

**“ANNEXURE C
TO
NOTICE OF MOTION”**

**“THE SHAREHOLDERS
OF THE
FIRST RESPONDENT”**

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

CASE NO: 26911/2016

In the application of:

AIR LIQUIDE (PTY) LTD

Applicant

and

**EVRAZ HIGHVELD STEEL AND VANADIUM
LIMITED
(IN BUSINESS RESCUE)**

First Respondent

**THE CREDITORS OF THE FIRST RESPONDENT
(LISTED IN ANNEXURE A TO THE NOTICE OF
MOTION)**

Second Respondents

**THE EMPLOYEES OF THE FIRST RESPONDENT
(LISTED IN ANNEXURE B TO THE NOTICE OF
MOTION)**

Third Respondents

**NATIONAL UNION OF METALWORKERS OF
SOUTH AFRICA**

Fourth Respondent

SOLIDARITY

Fifth Respondent

**THE SHAREHOLDERS OF THE FIRST
RESPONDENT
(LISTED IN ANNEXURE C TO THE NOTICE OF
MOTION)**

Sixth Respondents

In the matter between:

PIERS MICHAEL MARSDEN N.O.

First Applicant

DANIEL TERBLANCHE N.O.

Second Applicant

and

AIR LIQUIDE (PTY) LTD

Respondent

FOUNDING AFFIDAVIT IN SUPPORT OF JOINDER APPLICATION

I, the undersigned,

Amine Houssaim

do hereby make oath and say that:

1. I am the Director of Large Industries of Air Liquide (Pty) Limited ("**Air Liquide**").
2. Air Liquide is the applicant in this joinder application and the respondent in the main application brought by Piers Michael Marsden and Daniel Terblanche, in their capacity as the business rescue practitioners of Evraz Highveld Steel and Vanadium Limited, under the above case number out of the above Honourable Court on 4 August 2016 ("**the main application**").
3. I am authorised to depose to this affidavit on behalf of Air Liquide.
4. The facts contained in this affidavit are, save where the contrary appears from the context, within my personal knowledge and are to the best of my belief both true and correct.
5. Where I make submissions of a legal nature, I do so on the advice of Air Liquide's legal representatives, accepting that such advice is correct.

6. I depose to this affidavit in support of Air Liquide's application to join the following persons as additional respondents to Air Liquide's counter-application which it served on the applicants in the main application under case number 26911/2016 on 25 November 2016 ("**the counter- application**").

The parties

7. The applicant is **Air Liquide**, a private company duly registered and incorporated in terms of the company laws of South Africa with its registered address at Corner Vereeniging and Andre Marais Streets, Alrode, Alberton.
8. The first respondent is **Evrax Highveld Steel and Vanadium Limited** ("**Highveld**"), a public company duly incorporated in terms of the company laws of South Africa and listed on the Johannesburg Stock Exchange.
9. The second respondents are the **creditors of Highveld**, listed in annexure **A** to the notice of motion.
10. The third respondents are the **current and previous employees of Highveld**, listed in annexure **B** to the notice of motion.
11. The fourth respondent is the **National Union of Metalworkers of South Africa**, a trade union duly registered in terms of section 96 of the Labour Relations Act, 66 of 1995, with principal office at NUMSA Head Office, 153 Lillian Ngoyi Street, corner Gerald Sekoto Street, Newtown, Johannesburg, 2001.

12. The fifth respondent is **Solidarity**, a trade union duly registered in terms of section 96 of the Labour Relations Act, with principal office at Solidarity Head Office, corner DF Malan and Eendracht Street, Kloofsig, 0157.
13. The sixth respondents are the **shareholders of Highveld**, listed in annexure C to the notice of motion.

Introduction

14. At the outset it is necessary to provide the context in which this interlocutory application is brought, which I address below.
15. On 13 April 2015, Highveld was placed into business rescue pursuant to the filing of a resolution in terms of section 129 of the Companies Act 71 of 2008 (“**the Companies Act**”).
16. Following Highveld being placed into business rescue, the applicants in the main application, Piers Michael Marsden and Daniel Terblanche, were appointed as Highveld’s business rescue practitioners (“**the BRPs**”).
17. On 13 October 2015 a business rescue plan was adopted in terms of section 152 of the Act (“**the Plan**”). The Plan contained three alternative proposals. The first two proposals entailed a proposed scheme of arrangement and a proposed sale as a going concern, however both have failed. The BRPs have therefore proceeded to implement the third proposal, namely a wind down of Highveld and the payment of a dividend to

creditors. These aspects are set out in more detail in the founding affidavit to the main application.

18. In terms of the main application, the BRPs seek:

18.1 a declarator that the obligations of Highveld in terms of a written agreement concluded between Highveld and Air Liquide on 7 December 2011, and amended on 9 October 2012 (“the Supply Agreement”), are cancelled in terms of section 136(2)(b) of the Act, save for certain obligations relating to the supply of utilities in terms of the Supply Agreement;

18.2 a declarator that the BRPs’ suspension of Highveld’s obligations in the first instance to take from Air Liquide product and pay the minimum product purchase obligation regardless of whether or not Highveld actually receives or requires such product, and secondly, to pay the monthly fee in terms of the Supply Agreement, is, in terms of section 132(2)(a) of the Act, valid and effective from 2 October 2015 and 15 July 2016 respectively; and

18.3 to the extent that the declarators set out in 18.1 and 18.2 are granted, that any damages claim by Air Liquide will be a concurrent claim in the business rescue, will not constitute a cost of business rescue or post-commencement finance and is limited by the provisions of paragraph 24.2 of the Plan and clause 20.12 of the Supply Agreement.

19. On 16 August 2016, Air Liquide gave notice of its intention to oppose the main application and on 25 November 2016 served its answering affidavit to the main

application. In addition, Air Liquide delivered the counter-application, with the written permission of the BRPs as required by section 133(1)(a) of the Act.

20. In its counter-application Air Liquide seeks:

- 20.1 a declarator that the cancellation of the obligations of Highveld on the terms set out in paragraph 1 of the notice of motion in the main application amounts to a repudiatory breach of the Supply Agreement by Highveld;
- 20.2 a declarator that Air Liquide is not bound by paragraph 24.2 of the Plan;
- 20.3 a declarator that clause 20.12 of the Supply Agreement does not impose any limitation on Air Liquide's damages claim arising from the cancellation of Highveld's obligations under the Supply Agreement on the terms set out in paragraph 1 of the notice of motion in the main application;
- 20.4 a declarator that Air Liquide is entitled to submit and the BRPs are obliged to accept a claim to the full extent of Air Liquide's mitigated claim for damages discounted to a present day value in the business rescue proceedings and that any dispute regarding the quantification thereof is to be determined in accordance with the dispute resolution mechanism in paragraph 38 of the Plan;
- 20.5 a declarator that Air Liquide is entitled to be paid and the BRPs are directed to pay Air Liquide a dividend based on the full amount of Air Liquide's damages claim in the business rescue proceedings;

- 20.6 a declarator that Air Liquide is entitled to continue to receive a supply of water according to its requirements from the Highveld Steel water pipeline and to have its waste water managed by Highveld's waste water treatment facility, on reasonable commercial terms, with related relief; and
- 20.7 a declarator that Highveld and/or the BRPs is/are obliged to include Air Liquide in any agreement concluded by Highveld and/or the BRPs with any third party or parties concerning the ownership and continued operation of the pipeline and waste water treatment facility.
21. Air Liquide submits that it is appropriate that if successful with its counter-application it should be entitled to the costs thereof.
22. The creditors, employees and shareholders of Highveld have a direct and substantial interest in the relief sought in the counter-application.
23. The Replying Affidavit of the BRPs has not yet been served.
24. In December 2016, Air Liquide's attorneys, Van Hulsteyns and more particularly Andrew Legg, a partner thereof ("Legg"), was informed by Letitia Field ("Field") of ENSafrica (the BRPs attorneys), that the BRPs replying affidavit will be served by the end of January 2017.

The legal interest of the creditors, employees and shareholders

25. In the event that the BRPs had not sought and are not granted the order referred to in paragraph 18.1 above, the Supply Agreement would have endured for a further approximately 18 years, from which Air Liquide would have derived an income.
26. As fully traversed in Air Liquide's answering affidavit to the main application, upon which it also relies in support for its counter-application, Air Liquide will suffer damages of approximately R1.35 billion as a result of the cancellation of the obligations under the Supply Agreement which the BRPs seek the cancellation of as set out in paragraph 18.1 of this affidavit.
27. Broadly stated, the dispute, in respect of which the BRPs and Air Liquide are seeking opposing declaratory relief, pertains to whether or not Air Liquide's claim for damages is limited, either by virtue of the provisions of paragraph 24.2 of the Plan, or in terms of clause 20.12 of the Supply Agreement. The limitations contended for by the BRPs will, if upheld, have the effect that Air Liquide's damages claim will be limited to an amount of approximately R43 million resulting in a dividend payment to Air Liquide of approximately R5.6 million in respect of its mitigated damages claim of R1.35 billion.
28. However, if Air Liquide's damages claim is admitted in full, the dividend payment which Air Liquide could expect to receive would be approximately R108 million. In the circumstances, if the limitation imposed on Air Liquide's damages claim in terms of paragraph 24.2 of the Plan is enforceable (which Air Liquide denies), this will mean that Air Liquide will actually end up contributing R102.4 million to the dividend amount to be paid to all other concurrent creditors whose claims are not limited.

29. I have been advised that it is not necessary for purposes of this application to elaborate further on the various contentions raised by the BRPs and Air Liquide respectively in this regard (Air Liquide's position having been dealt with fully in its answering affidavit), save to state that Air Liquide has been advised by the BRPs that creditors are likely to receive 13 cents in the Rand as a dividend if the relief sought in the main application regarding the limitation of Air Liquide's damages claim is granted, and 8 cents in the Rand if the relief sought in the counter-application is granted. In such circumstances, Air Liquide, through the limitation of its damages claim, will be sponsoring the claims of other creditors which aggregate R2.35 billion, to the extent of approximately 5 cents in the Rand.
30. In these circumstances, Air Liquide has therefore been advised that Highveld's creditors, employees and shareholders all have or may have a direct and substantial interest in the outcome of the counter-application.
31. It is by virtue of such interest that this application is brought.
32. It is respectfully submitted that the creditors of a company in business rescue have a direct and substantial interest in the interpretation of Chapter 6 of the Companies Act, and the business rescue plan, particularly where a particular interpretation may have an impact upon the position of each creditor. Subject to what I have stated in Air Liquide's answering affidavit in the main application, section 152(4) of the Act provides that a business rescue plan is binding on all the creditors if approved. As set out above, the Plan provides for the winding down of Highveld. On the basis that Air Liquide's counter-application is granted in regard to paragraph 24.2 of the Plan, this will directly

- affect the dividend that becomes payable to each creditor as listed in annexure A to the notice of motion.
33. The Act specifically acknowledges the rights of employees in business rescue proceedings. Apart from possible accrued claims against Highveld, further amounts are likely to become payable to employees, particularly in circumstances where they are to be or have been retrenched. The majority of Highveld's employees have already been retrenched, and, as in the case of the other creditors, the dividend that will become payable to the employees listed in annexure B to the notice of motion will be affected by the outcome of the main and counter-applications.
34. The shareholders of Highveld only have a residual right in respect of any possible residue remaining after the payment of claims. It is most unlikely that any residual amount will remain for distribution to shareholders after the payment of claims. However, *ex abundanti cautela*, Air Liquide also seeks to join the shareholders of Highveld to these proceedings, as set out in annexure C to the notice of motion.
35. It is thus necessary for Air Liquide to also join the creditors and current and ex-employees of Highveld to these proceedings under this case number.
36. Annexures A, B and C to the notice of motion were all provided to Air Liquide's attorneys by ENSafrica. I attach marked "JA1", an e-mail addressed by Legg to Field on 23 November 2016 as well as her response dated 24 November 2016 as "JA2" which confirms the correctness of the list of creditors and employees (being Annexures A and B). Annexure C was provided separately to Van Hulsteyns.

37. As is evident from annexures A, B and C, there are some 614 creditors, 1764 current and retrenched employees, and several hundred shareholders of Highveld, each of whom have a direct and substantial interest in the counter-application.
38. Given the practicalities facing Air Liquide in notifying such parties of its counter-application, which it is not reasonably practicable to do in the ordinary course, simultaneously with the bringing of this application, Air Liquide intends making application to the above Honourable Court for leave to notify the second, third and sixth respondents respectively by way of substituted service (as set out in Air Liquide's application for substituted service that will be issued at the same time as the present application) as provided for therein.
39. A copy of the counter-application (excluding annexures) is annexed marked "JA3". I attach a confirmatory affidavit from Legg marked "JA4", in confirmation of the allegations contained herein which relate to him.

Conclusion

40. In all the circumstances I respectfully submit that as a result of the direct and substantial interest that the creditors, employees and shareholders of Highveld (as listed in annexures A, B and C to the notice of motion) have in Air Liquide's counter-application, that it is appropriate that they be joined as parties to the counter-application.
41. I accordingly request that the relief as set out in the notice of motion be granted.

Wherefore Air Liquide prays for an order in terms of the notice of motion to which this affidavit is attached.



DEPONENT

I HEREBY CERTIFY THAT THE DEPONENT HAS ACKNOWLEDGED THAT HE KNOWS AND UNDERSTANDS THE CONTENTS OF THIS AFFIDAVIT, WHICH WAS SIGNED AND SWORN TO BEFORE ME, A COMMISSIONER OF OATHS, AT SANDTON ON THIS THE 9TH DAY OF FEBRUARY 2017, THE REGULATIONS CONTAINED IN GOVERNMENT NOTICE NO. R1258 OF 21 JULY 1972, AS AMENDED, AND GOVERNMENT NOTICE NO. R1648 OF 19 AUGUST 1977, AS AMENDED, HAVING BEEN COMPLIED WITH.



COMMISSIONER OF OATHS

GUGULETHU T. CHAUKE
Practising Attorney R.S.A.
Ex-Officio
Suite 19, Second Floor
Katherine & West, 114 West Street
Sandown, SANDTON
Tel: (011) 303 7900 / Fax: (011) 303 7999

“JA1”

“JA2”

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“JA3”

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

CASE NO: 26911/2016

In the matter between:

DANIEL TERBLANCHE N.O.

First Applicant

PIERS MICHAEL MARSDEN N.O.

Second Applicant

and

AIR LIQUIDE (PTY) LTD

First Respondent

**EVRAZ HIGHVELD STEEL AND VANADIUM
LIMITED (IN BUSINESS RESCUE)**

Second Respondent

**THE CREDITORS OF THE SECOND
RESPONDENT LISTED IN ANNEXURE A TO THIS
NOTICE OF MOTION**

Third Respondents

**THE EMPLOYEES OF THE SECOND
RESPONDENT LISTED IN ANNEXURE B TO THIS
NOTICE OF MOTION**

Fourth Respondents

**NATIONAL UNION OF METALWORKERS OF
SOUTH AFRICA**

Fifth Respondent

SOLIDARITY

Sixth Respondent

**THE SHAREHOLDERS OF THE SECOND
RESPONDENT LISTED IN ANNEXURE C TO THIS
NOTICE OF MOTION**

Seventh Respondents

NOTICE OF COUNTER-APPLICATION

BE PLEASED TO TAKE NOTICE that the first respondent intends to counter-apply to this Honourable Court for an order in the following terms: -

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1. Declaring that an order cancelling the obligations of the second respondent on the terms set out in paragraph 1 of the notice of motion in the main application amounts to a repudiatory breach on the part of the second respondent of the agreement concluded between the first respondent and the second respondent on 7 December 2011 and amended on 9 October 2012 (“**the Supply Agreement**”) giving rise to a claim for damages on the part of the first respondent against the second respondent.

2. Declaring that:
 - 2.1. the first respondent is not bound by paragraph 24.2 of the Business Rescue Plan (“**the Plan**”);

 - 2.2. clause 20.12 of the Supply Agreement does not impose any limitation on the first respondent’s claim for damages arising from a cancellation of the second respondent’s obligations under the Supply Agreement on the terms set out in paragraph 1 of the notice of motion in the main application;

 - 2.3. the first respondent is entitled to submit and the applicants are obliged to accept a claim to the full extent of the first respondent’s duly mitigated claim for damages discounted to a present day value in the business rescue proceedings and that any dispute regarding the quantification thereof is to be determined in accordance with the dispute resolution mechanism in paragraph 38 of the Plan;

unc
AA

- 2.4. the first respondent is entitled to be paid and the applicants are directed to pay the first respondent a dividend based on the full amount of the first respondent's damages claim in the business rescue proceedings.
3. Declaring that:
 - 3.1. the first respondent is entitled to continue to receive a supply of water according to its requirements from the Highveld Steel water pipeline ("the pipeline") and to have its waste water managed by Highveld Steel's waste water treatment facility ("waste water facility"), on reasonable commercial terms;
 - 3.2. to that end, the second respondent and/or the applicants is/are obliged to include the first respondent in any agreement concluded by the second respondent and/or the applicants with any third party or parties concerning the ownership and continued operation of the pipeline and waste water facility.
4. Directing that the applicants pay the costs of this counter-application, including the costs consequent upon the employment of two counsel, as costs of the business rescue proceedings.
5. Granting the first respondent further and/or alternative relief.

TAKE NOTICE that the answering affidavit of **Amine Houssaim** in the main application, together with the attachments thereto, shall be used in support of this application.

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

- a) notify the first respondent's attorneys in writing within 5 days of the service of this notice of counter-application on you;
- b) within 15 days after you have so given your intention to oppose the application, to file your answering affidavits, if any; and
- c) appoint in such notification an address referred to in rule 6(5)(b) at which you will accept notice and service of all documents in these proceedings.

TAKE NOTICE FURTHER THAT the application will be made at the hearing of the main application.

DATED AT JOHANNESBURG ON THIS THE 25th DAY OF NOVEMBER 2016.

VAN HULSTEYNS ATTORNEYS

First Respondent's Attorneys
3rd Floor, Katherine & West Building
Cnr. Katherine and West Streets
Sandton

Email: andrew@vhlaw.co.za
Ref: Mr Legg/MAT10034

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

ure
AA

AND TO: EDWARD NATHAN SONNENBERGS INC

Applicants' Attorneys
 150 West Street
 Sandton
 Email: lfield@ens.co.za
 Ref: L Field

Received a copy hereof on this the
 ____ day of November 2016.

For: Applicants' Attorneys

**AND TO: EVRAZ HIGHVELD STEEL AND VANADIUM LIMITED
 (IN BUSINESS RESCUE)**

Second Respondent
 Care of Matuson Associates
 (Attention Piers Marsdon)
 Cnr Glenhove Road & Ninth Street
 Melrose Estate
 2196 Johannesburg

SERVICE BY THE SHERIFF

**AND TO: THE CREDITORS OF THE SECOND RESPONDENT LISTED IN
 ANNEXURE A TO THIS NOTICE OF MOTION**

Third Respondents
PER SUBSTITUTED SERVICE

**AND TO: THE EMPLOYEES OF THE SECOND RESPONDENT LISTED IN
 ANNEXURE B TO THIS NOTICE OF MOTION**

Fourth Respondents
PER SUBSTITUTED SERVICE

AND TO: NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA

Fifth Respondent
 NUMSA Head Office
 153 Lillian Ngoyi Street
 Cnr Gerald Sekoto Street
 Newtown
 2001 Johannesburg

SERVICE BY THE SHERIFF

CJC
 AA

AND TO: SOLIDARITY
Sixth Respondent
Solidarity Head Office
Corner DF Malan and
Eendracht Street
Kloofsig
0157

SERVICE BY THE SHERIFF

**AND TO: THE SHAREHOLDERS OF THE SECOND RESPONDENT LISTED IN
ANNEXURE C TO THIS NOTICE OF MOTION**
Seventh Respondents
PER SUBSTITUTED SERVICE

circ
AA

“JA4”

circ

AA

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

CASE NO: 26911/2016

In the application of:

AIR LIQUIDE (PTY) LTD

Applicant

and

**EVRAZ HIGHVELD STEEL AND VANADIUM
LIMITED
(IN BUSINESS RESCUE)**

First Respondent

**THE CREDITORS OF THE FIRST RESPONDENT
(LISTED IN ANNEXURE A TO THE NOTICE OF
MOTION)**

Second Respondents

**THE EMPLOYEES OF THE FIRST RESPONDENT
(LISTED IN ANNEXURE B TO THE NOTICE OF
MOTION)**

Third Respondents

**NATIONAL UNION OF METALWORKERS OF
SOUTH AFRICA**

Fourth Respondent

SOLIDARITY

Fifth Respondent

**THE SHAREHOLDERS OF THE FIRST
RESPONDENT
(LISTED IN ANNEXURE C TO THE NOTICE OF
MOTION)**

Sixth Respondents

In the matter between:

PIERS MICHAEL MARSDEN N.O.

First Applicant

DANIEL TERBLANCHE N.O.

Second Applicant

and

AIR LIQUIDE (PTY) LTD

Respondent

CONFIRMATORY AFFIDAVIT

I, the undersigned,

Andrew Legg

do hereby make oath and say that:

1. I am an adult male attorney of the above Honourable Court, practising in partnership under the name of Van Hulsteyns Attorneys, which carries on practice as such from Suite 25, 3rd Floor, Katherine & West Building, Katherine and West Streets, Sandown, Sandton.
2. I am the attorney of record for the Applicant under the aforesaid case number.
3. Save for where the contrary is otherwise indicated, the facts and allegations deposed to by me herein fall within my personal knowledge and are both true and correct.
4. I have read the affidavit deposed to by Amine Houssaim on behalf of the Respondent and confirm the correctness of the allegations contained in such affidavit insofar as they relate to me.



 DEPONENT


AA 
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I HEREBY CERTIFY, THAT THE DEPONENT HAS ACKNOWLEDGED THAT HE KNOWS AND UNDERSTANDS THE CONTENTS OF THIS AFFIDAVIT, WHICH WAS SIGNED AND SWORN TO BEFORE ME, COMMISSIONER OF OATHS, AT SANDTON ON THIS THE 09th DAY OF FEBRUARY 2017, THE REGULATIONS CONTAINED IN GOVERNMENT NOTICE NO. R1258 OF 21 JULY 1972, AS AMENDED, AND GOVERNMENT NOTICE NO. R1648 OF 19 AUGUST 1977, AS AMENDED, HAVING BEEN COMPLIED WITH.



COMMISSIONER OF OATHS

GUGULETHU T. CHAUKE
Practising Attorney R.S.A.
Ex-Officio
Suite 19, Second Floor
Katherine & West, 114 West Street
Sandown, SANDTON
Tel: (011) 303 7900 / Fax: (011) 303 7999

AT 
CWC