidavits were filed and the allegations were not explained;

54.6. FRB holds a General Notarial Bond over the movable assets of H&W, resulting in it having a preferential claim to the proceeds from the sale of the movable assets in the event that the bond is perfected and the assets sold, rendering it disadvantageous for the remaining creditors, when in truth the assets were being sold without consent of FRB and without paying the proceeds to FRB;

54.7. in the event that post-commencement funding is not obtained, then the business rescue can still continue, when in truth it could not as the assets were being disposed of.

55. In truth and to the knowledge of Myburgh, Klopper, Ellis, Ralston and Zietsman:

55.1. Ralston and Kemp had embarked on a process of selling the movable assets of H&W:

55.1.1. without the consent of Klopper, who had abandoned the business rescue process, but who supported the opposition to the winding-up;

55.1.2. without the consent of FRB, in whose favour General Notarial Bonds had been registered over some, or all, of the assets so sold;

55.2. the proceeds from the sale of the assets were utilised to pay expenses of H&W including:

55.2.1. retrenchment packages;

55.2.2. legal costs incurred by Ellis in the business rescue process and in opposition to the FRB winding-up application;

55.2.3. legal costs incurred by Ellis on behalf of GRE against the business rescue practitioners of Highveld Steel entirely unrelated to H&W;

55.2.4. legal costs incurred by Ellis in defending proceedings at the Financial Services Board (“FSB”) for insider trading, wherein H&W and Zietsman were found guilty and fined R1,000,000;

55.2.5. costs incurred by Ellis in respect of appeal proceedings to the Gauteng Division of the High Court, Pretoria, against the decision of the FSB, which was dismissed, as was an application for leave

to appeal to the Supreme Court of Appeal and the Constitutional Court;

55.2.6. personal and other expenses of Ralston, Zietsman, Kemp and others employed by H&W.

55.3. H&W was factually insolvent;

55.4. H&W was commercially insolvent;

55.5. annual financial statements had not been audited for the financial year 2014 and had not been prepared and audited for the years 2015 and thereafter;

55.6. tax returns had not been submitted to SARS by H&W;

55.7. Pay As You Earn (PAYE) had been deducted from employees and Value-Added Tax (VAT) had been collected from customers of H&W, without H&W having paid those amounts to SARS;

55.8. there was no reasonable prospect for the rescue of H&W;

55.9. there was no reasonable prospect of foreign funding realising to rescue H&W.

56. Despite the foreign funding not being forthcoming:

- 56.1. Klopper did not take steps to terminate the business rescue proceedings or to protect the creditors of H&W, including FRB;
- 56.2. Ralston and Kemp proceeded to sell the assets of H&W and utilised the proceeds, to the detriment of the creditors of H&W;
- 56.3. Myburgh, Klopper and Ellis were aware of, and acquiesced in, the conduct of Ralston and Kemp;
- 56.4. Myburgh and Ellis facilitated, aided and abetted in the conduct of Ralston and Kemp.

57. In the period October 2015 to 6 December 2016, when the provisional winding-up order was granted, neither H&W nor the intervening applicants withdrew their opposition to the winding-up.

58. On 6 December 2016, the resolution commencing business rescue proceedings was set aside and H&W was placed in provisional winding-up.

59. As at the time of the granting of the provisional winding-up order on 6 December 2016, according to Ralston:

- 59.1. H&W had assets estimated to be valued at R19,413,850;
- 59.2. H&W had liabilities estimated at R101,592,291;
- 59.3. the H&W debts amounted to R70,797,244.70.

60. The cranes and motor vehicles were sold in the winding-up of H&W for R6,100,000.00.

THE CONDUCT OF THE DEFENDANTS

61. At the time that the business rescue proceedings commenced in respect of H&W and until 6 December 2016, H&W traded in insolvent circumstances, when no reasonable prospect of rescue existed and the financial position of H&W deteriorated to the point of its winding-up.

62. The conduct of placing H&W in business rescue, keeping it in business rescue, opposing the winding-up and leaving the affairs to Ralston and Kemp was intended to benefit Ralston, Kemp, Myburgh, Klopper and Ellis and the shareholders and some creditors of H&W.

63. The conduct aforesaid was reckless and was intended to, or resulted in, prejudice to and was in fraud of the general body of creditors of H&W and in particular to FRB.

64. In breach of their fiduciary duties to H&W, its shareholders and creditors, Myburgh and Ellis:

64.1. actively objected to the business rescue plan, whereby assets could have been sold to satisfy the debt to FRB;

64.2. actively opposed the winding-up application, based solely on the unrealistic prospect of foreign funding;

- 64.3. were in their personal capacities and/or through their attorneys' firms, creditors of H&W;
- 64.4. were conflicted in respect of their personal interests and those of Zietsman, Ralston and Klopper, which they promoted at the expense of H&W, its creditors and its shareholders.
65. Ralston, Kemp, Myburgh, Klopper and Ellis were knowingly parties to the fraudulent and reckless conduct.
66. *Alternatively* Myburgh and Ellis actively assisted, aided and abetted Ralston, Kemp and Klopper in their conduct as set out above and Myburgh and Ellis are joint wrongdoers together with Ralston, Kemp and Klopper.
67. Klopper:
 - 67.1. had a relationship with H&W, through his being the business rescue practitioner of Circle Way that would lead a reasonable and informed third party that his integrity, impartiality and objectivity is compromised;
 - 67.2. delegated control to Ralston and Zietsman, well-knowing that they were not acting in the best interest of H&W but rather in their own personal interests;
 - 67.3. failed to investigate H&W's affairs, business, property and financial situation;

- 67.4. failed to consider whether there is any reasonable prospect of H&W being rescued;
- 67.5. failed to inform the Court, the company and all affected persons that there is no reasonable prospect of H&W being rescued;
- 67.6. failed to apply to court for an order discontinuing the business rescue proceedings and placing H&W in liquidation;
- 67.7. failed, despite, the evidence of voidable transactions and the failure by H&W and Ralston and Zietsman to perform material obligations relating to H&W, to rectify the matter and to direct management to take appropriate steps;
- 67.8. failed, despite, the evidence of reckless trading, fraud and other contraventions relating to H&W and to forward the evidence to the relevant authority for further investigation and possible prosecution and to direct management to take necessary steps to rectify the matter including recovering misappropriated assets of H&W;
- 67.9. derelicted his duties, upon the winding-up application of FRB being issued on 24 February 2015 by abandoning H&W and its business rescue to Ralston and Kemp.

68. Klopper, Ralston, Kemp, Ellis and Myburgh should be held liable for the H&W debts in terms of section 424 of the 1973 Companies Act alternatively Ralston, Kemp and Klopper should be held liable for damages sustained by

H&W in the aggregate amount of the H&W debts, in terms of section 77 of the 2008 Companies Act.

ALTERNATIVE CLAIM AGAINST THE FIRST DEFENDANT IN THE EVENT OF THE COURT NOT FINDING HIM LIABLE ON THE MAIN CLAIM

69. In terms of section 141 (1) of the 2008 Companies Act, Klopper had the duty to investigate H&W's affairs, business, property and financial situation and after having done so consider whether there was any reasonable prospect of H&W being rescued.
70. In terms of section 141 (2) Klopper had to apply to court for an order discontinuing the business rescue and placing H&W into liquidation as soon as he concluded that there was no prospect for H&W to be rescued.
71. By no later than 14 March 2014 there was no reasonable prospect for H&W to be rescued.
72. Klopper was aware of this fact, alternatively should have been aware of this fact had he properly investigated the affairs of H&W.
73. Klopper contravened section 141 (1) and (2) of the 2008 Companies Act by:
 - 73.1. Not investigating the affairs of H&W;
 - 73.2. Not applying for an order discontinuing the business rescue proceedings and placing H&W into liquidation.

74. Klopper is accordingly liable to the plaintiffs for the loss suffered by H&W as a result of his contravention of section 141 of the 2008 Companies Act.
75. H&W suffered R110,000,000,00 loss as a result of Klopper's contravention, being the difference between the value of the cranes and motor vehicles at the commencement of business rescue and the amount for which the remaining cranes and motor vehicles were sold in the winding-up, which would not have occurred had H&W been placed in liquidation on or before 14 March 2014.
76. Klopper is accordingly liable for the loss of R110,000,000,00 which amount he refuses to pay.
77. Klopper's conduct in not investigating the affairs of H&W and not applying for its liquidation was grossly negligent.

**ALTERNATIVE CLAIM AGAINST THE SECOND AND THIRD DEFENDANTS
IN THE EVENT OF THE COURT NOT FINDING THEM LIABLE ON THE MAIN
CLAIM**

78. Ellis and Myburgh were both attorneys who acted on behalf H&W.
79. During or about September 2012 Ellis and H&W entered into an oral agreement in terms whereof Ellis would act as attorney to H&W.
80. During or about March 2012 Myburgh and the Group, including H&W, entered into an oral agreement in terms of which he acted as attorney to the Group, including H&W.

81. The plaintiffs do not have knowledge of all the terms and conditions of the oral agreements.

82. In terms of the oral agreements set out above both Ellis and Myburgh owed H&W certain duties and they had certain specific obligations implied by law.

83. These duties and obligations were *inter alia* the following:

83.1. Both Myburgh and Ellis were under an obligation to, at all times, act in the best interests of H&W;

83.2. They were under an obligation not to put their own interests above those of H&W and not to be in a position where any conflict of interest might arise;

83.3. They were under an obligation and had a duty to properly advise H&W;

83.4. They were under an obligation and had a duty not to abuse the legal system or mechanisms of the 2008 Companies Act; and

83.5. They were under an obligation and had a duty to preserve H&W's assets and to ensure that H&W is not prejudiced.

84. Myburgh and Ellis breached their duties and obligations to H&W by:

84.1. Wrongly advising H&W;

84.2. Placing themselves in a position where they had a conflict of interest;

- 84.3. Placing their own interests above those of H&W;
- 84.4. Abusing the legal system and specifically the Business Rescue Procedure provided for in the 2008 Companies Act.
85. Myburgh and Ellis's breach of their obligations and duties contributed to H&W suffering damages.
86. Had Myburgh and Ellis not breached their obligations and acted properly H&W would have been liquidated in June 2013, when it had cranes and motor vehicles of R116,126,183.00. While in winding-up, H&W had cranes and motor vehicles to the value of R6,100,000.00.
87. Myburgh and Ellis are accordingly indebted to the plaintiffs in the amount of R110,000,000.00, which they refuse to pay.

WHEREFORE the plaintiffs claim from the defendants:

1. An order declaring that each of the defendants is liable for the H&W debts in terms of s424 of the 1973 Companies Act.
2. Alternatively, an order that the first, second and third defendants should be personally liable for the damages sustained by H&W in the aggregate amount of the H&W debts in the amount of R 65,797,244.70, in terms of section 77 of the 2008 Companies Act.

3. An order that the defendants, jointly and severally, must pay to the plaintiffs the H&W debts in the amount of R 65,797,244.
4. Payment of interest *a tempore morae* from the date of this order.
5. Costs of suit.
6. Further and/or alternative relief.

ALTERNATIVE CLAIM AGAINST THE FIRST DEFENDANT

1. Payment of R110,000,000.00;
2. Interest on R110,000,000.00, *a tempora morae* from date of this order;
3. Costs of suit on the scale as between attorney and client;
4. Further and/or alternative relief.

ALTERNATIVE CLAIM AGAINST THE SECOND AND THIRD DEFENDANTS

1. Payment of R110,000,000.00;
2. Interest on R110,000,000.00, *a tempora morae* from date of this order;
3. Costs of suit on the scale as between attorney and client;
4. Further and/or alternative relief.

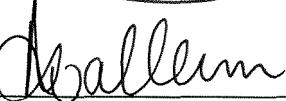
DATED at SANDTON 1 DECEMBER 2020.



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