IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: _____/15

In the matter between:

EAST METALS AG	First Applicant
MASTERCROFT S.A.R.L	Second Applicant
And	
EVRAZ HIGHVELD STEEL AND VANADIUM LIMITED (IN BUSINESS RESCUE) (Registration Number: 1960/001900/06)	First Respondent
PIERS MARSDEN N.O.	Second Respondent
DANIEL TERBLANCHE N.O. (in their representative capacities as the joint business rescue practitioners of Evraz Highveld Steel and Vanadium Limited (in business rescue))	Third Respondent
MAPOCHS MINE PROPRIETARY LIMITED (IN BUSINESS RESCUE) (Registration Number: 2008/009382/07)	Fourth Respondent
JOHN EVANS N.O.	Fifth Respondent
JOHN LIGHTFOOT N.O.	Sixth Respondent

FIRST - 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 supports the opposition to the applicants' urgent application and 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 what purports to be the founding affidavit, deposed to by Tania Mostert ("Mostert") on behalf of the applicants, in support of the urgent application.

6. On Friday night, 27 November 2015 at approximately 19h15, Gary Oertel ("Oertel") of ENS, the attorneys representing the practitioners and Highveld, received an sms from John Bell of Baker & McKenzie, the applicants' attorneys, informing Oertel of an urgent application and that it would be emailed. At 20h00 on Friday night, 27 November 2015, the present urgent application was emailed. It was emailed to Oertel but not to the practitioners. It was emailed in unsigned form. It was not until Sunday, 29 November 2015 after 11h30, that the practitioners' attorneys received a signed version by email.

7. The notice of motion requires the respondents to oppose by 16h00 on Saturday, 28 November 2015, and to deliver an answering affidavit by 09h00 on Sunday, 29 November 2015 (all before signed papers were served).

8. This answering affidavit has been prepared under enormous time constraints, unrealistic as they are. We, and our legal representatives, have done the best we could and we reserve the right to supplement this affidavit should the need arise. We cannot and do not deal with all of the allegations contained in the founding affidavit of Mostert. To the extent that I do not deal with any allegation contained therein it is denied.

EXTANT LITIGATION

9. As appears from the founding affidavit, the applicants launched the main application as long ago as 21 October 2015. The main application was brought in the ordinary course, despite the applicants knowing that Highveld's business rescue plan which was adopted on 13 October 2015 ("the Highveld plan") was being implemented as the Companies Act requires.

10. On 26 October 2015, the applicants brought an urgent application to interdict the implementation of the Highveld plan, pending the determination of the main application. In that urgent application, as has become customary for the applicants, the practitioners were placed under the applicants' unreasonable time constraints and required to deliver an answering affidavit by Tuesday, 3 November 2015. The practitioners did so. The applicants failed to deliver a replying affidavit and to set-down the application by Thursday, 12 November 2015 for hearing on 17 November 2015, as stipulated in the notice of motion.

11. The replying affidavit in that urgent application was finally deposed to by Mostert on 17 November 2015, being 10 court days after delivery of our answering affidavit. That urgent application, because of the applicants contending that the main application forms part of it, has not been enrolled for hearing as the deputy judge president is required to allocate a special court.

12. The practitioners delivered an answering affidavit in the main application on 18 November 2015. No replying affidavit has been delivered to date and it is due on 2 December 2015.

13. The applicants realised that both the main application and the urgent interdict application had to be served on affected persons, in light of the adopted Highveld plan and recent authority of the Supreme Court of Appeal. An urgent application was launched for substituted service, the practitioners answered timeously, the applicants replied thereto and the application was heard on 19 November 2015. An order was made by agreement for substituted service of the main and urgent interdict application. The order specifically excluded substituted service in respect of any other court process such as the present urgent application. I attach hereto, marked "**A**", a copy of the draft order that was made an order of Court. A separate consent order was taken in respect of SARS, which insisted that all court processes had to be served in hard copy at its head office in Pretoria. I do not have a copy of that order.

14. Due to the time constraints in preparing this affidavit, I will not attempt to repeat what is set out in my answering affidavits in the main application and the urgent application. I therefore attach hereto:

14.1. marked "**B**", a copy of the answering affidavit and supplementary answering affidavit in the main application; and

14.2. marked "**C**", a copy of the answering affidavit and supplementary answering affidavit in the urgent interdict application.

15. To avoid burdening the record, I do not attach the annexures to the main and interdict answering affidavits. These annexures, however, will be made available to this Court at the hearing of this application should same be required.

16. I confirm the contents of the aforesaid affidavits. Extensive reference will be made to my allegations in those affidavits when this application is argued.

PROCEDURAL DEFECTS

17. I have shown in my answering affidavits that Mostert has no personal knowledge of the facts pertaining to Highveld and its business rescue (see part A, paragraphs 8 to 14 of the main answering affidavit and paragraphs 141 to 144 of the interdict answering affidavit).

18. Despite this aspect being raised pertinently, the applicants approach this Court with Mostert as deponent and Mostert not stating how she obtained personal knowledge of the facts contained in the founding affidavit.

19. In the circumstances, there is no evidence upon which this urgent application is founded.

20. The applicants have also failed to join necessary parties, an aspect which they are acutely aware of in light of the substituted service application. There can be no

dispute that necessary parties in the Mapochs and Highveld business rescues have not been joined. In respect of:

20.1. Mapochs, an interdict is sought against, *inter alia*, holders of voting interests (see paragraph 3.2 of the notice of motion) without those persons having been joined as respondents.

20.2. Highveld, the affected persons have not been joined as respondents. In particular, the IDC, SARS and NUMSA, substantial creditors of Highveld, have opposed the main and interdict applications and have not been cited, served or notified by the applicants herein.

21. The applicants are aware of the necessity of joinder and substituted service where the rights of persons are affected.

22. The relief sought in this urgent application is *lis pendens* insofar as the implementation of the Highveld plan is concerned. That same relief is sought in the urgent application.

LACK OF URGENCY

23. I have made the point that the applicants did not deliver their replying affidavit timeously nor did they enrol the urgent interdict application for hearing on 17 November 2015. They are awaiting a response from the deputy judge president in respect of an allocation of a special court.

24. If regard be had to the relief being sought, this application is a transparent attempt to reactivate the urgent interdict application which the applicants did not previously enrol. The meeting in Mapochs of 30 November 2015 is being used to achieve the applicants' goal, namely to scupper the Highveld business rescue.

25. Even the Mapochs meeting does not render this application urgent. Nor does it justify the departure from the practice and the abuse of process. The applicants have known about the meeting, on their version, since Monday, 23 November 2015. They waited until 20h00 on Friday, 27 November 2015, to launch this urgent application. The application has been prepared during the course of the week and the correspondence attached thereto was evidently directed by the applicants' attorneys to fill the time and to create urgency.

26. There is no attempt by the applicants to deal with the deviation from the rules and practice of this Court. The applicants cannot seriously expect this application to be entertained.

27. This application ought to be struck from the roll with a punitive order as to costs.

LACK OF LOCUS STANDI: MAPOCHS

28. The applicants are not affected persons in respect of Mapochs. They would not be able to seek an adjournment or amendment of the Mapochs plan or vote for or against a plan in respect of Mapochs. They are not creditors and will not receive a benefit from Mapochs. If regard be had to the provisions of the Companies Act, 71 of 2008 ("the Companies Act"), affected persons determine the future of Mapochs in the context of business rescue, as is contemplated in sections 151 and 152. Those persons are the only ones entitled to decide on the future of the company, in particular, whether to adjourn the meeting or vote in favour or against the adoption of the Mapochs plan.

29. The applicants have not demonstrated *locus standi* in respect of Mapochs.

NOTICE OF MOTION

30. I have made the point that the relief in paragraph 3(a) is in effect the same relief sought in the urgent application.

31. The relief in paragraph 3(b) read with the rest of paragraph 3 pertains to the implementation of the adopted Highveld plan and the purchase of the claims against Mapochs for R35 million. If regard be had to the Highveld plan and compared to the Mapochs plan, as to be amended, it will be seen that both plans provide for the ultimate monetary figure of R35 million to be paid by IRPL. In addition, the stockpile will be sold for R18 million. This too will be purchased by IRPL.

32. There is no waiving of any claim by the practitioners of Highveld against Mapochs. Highveld will retain its claims against Mapochs and will also retain the 74% shareholding which it holds in Mapochs. Subject to the conditions being met, the practitioners have agreed not to receive a dividend from Mapochs in respect of its trading loan account which will increase the value of the distribution at Mapochs' level. This does not affect the R350 million purchase price of IRPL payable to Highveld in terms the Highveld plan. Accordingly, it does not affect the monetary outcome of the Highveld business rescue as concerns the proposed transaction.

33. However, as I have indicated in the answering affidavits, this is contrary to the predetermined objective of the applicants to have the third proposal of a wind-down in business rescue implemented. The applicants are only interested in the winding-down of Highveld in business rescue.

34. I have also made the point that the applicants seek an interdict against the holders of a voting interest in paragraph 3.2 without them being cited as respondents.

35. The applicants are not affected persons in respect of Mapochs. They are accordingly not entitled to seek an adjournment of the meeting on 30 November 2015, as sought in paragraph 4 of the notice of motion.

DEPONENT (PARAGRAPHS 1 - 3)

36. I deny that Mostert has personal knowledge of the facts "*in this affidavit*".

37. There is no evidence on which this court can grant the relief sought by the applicants. I note that not a single confirmatory affidavit has been referred to or attached to the founding affidavit.

38. I also deny that Mostert is authorised to depose to the affidavit on behalf of the applicants, both of which are foreign companies situated in Europe.

PARTIES (PARAGRAPHS 4 - 18)

39. I deny that the first respondent is the largest creditor of Highveld. I have made the point in the answering affidavits that SARS is the largest creditor. SARS has issued an assessment in respect of its second claim which has been provided to the applicants prior to this application (same being attached to the supplementary answering affidavits), yet no mention is made thereof by Mostert who clearly has no knowledge of the facts pertaining to Highveld. I have also made the point that SARS opposes the main and urgent applications, but despite its opposition and the consent order for proper service, it is not cited nor has it been served.

40. It is not disputed that the first applicant advanced money to Highveld, however, it was not the only financier at the time of business rescue. In this regard, Sasfin Bank Limited also financed Highveld.

41. The applicants request the practitioners of Highveld to inform all affected persons of the proceedings. This is not in compliance with the Companies Act and does not absolve the applicants from having cited necessary parties and having served, or sought substituted service, which they have not.

42. I do not take issue with the remainder of the allegations for the purpose of this application, however, I reserve the right to deal with these issues should the need arise.

JURISDICTION (PARAGRAPH 19)

43. This is admitted.

S133 LEAVE OF THE COURT (PARAGRAPHS 20 - 22)

44. I deny the allegations herein.

45. No case is made out for leave in terms of s133 of the Companies Act.

BACKGROUND (PARAGRAPHS 23 – 28)

46. I deny that the first applicant is the largest creditor of Highveld. I admit that it is an affected person of Highveld, although not independent.

47. The applicants are not affected persons in respect of Mapochs and are not entitled to the relief sought for the reasons already set out herein.

48. I have referred to the extant litigation. The applicants have not addressed the defects in Mostert's ability to depose to affidavits which disability has been exposed in my answering affidavits.

49. It is denied that the main application will be ripe for hearing at the commencement of the first term of 2016. The applicants know that this is not true. The practitioners are unaware if the applicants have complied with the substituted service required in terms of the order.

50. I object to the applicants' reference to the papers in the main application or the manner in which the applicants' attempt to place the papers before the court and without specifying those portions of the affidavits on which reliance is placed in this application. This is not permissible and any attempt to refer to those affidavits in argument will be objected to.

51. I do not take issue with the remainder of the allegations for the purpose of this application, however, I reserve the right to deal with these issues should the need arise.

NATURE OF APPLICATION (PARAGRAPHS 29 - 30)

52. As stated in my answering affidavits, the proposed transaction contemplated in the Highveld plan (referred to as "Proposal 1" and "Proposal 2") is an offer received from IRPL. The offer for Highveld was interlinked in the plan with an offer for Highveld's subsidiary, Mapochs. The two offers have since been de-linked by IRP, in order for the business rescue process of Mapochs not to be dependent on what happens in the Highveld business rescue process.

53. I have made the point that the monetary value of R350 million is unaffected.

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54. The remainder of the allegations contained in these paragraphs are denied.

RELIEF SOUGHT (PARAGRAPH 31)

55. I take note of the relief sought.

56. I have dealt with these aspects separately in this affidavit.

57. The applicants cannot affect a vote in respect of an adjournment of a meeting in terms of Mapochs or in respect of an amendment to the Mapochs plan.

THE IRPL OFFER (PARAGRAPHS 32 - 38)

58. I have made the point that the offer in respect of Mapochs has been de-linked.

59. If the relief sought is granted, it will be detrimental to Highveld and its business rescue. I have made the point in my other affidavits that the conduct of the applicants is prejudicial to the employees and the Witbank community. Extensive reference will be made in argument to the importance of the implementation of the Highveld plan.

60. In paragraph 34, it is made clear that the applicants seek to achieve with this application what they set out to achieve with the urgent interdict application. This they attempt to do on virtually no notice and in a transparent attempt to steal a march on the respondents.

61. The applicants are aware of the amendments and have been informed thereof at the 13 October 2015 meeting. These amendments are also attached as annexure PM19 to my answering affidavit in the main application.

62. In respect of paragraphs 36 to 38, I deny what is alleged as concerns the conduct of the practitioners. The applicants resort to sweeping and unsubstantiated statements. These statements are in any event contradicted by the applicants' own version and the fact that they have been aware throughout that there was one successful bidder, IRPL, which was, in terms of the Highveld plan, to obtain the assets of Highveld, which would include Mapochs.

63. The practitioners are giving effect to the Highveld plan.

64. The remaining allegations in these paragraphs are denied.

URGENCY (PARAGRAPHS 39 - 55)

65. I deny that this application is urgent and refer to what I have already stated herein.

66. I have also dealt with the applicants' failure to deal with urgency in the urgent interdict application (see part A, paragraphs 21 to 27).

67. The applicants resort to allegations in respect of the conduct of the practitioners to bolster their case for urgency. They now contend that the practitioners are acting in the interests of IRPL and to the detriment of Highveld and its affected persons.

68. The practitioners dealt with the allegations levelled against us in our affidavits in our main application. Despite that, the applicants have not made any attempt to deal with those facts and as if the practitioners have not set out our version in those affidavits.

69. In paragraphs 49 and 50, a list of conclusions is set out without any foundation for such conclusions. The applicants do so under the rubric of urgency. The

conclusions are denied and if and when the applicants set out a factual foundation for such conclusions, the practitioners will meaningfully respond thereto.

70. It is correct that there will be a flow of funds to Mapochs if the plan is adopted on 30 November 2015. Mapochs is desperately awaiting funds and if the relief is granted in this application, it would result in the liquidation of Mapochs. The applicants have spoken about the importance of the rescue of Mapochs to the Roossenekal community, as is stated in their founding affidavit. Contrary to what is concluded by the applicants that there is collusion, the purpose of the business rescue in both Highveld and Mapochs is to save businesses which employ thousands of people and are critical to the local communities. I again refer this Court to the affidavits in the main application (see part J, paragraphs 154 to 166) and the urgent interdict application (see paragraphs 121 to 138) and point out that the applicants have not disputed what has been stated by me in those applications.

71. In respect of paragraph 52, I note when the Mapochs plan came to the attention of the applicants. I deny that there has been an "*inadequate*" or "*late response*" by the practitioners. What is evident is that the applicants commenced preparation of the papers in this application on 23 November 2015 or soon thereafter and that the letters were written to fill the time and create urgency. The criticism in respect of the responses is also not understood as the applicants, as they always do, set unrealistic and unreasonable deadlines which the practitioners have attempted to comply with and in fact complied prior to the deadline of the latest letter.

72. In respect of paragraph 54, the Mapochs plan will be amended to reflect IRPL as the offeror. The remainder of the allegations in this paragraph are so vague that they cannot be meaningfully responded to.

73. In respect of paragraph 55, the "*manipulation of the offer*" is another sweeping and scurrilous allegation. The applicants evidently realise that the affected persons of Mapochs will probably vote in favour of the Mapochs plan, as amended. Those affected persons are best suited to decide what is appropriate and beneficial to Mapochs and themselves.

74. There is no waiving of claims and the flow of funds to Mapochs is a necessity. It is telling that the applicants who were in control of Highveld and therefore Mapochs for many years and under whose control these entities became financially distressed, shows no regard for the affected persons, the employees and the communities. Certainly the applicants do not suggest that they are prepared to fund the operations of Mapochs.

THE HIGHVELD BUSINESS RESCUE PROCEEDINGS (PARAGRAPHS 56 – 58)

75. I deny the allegations in these paragraphs, which have been dealt with in my answering affidavits (see part J, paragraphs 118 to 115, 188 and 187 of the main answering affidavit and paragraphs 83 to 113 of the interdict answering affidavit).

76. I deny that the applicants only received the final offer upon publication. The final offer was sent simultaneously to the practitioners and the applicants' advisors.

77. The applicants have sought to interdict the Highveld plan from being interdicted. They have not been successful. This application is a further attempt to do so and should not be countenanced.

THE MAPOCHS BUSINESS RESCUE PROCEEDINGS (PARAGRAPHS 59 - 63) AND THE APPLICANTS' RIGHTS (PARAGRAPHS 64 TO 87)

78. I have made the point that the first respondent is not the largest creditor in Highveld.

79. In regard to paragraphs 59 to 63, 65 to 74, 76, 82 and 83, I refer to the letters addressed by ENS to Baker & McKenzie on 26 and 27 November 2015 (annexures FA5 and FA7) and I reiterate what is stated therein. I have further set out above that there is no waiver of any claim by the practitioners of Highveld against Mapochs. Highveld's claims against Mapochs will remain and will ultimately be transferred in terms of the sale of business to IRPL, as contemplated in the second proposal set out in the Highveld plan.

80. The Highveld plan and Mapochs plan seek to ultimately rescue the respective businesses involved. Although the two offers have been de-linked, it is evident that the successful rescue of Highveld is dependent on the successful rescue of Mapochs. This is achieved in terms of the proposed transactions contemplated in the Highveld plan and the Mapochs plan, as to be amended.

81. The applicants' allegations and assumptions regarding the respective proposed offers and results thereof are accordingly incorrect and unfounded. In fact, the only party incurring any risk in respect of the Mapochs plan and Highveld plan is IRPL.

82. As stated in paragraph 2 of annexure FA5, the practitioners will seek to rectify any inaccuracies relating to the offer set out in the Mapochs plan by proposing amendments thereto at the meeting to be held on 30 November 2015.

83. There is no requirement for the meeting to be adjourned to effect the amendments. The Companies Act provides for motions by creditors to amend a business rescue plan. It also provides for creditors to direct the business rescue practitioners to adjourn the meeting to amend the plan, should they so wish.

84. In the circumstances, the creditors of Mapochs are the only persons entitled to determine whether to accept the proposed amendments at the meeting or direct an adjournment of the meeting for purposes of effecting the amendments and republishing an amended plan.

85. It is evident that the applicants intend objecting to every aspect of the Highveld business rescue in order to stop the implementation of the Highveld plan. All of these objections are without merit.

86. The practitioners have acted in accordance with their statutory duties and are giving effect to the Highveld plan. There are numerous scandalous allegations made by the applicants in these paragraphs but no particulars given. It makes it impossible to deal with other than to deny, which I hereby do.

FINAL RELIEF IN EFFECT (PARAGRAPH 88)

87. The applicants seek to make out a case for interim relief. If regard be had to their notice of motion and the effect of the relief, if granted, it is a final interdict that they are seeking.

88. Such a final interdict would be the death knell for Highveld and for Mapochs and will have devastating consequences for affected persons and especially employees and the respective communities surrounding Highveld and Mapochs.

89. I have made reference to these aspects in my answering affidavits (see part J, paragraphs 154 to 166 of the main answering affidavit and paragraphs 121 to 138 of the interdict answering affidavit) and they have not been addressed in the founding affidavit in this application.

IRREPARABLE HARM AND BALANCE OF CONVENIENCE (PARAGRAPHS 89 - 95)

90. I deny the allegations contained in these paragraphs.

91. In terms of the first proposal contemplated in the Highveld plan, the second applicant would have received 85% of the R20 million offered by IRPL for its shareholding. As set out in the answering affidavits, the applicants made it clear that they do not support the proposed transaction by IRPL and do not approve of the proposed scheme contemplated in the first proposal.

92. What makes no commercial sense is for the applicants to insist on the winding-down in terms of proposal 3 as they will receive less for their respective claim and nothing for their shareholding. I have made this point in my answering affidavits but again it is not addressed in the founding affidavit.

93. I have dealt extensively with the balance of convenience in my answering affidavits, but not surprisingly, the applicants have not dealt with what I have said in their founding affidavit.

94. I deny what is said in paragraph 92 and, as I have indicated, the applicants disregard the necessity for the funding to flow on the part of Mapochs and the effect thereof if this does not happen.

NO ALTERNATIVE REMEDY (PARAGRAPHS 96 TO 97)

95. I deny the allegations contained in these paragraphs.

96. The conclusion that the applicants would be incapable of successfully recovering damages is unsubstantiated.

CONCLUSION

97. I respectfully submit that the application should be dismissed with costs including those consequent on the employment of two counsel. In regard to the scale of costs sought, by virtue of what is stated herein, a punitive costs order should be granted against the applicants. The first to third respondents accordingly seek costs on the scale of attorney and client, including those consequent upon 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 30 November 2015.

COMMISSIONER OF OATHS

SOUTH AFRICAN POLICE SERVICE
CLIENT SERVICE CENTRE
2015 -11- 30
CSC
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