

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

CASE NO:

In the matter between:

RE-ACTION CONSULTING PROPRIETARY LIMITED
(Registration Number 2004/019236/07)

Applicant

and

OPTIMUM COAL MINE PROPRIETARY LIMITED

Respondent

(Registration Number 2007/005308/07)

Registered Address: Block A Lower Ground Floor

Graystone Ridge Office Park

144 Katherine Street, Sandton, Gauteng

FOUNDING AFFIDAVIT

I, the undersigned,

SHARON NAOMI WHITE

do hereby make oath and state that:

1. I am an adult businesswoman having my principal place of business at 24 Bolton Road, Parkwood, Johannesburg. I am a director of the Applicant



herein as appears from a Companies and Intellectual Property Commission ("CIPC") search report annexed hereto marked "FA1".

2. I am duly authorised by the Applicant to depose to this affidavit on its behalf as appears from a resolution of the board of directors of the applicant, a copy of which is annexed hereto marked "FA2".
3. The facts and allegations herein contained are, save where the context clearly indicates to the contrary, within my personal knowledge and are to the best of my belief both true and correct.
4. Where I make submissions of a legal nature, I do so based on the advice of the Applicant's legal representatives, which advice I verily believe to be true and correct.

THE PARTIES

5. The Applicant is **RE-ACTION CONSULTING PROPRIETARY LIMITED** (Registration Number 2004/019236/07), a private company duly registered and incorporated in accordance with the laws of the Republic of South Africa, having its principal place of business and its registered office at 24 Bolton Road, Parkwood, Johannesburg.
6. The Respondent is **OPTIMUM COAL MINE PROPRIETARY LIMITED** (Registration Number 2007/005308/07) a private company duly registered and incorporated in accordance with the laws of the Republic of South

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Africa, having its registered office and principal place of business at Block A, Lower Ground Floor, Graystone Ridge Office Park, 144 Katherine Street, Sandton, Gauteng. The details of the Respondent's registered address appear from a CIPC search report a copy of which is annexed hereto marked "FA3".

LOCUS STANDI

7. The Applicant is a creditor of the Respondent in an amount of R4 204 206.00 (four million two hundred and four thousand two hundred and six rand). The Respondent's indebtedness to the Applicant arises from the provision of services by the Applicant to the Respondent at the Respondent's special instance and request. The nature and extent of the said services are more fully set out hereunder.
8. I confirm that the Applicant holds security for its claim against the Respondent as appears from what is set forth below.

JURISDICTION

9. The Applicant respectfully submits that the above Honourable Court has jurisdiction to entertain this application by virtue of the fact that the Respondent's registered address falls within this Honourable Court's area of jurisdiction.



RELIEF SOUGHT

10. This is an application for the winding-up of the Respondent on the basis that it is unable to pay its debts, despite demand, as contemplated in section 344(f) read with section 345 of the Companies Act 61 of 1973 ("**the 1973 Companies Act**").
11. I am advised that the aforesaid provisions of the 1973 Companies Act remain applicable by virtue of Item 9 of Schedule 5 to the Companies Act 71 of 2008 ("**the 2008 Companies Act**").
12. The Applicant also respectfully submits that it is just and equitable to wind-up the Respondent in terms of Section 344(h) of the 1973 Companies Act.
13. As will appear more fully from the paragraphs that follow, on or around 7 November 2016, a written notice was furnished to the Respondent's attorneys addressed to the Respondent's registered address in terms of Section 345 of the 1973 Companies Act (annexed hereto marked "FA13") affording the Respondent the statutorily prescribed three week period within which to effect payment of monies due by the Respondent to the Applicant, or to secure or compound for the amount to the reasonable satisfaction of the Applicant. The said notice was *ex abundanti cautela* served by the sheriff of this Honourable Court.

14. A copy of the notice aforesaid together with the sheriff's return of service confirming service upon the Respondent's registered address are annexed hereto marked "FA4" and "FA5" respectively.
15. The Respondent, has not disputed its indebtedness to the Applicant save for requesting sight of certain supporting documentation all of which have either been provided to the Respondent alternatively have been made available to the Respondent by the Applicant alternatively the Respondent has been invited to inspect but has failed to do so.
16. Subsequent to service of the aforementioned notice, the Respondent has failed to pay the sum of R4 204 206.00 to the Applicant, or to secure or compound for it to the reasonable satisfaction of the Applicant.
17. In the circumstances and as contemplated by the provisions of Section 345(1)(a) read with the provisions 344(f) of the 1973 Companies Act, the Respondent is deemed to be unable to pay its debts as and when they fall due and ought may be wound-up by the above Honourable Court.
18. As will be dealt with more fully herein below, the Applicant also respectfully submits that it is just and equitable for this Honourable Court to wind-up the Respondent by virtue of the fact that *inter alia* it is apparent that the Respondent continues to trade in insolvent circumstances and presently owes creditors including the Respondent many millions of rands.



19. The monies owing by the Respondent to the Applicant, as will be more fully dealt with below, arise in relation to the construction of a 24 hour primary health care clinic, which includes a maternity wing, emergency medical services centre and youth centre intended to be utilised by indigent members of the Kwazamokhuhle community in Hendrina, Mpumalanga at which the Respondent operates a coal mine.
20. The Applicant agreed to provide the services to the Respondent, in order to allow the Respondent to comply with its social and labour commitments in terms of the Broad Based Socio Economic Empowerment Charter for the South African Mining and Mineral Industry.
21. In order not to prejudice the completion of the clinic and the community it is intended to serve, the Applicant, has continued, at its expense and continued liability, to progress the project in circumstances where the Respondent has failed and is deemed to be able to make payment to the Applicant of the amounts to it by the Respondent.
22. It is not without significance, that the Respondent is a company falling within the Oakbay Investments Group of Companies controlled by the Gupta Family which have faced much criticism for their involvement in business transactions which are the subject matter of scrutiny and investigation by the press, public and the relevant authorities to be to the detriment of country. The fact that the Respondent falls within the Oakbay Investments Group of Companies was confirmed by the Respondent's

attorneys Messrs Van der Merwe and Associates in a letter addressed to the Applicant dated 25 October 2016, a copy of which is annexed hereto marked "FA6".

23. As will be detailed below, the Respondent has been dogged by controversy since being purchased by Oakbay Resources and Energy Limited.
24. In these circumstances, it is respectfully submitted, that it would, in addition to the grounds outlined in section 344(f), be just and equitable for this Honourable Court to wind up the Respondent for the reasons set forth below.

BACKGROUND

25. As is briefly alluded to above, the Respondent is the owner and operator of a coal mine situated in Hendrina, a small town in the Nkangala District Municipality of the Mpumalanga Province.
26. The Respondent was previously wholly owned and operated by the Anglo-Swiss multinational commodity trading and mining company Glencore. The Applicant had a good working relationship with Glencore and assisted it on several occasions with a number of its Social and Labour Plan projects.
27. The Applicant provides health, sustainability and well-being services and solutions to public and private entities including *inter alia* HIV/AIDS testing, care and treatment as well as the general upliftment of individuals and

communities, including managing and carrying out projects for the construction of health care clinics.

28. In this regard, in and during the latter part of 2015, the Applicant's assistance was sought to manage, on a turn-key basis, the construction of a Community Healthcare Clinic in Hendrina as part of the Respondent's social and labour commitments in terms of the Broad Based Socio Economic Empowerment Charter for the South African Mining and Mineral Industry. More particularly, the Respondent had agreed to fund the construction of the Clinic on behalf of the Mpumalanga Department of Health and contracted the Applicant to manage all aspects of the project on a turn-key basis.
29. When Glencore owned and controlled the Respondent, the relationship between it and the Applicant was one based on trust and mutual respect. The Applicant had no difficulty in concluding similar agreements based on the request for it to commence such activities on an assurance by the Respondent/Glencore that a service agreement would be concluded in due course.
30. Accordingly on or around 7 September 2015, the Applicant as employer, concluded a Joint Building Contracts Committee ("JBCC") Principal Building Agreement ("the JBCC contract") with an entity known as Strewed Building Construction CC. A copy of the JBCC contract is annexed hereto marked "FA7". Given the historical relationship with the

Respondent/Glencore, the Applicant was content concluding the JBCC contract prior to the conclusion of its service agreement with the Respondent,

31. As appears from the JBCC contract, the principal agent was to be the project architect, LAD Architects CC, and the project cost was to be a fixed price of R15 132 816.00 inclusive of VAT.
32. Subsequent to the conclusion of the JBCC contract, and on or around 26 February 2016, the Applicant concluded a written service agreement with the Respondent ("**the Services Agreement**"). A copy of the Service Agreement is annexed hereto marked "**FA8**".
33. The material express alternatively tacit alternatively implied terms of the Services Agreement were *inter alia* as follows:
 - 33.1. The Applicant was appointed to project manage the construction of the Hendrina Clinic in Kwazamokhuhle as part of the Respondents "*social and labour commitments*" from the commencement date recorded in Annexure A to the Service Agreement as 1 December 2015 for 16 months terminating on 31 March 2017;
 - 33.2. The contracting parties intended the Applicant to provide a turn-key service essentially meaning that the Applicant would attend to all aspects of the project with the Respondent's obligation

simply being payment of the contract sum together with the Applicant's management fee;

33.3. The above is evidenced by the Applicant's responsibilities outlined in clause 6 of the Service Agreement which included *inter alia* the responsibility to:

33.3.1. Provide all equipment and materials necessary to perform the services;

33.3.2. Provide suitably qualified employees to attend to the services;

33.3.3. Consult with the Respondent and supply any documentation reasonably requested by the Respondent; and


33.3.4. Provide information to the Respondent relating to the completion of the services including the time frames for the provision of reports to the Respondent.

33.4. The Respondent agreed to effect payment to the Applicant of the total project cost of R17 156 000.00 together with VAT of R2 401 840.00 ("the Project Fee") outlined on annexure D consisting of:

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- 33.4.1. The construction cost of R15 000 000.00 excluding VAT (payable in terms of the JBCC contract);
 - 33.4.2. The provision of Clinic equipment in the sum of R1 500 000.00 excluding VAT; and
 - 33.4.3. A project management fee of R656 000.00 excluding VAT.
- 33.5. The Project Fee was to be paid by the Respondent as follows:
- 33.5.1. the construction costs (R15 000 000.00 excluding VAT) would be paid in three tranches as follows:
 - 33.5.1.1. R5 600 000.00 excluding VAT on or before 7 January 2016;
 - 33.5.1.2. R5 600 000.00 excluding VAT on or before 16 March 2016; and
 - 33.5.1.3. R3 800 000.00 excluding VAT on or before August 2016.
 - 33.5.2. The project management fee would be payable in monthly instalments of R41 000.00 excluding VAT per month; and

- 33.5.3. The Clinic equipment would be paid for by the Respondent. The clinic equipment was paid for by the Respondent whilst it was still under the control of Glencore.
- 33.6. The Applicant was to submit an invoice to the Respondent on the "Invoice Date", being the last day of each calendar month, reflecting the services completed and the Consideration claimed together with applicable VAT thereon;
- 33.7. The Respondent was obliged to effect payment of the invoice as long as the invoice complied with the requirements outlined in 23.6 above and reflected the correct amount;
- 33.8. Should the invoice not be timeously paid, the Respondent would be obliged to effect payment of interest to the Applicant at the Prime Rate from the Payment Date to the date on which payment is made by the Respondent;
- 33.9. All disputes were to be resolved either by agreed dispute resolution mechanism outlined in the Services Agreement or by arbitration save that it was agreed that the parties would be entitled to approach a court of competent jurisdiction in circumstances where the relief sought is urgent and cannot be granted by the arbitrator;



- 33.10. The Applicant agreed that 5% of each invoice rendered would be retained by the Respondent and would be paid on final completion of the project;
34. Following the conclusion of the Service Agreement, the Respondent effected payment of the first and second tranche outlined in 33.5.1.1 and 33.5.1.2 above on 7 January 2016 and 31 March 2016 respectively.
35. Subsequent thereto however, the Respondent was placed into business rescue and I understand that as part of such process, the Respondent and its substrata (being the mine itself) were purchased by the Gupta controlled Oakbay Resources and Energy Limited. As detailed above, the Respondent has recently been discharged from business rescue.
36. Following the change of ownership however, the last payment due in relation to the construction being R3 800 000.00 (excluding VAT) was not paid by the Respondent at the end of August as outlined in the Service Agreement. In addition, a number of monthly management fee payments were not timeously made by the Respondent. The Applicant's statement of account rendered in October 2016 is annexed hereto marked "FA9".
37. From the statement the following is to be observed:
- 37.1. The sum of R14 851 920.00 has been paid by the Respondent between February 2016 and July 2016; and



- 37.2. The sum of R4 472 220.00 remains outstanding to the Applicant being:
- 37.2.1. The R3 800 000.00 (R4 332 000 including VAT) due as the third tranche in August 2016; and
- 37.2.2. Management fees for August, September and October 2016 in the sum of R140 220.00 (including VAT).
- 37.3. Attached hereto marked "FA10", are the invoices supporting the Applicant's statement as aforesaid.
38. Following attempts to procure payment from the Respondent and on 11 October 2016, I received a letter from the Respondent's general manager, Mr Hlayiseka Chauke, a copy of which is annexed hereto marked "FA11", informing me that:
- 38.1. In preparation for the project's immanent completion, the Respondent had "*initiated a project close out checklist*";
- 38.2. That there were, in the Respondent's view, outstanding "*submissions*" in terms of the Service Agreement; and
- 38.3. These included the documents outlined in clause 6.9 (information relating to the timing of performance by the Applicant) and 6.11 (licences issued by the authority) of the Services Agreement and

the documents outlined on page 25 and 26 of the Service Agreement.

39. On 17 October 2016, the Applicant responded to the Respondent's letter of 11 October 2016, a copy of which is annexed hereto marked "FA12". The said letter provided the Respondent with all of the information outlined in 6.9 and 6.11 of the Services Agreement, and attached the approval received from the Steve Tshwete local municipality as well as a series of photographs evidencing the extent of completion of the project.
40. On 25 October 2016, a letter was received from the Respondent's attorneys Messrs Van der Merwe and Associates (a copy of which is annexed as annexure FA6). The letter essentially requests documentation including *inter alia* minutes of site meetings and payment certificates and indicates that only once the documents have been provided would payment be made. The said letter also made payment conditional upon the holding of a board meeting which is not a requirement of the Service Agreement.
41. The letter confirms the Respondent's indebtedness on the Applicant, but seeks to impose certain impermissible conditions prior to payment of its admitted indebtedness.
42. On 7 November 2016, I instructed the Applicant's attorneys, Messrs Assheton-Smith Inc. ("ASI") to respond to the Respondent's attorney's

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letter of 25 October 2016. A copy of ASI's letter is annexed hereto marked "FA13".

43. The letter confirms that:

43.1. The Applicant's letter of 17 October 2016 addressed comprehensively all of the information requested by the Respondent on 11 October 2016;

43.2. In any event, regular updates were provided to the Respondent and the Respondent's senior management:

43.2.1. were given a full briefing on 23 May 2016;

43.2.2. attended a site meeting on 6 June 2016; and

43.2.3. attended further site meetings and were regularly updated on the progress of the project.

43.3. The Applicant had complied with its obligations in terms of the Services Agreement;

43.4. The sum of R4 204 206, being R4 425 480 less the 5% retention, was due, owing and payable by the Respondent to the Applicant;

43.5. To the extent that the Respondent required further documentation alluded to in the letter of 25 October 2016, these

documents were voluminous but were in any event available on site for the Respondent's inspection;

- 43.6. The clinic needed to be handed over to the Mpumalanga department of Health by 10 December 2016; and
- 43.7. The Applicant believed the request for documentation was nothing more than a ruse the aim of which was to delay payment to the Applicant of monies due to it in terms of the Services Agreement.
44. In addition to the letter aforesaid, and on 8 November 2016, the sheriff of the above Honourable Court served the 345 demand on the Respondent's registered address, evidenced by the return annexed hereto marked annexure FA5.
45. On 15 November 2016, notwithstanding that the Applicant had tendered the Respondent sight of all of the documents it requested (which are voluminous) and notwithstanding the fact that payment of the Applicant's invoices was not contingent upon the Respondent being provided with such documentation, the Respondent through its attorney, insisted upon the Applicant providing the said documents to the Respondent. A copy of the Respondent's Attorney's letter is annexed hereto marked "FA14".

46. On 1 December 2016, I instructed ASI to respond to FA14 and a copy of the said response is annexed hereto marked "FA15". The said letter records that:
- 46.1. despite having been invited to inspect the documents requested, the Respondent had failed to do so;
 - 46.2. the Applicant has complied with all of its obligations arising from the Service Agreement; and
 - 46.3. the request for documents was made with the ulterior purpose of delaying payment rather than a *bona fide* request for documentation;
47. The letter also provided the Respondent with a mechanism to avoid this application and to obtain whatever satisfaction it required that the services have been properly supplied. In this regard, ASI called upon the Respondent to effect payment into trust of the outstanding sums pending the final determination of whatever concerns the Respondent may have in relation to the provision of services by the Applicant.
48. This offer was not taken up by the Respondent and no further correspondence has been received from the Respondent's attorneys.
49. On 1 December 2016 the Applicant received a letter from the Respondent, a copy whereof is annexed hereto marked "FA15A" which letter is dated



28 November 2016, and is signed by its general manager. In the said letter the Respondent requested a list of services since “the last invoice for processing the final payment” and that “a certificate of practical completion should accompany your invoice.”

50. The contents of the aforesaid letter is peculiar in that:
- 50.1. It is addressed to the Applicant despite the fact that the matter is being dealt with by the parties respective attorneys;
 - 50.2. No project check list is required to be provided by the Applicant to the Respondent, whether in terms of clause 11.3 of the Services Agreement or at all;
 - 50.3. No reference is made at all to the outstanding unpaid invoices of the Applicant but simply to a final invoice; and
 - 50.4. No invoices of the Applicant are required to be submitted to the Respondent with a practical completion certificate.
51. On 5 December 2016 I called Mr Vusi Zwane (“Zwane”) telephonically regarding the Respondent’s letter of 1 December 2016.
- 51.1. Zwane is the representative of the Respondent that the Applicant has interacted with regarding the Services Agreement, and the services provided thereunder.

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- 51.2. He has and continues to be the Respondent's representative in terms of Clause 28 of Annexure A of the Services Agreement (as appears from Annexure "FA12").
- 51.3. The Applicant has provided information to him throughout the duration of the provision of services by the Applicant in terms of the Services Agreement, and he has expressed satisfaction with the delivery of such services.
- 51.4. During the telephone conversation, I questioned Zwane as to whether he was aware of the fact that the parties had appointed attorneys. He advised me that he had not been made aware of this fact and I told him that the matter should be dealt with by the parties' respective attorneys. I confirmed this in an e mail addressed to him the same day which is annexed hereto marked "FA15B"
52. It was clear from my conversation with Zwane that the Respondent was in complete disarray, and that the instruction to Zwane to request documents from the Applicant was nothing more than a *mala fide* attempt by the Respondent to avoid and/or delay payment of monies that are due owing and payable by the Respondent to the Applicant in terms of the Services Agreement.
53. The ineluctable conclusion to be drawn from my telephone conversation with Zwane is that the Respondent is simply unable to pay its debt to the

Applicant as and when it fell due, and that the Respondent was looking for any excuse to delay this payment.

54. This conclusion is enforced by the Respondent's repeated request for "documents" prior to effecting payment, in circumstances where the documents have been provided to the Respondent on numerous occasions, yet are still being illogically requested by the Respondent.
55. The Respondent's *mala fides* in requesting the "outstanding documents" are further evidenced by the fact that inspection of these allegedly "outstanding documents" has been tendered by the Applicant on numerous occasion, yet the Respondent has failed and/or refused to come and inspect the documents.
56. Finally, the Respondent has not raised any dispute in relation to the sums alleged by the Applicant to be owing and has failed to comply with the three-week period prescribed by Section 365 of the 1973 Companies Act.
57. In fact, and to the contrary, the Respondent appears to have admitted the indebtedness, but refused payment based on the imposition of certain impermissible conditions.
58. In light of its failure to pay the sum demanded, or to secure or compound for it to the reasonable satisfaction of the Applicant, I am advised and respectfully submit that the Respondent is deemed to be unable to pay its

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debts and therefore subject to being wound up in terms of Section 344(f) of the 1973 Companies Act.

JUST AND EQUITABLE

59. The Respondent has been dogged by controversy since being purchased by the Gupta controlled by the Gupta controlled Oakbay Resources and Energy Limited.
60. The Respondent has been in the newspapers quite frequently in the recent past. In this regard, it is rumoured that approximately R1.3billion has been misappropriated from the Respondent's rehabilitation trust, following the purchase of the Respondent by the Gupta controlled Oakbay Resources and Energy Limited. In this regard, attached hereto and marked "FA16" is an article from the Daily Maverick website summarising the controversy surrounding the missing R1.3billion.
61. Further, it is widely known that Oakbay Resources and Energy Limited, the holding company of the Respondent, has had all of its local bank accounts closed by all of the South African banks. As recently as 5 December 2016, Mr Johan Burger of FirstRand Bank Limited admitted that the accounts had been closed because of FirstRand Bank Limited's suspicions that Oakbay Resources and Energy Limited had been guilty of money laundering. In this regard, I attached hereto as "FA17" is an articles from the Eye Witness News website setting out FirstRand Bank Limited's suspicions of money laundering.

62. In addition, the Respondent has only recently (in late August 2016) been discharged from business rescue, indicating that the Respondent was (and, it is submitted, still is) financially distressed. In this regard, attached hereto and marked "FA18" is an article from the Times Live website detailing the Respondent's business rescue. This clearly indicates that the Respondent has been significantly financially distressed in recent months.
63. Given that its bank accounts, as well as those of Oakbay Resources and Energy Limited, have been closed, if it isn't currently financially distressed (which, as detailed above, it is submitted it is), the lack of a bank account will ensure that it will inevitable and invariably become financially distressed.
64. Finally, more recently in the report issued by the Public Protector on state capture, Eskom was accused of colluding with the Gupta Family to ensure that the Respondent became financially distressed in order to allow the Gupta Family to purchase the Respondent at a reduced price, and thereafter secure certain payments from Eskom in order for the Gupta Family to purchase the Respondent from Glencore. In this regard, attached hereto and marked "FA19" is an article from the Fin24 website setting out a summary of the Public Protector's findings.
65. The article also reveals that a related company, Tegeta Resources & Energy, was interposed as an intermediary between Eskom and the Respondent, in order to artificially inflate the price of coal sold to Eskom.

66. Bearing in mind the above, I submit that it would be just and equitable in terms of section 344(h) of the 1973 Companies Act for the Respondent to be wound-up for the following reasons:

66.1. it would allow a liquidator to investigate the nature and extent of the allegations regarding the misappropriation of the R1.3billion rehabilitation fund;

66.2. it would provide protection to the Respondent's creditors (including the Application) from the inevitable financial hardship that will result in it not being able to operate bank accounts in South Africa;

66.3. it would allow the liquidator to investigate the allegation of irregularity by and between the Respondent, the Gupta Family, and Eskom.

67. I further submit that it would be just and equitable in terms of section 344(h) of the 1973 Companies Act for the Respondent to be wound-up and that this would be to the advantage of the creditors of the Respondent as:

67.1. its assets would vest in a liquidator, who would be in a position to realise same for the benefit of the general body of creditors of the Respondent and to ensure that one creditor would not be preferred above another; and

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- 67.2. a liquidator would be in a position to investigate the assets held by the Respondent and to take charge of all and any benefits to which the general body of creditors may be entitled.
68. In addition the monies that are owing, relate to the construction of a community clinic required to provide emergency health care to the community of Kwazamokhuhle, which is desperately required by the community and is required to be handed over to the provincial department of health as soon as possible which handover is being hampered by the failure by the Respondent to effect payment of what is due to the Applicant without any just cause which is prejudicing the Applicant, the Provincial Department of Health and the said community and in flagrant contravention of the Respondent's social and labour plan which is directly linked with its mining license referred to above.
69. It is clear from what is set forth above and the submissions made below that the Respondent simply does not have the funds to pay and despite this continues to trade in insolvent circumstances regardless and continues to incur credit to employees and other creditors, and prefers one creditor above another.
70. It is also apparent that Zwane has not been advised of the Respondent's ploy to avoid payment of what is clearly due owing and payable to the Applicant by the Respondent, which is best described as a ruse to avoid payment to the Applicant.

71. Given the above considerations it would, in my respectful view, be just and equitable for the Respondent to be wound-up and for a liquidator to take charge of the affairs of the Respondent and its assets.

URGENCY

72. I have been advised that given that the Respondent is unable to pay its debts and is deemed to be so that this matter is urgent by its very nature in that if the Respondent is permitted to continue to trade then it will continue to trade under insolvent circumstances, thus continuing to incur credit and that this will result in the Respondent preferring one creditor above another.
73. The media is rife with articles relating to the Respondent's precarious financial position and one such article published in the Citizen Newspapers entitled "*Gupta-owned Optimum Coal mine could face liquidation*" reports that Barlow World Equipment has sought a winding-up of the Optimum Coal Mine. A copy of the article is annexed hereto marked "FA20". A subsequent article reports that Barlow World's claim was paid under protest. A copy of the article is annexed hereto marked "FA21". I am advised that such payment would constitute a payment in preference.
74. As detailed above, it is suspected that an amount of R1.3billion has already been misappropriated from the Respondent's coffers.

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75. In addition, as revealed in the Public Protector's report ("FA19"), huge payments were made to Tegeta Resources & Energy in order to circumvent direct payment to the Respondent. It is feared that these Eskom payments will never find their way to the Respondent, and will be spirited off-shore thereby committing the very money-laundering that FirstRand Bank Limited feared when closing the Oakbay bank account.
76. If this liquidation application is brought in the ordinary course, the Gupta controlled Respondent will be able to continue spiriting away the Respondent's monies, to the detriment of its creditors and employees.
77. It is absolutely essential and imperative that a liquidator be placed in control of the Respondent as a matter of extreme in order to prevent any further misappropriation of monies.
78. Given the nature of the allegations that have been levelled against the Respondent in the newspaper articles referred to above, it is imperative that an enquiry into the Respondent's affairs be urgently convened in terms of the provisions of the 1973 Companies Act and the Insolvency Act 24 of 1936, in order to determine what dispositions have been made and whether the directors and officers of the Respondent have traded in a reckless and negligent manner. A liquidator would have the powers and would be best placed to conduct such an urgent investigation
79. Finally, the handover of the clinic was to take place on 10 December 2016. Unless and until the Applicant is paid in full, it will continue to exercise a

lien over the clinic, and will not handover same, whether on 10 December 2016 or at all.

80. Although the Applicant is desirous that the provincial government and its constituents who serve to benefit from the clinic to be afforded the benefit of the clinic opening on time and being handed over without delay, it cannot and will not forgo its security.
81. It goes without saying that the longer the handover of the clinic is delayed, the more the community it serves will be prejudiced. This clearly cannot be in the interests of justice, and further justifies hearing this application as a matter of urgency.
82. It is imperative that a liquidator is appointed as a matter of urgency in order to ensure that the estate is wound up promptly, the Applicant paid whatever dividend it will receive in the estate, and the clinic released in order to service the community it was built to benefit.
83. In the circumstances, I respectfully submit that this application cannot wait to be heard in the normal course and requires to be dealt with as a matter of urgency in terms of Rule 6(12) of the Uniform Rules of Court.
84. Bearing in mind the impending December holiday period, and the fact that this liquidation application concerns matters of commercial urgency, the Applicant will afford the Respondent a reasonable time to oppose the application and deliver its answering affidavit.

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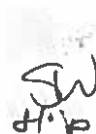
85. In this regard, it is submitted that it would be appropriate for this application to be heard on 17 January 2016. This will allow the parties ample opportunity to draft and file answering and replying affidavits in accordance with the time table set out in the notice of motion.
86. This will also ensure that all interested parties, including employees and unions, are advised of the liquidation application with ample time to intervene if they so desire.
87. The Applicant will cause this application to be served on the Respondent in the ordinary manner – that is by sheriff. In addition, I shall cause this application to be e-mailed to each of the directors of the Respondent, as well as to Zwane, whom I have dealt with at all material times.

COMPLIANCE WITH FORMALITIES

88. I have been advised by the Applicant's attorneys that a copy of this application must be furnished to the Respondent's employees, every registered trade union which represents any of the Respondent's employees, the South African Revenue Service ("SARS") and the Respondent itself.
89. Although the formalities do not subscribe this a copy of this application will be served on the Department of Mineral Resources (given that the Respondent is active in the mining industry) and the Department of Health (given that the clinic was envisaged to be transferred to government).

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90. I verily believe that the employees of the Respondent belong to the National Union of Mineworkers and a copy of this application will be served on them. I will instruct my attorneys to make the necessary enquiries to ascertain whether there are any other registered trade unions representing the Respondent's employees. Where necessary, the Applicant's attorneys will instruct the sheriff to serve this application on any other registered trade union to which any of the employees may belong.
91. In addition the Applicant's attorneys will instruct the Sheriff of this Honourable Court to serve this application on the employees by affixing a copy of this application to the principal notice board at the principal place of business of the Respondent.
92. The Applicant's attorneys will also cause a copy of this application to be furnished to SARS and to the Respondent at its principal place of business and registered address.
93. The Applicant's attorneys will cause a copy of this application to be lodged with the Master as will appear from the Master's Report that will be filed of record.
94. This application will be accompanied by a certificate issued by the Master not more than 10 (ten) days before the date of this application to the effect that sufficient security has been given for the payment of all fees and charges necessary for the prosecution of all winding-up proceedings and all costs in administering the Respondent



95. I will cause the Applicant's attorneys of record to file an affidavit with the above Honourable Court, specifying the manner in which a copy of the application and founding affidavit have been furnished in compliance with the provisions of section 346(4A)(b) of the 1973 Companies Act.

CONCLUSION

96. Accordingly, I respectfully submit that a proper case has been made out that:

96.1. the Respondent is unable or deemed to be unable to pay its debts; and/or

96.2. it is just and equitable for the Respondent to be wound-up in the hands of the Master of this Honourable Court.

I accordingly pray that the above Honourable Court grant an order in terms of the Notice of Motion to which this affidavit is annexed.



SHARON NAOMI WHITE

I certify that the above signature is the true signature of **SHARON NAOMI WHITE** and that she acknowledged to me that she knows and understands the contents of the above Affidavit, which Affidavit was signed and sworn to before me in my office at **JOHANNESBURG** this the ^{8th} day of **DECEMBER 2016** in

accordance with the requirements of Regulation No 1258 dated 21 July 1972 as amended by Regulation No 1648 dated 19 August 1977 as further amended by Regulation No R1428 dated 11 July 1980.

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~~HPNdebeke~~ CST
HPNdebeke
COMMISSIONER OF OATHS
71 Dundale Avenue
Parkview

SOUTH AFRICAN POLICE SERVICE
STATION COMMANDER
08 -12- 2016 :-
CLIENT SERVICE CENTRE
PARKVIEW
SOUTH AFRICAN POLICE SERVICE