

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

Case number: 85549/15

In the matter between:

EAST METALS AG First Applicant

MASTERCROFT S.A.R.L Second Applicant
and

EVRAZ HIGHVELD STEEL AND VANADIUM LIMITED First Respondent
(IN BUSINESS RESCUE)
(Registration Number: 1960/001900/06)

PIERS MARSDEN N.O. Second Respondent

DANIEL TERBLANCHE N.O. Third Respondent
(in their representative capacities as the joint business
rescue practitioners of Evraz Highveld Steel and
Vanadium Limited (in business rescue))

In re:

EAST METALS AG First Applicant

MASTERCROFT S.A.R.L Second Applicant
and

EVRAZ HIGHVELD STEEL AND VANADIUM LIMITED First Respondent
(IN BUSINESS RESCUE)
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Vanadium Limited (in business rescue))

COMPANIES AND INTELLECTUAL PROPERTY Fourth Respondent
COMMISSION

THE CREDITORS OF THE FIRST RESPONDENT Fifth Respondent
LISTED IN ANNEXURES "A" AND "B" TO THE
NOTICE OF MOTION

THE EMPLOYEES OF THE FIRST RESPONDENT Sixth Respondent

NATIONAL UNION OF METALWORKERS OF SOUTH Seventh Respondent
AFRICA

SOLIDARITY UNION	Eighth Respondent
RMB SECURITIES	Ninth Respondent
THE REMAINING SHAREHOLDERS OF THE FIRST RESPONDENT	Tenth Respondents
SOUTH AFRICAN REVENUE SERVICES	Eleventh Respondent
INTERNATIONAL RESOURCES PROJECT LIMITED	Twelfth Respondent

FILING SHEET

PLEASE TAKE NOTICE THAT the first to third respondents present the following documents for service and filing:

1. notice of intention to oppose the application for substituted service;
2. answering affidavit deposed to by Piers Michael Marsden; and
3. confirmatory affidavit deposed to by Daniel Terblanche.

DATED AT SANDTON ON THIS THE 5th DAY OF NOVEMBER 2015.

EDWARD NATHAN SONNENBERGS INC.

First to Third Respondents' Attorneys
 150 West Street
 Sandown
 Sandton
 JOHANNESBURG
 Tel: 011 269 7600
 Fax: 011 269 7899
 Email: lfield@ensafrica.com
 (Ref: L Field / 0347687)

C/O JACOBSON AND LEVY INC.

215 Orient Street
 Arcadia
 Pretoria
 Tel: 012 342 3311

Fax: 012 342 3313
(Ref: J Levy / D Brooks / 42316)

TO: **THE REGISTRAR OF THE GAUTENG DIVISION**
PRETORIA

AND TO: **BAKER & MCKENZIE ATTORNEYS**
By email

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COMMISSION** Fourth Respondent

THE CREDITORS OF THE FIRST RESPONDENT LISTED IN ANNEXURES "A" AND "B" TO THE NOTICE OF MOTION	Fifth Respondent
THE EMPLOYEES OF THE FIRST RESPONDENT	Sixth Respondent
NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA	Seventh Respondent
SOLIDARITY UNION	Eighth Respondent
RMB SECURITIES	Ninth Respondent
THE REMAINING SHAREHOLDERS OF THE FIRST RESPONDENT	Tenth Respondents
SOUTH AFRICAN REVENUE SERVICES	Eleventh Respondent
INTERNATIONAL RESOURCES PROJECT LIMITED	Twelfth Respondent

NOTICE OF INTENTION TO OPPOSE

BE PLEASED TO TAKE NOTICE that the first to third respondents hereby give notice of their intention to oppose the application for substituted service under the above case number.

TAKE NOTICE FURTHER that the first to third respondents have appointed the offices of **EDWARD NATHAN SONNENBERGS INC.** 150 West Street, Sandton, Johannesburg **C/O JACOBSON AND LEVY** 215 Arcadia Street, the Orient, Pretoria as the address at which the first to third defendants will accept notice and service of all process in these proceedings.

DATED AT SANDTON ON THIS THE 3rd DAY OF NOVEMBER 2015.



EDWARD NATHAN SONNENBERGS INC.

First to Third Respondents' Attorneys
150 West Street
Sandown
Sandton
JOHANNESBURG
Tel: 011 269 7600
Fax: 011 269 7899
Email: lfield@ensafrica.com
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**TO: THE REGISTRAR OF THE GAUTENG DIVISION
PRETORIA**

AND TO: BAKER & MCKENZIE ATTORNEYS
Applicants' Attorneys
1 Commerce Sqaure
39 Rivonia Road
Sandhurst, Johannesburg
(011) 911 4300
Ref: G RUDOLPH/co/b,
c/o Adams & Adams
Lynwood Bridge
4 Daventry Street
Lynwood Manor

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COMMISSION** Fourth Respondent



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NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA Seventh Respondent

SOLIDARITY UNION Eighth Respondent

RMB SECURITIES Ninth Respondent

THE REMAINING SHAREHOLDERS OF THE FIRST RESPONDENT Tenth Respondents

SOUTH AFRICAN REVENUE SERVICES Eleventh Respondent

INTERNATIONAL RESOURCES PROJECT LIMITED Twelfth Respondent

FIRST TO THIRD RESPONDENTS' ANSWERING AFFIDAVIT

I, the undersigned,

PIERS MICHAEL MARSDEN,

do hereby make oath and state that:

1. I am a major male practising as a business rescue practitioner at Matuson & Associates (Pty) Limited at One on Ninth, corner of Glenhove Road and Ninth Street, Melrose Estate, Johannesburg. I am the second respondent herein.



2. The third respondent and I are cited herein in our capacities as the joint business rescue practitioners ("the practitioners") of the first respondent ("Highveld").
3. The third respondent has authorised me to depose to this affidavit on his behalf. In this regard, I refer to the confirmatory affidavit of the third respondent filed herein.
4. The facts deposed to in this affidavit are within my personal knowledge and belief, save where the context indicates to the contrary, and are furthermore true and correct. Where I refer to information conveyed to me by others, I verily believe such information to be true. Where I make submissions of a legal nature, I do so on the advice of my legal representatives.
5. I have read the notice of motion and founding affidavit deposed to by Callum Michael O'Connor on behalf of the applicants on 30 October 2015, with the annexures thereto ("the service application").
6. The practitioners oppose the relief sought in the service application. Moreover, because of the lateness and failure to serve the service application on the other respondents, the practitioners are constrained to raise non-service on interested parties as a reason why the urgent interdict application cannot be heard on its enrolment date.
7. As I will demonstrate below, the service application suffers from several material defects. It does not afford the respondents a proper opportunity to prepare and be heard in the urgent interdict application. Moreover, even the "service" that is envisaged for the respondents is such that they will not receive service of the service application, i.e. the papers that have been served on the first 3 respondents. They will (if they are fortunate enough to receive anything) receive a notice setting



out the steps that they will need to take if they wish to obtain the full papers filed by the applicants.

8. I have been advised that it is not necessary for me, in this affidavit, to establish the interest that each of the respondents has in the relief sought in the main and interdict applications. It is conceded by the applicants. What I do intend to do is to identify what a respondent is normally entitled to by way of service. I do this because I have been advised that service is the manner in which this Honourable Court preserves the most fundamental principle in South African law – the *audi alteram partem* rule. A party who is not served or is served a variation of what other parties are served is in no position to fully exercise his right under the *audi alteram partem* rule.

9. Rule 4(1)(a) of the Uniform Rules of Court sets out the manner in which service by a sheriff is authorised and required to effect service on a respondent. The Rule sets out nine possible ways of effecting that service.

10. Rule 4(1)(d) makes it "...the duty of the sheriff... serving the process or documents to explain the nature and contents thereof to the person upon whom service is being effected...".

11. Rule 4(2) provides:

"If it is not possible to effect service in any manner aforesaid, the court may, upon the application of the person wishing to cause service to be effected, give directions in regard thereto. Where such directions are sought in regard to service upon a person known or believed to be within the Republic, but whose whereabouts cannot

be ascertained, the provisions of sub-rule (2) of rule 5 shall, mutatis mutandis, apply (emphasis added).

12. Rule 5(2) provides:

"Any person desiring to obtain such leave shall make application to the court setting forth concisely the nature and extent of his claim, the grounds upon which it is based and upon which the court has jurisdiction to entertain the claim and also the manner of service which the court is asked to authorise. If such manner be other than personal service, the application shall further set forth the last known whereabouts of the person to be served and the enquiries made to ascertain his present whereabouts.

Upon such application the court may make such order as to the manner of service as to it seems meet and shall further order the time within which notice of intention to defend is to be given or any other step is to be taken by the person to be served. Where service by publication is ordered, it may be in a form as near as may be in accordance with Form 1 of the First Schedule, approved and signed by the registrar". (emphasis added)

13. First, as I have pointed out, Rule 4(2) envisages substituted service "if it is not possible to effect service in any manner aforesaid". I have been advised that Rule 4(2) does not offer alternative methods of service because the authorised manners are either inconvenient or expensive. A Court can only be approached where it is impossible to serve in any of the nine modes identified in Rule 4(1)(a).
14. Nowhere in the founding affidavit to the service application is it asserted that conventional service is impossible. In paragraph 20.2 of the founding affidavit, it is



alleged that normal service would be *"impractical and prohibitively costly"*. No indication is given of what the impracticalities are or of what the costs are. Nor is any indication given of the ability or inability of the applicants to meet the costs. Nor are the many respondents dealt with on an individual basis.

- 15. The respondents are dealt with globularly as if each and every one of them is deemed by the applicants to be similarly difficult to achieve service upon and similarly interested or disinterested in the subject matter of the applications.
- 16. This is not the case.
- 17. In breach of Rule 5(2), notwithstanding that the respondents are based in South Africa and notwithstanding that the applicants seek service that is not personal, they have not, in respect of any of the respondents, identified their last known address or steps taken to find them. The applicants have simply not made out a case to deviate from the normal rules relating to service.
- 18. Annexed to the founding affidavit is a list of email addresses. In general terms, although that annexure contains the email addresses of some employees, it is mainly a list of creditors. Numerous employees are not on the list specifically because they have no access to internet facilities. Those employees are factory workers who rely on the business rescue of Highveld for any prospect that they have of future employment. They, more than anyone else, are directly affected by any relief that this Honourable Court may grant pursuant to either the main or the interdict application.
- 19. Yet there is no provision for direct service upon them.

- 20. Those workers, as I have already indicated, do not necessarily have access to internet facilities. In the circumstances, emails will not come to their attention. Moreover, publications on a website are unlikely to be viewed by employees.
- 21. The applicants are aware of the fact that the operations of Highveld have been mothballed. They have asserted this in their own affidavits. That being the case, the employees are currently on a rotational employment basis and are not required to be on site every day.
- 22. There is no allegation made by the applicants that either the creditors or the employees read either the Witbank News or any other newspaper circulating in its area. Indeed, whether or not those in the area read it, it is not a newspaper that circulates beyond eMalahleni. There is little prospect that either creditors or employees scattered beyond eMalahleni will obtain notice of the applications via that publication.
- 23. The applicants suggest that, because the employees are members of unions, service can be effected on the employees by way of service on the unions. That is simply a way of the applicants making their problem the problem of the unions. No suggestion is made by the applicants of how the unions should effect surrogate service on its members. Nor, assuming the members require copies of the papers, is any indication given of who should create the papers and bear the costs thereof. There is no tender by the applicants. They surely cannot contend that the costs that they find prohibitive should be borne by either the unions or their members.
- 24. The other problem with whichever form of service the applicants seek to achieve is that they seek to "serve" notice of the existence of the main application (and possibly the interdict application) rather than what a respondent is entitled to,

namely the application itself. Nor is any provision made for compliance with Rule 4(1)(d) which requires the server of process to explain to the recipient "the nature and contents thereof".

- 25. The practitioners' attorneys have informed us that they know of no Rule which authorises an applicant seeking relief that affects respondents to serve on the respondents anything other than the documents which set out the relief to be claimed and the basis upon which it is claimed. I have been advised that service of a notice rather than an application is a flagrant breach of the *audi alteram partem* rule.
- 26. The applicants appear to suggest that this problem (not experienced by them, but experienced by the respondents) can be overcome by the respondents embarking upon a course of conduct which makes it the responsibility of each respondent, rather than that of the applicants, to ensure that the respondents obtain the motion papers and that they pay for the luxury of receiving them.
- 27. The applicants have set-down the service application to be heard simultaneously with the urgent interdict application. It is obvious that the unserved respondents have an interest in the interdict application. It is equally obvious that, because those respondents have not been served, this Honourable Court is precluded from entertaining the interdict application.
- 28. The notice of motion in the service application makes it clear that it relates to the main application. It is not clear whether or not it relates to the interdict application. I attach, marked "PM1", the covering email received from Mr O'Connor with the founding papers. That covering email suggests that the service application relates to both the main and the interdict applications.

29. Leaving aside any technical arguments about the notice of motion in the service application, there are two points to be made. First, if the service application does not relate to the Interdict application, it is clear that the Interdict application cannot proceed because interested parties have not been served. Second, even if the service application does relate to Interdict application, it is equally clear that the Interdict application cannot proceed. This is because the applicants seek leave for substituted service simultaneously with the relief that they seek in the Interdict application. This means that they seek their relief in the Interdict application before they have served on the respondents who they concede are interested in the relief to be sought in the Interdict application.

THE FOUNDING AFFIDAVIT

30. I now turn to deal with the paragraphs in the founding affidavit consecutively to the extent that same is necessary. To the extent that I omit to deal with any particular allegation in the founding affidavit, if it is inconsistent with what I state herein, I deny it.

Ad paragraphs 3, 4, 10 and 11

31. It is denied that the applicants are entitled to the relief sought for the reasons set out herein.
32. The relief sought is further only in respect of the main application, not the urgent Interdict application.
33. The applicants concede in paragraph 10 that they are obliged to effect service of the main application on all of the respondents.



34. As set out above, the applicants do not assert that service is impossible. In addition, the various forms of substituted service proposed by the applicants do not constitute service of the main application but rather notice of same.

Ad paragraphs 5 and 20.2

35. The applicants allege that substituted service is required as:

35.1. there are hundreds of respondents; and

35.2. the identities and/or contact details of the respondents are "*not all known to the applicants*".

36. As stated in paragraph 14 above, the applicants do not assert that conventional service is impossible on the respondents. Instead, the applicants allege that same would be impractical or prohibitively costly.

37. The applicants have failed to specify the unknown respondents or contact details. The applicants have dealt globularly with the respondents and made no attempt to obtain further information after receipt of the letter from Edward Nathan Sonnenbergs Inc. ("ENS") on 22 October 2015 (annexure SA2 to the founding affidavit).

38. The applicants have accordingly failed to establish a case for substituted service.

Ad paragraphs 6 and 23

39. The applicants are attempting to place their responsibility to serve on the first to third respondents.



40. Even if the first to third respondents attend to the requests of the applicants, I reiterate that the applicants are merely giving notice, as opposed to service, of the main application through the proposed forms of substituted service.

Ad paragraphs 7 and 8

41. It is denied that the first applicant is the largest creditor of Highveld.

42. The practitioners have opposed the relief sought in the main application.

43. The relief sought by the applicants is opposed for the reasons set out herein.

Ad paragraphs 12 to 16

44. The applicants made no further attempt to obtain any further information from the practitioners regarding the contact details of the respondents after receipt of the letter of ENS which is attached as annexure SA2 to the founding affidavit.

Ad paragraphs 17 to 19

45. Publication of notices and documents on the first respondent's website, and the fact that a document is "available", does not constitute service of a process of Court.

46. I refer to what I have already stated above in this regard.

Ad paragraphs 20 to 22

47. It is denied for the reasons set out herein that the forms of substituted service set out in these paragraphs constitute effective service upon the respective respondents. At best, it constitutes notice.



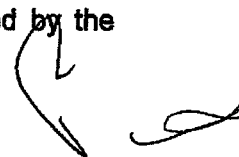
48. It is further denied that creditors do not necessarily express an interest in the business rescue as it has a direct impact on them.
49. In regard to the employees, there are over 500 employees who are not represented by a trade union.
50. In addition, the applicants cannot assume that employees and other respondents will have recourse to the first respondents' website and would be able to protect their rights if they are ignorant of the very fact that proceedings have been instituted wherein they are interested parties. Obviously, this ignorance is due to the applicants' failure to serve the main application in the first instance.

Ad paragraph 24

51. On 21 October 2015 the main application was launched and was enclosed under cover of the letter from the applicants' attorneys annexed as SA1 to the founding affidavit.
52. Paragraph 6 of annexure SA1 deals with the applicants' intention to serve by way of substituted service and the applicants' requests relating to affected persons.
53. On 22 October 2015, being the following day, ENS responded with annexure SA2.
54. On 2 November 2015 this application was launched.
55. The applicants accordingly waited for 10 days before bringing the service application and have attempted to enrol same for hearing on the same day as the urgent interdict application, being 17 November 2015.
56. In this regard, I refer to what I have stated in paragraphs 27 to 29 above.




57. No specific prayer is sought in respect of the substituted service of the urgent interdict application. It appears from prayer 5 of the notice of motion to the service application that the applicants will seek to obtain an order that all subsequent proceedings be served by publication on the website on Highveld. This would, in effect, include the interdict application.
58. As stated above, the covering email from the applicants' attorneys makes it clear that the application for substituted service is for substituted service of the urgent interdict application. This means that this Court will be asked to simultaneously make an order against interested parties and make an order in respect of service upon those very interested parties. On that basis the purpose of service will be defeated. In whatever form the envisaged service occurs, it will only happen after argument of the matter in which they have an interest in being heard.
59. I submit that this does not constitute proper service of the urgent interdict application on affected persons. I have been advised that the effect of this approach is that the applicants seek to hear the urgent interdict application prior to effecting proper service on the creditors of Highveld. This is not only irregular but severely prejudicial to the affected persons of Highveld in that an order will be sought preventing the implementation of the plan which has far reaching effects on affected persons.
60. It is submitted that the applicants should have obtained the details of the affected persons before launching the main application. No explanation is advanced for the applicants' failure to do so. Nor is it alleged that they cannot do so.
61. Had the information been sought timeously this application could have been launched on more reasonable time limits. In short, the urgency alleged by the

A handwritten signature in black ink is located at the bottom right of the page. A curved arrow points from the signature towards the text of paragraph 61, specifically towards the words "urgency alleged by the".

applicants is of their own making and further prejudicial to the affected persons. On that basis the application should be dismissed.

Ad paragraph 25

62. I respectfully submit that the service application fails on numerous bases. It should be dismissed with costs including those consequent on the employment of two counsel.



PIERS MICHAEL MARSDEN

I certify that:

- I. the Deponent acknowledged to me that :
 - a. He knows and understands the contents of this declaration;
 - b. He has no objection to taking the prescribed oath;
 - c. He considers the prescribed oath to be binding on his conscience.
- II. the Deponent thereafter uttered the words, "I swear that the contents of this declaration are true, so help me God".
- III. the Deponent signed this declaration in my presence at the address set out hereunder on 4 November 2015.



COMMISSIONER OF OATHS

COMMISSIONER OF OATHS
 Lisa Nichole Metzger - Admitted Attorney (RSA)
 One on Ninth, First Floor, Corner of
 Glenhove Road & Tottenham Avenue
 Rosebank, Johannesburg, South Africa, 2196
 Main line: +27 (0) 11 684 9000
 Facsimile: +27 (0) 11 388 5350

"PM1"

Letitia Field

From: O'Connor, Callum <Callum.OConnor@bakermckenzie.com>
Sent: 02 November 2015 15:19
To: Letitia Field; Paul Winer; Gary Oertel
Cc: Rudolph, Gerhard; Bell, John; Malan, Berna
Subject: RE: EMAG & Mastercraft / Evraz Highveld & Others
Attachments: Notice of Motion.PDF; Affidavit.pdf

Thanks Letitia

We confirm receipt of your clients' notice of intention to oppose.

Please see attached our clients' application for leave to serve their urgent application on affected persons by way of substituted service. Please let us know if you have any objection to accepting service of the application in terms of Rule 4A(1)(c).

You will see from the notice of motion that we propose having the application for substituted service heard on 17 November 2015. We intended to have the application enrolled with the urgent clerk on Friday but our correspondent was unable to do so as a result of a bomb scare at the Pretoria High Court. In the circumstances, we hereby extend the period within which your clients may deliver their notice of intention to oppose, if any, until tomorrow, Tuesday, 3 November 2015 (instead of today by 16h00, as currently indicated on the notice of motion).

Regards

Callum O'Connor
Senior Associate
Baker & McKenzie
1 Commerce Square, 39 Rivonia Road, Sandhurst
Johannesburg, 2196, ZA
Tel: +27 (0) 11 911 4350
Switchboard: +27 (0) 11 911 4300
Fax: +27 (0) 11 783 4177
Callum.OConnor@bakermckenzie.com

We've moved

Our new address is
1 Commerce Square, 39 Rivonia Road, Sandhurst.



Baker & McKenzie is a member of Baker & McKenzie International, a Swiss Verein.

From: Letitia Field [mailto:lfield@ensafrica.com]
Sent: 30 October 2015 05:19 PM
To: O'Connor, Callum; Paul Winer; Gary Oertel
Cc: Rudolph, Gerhard; Bell, John; Malan, Berna
Subject: RE: EMAG & Mastercraft / Evraz Highveld & Others

Dear Sirs

Please see attached our clients' notice of intention to oppose.

We will also accept service by email.

Regards

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MASTERCROFT S.A.R.L. Second Applicant

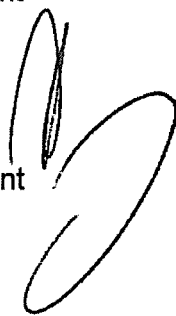
and

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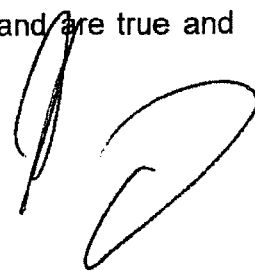
CONFIRMATORY AFFIDAVIT

I, the undersigned,

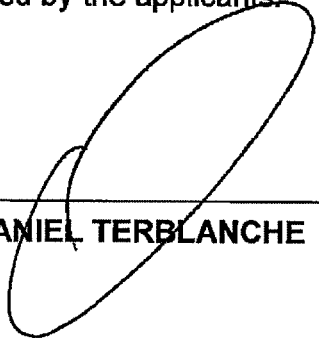
DANIEL TERBLANCHE,

do hereby make oath and state that:

1. I am a major male practising as a business rescue practitioner at Mazars Recovery and Restructuring (Pty) Limited. I am the third respondent herein.
2. The contents of this affidavit are within my personal knowledge and are true and correct.




3. I have read the answering affidavit deposed to by the second respondent and confirm that the contents thereof insofar as same relate to me. I further confirm that I support the opposition of the service application launched by the applicants.



DANIEL TERBLANCHE

I certify that:

- I. the Deponent acknowledged to me that :
 - a. He knows and understands the contents of this declaration;
 - b. He has no objection to taking the prescribed oath;
 - c. He considers the prescribed oath to be binding on his conscience.
- II. the Deponent thereafter uttered the words, "I swear that the contents of this declaration are true, so help me God".
- III. the Deponent signed this declaration in my presence at the address set out hereunder on 5th November 2015.



COMMISSIONER OF OATHS
JOHANNES JAC. DUES FOURIE
COMMISSIONER OF OATHS
PRACTISING ATTORNEY RSA
C & A FRIEDLANDER INC
1ST FLOOR
IMPERIAL BANK TERRACES
TYGER WATERFRONT
BELLVILLE