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 (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
COMPANIES AND INTELLECTUAL PROPERTY 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

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' application under the above case number ("the main 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 on behalf of the applicants on 21 October 2015, in support of the main application.

6. The main relief sought by the applicants is effectively for the setting aside of the business rescue plan published in respect of Highveld ("the plan"). The application is ill-founded and based on numerous untrue allegations. The applicants have been selective in what they have disclosed to this Honourable Court and have shown a complete disregard of this Honourable Court's processes and the requirements of the Rules of Court.

7. Before dealing with the allegations contained in the founding affidavit consecutively, it is necessary to deal with certain issues upfront. For ease of reference, these issues are dealt with under the following headings:

7.1. Part A: Lack of knowledge and striking out of the founding affidavit (paragraphs 8 to 14);

7.2. Part B: Non-compliance (paragraphs 15 to 24);

7.3. Part C: Non-disclosure: SARS (paragraphs 25 to 48);

7.4. Part D: The plan: non-compliance with s150 of the Companies Act (paragraphs 49 to 69);

7.5. Part E: The voting interests (paragraphs 70 to 82);

7.6. Part F: Shareholders' vote: non-compliance with s152(3) of the Companies Act (paragraphs 83 to 87);

7.7. Part G: Practitioners' fees (paragraphs 88 to 93);

7.8. Part H: Motive (paragraphs 94 to 117);

7.9. Part I: The proposed transaction (paragraphs 118 to 153);

7.10. Part J: The importance of the implementation of the plan on affected persons (paragraphs 154 - 166).

A. LACK OF KNOWLEDGE AND STRIKING OUT OF THE FOUNDING AFFIDAVIT

8. The deponent, Mostert, does not have personal knowledge of the facts contained in the founding affidavit nor can personal knowledge be inferred from the context of the founding affidavit.

9. Mostert is the financial director of Evraz Vametco Holdings (Pty) Ltd ("EVH"). EVH is a separate legal entity from the applicants and the first respondent. It is not explained what the relationship between EVH and the applicants is, other than that they have the same ultimate shareholder. It is further not explained how, by virtue of her position at EVH, Mostert has personal knowledge of Highveld or its business rescue. Nor is any allegation made of the number of other related companies in the group.

10. In this regard:

10.1. I have been informed by Anre Weststrate ("Weststrate"), who has been in the employ of Highveld since 2006 and has been its company secretary since 2013, that the deponent left the employ of Highveld during March 2011 to work at EVH. Prior to her departure from Highveld, the deponent was Highveld's finance unit manager – accounting. After her departure from Highveld, the deponent had no further involvement in the business of Highveld and accordingly ceased to have any knowledge of the affairs of Highveld;

10.2. The only relationship between Highveld and EVH was contractual, i.e. a third party relationship, in terms whereof Highveld and EVH concluded:

10.2.1. a supply agreement in terms whereof Highveld supplied vanadium bearing slag to EVH, which terminated during December 2011; and

10.2.2. a services agreement in terms whereof Highveld offered legal, corporate, security and management services (excluding financial services) to EVH, which terminated during September 2015,

10.3. the deponent and EVH have not been involved in the business rescue of Highveld; and

10.4. the practitioners have not spoken to the deponent and no form of correspondence has been exchanged with her.

11. I refer to the affidavits of Weststrate and Johan Burger, a director of Highveld and its CEO since 19 August 2014, filed herewith, wherein the aforesaid is confirmed.

12. It is telling that those who have represented the applicants in the business rescue have not deposed to confirmatory affidavits. Callum O'Connor and Berna Malan of Baker & McKenzie only became involved in the business rescue after the publication of the plan and came on record around 25 September 2015.

13. At the time of the resolution to commence business rescue, Highveld's board of directors consisted of 9 members. The second applicant appointed 4 of those 9 directors. Mostert does not contend to have communicated with those directors, or any of the other directors. She also does not contend to have obtained any knowledge of Highveld and its business rescue through the practitioners.

14. In the circumstances, the applicants were required to make out their case based on admissible non-hearsay evidence in their founding papers. They have not. On this basis alone the application falls to be dismissed.

B. NON-COMPLIANCE

15. The applicants issued the main application on long form, citing Highveld, the practitioners as well as the creditors (as fifth respondents), the employees (as sixth respondents) and the remaining shareholders (as tenth respondents).

16. The creditors, employees and remaining shareholders obviously have an interest in the adopted plan and in the relief sought by the applicants.

17. Despite their interest, and these interested persons being cited as respondents, the main application was not served on the creditors, employees and remaining shareholders.

18. In paragraphs 28 and 32.2, the applicants indicated that the practitioners would be requested to furnish details of the creditors, employees and remaining shareholders and how best to effect service on them. If regard be had to the letter of the applicants' attorneys, Baker & McKenzie, dated 21 October 2015, a copy of which is attached, marked "**PM1**", there was no request in respect of the best manner of service.

19. Until now, there has been no confirmation that service was effected and that all respondents (who are entitled to oppose the main application, as of right) are aware of what relief is sought and the allegations made in support thereof.

20. The position of the employees is worse. They are cited as a globular mass of employees. Although each employee is a respondent, none of them is mentioned

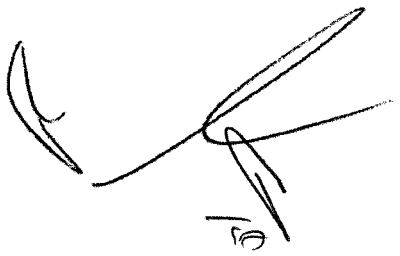
by name even in a schedule. It is perfectly possible, even if this application comes to the attention of all employees, many of them, not having been named, will not even realise that they are respondents.

21. On 26 October 2015, the applicants launched an urgent application to interdict the implementation of the plan ("the interdict application") pending the determination of the main application. That application was said in the notice of motion to be set-down for 17 November 2015. The applicants then, having served that notice of motion, unilaterally decided not to enrol this application for 17 November 2015. Similarly, the creditors, employees and remaining shareholders are cited as respondents in the interdict application but have not been served with the papers therein.

22. On 2 November 2015, having realised the procedural defects in the main application, the applicants launched an urgent application for substituted service ("the service application"). The service application was also set-down for hearing on 17 November 2015 and subsequently allocated for hearing on 19 November 2015. Therein the applicants seek leave from the Court to "*serve*" the main application on the creditors, employees and remaining shareholders.

23. As things stand, the relief sought in the main application and in the interdict application are incompetent for a want of compliance with the Rules of Court. The service application is opposed seeing that the applicants attempt to circumvent compliance with the Rules of Court and respondents being notified of the relief sought and allegations made in support thereof.

24. Unless and until the applicants have shown compliance in this regard, the relief sought is incompetent.



C. NON-DISCLOSURE: SARS

25. It is evident from the founding affidavit that the applicants' main objection is in respect of the practitioners having allowed SARS to vote in respect of its claims.

26. SARS has submitted the following claims:

26.1. unpaid PAYE (pay as you earn); and

26.2. income taxes in respect of the 2007 to 2009 financial years, which has been the subject of a dispute between Highveld and SARS.

27. The second claim is attached to the founding affidavit as annexure FA19. The calculation of the second claim is further attached to the founding affidavit as annexure FA28.

28. The following is stated in annexure FA28:

"*The figures as per the Audit letter were used, with an estimated impact of the interest accordingly. These calculations were performed taking the credits of each year into account, and assuming a due date for the assessments of 30 November 2015:*

ESTIMATED Potential Assessments:

Year	***Capital***	***Q89(2)***	***TOTAL***
2007	*R 109 467 802.72*	*R 80 025 524.94*	*R 189 493 327.66*
2008	*R 231 435 629.04*	*R 135 438 058.74*	*R 366 873 687.78*
2009	*-R 11 290 143.48*		*-R 11 290 143.48*
TOTAL of years	***R 329 613 288.28***	***R 215 463 583.68***	***R 545 076 871.96***

Notes:

**2007 has a credit of R3,060,940.04 which reduces the assessed tax from R112,528,742.76 to R109,467,802.72*

The 89Q4 of R78,530.66 currently on the account will be reversed in full

**2008 has a credit of R14,765,685.76 which reduces the assessed tax from R246,201,314.80 to R231,435,629.04*

The 89Q4 of R205,910.51 currently on the account will be reversed in full

**2009 has a credit of R54,971,593.04 which reduces the assessed tax from R43,681,449.56 to a credit of R11,290,143.48. The 89Q4 of R1,631,603.94 will reduce to R552,598.39*

This is an estimation, as we will only have the full tax liability as soon as the assessments are raised".

29. The applicants allege that the practitioners failed to disclose the second claim in the plan. This is incorrect.

30. Paragraph 7.5.5 of the plan details the background relating to the issues with SARS, the basis for SARS' claim and the approximate tax liability that could be claimed.

31. The applicants have full knowledge of the basis of SARS' claim and the issues relating to SARS. In fact, the applicants have been the parties who attempted to manipulate the business rescue process having such knowledge.

32. In this regard, the applicants requested the practitioners to participate in an unlawful stratagem to frustrate SARS from exercising any voting interest in the business rescue.

33. I attach hereto, marked "**PM2**", the letter addressed by the applicants' erstwhile attorneys, DLA Cliffe Dekker Hofmeyr ("CDH"), to the practitioners' attorneys, Edward Nathan Sonnenbergs ("ENS"), dated 1 July 2015. The following is stated in annexure PM2:

> "*1. Thank you for your earlier correspondence enclosing under cover thereof the various documentation requested by ourselves.*
>
> *2. We are somewhat alarmed by the fact that SARS has only agreed to an extension until 8 July 2015. In the event that the SARS assessment becomes a claim, the aforementioned will have dramatic effects on any potential business rescue and will no doubt shift the voting power within a business rescue to SARS. Given the tight time frames within which you and your team have to work, can you please confirm today that you will make the necessary arrangements to meet with KPMG, who were previously instructed by the shareholders of the company, to provide tax advice in regard to the issues now raised in the SARS correspondence. Will you revert to us as a matter of urgency in respect of the aforementioned issue as it is imperative that the SARS 'claim' either be expunged or determination of the aforementioned be delayed for as lengthy a period as possible*" (emphasis added).

34. The practitioners were taken aback by the request by the applicants to deliberately frustrate SARS from pursuing its claims so as to ensure that the applicants controlled the voting interests. Such request is unlawful.

35. The practitioners were not willing to accede to the applicants' unlawful request. I attach hereto, marked "**PM3**", the response from ENS, wherein the following is stated:

"2. *As you are aware, our clients have commenced with investigating the potential SARS claim and have already instructed our firm to furnish tax advice. We confirm that our clients have received substantial documentation, which includes documentation from KPMG, relating to the potential SARS claim and accordingly it is unnecessary for our clients to engage further with KPMG.*

3. *In addition, our clients are obliged to act independently and comply with their statutory duties. To this extent, our clients will not seek to delay the exercise of their statutory duties and/or any process relating to the determination of claims. Our clients therefore do not agree to your request to do so*" (emphasis added).

36. I draw to the attention of this Honourable Court that:

36.1. the second applicant has been the major shareholder of Highveld since 2007, had 4 representatives on Highveld's board and was actively involved in the operations of Highveld for over 7 years;

36.2. the applicants have intimate knowledge about the issues with SARS as appears below;

36.3. the applicants requested the practitioners to consult with KPMG, who were previously instructed by the second applicant, to give tax advice in regard to SARS' second claim, as same would obviate the need for the practitioners to

peruse the voluminous documentation pertaining to the SARS claim. By way of example:

36.3.1. I refer to annexure PM2, wherein the following is stated by the applicants' attorneys:

"Given the tight time frames within which you and your team have to work, can you please confirm today that you will make the necessary arrangements to meet with KPMG, who were previously instructed by the shareholders of the company, to provide tax advice in regards to the issues now raised in the SARS correspondence...".

36.3.2. I attach hereto, marked **"PM4"**, a letter from the applicants' attorneys, dated 3 July 2015, in terms whereof the following is stated:

"Can you please revert to us in regard to the issues raised, especially the issues surrounding the SARS liability and more importantly whether arrangements have been made to meet with KPMG who should be fully aware of the issues raised in the correspondence".

36.3.3. I attach hereto, marked **"PM5"**, a further letter from the applicants' attorneys, dated 6 July 2015, in terms whereof the following is stated:

"We suggested that your client meet with KPMG as it may remove the need for you client to peruse the voluminous documentation

pertaining to the SARS claim. Can you please furnish, for our records, a copy of your response to SARS once same has been transmitted?",

36.4. since the commencement of business rescue, the practitioners and their attorneys have held numerous meetings and telephone conferences with the applicants and their attorneys (previously CDH and now Baker & McKenzie) regarding SARS and other issues in Highveld's business rescue, including Eskom and the environmental liabilities. By way of example:

36.4.1. on 9 July 2015, a telephone conference was held and attended by the applicants and their attorneys and the practitioners and our attorneys during which the following was discussed: the International Trade Administration Commission ("ITAC") application, production levels and possible cessation of production, SARS, the environmental liabilities, the sales process and the Industrial Development Corporation of South Africa Limited ("IDC");

36.4.2. on 30 July 2015, a telephone conference was held and attended by the applicants and their attorneys and the practitioners and our attorneys during which the following was discussed: the then current trading conditions, labour, litigation, Eskom, the IDC facility, SARS, the sales process, the business rescue costs, possible "Plan B", being a wound-down in business rescue, environmental and creditors; and

36.4.3. on 25 August 2015, a telephone conference was held and attended by the applicants and their attorneys and the practitioners and our attorneys during which the items on an agenda prepared by the applicants were discussed. I attach hereto, marked "**PM6**", a copy of the agenda,

36.5. numerous correspondence was exchanged between the practitioners, the applicants and their attorneys wherein the applicants made various requests for information and/or documentation relating to SARS and other issues in the business rescue. The practitioners provided same. By way of example:

36.5.1. I attach hereto, marked "**PM7**", a letter addressed by the applicants' attorney to the practitioners' attorneys, dated 30 June 2015, wherein the applicants requested a copy of:

36.5.1.1. the holding letter addressed by the practitioners' attorneys to SARS requesting an extension to respond to SARS' letter of audit findings;

36.5.1.2. the correspondence addressed by the practitioners to Eskom;

36.5.1.3. the correspondence addressed by the practitioners to the South African government (the Department of Trade and Industry); and

36.5.1.4. the calculation of the vote in regard to an extension of the publication date in respect of the plan.

36.5.2. I attach hereto, marked **"PM8"**, a copy of the response from the practitioners' attorneys wherein the applicants' attorneys attached the relevant documentation;

36.5.3. I attach hereto, marked **"PM9"**, a letter addressed by the applicants' attorney to the practitioners' attorneys, dated 13 July 2015, wherein the applicants requested a copy of the correspondence addressed to SARS and the agenda for the second creditors' committee meeting;

36.5.4. I attach hereto, marked **"PM10"**, a copy of the response to the aforesaid request addressed by the practitioners' attorneys to the applicants' attorneys.

36.6. the applicants received the correspondence addressed by SARS to the practitioners, including the letter of audit findings. Due to the applicants' knowledge of the issues relating to SARS, the applicants were given an opportunity to give their input into the practitioners' response sent to SARS in respect of its letter of audit findings, which they duly did. I attach hereto, marked **"PM11"**, the correspondence exchange with the applicants' attorneys and their comments on the response to SARS. As is stated in annexure FA28, the calculation of the second claim is based on the same letter of audit findings on which the applicants' commented.

37. The applicants have not disclosed the aforesaid and have brought this application premised on their feigned lack of knowledge as to the claims of SARS. Plainly this is untrue.

38. As dealt with more fully below, the practitioners were advised that even prior to issuing an assessment an income tax debt owing to SARS is not a contingent debt but is a claim in the hands of SARS. I was advised that this was confirmed by the Supreme Court of Appeal in the second judgment referred to in paragraph 39 below. Accordingly, the practitioners allowed SARS to exercise its voting interest at the meeting and this decision is consistent with the practitioners' impartial and independent approach to the business rescue of Highveld. This decision did not fit in with the applicants' strategy and objectives, namely, to keep SARS from voting.

39. I attach hereto, marked "**PM12**", a copy of an email addressed by ENS to the applicants' attorneys on 16 October 2015 wherein the following is stated:

"*Further to our letter of yesterday and our meeting this morning, please see attached judgments dealing with the status of SARS as a creditor prior to an assessment being raised.*

Paragraph 7 of Spitskop relies on p289E-G of Namex and states:

debt, is not correct. The Supreme Court of Appeal has held that an income tax debt, even prior to the raising of an assessment, is not a contingent debt.[1] For the above reasons I was satisfied that SARS is a creditor of Spitskop, and as such, qualified as an affected person in terms of s 128(1)(i) of the Act. These are the considerations which led me to make the order referred to in para 3 above, allowing SARS to intervene as a party in these proceedings.

Page 289E-G of Namex states:

uitgereik is.[28] Dié betoog is gegrond. Uit bedoelde beslissings blyk dit dat hoewel die uitreiking van 'n aanslag 'n vereiste vir die afdwingbaarheid van 'n belastingskuld mag wees, die skuld as sulks reeds voor daardie gebeurlikheid bestaan. Dit is dus nie onderhewig aan 'n voorwaarde die vervulling waarvan kan meebring dat verskuldigheid nie sal ontstaan nie of sal verval. Ten opsigte van onaangeslane inkomstebelastingpligtigheid is die respondent gevolglik nie 'n voorwaardelike skuldeiser wat in 'n klas anders as die algemene klas van preferente skuldeisers van 'n belastingbetaler val nie.

In the circumstances, SARS is a creditor, as opposed to a contingent creditor, and therefore our clients were obliged to accept SARS' second claim at the meeting and allow them to vote".

40. The applicants' attorneys did not respond to the aforesaid email.

41. As is evident from the case law quoted in annexure PM12, the practitioners were obliged to include SARS' claim in the voting interests.

42. The applicants have accordingly not only failed to disclose their unlawful request to the practitioners in regard to SARS' claims, but have also deliberately failed to disclose the aforesaid correspondence addressed to their attorneys in respect of the acceptance of SARS' claims for the purpose of the vote conducted at the s151 meeting.

43. The practitioners have at all times acted impartially and in accordance with their statutory duties. This is evidenced by the practitioners' refusal to agree to the applicants' aforesaid request to unlawfully frustrate SARS in the business rescue as well as the practitioners' refusal to agree to SARS' request for an adjournment of the meeting convened on 28 September 2015 without the general body of creditors agreeing to same. In this regard, I attach hereto, marked "**PM13**", email correspondence exchanged between myself and SARS.

44. I further reiterate what was stated in the letter sent to the applicants' attorneys on 15 October 2015 advising that the practitioners had no indication of what amount would be submitted by SARS in its claim form or the way in which SARS would vote at the s151 meeting, particularly given that SARS would be in a better position in a

liquidation than it would be in a business rescue. I attach hereto, marked "**PM14**", a copy of the aforesaid letter.

45. The practitioners' decision to include SARS' claim in the voting at the s151 meeting was accordingly not done to manipulate the vote or dilute the applicants' voting interest.

46. Therefore in respect of SARS:

46.1. the plan comprehensively deals with SARS and the effect of its claims on any dividend at pages 18, 25 – 27, 33, 51 - 53 and 55;

46.2. the applicants are fully aware of the issues relating to SARS, have held various meetings and telephone conferences with the practitioners and further gave their input into correspondence addressed by the practitioners to SARS;

46.3. the practitioners have kept affected persons fully abreast in respect of SARS at meetings held with affected persons and have provided a best and worst case scenario in the plan in respect of the anticipated dividend in both a business rescue and liquidation, which dividend range depends on the quantum of SARS' claim (paragraph 12.8 at page 33 and paragraph 27.2 at page 52 of the plan); and

46.4. the applicants concede in paragraph 8 of the founding affidavit in the main application that "*the entire... plan's dividend flow is based upon whether SARS advances a claim or not*".

47. The voting interest exercised by SARS at the s151 meeting was based on what was already disclosed in the plan.

48. The allegation of non-disclosure of the SARS claim, which is central to the main application, is untrue.

D. THE PLAN: NON-COMPLIANCE WITH SECTION 150 OF THE COMPANIES ACT

49. The applicants allege that the contents of the plan do not comply with certain requirements prescribed by section 150 of the Companies Act.

50. The applicants allege that the plan does not comply with the provisions of section 150(2) of the Companies Act because:

50.1. a large body of persons was permitted to exercise voting interests to vote on the plan who had not been reflected in the plan, and in particular annexure B to the plan; and

50.2. the plan did not contain all the information reasonably required to enable affected persons to decide whether or not to accept or reject the plan, including the inclusion of R1.4 billion of alleged creditors.

51. As will be demonstrated below, these allegations are untrue.

52. In essence, the applicants attack the validity of the plan on the basis that the quantum of creditors' claims stated in annexure B to the plan does not reconcile with the quantum of creditors' voting interests that voted at the s151 meeting. It is on this basis, presumably being an anticipated dividend outcome, that the applicants contend that affected persons were unable to reasonably decide whether to accept or reject the plan.

53. The plan, as well as annexure B thereto, complies with section 150 of the Companies Act in that it sets out sufficient information envisaged by section 150 of the Companies Act to enable affected persons to take an informed decision in considering whether a proposed business rescue plan should be adopted or rejected. In this regard, I refer to page 12 onwards of the plan.

54. The plan sets out the essence required by affected persons as well as sufficient particularity in respect of the practitioners' estimates, based on known facts, as to the likely benefit to all affected persons if the plan is implemented. It sets out the list of Highveld's creditors when the business rescue proceedings began, as well as an indication of the ranking of creditors in terms of the laws of insolvency and an indication of which creditors have proved their claims at the date of publication of the plan. In fact, all of the alleged deficiencies raised by the applicants are either dealt with in annexure B (page 65 of the plan) or in the body of the plan.

55. The applicants allege that the practitioners have allowed an additional R1.4 billion of creditors who had not been reflected in the plan to vote on the plan. This is incorrect.

56. The applicants incorrectly allege that the following creditors were not reflected in the plan:

56.1. SARS:

56.1.1. as set out above, SARS is dealt with in detail in the plan.

56.2. Eskom:

56.2.1. the applicants incorrectly inflate Eskom's claim by R100 million in paragraph 59.1 of the founding affidavit;

56.2.2. annexure B, at page 68 of the plan, clearly sets out Highveld's indebtedness to Eskom in the amount of R219 608 643.31;

56.2.3. as at the date of the s151 meeting, Highveld was indebted to Eskom in an additional amount of R26 263 925.85 in respect of electricity consumption during the month of September 2015. I attach hereto, marked "**PM15**", a copy of the September statement;

56.2.4. the applicants are fully aware of the fact that Eskom is one of Highveld's critical suppliers and that Highveld's monthly electricity consumption amounted to approximately R100 million. In fact, the applicants specifically requested updates on the negotiations with Eskom in regard to the interim payment arrangement with Eskom during the business rescue. I refer to sub-paragraphs 36.4 and 36.5 above;

56.2.5. the practitioners concluded an amendment to the agreement with Eskom providing for the interim payment arrangement. In terms of the amendment, the indebtedness to Eskom is clearly identified. I attach hereto, marked "**PM16**", a copy of the amendment; and

56.2.6. there was accordingly no need for Eskom to submit a "*claim in a cognizable form*" as the Companies Act does not prescribe same and the practitioners were already in possession of Eskom's statements and signed the aforesaid amendment reflecting the details of the amounts due to Eskom.

56.3. Mapochs:

56.3.1. Annexure B, at page 72 of the plan, once again clearly reflects Mapochs as a creditor;

56.3.2. at the time of the publication of the plan, Mapochs had not submitted a claim form, however, did so prior to the s151 meeting. The amount claimed in the claim forms differed from Highveld's records, however, the claim forms were accompanied by supporting documents; and

56.3.3. in compliance with the practitioners' uniform approach to all creditors, as set out in paragraph 71 below, Mapochs was allowed to vote on the claim submitted, subject to the reservation of the practitioners' right to dispute the claims.

57. The following creditors who voted at the meeting were not reflected in the plan:

#	CREDITOR	S151 VOTE	VOTE
1	GUARDRISK INSURANCE COMPANY	63,332,809	YES
2	NATIONAL UNION OF METAL WORKERS ("NUMSA")	30,807,260	YES
3	RAND MUTUAL ADMIN SERVICES	19,323,109	YES
4	SOLIDARITY	10,265,234	YES
5	SWAN ELECTRICAL DISTRIBUTORS	33,720	YES
6	UNPAID VOLUNTARY SEVERANCE PACKAGES ("VSPs")	9,940,928	YES

7	VANCHEM VANADIUM PRODUCTS (PTY) LTD ("VANCHEM") (REFLECTED IN ANNEXURE B WITHOUT AN AMOUNT)	18,000,000	NO
		151,703,061	

58. Therefore the applicants' contention that a large body of persons totalling R1.4 billion was added is clearly incorrect.

59. In respect of:

59.1. NUMSA and Solidarity, these claims relate to unpaid leave due to employees;

59.2. The VSPs, this claim relates to the claims of employees for the unpaid amounts in terms of the VSPs, which employees submitted proxy forms;

59.3. Rand Mutual Admin Services, this claim relates to unpaid workmen's compensation that Highveld, under the control of the second applicant, failed to pay prior to business rescue;

59.4. Guardrisk, this claim relates to the environmental guarantee and policy issued in the name of Highveld in respect of Mapochs. Prior to business rescue, the invoices were issued to Mapochs and accordingly this liability was not reflected in Highveld's records at the date of commencement of business rescue. Highveld, however, is contractually liable for payment of the premiums in terms of the policy with Guardrisk;

59.5. Vanchem, annexure B to the plan reflects Vanchem, however, no amount is reflected. At the s151 meeting, Vanchem submitted a ballot form indicating a claim amount of approximately R18 million. The practitioners adopted a uniform approach in their stance at the s151 meeting that creditors whose claims were disputed would be allowed to vote. Vanchem voted against the adoption of the plan.

59.6. Swan Electrical, this claim relates to services rendered prior to business rescue and there was no reason for the practitioners not to allow this creditor to vote at the s151 meeting.

60. In the circumstances, over half of the additional creditors reflected in the aforesaid table relate to employees. It is inconceivable that the applicants would dispute the rights of employees to exercise their voting interests at the s151 meeting.

61. Furthermore, if the voting interests of these creditors, as well as the increased claim of Mapochs were to be excluded the plan would have still been adopted. In this regard the voting interests would be as follows:

	All Creditors			**Independent Creditors**		
	#	**S151**	**s151 %**	**#**	**S151**	**s151 %**
Yes	300	R 1 591 349 516	77.01%	300	R 1 591 349 516	94.29%
No	32	R 468 389 353	22.67%	31	R 89 550 872	5.31%
Abstain	1	R 4 078 361	0.20%	1	R 4 078 361	0.24%
Spoilt	16	R 2 681 537	0.13%	16	R 2 681 537	0.16%
Total		**R 2 066 498 767**	**100%**		**R 1 687 660 286**	**100%**

62. The Companies Act does not prescribe when or how creditors must submit or establish their claims. It also affords no mechanism to assist a practitioner when claims are or are not to be allowed or what is sufficient for a claim to be allowed.

63. The anticipated dividends payable to creditors under the plan remain within the anticipated dividend range provided for at pages 51 and 52 of the plan. In addition, the practitioners are still allowed to dispute such claims and/or the quantum thereof in terms of the dispute resolution mechanism provided for at page 60 of the plan.

64. There was therefore no need to adjourn the s151 meeting to consider the effect of such inclusion of voting interests as same was already provided for in the plan. There was further no need to consider the practitioners' intention in respect of SARS' claims as it is clear from page 25 of the plan that there is a dispute in respect of same.

65. The applicants' allegation regarding annexure B being deficient in that it does not "*properly describe all the secured creditors*" is untrue. This allegation is based on a statement made in annexure A to the plan that certain creditors have submitted claims for liens. Firstly, the practitioners have specifically drawn affected persons' attention to same in annexure A to the plan (annexure FA5). Secondly, creditors are required to establish a valid lien over the assets before they can be acknowledged and classified as secured creditors.

66. The issue of lien creditors was previously raised by the applicants in paragraph 6.5 of the letter first sent by Baker & McKenzie on 3 October 2015 (unsigned) and thereafter on 5 October 2015 (signed), a copy of which is attached to annexure FA16 to the founding affidavit.

67. The practitioners' response is set out in paragraph 23 of the letter from ENS dated 7 October 2015, attached as annexure FA17.1 to the founding affidavit, in terms whereof the following is stated:

"This is an estimated figure. In this regard, the estimated lien creditor claim amount is approximately R119 million, based on management's assessments for repairs to be carried out and the assumption is that the assets held by these creditors will realise 50% of the value of the lien claims".

68. In summary:

68.1. The practitioners are in the process of establishing which of the creditors holding assets of Highveld have valid liens, if any, over such assets and the extent of the liens.

68.2. As set out in annexure A to the plan, management was unable to provide an estimated book value of these assets. These assets are held by approximately 52 creditors and vary from small items, such as rotors, to larger items, such as machinery and vehicles.

68.3. For purposes of the liquidation dividend calculation reflected in the plan, KPMG estimated that these assets would realise an amount which is equal to 50% of the aforesaid amount of R119 million.

68.4. The effect which these assets and claims will have on the amount to be paid to creditors can only be finally determined once the above process has been completed, hence the reason for the estimate referred to above. However, it will have no effect on the amount of the purchase price to be paid in terms of the proposed transaction.

69. In the circumstances, the applicants' allegations regarding non-compliance with section 150 of the Act are without merit. The plan contains the necessary

information required by affected persons to make an informed decision as to whether to vote in favour or against the plan.

E. THE VOTING INTERESTS

70. The voting results in respect of the s151 meeting are as follows:

	All Creditors			Independent Creditors		
	#	S151	s151 %	#	S151	s151 %
Yes	307	R1 878 304 148	79.20%	307	R1 878 304 148	94.26%
No	33	R486 389 353	20.51%	32	R107 550 872	5.40%
Abstain	1	R4 078 361	0.17%	1	R4 078 361	0.20%
Spoilt	16	R2 681 537	0.11%	16	R2 681 537	0.13%
Total		**R2 371 453 398**	**100%**		**R1 992 614 917**	**100%**

71. The practitioners adopted a uniform approach in their stance at the s151 meeting that creditors whose claims were disputed would be allowed to vote. This included creditors such as Vanchem whom the business rescue practitioners knew would be voting against the plan. The practitioners adopted a fair and consistent approach to all creditors at the section 151 meeting.

72. The applicants allege that the vote was irregular and manipulated at the s151 meeting due to the practitioners including certain voting interests at the s151 meeting.

73. In this regard, the applicants contend that the practitioners should not have allowed the following creditors to exercise their legitimate voting interests at the s151 meeting:

73.1. SARS;

73.2. Eskom;

73.3. Mapochs;

73.4. NUMSA; and

73.5. IDC.

74. As set out above, SARS, Eskom and Mapochs are dealt with in the plan. In addition, the plan clearly sets out Highveld's indebtedness to the IDC and details the number of Highveld's employees. It is particularly surprising that the applicants even question the rights of employees to exercise a voting interest through their trade union, Numsa.

75. The inclusion of the claim of SARS was based on advice which the business rescue practitioners had received that the claim of SARS was not a contingent claim but a claim in the hands of SARS and notwithstanding the ongoing dispute process regarding the claim of SARS. I reiterate that the business rescue practitioners had no idea whether and how SARS would vote and it was by no means obvious that SARS would vote in favour of the plan as SARS would be better off as a preferred creditor in a liquidation.

76. In respect of the IDC, I am advised that the Companies Act does not distinguish between pre or post-commencement creditors in the definition of "*affected persons*"

nor does it preclude post-commencement finance creditors from exercising a vote in terms of section 152(2) of the Companies Act.

77. As is evident from the plan, the proposed transaction deals with the IDC and the repayment of the facility provided by the IDC. The plan clearly affects the IDC and accordingly it would be an absurdity to allege that an affected person affected by the plan would be precluded from voting on the plan simply because it is a post-commencement finance creditor.

78. Notwithstanding the inclusion of the aforesaid creditors in the plan, the applicants dispute the practitioners' inclusion of these creditors' voting interests at the s151 meeting.

79. A general meeting of affected persons was held on 8 October 2015 for the purpose of, *inter alia*, permitting affected persons to ask questions in respect of the plan ("the Q&A session"). At the Q&A session, a creditor specifically enquired if the SARS dispute had been settled. The practitioners advised that it had not been settled and that SARS was present at the Q&A session.

80. At the s151 meeting the applicants were represented by a team of attorneys. The applicants state in their founding affidavit that they were led to believe by the practitioners and were advised by their attorneys that they would hold 32% of the voting interests, which would be sufficient to result in a rejection of the plan at the s151 meeting.

81. In light of the aforesaid belief and advice, what is unexplained is the failure by the applicants' team of attorneys to immediately dispute the result or to request the practitioners to disclose the votes at the s151 meeting.

82. In the circumstances, the applicants' allegations in regard to the voting by certain creditors at the s151 meeting are incorrect and without merit.

F. <u>SHAREHOLDERS' VOTE: NON-COMPLIANCE WITH SECTION 152(3) OF THE COMPANIES ACT</u>

83. In terms of the plan, the first and second proposals are provided for in the proposed transaction. In this regard, the proposed transaction contemplates the proposal of a scheme of arrangement in terms of section 114, as read with section 115, of the Companies Act (the first proposal), failing which, the sale of Highveld's business and assets as a going concern (the second proposal).

84. The plan in itself, or the adoption thereof, does not alter the rights of the holders of any class of Highveld's securities or give effect to a scheme of arrangement. The plan may contemplate a proposed scheme of arrangement, however, same must be proposed separately to the holders of Highveld's securities in terms of section 114 of the Companies Act.

85. Even the scheme of arrangement in itself does not contemplate the alteration of rights of the shareholders but contemplates a disposal of *inter alia* the second applicant's shares subject to the second applicant agreeing to such disposal.

86. In the circumstances, the applicants' allegations in regard to the irregular vote in terms of s152 of the Companies Act are also without merit as the applicants' rights before the adoption of the plan are the same after the adoption of the plan.

87. In all of the circumstances, the applicants have failed to establish any entitlement to the relief sought in their notice of motion.

G. PRACTITIONERS' FEES

88. On 28 September 2015, the practitioners convened a meeting in terms of section 143 of the Companies Act to approve an agreement with Highveld providing for further remuneration of the practitioners as provided for in paragraph 14 of the attached plan ("the section 143 meeting").

89. I am advised that the creditors' voting interest required in terms of section 143 of the Companies Act is the majority independent creditors' voting interest, as contemplated in section 147(3) of the Companies Act. The first applicant would accordingly not be included in the voting interests.

90. I am further advised that due to there being no residual value accruing to shareholders on a winding-up of Highveld, the second applicant's vote would not be required in terms of section 143 of the Companies Act.

91. At the s143 meeting, the agreement for further remuneration was approved by the majority of the independent creditors' voting interests that voted.

92. The allegations regarding the practitioners having a material financial interest in the adoption of the plan are denied as any increased remuneration is only valid if approved in terms of section 143 of the Companies Act.

93. In the circumstances, the approval required in terms of s143 meeting was obtained and the setting aside of the vote will not affect this.

H. MOTIVE

94. It is submitted that the main application is an abuse of this Honourable Court's process in that the applicants have brought the main application to frustrate the

proposed transaction contemplated in the plan and to force its desired objective, being a wind-down in business rescue.

95. This objective has been disclosed by the applicants on several occasions and again confirmed in the founding affidavit in the main application:

95.1. On 6 October 2015, during the telephone conference referred to in paragraph 68 of the founding affidavit, the practitioners were informed that the applicants decided to give Highveld one last chance through business rescue to see if there was a viable buyer, however, there was no expectation that a successful sale would come out of business rescue.

95.2. On 12 October 2015, in the email attached as annexure FA21 to the founding affidavit, the applicants' attorneys stated that the applicants were only prepared to support a wind-down in business rescue. The statement that the applicants remain open to all reasonable properly motivated proposals which may realise the maximum value for all affected persons does not detract from the stated objective.

95.3. Paragraph 155 of the founding affidavit confirms the aforesaid objective. From a reading of the founding affidavit it is evident that the applicants do not believe that Proposal 1 and 2 will come to fruition or that the conditions precedent are capable of fulfilment.

96. The applicants are accordingly disgruntled by the fact that they were unable to control the voting interests at the meeting convened in terms of section 151 and that the plan, substantially in its original published form, was adopted.

97. Despite the plan specifically making provision for a default to a wind-down in a business rescue should the proposed transaction fail for any reason (referred to as "Proposal 3" at page 47 of the plan), the applicants still persist with the main application - allegedly on the basis to prevent unnecessary fees and costs from being incurred.

98. If the proposed transaction is unsuccessful the applicants will achieve their desired objective of a wind-down in a business rescue before the hearing of the main application in the ordinary course.

99. The applicants' conduct in bringing this application and seeking a wind-down in a business rescue before giving a more than viable proposed transaction an opportunity to be fulfilled within a short time period is questionable.

100. The most beneficial outcome for the applicants in terms of the business rescue is if Proposal 1 is implemented. In that scenario the second applicant will receive 85.11% of R20 million for its shares and the first applicant will receive between 16 to 29 cents in the rand for its claim of approximately R376 million.

101. In the event of a wind-down in business rescue, the second applicant will not receive anything for its shares and the first applicant will receive between 10 to 14 cents in the rand, which is lower than the anticipated dividend in respect of Proposal 1 or Proposal 2.

102. In the event of a liquidation, the applicants are likely to see no return in light of SARS' preferent claims.

103. The conditions precedent provided for in the proposed transaction have to be implemented by 31 January 2015. Some of them have been met or waived.

Should the plan be implemented, creditors, including the first applicant, will receive between 16 and 29 cents in the rand.

104. The main application is not *bona fide*. The relief sought is for an ulterior purpose which is not disclosed to Court. In this regard, it is noted from paragraph 1 of the founding affidavit that the applicants form part of a multinational vertically integrated steel making and mining company, Evraz PLC. Highveld, under the control of another multinational steel making company, would be a competitor of Evraz PLC.

105. Should Highveld cease to exist, this will affect the vanadium market. In this regard, in addition to the production of steel, Highveld is active in the production of vanadium feedstock.

106. By way of background, the vanadium industry value chain can be broken down into the following segments:

106.1. upstream (vanadium feedstock),

106.2. intermediate (vanadium oxides); and

106.3. downstream (finished vanadium products).

107. Vanadium feedstock can be obtained from vanadium-rich ore or from by-products of various production processes such as slag from steel production and residues from oil processing (boiler slag, cokes and ashes, gasifier residues and spent catalysts).

108. In the case of Highveld, vanadium slag is obtained from Mapochs' vanadium-rich ore as well as from the by-product of Highveld's steel production processes.

109. When Evraz acquired a controlling stake in Highveld in 2007, the transaction was notified to the European Commission ("the EC") as well as to the South African competition authorities.

110. I attach hereto, marked "**PM17**", a copy of the EC decision. In its decision, the EC stated in paragraph 62 that:

"As the result of the proposed transaction, the new entity would control nearly half of the global vanadium resources currently exploited and would be vertically integrated in the entire vanadium value chain. The new entity would in particular gain a very strong position in the production and supply of vanadium feedstock, in particular in the supply of vanadium steel slag, where Evraz and Highveld are the two major suppliers. The majority of respondents in the vanadium industry expressed serious concerns about the competitive impact of the proposed transaction" (emphasis added).

111. As a result of the aforesaid, Evraz PLC acceded to various commitments to the EC to remedy any potential concerns ("the Commitments"). I attach hereto, marked "**PM18**", a copy of the Commitments.

112. The Commitments consisted of, *inter alia*, the following:

112.1. The divestment of Highveld's vanadium and ferrovanadium extraction and processing facilities at the Vanchem site in Witbank, South Africa, and the divestment of Highveld's 50% shareholding in South Africa Japan Vanadium Proprietary Limited, a ferrovanadium smelter in South Africa. In addition to the divestment of Highveld's vanadium processing assets, the EC also required the merging parties to guarantee that the purchaser of the Vanchem

business would have access to sufficient vanadium feedstock in the form of vanadium-bearing ore (fines) or slag to enable it to run as a going concern.

112.2. The obligation to maintain the current supply obligations between Hochvanadium Handels GmbH ("Hochvanadium"), which is an Austrian subsidiary of Highveld, to Treibacher Industrie AG ("Treibacher").

113. The Commitments therefore prevented Evraz from controlling the global vanadium industry.

114. Evraz and Highveld are still significant players in the vanadium industry both in South Africa and globally. Highveld currently supplies its vanadium to Evraz's competitors, namely Treibacher and Vanchem Vanadium Products Proprietary Limited ("VVP").

115. Highveld and Mapochs account for approximately 50% of production in South Africa and 10% of global production of vanadium.

116. Should Highveld's business rescue succeed, on the other hand, Evraz will continue to face competition in the vanadium industry.

117. In the circumstances, in the absence of a cogent commercial reason for pursuing Proposal 3, with the risk of liquidation, it is not unreasonable to infer that the decision is founded on anti-competitive reasons as opposed to commercial reasons. The applicants have advanced no reason for what otherwise appears to be an uncommercial approach to a comparison of their position in business rescue compared to that in a liquidation.

I. THE PROPOSED TRANSACTION

118. The proposed transaction contemplated in the plan (referred to as "Proposal 1" and "Proposal 2") is an offer received from International Resources Project Limited ("IRP"). 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.

119. The practitioners are of the opinion that the proposed transaction is capable of implementation and, if consummated, will result in a successful turnaround of Highveld.

120. By way of background, the practitioners embarked on an accelerated sales process to ascertain whether it was a viable option to sell Highveld as a going concern. The benefits of same included saving thousands of jobs and creating the opportunity for local service providers to continue rendering goods and services to Highveld.

121. The Standard Bank of South Africa Limited ("Standard Bank") at all times acted as the appointed advisor to Evraz PLC and its subsidiary, the second applicant, during the sales process. CDH acted as their legal advisors during this period. As the advisors to Evraz PLC and the second applicant, Standard Bank and CDH were fully involved and participated in the accelerated sales process, prepared the information memorandum circulated to bidders, evaluated the offers received and assisted with certain verification work done in respect of interested bidders.

122. At the insistence of the second applicant, its advisor, Standard Bank, had to be copied and had to sign-off on formal communication sent to and received from prospective bidders in the sales process.

123. In addition, the applicants were represented at all of the creditors' committee meetings, mostly by their attorneys at the time, CDH.

124. In particular, at the third creditors' committee meeting, the practitioners presented the three final binding offers received from the preferred bidders in terms of the sales process. The applicants attended the third creditors' committee meeting by way of telephone conference and their attorneys were further present at the meeting.

125. During the third meeting, the practitioners *inter alia*:

125.1. discussed the process leading up to the receipt of the final binding offers, the background of each preferred bidder and the details of the three final binding offers. I attach hereto, marked **"PM19"**, a copy of the presentation used at the third creditors' committee meeting; and

125.2. specifically enquired if any member opposed the practitioners pursuing IRP's offer. No opposition was noted and accordingly the practitioners' recommendation to pursue IRP's offer was unanimously supported. In this regard, the only request from one of the members was that the practitioners afford 2 more days to one of the other preferred bidders to furnish a guarantee. This guarantee was not forthcoming.

126. It is unexplained why the applicants, after having been involved in the entire sales process and represented at the creditors' committee meetings, only took issue with

IRP's offer after the close of business on the Friday before the first s151 meeting was held on Monday, 28 September 2015.

127. In regard to the sales process, and as appears from paragraph 18 on page 36 of the plan, the sales process entailed an accelerated and rigorous two phased process:

127.1. The practitioners initially obtained expressions of interest from 27 parties interested in participating in the sales process.

127.2. Seven interested parties complied with the requirements in terms of the first phase and were accordingly furnished with a copy of the information memorandum. A formal letter, referred to as the first process letter, was also addressed to these interested parties.

127.3. Subsequent to the information memorandum being distributed:

127.3.1. two of the interested parties formally withdrew from the sales process;

127.3.2. one interested party indicated that it would not be submitting an offer as contemplated in the sales process; and

127.3.3. one interested party did not engage further.

127.4. In terms of the first process letter, the 3 remaining interested parties were required to submit non-binding indicative offers to the practitioners by no later than 15 July 2015. The first process letter set out the criteria for and what details had to be included in the non-binding indicative offers.

127.5. The 3 interested parties submitted their non-binding indicative offers timeously and the contents of those non-binding indicative offers were evaluated by the practitioners and disclosed to the creditors' committee at the second creditors' committee meeting held on 16 July 2015.

127.6. Pursuant to the support of the creditors' committee at the second creditors' committee meeting, all 3 interested parties were invited to proceed to the second phase of the sales process as preferred bidders. In this regard a second process letter was addressed to the 3 preferred bidders on 17 July 2015 which, *inter alia*, set out the process going forward and the requirements the preferred bidders had to comply with in order to participate in the second phase of the sales process.

127.7. On 28 August 2015, three final offers were received by the practitioners from the three preferred bidders.

127.8. Only one preferred bidder, being IRP, had provided acceptable proof of payment of the deposit required in terms of phase 2. Notwithstanding their concerns regarding the inability of two of the preferred bidders to secure this deposit, and in the interests of creditors, all three final offers were evaluated by the practitioners and disclosed to the creditors' committee at the third creditors' committee meeting and the second employees' committee meeting.

127.9. At the third creditors' committee meeting, the creditors' committee unanimously agreed to the practitioners' pursuing IRP's offer.

128. In the circumstances, at the end of the stringent sales process and after much deliberation, consideration and numerous engagements, the practitioners, in consultation with the creditors' committee and the employees' committee, decided to accept the IRP offer.

129. In this regard IRP:

129.1. demonstrated the necessary skills, knowledge, financial viability and expertise to successfully acquire Highveld and its subsidiary and restore same to solvency;

129.2. demonstrated its financial strength by, *inter alia*, depositing an amount of US$10 million into the trust account of its attorneys of record on request from the practitioners. This amount is still held in trust as security for the proposed transaction;

129.3. has met all of the deadlines set out by the practitioners in the accelerated sales process;

129.4. has deployed the required resources and advisors (internationally and locally) to assist them on the proposed transaction;

129.5. held numerous extensive meetings with the senior management of Highveld regarding technical capability, knowledge of the industry, the viability of turning around Highveld given its existing infrastructure, discussing and debating current market conditions and potential government support to ensure the sustainability of Highveld going forward; and

129.6. has engaged with:

129.6.1. the IDC, who provided post-commencement finance to Highveld;

129.6.2. various governmental departments such as the Department of Environmental Affairs, the Department of Trade and Industry and the Department of Economic Development; and

129.6.3. various key suppliers to Highveld.

130. The proposed transaction is supported by Numsa and Solidarity, who represent the overwhelming majority of the employees, as well as the IDC, which support is evidenced by their voting in favour of the plan. In addition, the practitioners have been contacted by the Department of Economic Development who indicated that they support the opposition to the main application and oppose the attempt by the applicants to derail the proposed transaction. The practitioners have further been contacted by the IDC and Numsa who have confirmed that they are opposing the main application and the interdict application.

131. In light of the depressed steel prices, environmental liabilities, outdated technology and severe cash constraints facing Highveld, Highveld is not an easy asset to sell, particularly given the inherent risks that arise from acquiring a company in business rescue.

132. As with all offers received, IRP had certain conditions precedent attached to its offer. The applicants refer to same in the founding affidavit and allege that same are commercially untenable and therefore incapable of implementation.

133. The conditions precedent are to be expected in the ordinary course of any business transaction and are very similar to the conditions contained in the other two offers received for Highveld.

134. The practitioners have spent considerable time with IRP on these conditions precedent and substantial progress has already been made in respect of progressing the IRP offer. In fact, a number of these conditions precedent have already either been waived or satisfied, as reflected in the table attached hereto, marked "**PM20**".

135. The practitioners are of the opinion that the remaining conditions precedent are achievable.

136. IRP's commitment to the acquisition of Highveld is further demonstrated by the irrecoverable and substantial investments which have already been made by IRP in terms of money spent and resources allocated to explore and assess Highveld. By way of example, IRP has on four occasions flown out a full complement of project members to engage with Highveld's senior management, creditors and the practitioners.

137. The IRP project management team comprises experts in *inter alia* the following fields:

137.1. Vanadium: Dr Wen Heng Mu, the former Chairman and CEO of Cheng De Iron & Steel ("CDIS"), being one of the two major steel mills in China;

137.2. Titanium: Dr John Chao, the former Manager of Industry Studies (2000-2013) and Manager of Research (1996-2000), Rio Tinto Iron & Titanium. Dr Chao has over 30 years of experience in titanium ore processing technology, including ore beneficiation, smelting, and refining;

137.3. Steel: Mr Ji Bin Liu, the former Executive Vice President of CDIS, President of Tangshan Stainless Steel. Mr. Liu has over 20 years' operating experience

in integrated steel mills, including production, maintenance, equipment design, plant construction and project management, and;

137.4. Mineral Exploration and Mining: Dr Yong Yao, who has a PhD from Technische Universitat Munchen, is an Associate Professor of Exploration Geology of Rhodes University and is the former General Manager and Chief Representative of Anglo Platinum's geological and exploration projects in China.

138. In regard to the industrial process capabilities of IRP, I have been advised during the bidding process, that:

138.1. amongst its team, IRP has Mr Mu, the former Chairman of CDIS and former Deputy General Manager of TangShan Iron & Steel. Under his management, CDIS significantly increased its production capacity and also invested in environmental protection facilities whilst maintaining a level of profitability;

138.2. IRP, together with its affiliated companies within the IRL group, has over 100 technical professionals primarily from global mining and metallurgical industries, including surface mining, mineral processing, smelting, oxygen refining, steelmaking and steel milling. IRP will bring its in-house managerial and technical expertise and provide comprehensive assistance to Highveld to ensure profitable and sustainable operations; and

138.3. through the acquisition of the assets of Chaoyang Jin Gong Vanadium and Titanium Technology Limited, IRL is conducting a trial project in Liaoning Province, PRC, through its wholly-owned subsidiary, Maxdo Vanadium

Titano Liaoning Company Limited. This subsidiary is a vanadium, titanium and magnetite manufacturing company with phase 1 planned annual production capacity of vanadium, high grade titanium (92%) and cast iron products of 200ktpa.

139. Numerous site visits have taken place at Highveld and Mapochs for purposes of, *inter alia*, testing of raw material samples, assessing the environmental liabilities, evaluating the current technology used in the manufacturing of steel and monitoring the managed shut down of Highveld's operating plant to ensure minimal damage and the ability to restart the furnaces as efficiently as possible.

140. Numerous meetings have been held with senior management and the management of IRP in respect of the required upgrading and new technologies to be invested in Highveld post-acquisition with the prospect of returning Highveld, and particularly its steel plant, to commercial viability.

141. As part of IRP's engagement with the various stakeholders, IRP has detailed its plans for Highveld going forward and has explained the benefits attaching to the introduction of new technology which will enable IRP, once it has acquired Highveld, to extract vanadium, titanium and steel from the raw product generated by Highveld.

142. IRP plans to restore the business of Highveld to its former status by using proprietary technology involving the fluid-bed pre-reduction of VTM ore, BOF vanadium extraction, production of advanced industrial grade and ultra-high grade V_2O_5. IRP's technology will also facilitate the extraction of saleable titanium oxide. This substantially increases the value add of Highveld and will increase profitability,

investment, local spend, employment and contribution to the gross domestic product.

143. In addition, IRP has a team of over 100 professionals and experts with international and local experience in exploration, mineral processing, ironmaking, electric furnaces, BOF operations, steelmaking, casting, milling, vanadium and titanium extraction and marketing.

144. As set out above in paragraph 70, at the s151 meeting only 33 of the 357 creditors (including the first applicant) who voted at the s151 meeting voted against the plan. In the circumstances, an overwhelming majority of over 90% in number of creditors who attended the s151 meeting supported the plan which contemplates the proposed transaction with IRP. Furthermore, over 90% in value of independent creditors (i.e. excluding the first applicant) voted in favour of the plan.

145. This is important due to the socio-economic impact it will have on eMalahleni if Highveld ceases to exist. Numerous small to medium enterprises rely either directly or indirectly on Highveld as a source of income.

146. The socio-economic impact is also the main reason for the support from government, including:

146.1. the urgent post-commencement financing provided by the IDC; and

146.2. the support in submitting an application to ITAC for steel price protection.

147. The benefits of accepting the IRP offer include:

147.1. a written undertaking from IRP to the practitioners that it will offer local creditors and suppliers of goods and services to Highveld a *"right of last*

refusal" in respect of rendering services to Highveld going forward for at least the first twelve months post-implementation of the plan. I attach hereto, marked **"PM21"**, a copy a letter confirming the undertaking; and

147.2. the introduction of new technology into South Africa, new skills and expertise in the steel industry and the commitment of IRP to invest approximately R4.5 billion over the next few years in upgrading the steel plant and old furnaces.

148. As set out above, there is no prejudice to the applicants should the IRP offer not be concluded for whatever reason. Should the IRP offer fail for whatever reason, the plan provides at page 47 for the default position of an orderly wind-down in business rescue.

149. I reiterate that the wind-down is not the preferred route for obvious reasons.

150. In regard to the environmental liabilities, the practitioners obtained independent reports on the environmental liabilities of Highveld from three reputable independent industry leaders, which reports have been furnished to the applicants.

151. The independent reports reflect substantial environmental liabilities that need to be addressed and remedied. If Highveld is wound-down, the State would have to rehabilitate the assets to mitigate the current environmental damage being done.

152. IRP has given a written undertaking that if the IRP offer is accepted it will undertake to adhere to an agreed rehabilitation plan that will seek to address the environmental infractions over a period of the next 8 to 10 years in conjunction with the Department of Environmental Affairs. This is an additional expense to be

incurred by IRP to the payment offered to the creditors and the commitment to capital expenditure.

153. In the circumstances, the IRP offer is a preferred option in business rescue and is reasonably capable of implementation.

J. THE IMPORTANCE OF THE IMPLEMENTATION OF THE PLAN

154. I reiterate that the adoption of the plan was supported by:

154.1. over 90% of independent creditors who voted at the meeting;

154.2. Solidarity and NUMSA, representing over 1560 Highveld employees; and

154.3. various government departments.

155. It is evident from the voting results that the proposed transaction set out in the plan has received overwhelming support. This is not surprising given that the livelihood of thousands of employees, sub-contractors and creditors depend on same.

156. The wind-down of Highveld is a last resort and will have a devastating effect on the local communities of eMalahleni and Roossenekal. It is of critical national importance that Highveld be rescued pursuant to the implementation of the proposed transaction, which includes an offer in respect of Highveld's subsidiary, Mapochs, for the following reasons:

156.1. Highveld has been the cornerstone employer of the eMalahleni area as well as the town of Roossenekal for the last 50 years. Highveld employs approximately 3700 employees comprising 2300 permanent employees and 1400 contractors;

156.2. Highveld spent approximately R788 million during 2014 on the eMalahleni community;

156.3. Mapochs, which is also in business rescue, is the only employer in the Roossenekal area and spent approximately R297 million during 2014 on community development;

156.4. Mapochs enforces a policy that contract miners must staff their operation from the community surrounding the mine and also source goods and services preferentially from the Roossenekal community and is supporting around 600 businesses in the eMalahleni and Roossenekal area;

156.5. Mapochs provides critical ongoing support to the local municipality which includes the supply of potable water;

156.6. Highveld epitomises government's beneficiation drive as Highveld converts South African mined ore and coal into steel and the Mapochs mine is the source of 15% of the total global production of vanadium;

156.7. those South African manufacturers who purchase their steel from Highveld enjoy significant foreign exchange savings from this local source of vanadium and steel;

156.8. Highveld has a fully accredited apprentice training centre where up to 200 apprentices can be trained at any time and annually awards between 10 and 20 graduate level bursaries in engineering and metallurgy and around 20 technicon level bursaries; and

156.9. significant progress has been made with the developing of a business plan to produce rail tracks as Highveld is most ideally positioned to produce rail tracks in South Africa, resulting in the creation of high skill job opportunities.

157. In addition, the practitioners applied to the CCMA in respect of a training lay-off scheme ("TLS").

158. On 22 July 2015, Highveld issued a notice of the contemplated restructuring of its operations in terms of section 189(3) of the Labour Relations Act 66 of 1965 ("LRA"), to all its employees, and representative trade unions ("section 189(3) notice"). A copy of the section 189(3) notice is attached hereto marked "**PM22**". A CCMA facilitator was subsequently appointed in accordance with section 189A of the LRA and several facilitated consultation meetings were consequently held between the consulting parties.

159. During the facilitated consultation meetings, various alternatives to the proposed retrenchments were tabled and discussed. The consulting parties ultimately agreed to consider the possible participation of Highveld's employees in the TLS as a means to avoid the retrenchments. Separate meetings were held under the auspices of the CCMA with the consulting parties to explore the feasibility and the possible implementation of the TLS. The purpose of the TLS is primarily the promotion of employment security and to *inter alia* avoid forced retrenchments. In order to participate in the TLS, an employer must:

159.1. be in distress or facing distress;

159.2. be contemplating the retrenchment of workers;

159.3. have the potential of becoming sustainable through short term relief; and

159.4. be compliant with its statutory obligations.

160. Highveld falls squarely within the parameters of the aforementioned factors and is therefore eligible to participate in the TLS, upon its application for participation in it being approved.

161. Accordingly, on 2 October 2015, Highveld and the representative trade unions submitted an application to the CCMA to enable all of Highveld's employees to participate in the TLS. A copy of the application to the CCMA is attached hereto marked "**PM23**". Whilst Highveld has been informed that the application has been submitted to the UIF and MERSETA for processing, it has not yet received any formal, written confirmation of the TLS having been approved and it is not yet certain that it will be successfully implemented and that payments will be made in terms of it.

162. In the event that the TLS is approved and successfully implemented, the TLS will bear Highveld's costs in respect of remunerating its employees, as per the TLS terms and conditions. Moreover, employees are sent on training whilst they are on lay-off allowing them to obtain valuable skills. At the same time, their retrenchment can be avoided for the 6 (six) month duration of the TLS, resulting in significant job loss and unemployment being prevented.

163. Any delays in the approval and/or implementation of the TLS and/or any deviations from the implementation of the proposed transaction places Highveld at a real risk. In this regard, given that one of the requirements for the TLS is that Highveld must have the potential of becoming sustainable through short term relief, Highveld will no longer be eligible for the TLS if Highveld is wound-down in a business rescue or placed in liquidation. This would make retrenchments unavoidable and would result

in approximately 2 000 employees being dismissed and being denied the opportunity of benefiting from the TLS.

164. This application is therefore severely prejudicial to Highveld and its employees as there is a real risk that it may jeopardise the approval and/or successful implementation of the TLS, if it is granted.

165. A failure to rescue Highveld will have devastating consequences in that it will have an impact on approximately 20 000 people.

166. The business rescue of Highveld is accordingly no ordinary business rescue and to date the only main opposition to same is from the applicants, being a foreign creditor and shareholder, the latter having received substantial dividends during the 2007 to 2009 financial years, being the same period in respect of which SARS is asserting its second claim.

THE FOUNDING AFFIDAVIT

167. 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 1, 2 and 158

168. It is denied that the deponent has personal knowledge of the facts contained in the affidavit and I refer to what I have already stated under Part A of this affidavit under the heading "*Lack of knowledge and application to strike out the founding affidavit*".

169. Callum O'Connor and Berna Malan only became involved in the business rescue after the publication of the plan and around 25 September 2015.

Ad paragraphs 3 to 14: *"Introduction"*

170. It is admitted that the first applicant is a creditor of Highveld and the second applicant a shareholder of Highveld.

171. The first applicant, however, is not the largest creditor of Highveld, SARS is. The first applicant is further not an independent creditor of Highveld.

172. In respect of paragraphs 5 and 9, it is denied that the practitioners created the impression or led the applicants to believe that their vote would be sufficient to result in a rejection of the plan.

173. The 32% voting interest was an estimated calculation furnished to the applicants pursuant to the request made by the applicants' attorneys on 23 September 2015 in annexure FA12 to the founding affidavit, being four business days before the s151 meeting convened on 28 September 2015.

174. On 25 September 2015 the practitioners' attorneys advised that the applicants' voting interest of 32%, calculated in terms of annexure B, was subject to change as further claims may be submitted at the s151 meeting convened on 28 September 2015. I refer to annexure FA13 to the founding affidavit.

175. On 28 September 2015, the section 151 meeting was adjourned, at the specific request of the applicants, to 13 October 2015.

176. In the circumstances, over two weeks passed since the applicants' letter of 25 September 2015. Despite the applicants being specifically advised that the 32%

voting interest was subject to no further claims being submitted, the applicants, as represented by a team of attorneys at the adjourned s151 meeting on 13 October 2015, did not request confirmation from the practitioners or their attorneys immediately prior to the s151 meeting of further claims having been submitted.

177. As stated above, what is unexplained is the failure by the applicants' team of attorneys to immediately dispute the result or to request the practitioners to disclose the votes at the s151 meeting, which was attended by over 160 creditors.

178. On 14 October 2015, being a day after the s151 meeting, the applicants' attorneys specifically acknowledged in their letter attached as annexure FA24 that the 32% voting interest was "*subject to the caveat that further creditors may submit additional claims, which could affect EMAG's voting interest*".

179. Save as aforesaid, I deny the allegations in these paragraphs and I refer to what I have already said herein, particularly in regard to:

179.1. compliance with section 150 of the Companies Act and the requisite information included in the plan;

179.2. the voting interests included in the vote;

179.3. section 152 of the Companies Act; and

179.4. SARS' claims and the applicants' knowledge of same, including the effect thereof on any potential dividend.

Ad paragraphs 15 to 36: "*Parties*"

180. In regard to the first applicant:

180.1. as already stated herein, the first applicant is not the largest creditor of Highveld nor is it independent;

180.2. 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.

181. In regard to the second applicant:

181.1. the practitioners were not required to conduct a separate vote in terms of section 152(3)(c) of the Companies Act for the reasons already set out herein;

181.2. I have made the point that the rights of the second applicant will not be altered by the adoption of the plan; and

181.3. in regard to the issue of a scheme of arrangement being legally possible, same is irrelevant for the purpose of the main application, however, the applicants are referred to the provisions of section 115 of the Companies Act.

182. In regard to the affected persons, I refer to what I have said in Part A of this affidavit, under the heading non-compliance. Plainly, most of the respondents in the application have not been served, many are neither named nor identified and the relief is incompetent.

TR

Ad paragraphs 38 to 45: "*Leave in terms of section 133(1)(b) of the Companies Act*"

183. I deny the allegations herein.

184. The information was sought by the applicants from the practitioners on Wednesday, 14 October 2015 at 19h47. Correspondence was exchanged with the applicants' attorneys on 14 and 15 October 2015 wherein the applicants were furnished with certain requested information and were further invited to attend at the offices of the practitioners' attorneys to go through the information requested. From 08h00 until approximately 10h00 on Friday, 16 October 2015, a meeting was held with applicants' attorneys during which the information was furnished.

185. It is denied that the remaining respondents have been forewarned that the adoption of the plan is challenged as the remaining respondents have not yet been served.

186. In regard to paragraphs 43 to 45 and the interdictory relief, the applicants have already issued a separate application for urgent interim relief, initially set-down for hearing on 17 November 2015 and thereafter allocated to 19 November 2015 ("the interdict application"). The contentions of the applicants have been addressed in the first to third respondents' answering affidavit to the interdict application. The balance of convenience favours Highveld and its affected persons.

Ad paragraphs 46 to 49: "*The business rescue proceedings*"

187. In regard to the plan, and as set out in paragraph 4 of ENSafrica's letter dated 14 October 2015 (annexure FA25 to the founding affidavit):

"one plan was presented to creditors for voting and approval. The plan clearly sets out the process that will be followed upon adoption, being that the business rescue will proceed in terms of the proposed transaction and should the proposed

transaction fail for any reason, then the business rescue will automatically default to the third proposal".

188. Accordingly although the plan provides for three proposals, the proposals are not separate and alternative proposals to be voted on individually. The plan contemplates the business rescue proceeding in terms of the proposed transaction (whether by way of the scheme or sale of business), failing which, a wind-down.

189. Save as aforesaid, the remainder of the allegations in these paragraphs are denied.

Ad paragraphs 50 to 61: "*The determination of EMAG's voting interest*"

190. The submission of the claim by the first applicant, the exchange of the correspondence and the contents of the plan to the extent that the applicants have correctly made reference thereto are admitted.

191. In paragraph 56 of the founding affidavit the applicants "*highlight*" that no mention is made of the SARS claim in annexure B to the plan. At the time of publication of the plan, SARS had not yet submitted any claims. The applicants, however, fail to highlight that SARS and its potential claims are comprehensively dealt with in the body of the plan at pages 18, 25 – 27, 33, 51 - 53 and 55. The applicants further fail to highlight their extensive knowledge of SARS' claim as already dealt with herein.

192. In regard to the various allegations in respect of the calculation of the voting interest, the practitioners' attorneys specifically stated in annexure FA13 that the voting interest calculated in terms of annexure B to the plan is subject to there being:

"no material difference between Highveld's records and the claim amount reflected on the respective creditor's claim form. Furthermore, there is the possibility that further creditors lodge their claims on the day of the meeting".

193. In the circumstances, the applicants were advised that their voting interest was subject to change. The plan further provided for the additional voting interests of those creditors complained of by the applicants. The applicants accordingly cannot allege that they were surprised or "*ambushed*" at the s151 meeting.

194. The practitioners note that the applicants do not dispute the determination by the practitioners that the first applicant is not independent.

195. Save as aforesaid, the remainder of the allegations in these paragraphs are denied.

Ad paragraphs 62 to 69: "*The first meeting*"

196. The first s151 meeting held on 28 September 2015, the exchange of correspondence, the adjournment of the s151 meeting for two weeks and the conference call on 6 October 2015 are admitted.

197. The applicants selectively quote from the correspondence and avoid the context of what was stated therein.

198. At the first meeting on 28 September 2015 the practitioners:

198.1. afforded the applicants' attorneys an opportunity to address creditors in regard to the proposed postponement;

198.2. advised creditors of the advantages and disadvantages of a postponement; and

198.3. further advised that if an adjournment was agreed to by the majority of creditors, the adjournment would be used to address any queries which creditors may have in regard to the plan or business rescue process.

199. A vote was called and an adjournment was supported by the majority of creditors.

200. There was no requirement for the practitioners to advise of any additional creditors who had submitted claims pursuant to the commencement of business rescue or to consider an amendment to annexure B to the plan at the first meeting. Firstly, this is not required in terms of the Companies Act. Secondly, SARS had not yet submitted its second claim at the time of the first meeting on 28 September 2015.

201. After the first meeting, the applicants took several days before addressing their concerns referred to in annexure FA16 to the founding affidavit. Annexure FA16 was emailed to the practitioners on Saturday, 3 October 2015.

202. As stated in annexure FA17.1, being the practitioners' response to annexure FA16, a substantial portion of the documents and information requested in annexure FA16 was either within the knowledge of the applicants or previously furnished to the applicants by the practitioners.

203. Notwithstanding the aforesaid, the practitioners expeditiously arranged for a telephone conference to be held on the following Tuesday, 6 October 2015, to address the concerns raised in annexure FA16. The practitioners thereafter furnished annexure FA17.1 on Wednesday, 7 October 2015, which enclosed the various documents requested by the applicants.

204. Save as aforesaid, the remainder of the allegations in these paragraphs are denied.

Ad paragraphs 70 to 86: "*The Q&A meeting*"

205. I admit that a Q&A meeting was held on 8 October 2015 and that a further meeting between the applicants' attorneys and the practitioners' attorneys was held on 12 October 2015.

206. The applicants attempt to create the impression that prior to the s151 meeting the practitioners deliberately withheld information relating to SARS and were "*silent*" in this regard. This is denied for the reasons set out herein.

207. The Q&A meeting was held for the purpose of, *inter alia*, allowing affected persons to ask questions in respect of the plan. At the Q&A meeting, a creditor specifically enquired if the SARS dispute had been settled. I advised that it had not been settled and that SARS was in fact present at the Q&A session.

208. At the time of the Q&A meeting, SARS had not submitted its second claim and the practitioners had no knowledge as to whether SARS would be submitting a second claim.

209. As already stated herein, the plan clearly deals with SARS. In addition, the applicants had full knowledge of the details relating to SARS' second claim and were already in possession of the correspondence exchanged between the practitioners and SARS in regard to its second claim.

210. The letter of Friday, 9 October 2015, referred to in paragraph 71 of the founding affidavit and attached as annexure FA18 thereto, was not sent as a result of the applicants' concern relating to the alleged "*silence with regard to the SARS claim*". This letter (annexure FA18) was a seven page general response wherein the applicants requested further clarity in regard to the information and documentation

provided by the practitioners in our letter of 7 October 2015 (annexures FA17.1 and FA17.2), which in turn dealt with the applicants' letter of 3 October 2015 (annexure FA16).

211. In paragraph 72, the applicants complain that no written response was received to their letter of 9 October 2015. The letter was received at 15h00 on Friday, 9 October 2015. On Thursday, 8 October 2015 and Friday, 9 October 2015, an urgent application served before the High Court, Gauteng Local Division, Johannesburg in respect of Highveld. The applicants' attorneys had a representative at Court. The matter was struck from the urgent roll after 16h00 on Friday, 9 October 2015. On Monday, 12 October 2015, the meeting with the applicants' attorneys to which I refer to below commenced at 08h00.

212. As is evident from paragraph 73, the practitioners immediately made its tax advisors available to meet with the applicants' attorneys on the following business day, being Monday, 12 October 2015. This was the day before the s151 meeting.

213. The aforesaid meeting was in fact proposed by the practitioners in its letter of 7 October 2015 (annexure FA17.1 to the founding affidavit). In this regard, paragraph 21 of annexure FA17.1 states:

"*In regard to the advice received on the merits, this information is confidential, however, our clients are willing for your attorneys to meet with our clients' tax advisors on a confidential basis to discuss our clients' views in regard to same. Our clients have had various meetings and exchanged various correspondence with your clients regarding the SARS claim*".

214. Despite the practitioners specifically advising that any discussions regarding the advice received on the merits of SARS' second claim would be confidential, the applicants deliberately disregarded same and prejudiced Highveld's position by not only disclosing what was discussed at the meeting, but also incorrectly stating in subsequent correspondence what was advised by the practitioners' attorneys thereat. In this regard, I refer to the correspondence addressed by the practitioners' attorneys to the applicants in terms whereof the practitioners' attorneys corrected the applicants' misunderstanding of what was advised at the meeting in regard to the merits (paragraph 7 of annexure FA26 to the founding affidavit).

215. Significantly, it appears to be the case of the applicants that because no assessment has been raised, no claim exists and SARS could not vote.

216. The applicants cannot expect the practitioners to ignore SARS' second claim. In light thereof, it cannot be expected that the practitioners disallow SARS to vote thereon.

217. As already set out herein, our courts have held that the fact that SARS has not yet issued an assessment does not alter the fact that SARS has a claim against Highveld. The applicants have not responded to the aforesaid correspondence.

218. In regard to the proxy form, paragraph 11.3 of the plan clearly states that same would only be required if the creditor intended voting by proxy. SARS did not vote by proxy but attended the meeting. There was accordingly no requirement for a proxy to be submitted with its ballot form. The applicants' allegations relating to same and the alleged deficiencies of SARS' claim are accordingly denied.

219. I have already dealt with the fact that the plan fully discloses SARS' second claim against Highveld, including the effect of same on any potential dividend.

220. The history demonstrates that SARS' second claim has been a reality and is not something that the practitioners have fabricated or could use to manipulate the vote. The applicants' allegations in regard to the inclusion of SARS' claims for the purpose of diluting the first applicant's voting interests are accordingly denied.

221. Save as aforesaid, the remainder of the allegations in these paragraphs are denied.

Ad paragraphs 87 to 102: "*The adjourned meeting*"

222. The receipt of the applicants' proxies and indicated voting thereon did not come as a surprise to the practitioners. The applicants' advisors had already previously advised the practitioners on more than one occasion that the applicants did not support the proposed transaction and wanted a wind-down in business rescue.

223. I reiterate that SARS and the other creditors referred to by the applicants in the founding affidavit were dealt with in the plan. No amendment of the plan was accordingly required.

224. In fact, the applicants specifically concede in paragraphs 90 and 92 to 94 of the founding affidavit that:

224.1. the practitioners confirmed at the s151 meeting that the conditions precedent in respect of SARS' claims could not be waived;

224.2. the plan compares the dividend outcome in a liquidation and business rescue scenario, with both scenarios including a high and low dividend depending on SARS' claims against Highveld. To this extent, the plan details SARS'

claims and contains the necessary information to enable affected persons to determine whether to adopt or reject the plan; and

224.3. the benefit of a business rescue given the preferent status accorded to SARS in a liquidation.

225. In addition, the inclusion of these creditors' claims did not affect the dividend range provided for in the plan. In the circumstances, the practitioners were not required to deal further with same at the s151 meeting.

226. At the s151 meeting the applicants were represented by a team of attorneys. The applicants state in their founding affidavit that they were led to believe by the practitioners and were advised by their attorneys that they would hold 32% of the voting interests, which would be sufficient to block a vote on the adoption of the plan at the s151 meeting.

227. In light of the aforesaid belief and advice, what is unexplained is the failure by the applicants' team of attorneys to immediately dispute the result or to request the practitioners to disclose the votes at the s151 meeting.

228. It is accordingly denied for the reasons set out herein that there was any material non-disclosure by the practitioners or that affected persons were precluded from considering whether to adopt or reject the plan.

229. I reiterate that the applicants had full knowledge of SARS' second claim against Highveld and were specifically advised that the calculation of their voting interest depended on claims being submitted after the publication date of the plan (annexure FA24 to the founding affidavit). The allegations relating to the applicants' surprise are accordingly unfounded.

Ad paragraphs 103 to 118: *"The irregularities in the vote"*

230. The voting interests included at the s151 meeting as well as the disclosure of SARS' second claim has already been dealt with herein.

231. For the sake of clarity, annexure B comprises the following 5 columns:

231.1. creditor name;

231.2. indication of the creditor's status in terms of the laws of insolvency;

231.3. the amount owed to the creditor according to Highveld's records;

231.4. the amount claimed by the creditor in terms of claim forms submitted; and

231.5. the variance between Highveld's records and the claim forms submitted.

232. The reference to "*additional claims submitted*" is only in respect of creditors who had not submitted claim forms at the date of publication of the plan and does not necessarily mean that the creditor is not mentioned in annexure B. Almost all of the creditors forming part of the schedule attached to annexure FA25 are either listed in annexure B or dealt with in the plan. I refer to paragraphs 55 to 60 in this regard.

233. As is evident from the summary of the vote referred to in paragraph 108 of the founding affidavit, the adoption of the plan was supported by over 90% of the independent creditors who voted at the s151 meeting.

234. In regard to the applicants' letter referred to in paragraph 109 of the founding affidavit, in particular the allegations of manipulation and the discussions held with the practitioners' tax advisors, I reiterate what was said in our letter attached as annexure FA26 to the founding affidavit.

235. As is evident from the correspondence exchanged and meetings held with the applicants and their advisors, the practitioners have at all times made themselves available to the applicants and their advisors and have furnished the applicants with all of the information requested.

236. The practitioners and their advisors further explained in detail at the meetings held with the applicants' attorneys how the voting interests were calculated and the uniform approach adopted by the practitioners in respect of all claims submitted and votes exercised.

237. It is evident from the founding affidavit that the applicants only take issue with the claims of creditors who voted in favour of the adoption of the plan. In this regard, in paragraph 110 of the founding affidavit, the applicants specifically refrain from quoting paragraph 5 of annexure FA26 which states:

"By way of example, we attach a letter which was sent to Fasken Martineau who represents Vanchem in terms of which we informed Fasken Marineau that the Practitioners dispute their claim, however, they would be allowed to vote at the meeting. Vanchem voted against the Plan".

238. Vanchem was not listed in annexure B to the plan, however, submitted a ballot form indicating a claim amount of approximately R18 million at the s151 meeting. This claim was not disputed by the applicants or raised in the founding affidavit.

239. The applicants fail to disclose the email addressed by the practitioners' attorneys to the applicants' attorneys shortly after the meeting held on 16 October 2015, attached hereto as PM12. The email sets out the legal position in regard to SARS'

claims and the fact that the practitioners were obliged to include same in the voting interests. The applicants have not responded to this email.

240. Save as aforesaid, the remaining allegations in these paragraphs are denied.

Ad paragraphs 119 to 139: *"Failure to comply with section 150 and to conduct a regular vote in terms of section 152"*

241. I deny the allegations in paragraph 119 and in particular that the probable dividend is dramatically reduced in the various scenarios.

242. It is evident from the plan that a dividend range is provided for in contemplation of SARS' claim. It is no more than speculation on the part of the applicants that the manner of voting would change if SARS' second claim was good. The contrary is true. If the SARS claim is good, affected persons would still vote in favour of the plan as it would avoid Highveld being liquidated and SARS, by virtue of its preferent status in a liquidation, receiving the entire free residue and hence there being no dividends to concurrent creditors.

243. In respect of paragraphs 120 to 128, I have already dealt with these allegations elsewhere in this affidavit. I reiterate that the plan submitted to the s151 meeting is detailed and reflected the information required in terms of the Companies Act to vote thereon.

244. In respect of paragraphs 129 to 132, I deny that the practitioners have acted recklessly, contrary to our duties or contrary to the interests of Highveld and its affected persons. It is scurrilous for the deponent, who has no knowledge of Highveld or the business rescue, to make these unsubstantiated allegations. An application to strike out paragraphs 129 to 137 will be made to the Court.

245. In respect of the IDC claim and what is said in paragraphs 133 to 136, I have dealt with its claim and its entitlement to vote elsewhere in this affidavit.

246. In respect of the Eskom claim and the rights of shareholders, referred to in paragraphs 137 and 138, I have dealt with same elsewhere in this affidavit.

247. Save as aforesaid, the remaining allegations in these paragraphs are denied.

Ad paragraphs 140 to 146: "*The remuneration of the business rescue practitioners*"

248. I deny the allegations in these paragraphs and refer to what I have stated in paragraphs 88 to 93 above.

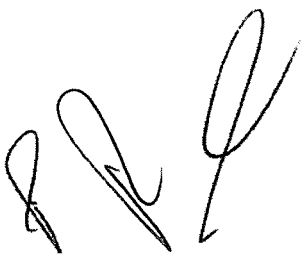
Ad paragraphs 147 to 157: "*The relief sought*"

249. On the applicants' version, the prospects of the proposed transaction coming to fruition are negligible. Although this is incorrect, it is evident that the majority of creditors and other affected persons, including the employees and their trade unions, support the business rescue and the proposed transaction.

250. The applicants are intent on winding-down or winding-up Highveld for their own undisclosed motives.

251. Business rescue is a balancing of interests and evidently the applicants show no regard for the interest of other creditors, the employees and the community who are all dependant on the continuation of Highveld.

252. Save as aforesaid, the remaining allegations contained in these paragraphs are denied.



To

CONCLUSION

253. I respectfully submit that the main application fails on numerous bases. It 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 18th November 2015.

[redacted]
Commissioner of Oaths in terms of
Section 5(1), Justices of the Peace and
Commissioners of Oaths Act, 1963 (Act 16 of 1963)
COMMISSIONER OF OATHS
9/1/8/2 Randburg, 19/7/2007
Secretary to Group One
2nd Floor, Block A, Sandown Village
Cnr Gwen Lane & Maude Street, Sandton
Tel: (011) 290-4000

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 (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
COMPANIES AND INTELLECTUAL PROPERTY 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

FIRST - THIRD RESPONDENTS' SUPPLEMENTARY ANSWERING AFFIDAVIT IN THE MAIN APPLICATION

I, the undersigned,

PIERS MICHAEL MARSDEN,

do hereby make oath and state that:

1. I deposed to the answering affidavit in the main application.

2. 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.

3. In the answering affidavit in the main application I dealt with the two claims of SARS. The applicants made the point in their founding affidavit that no assessments were issued by SARS in respect of the second claim.

4. On Wednesday, 18 November 2015, and after service of the answering affidavit on the applicants, the first to third respondents received an email from SARS attaching what is referred to in the email as an "*audit finalisation letter*" and attached as the "*Evraz letter of assessment*" in respect of the 2007 to 2009 tax period. I attach hereto, marked "**SA1**", a copy of the covering email and letter.

5. It will be noted from SA1 that SARS has finalised its audit in respect of the first respondent's income tax for the 2007 to 2009 tax period. In this regard, SARS would make adjustments totalling R1 452 432 899 to the first respondent's taxable income for the determination of the amount of the first respondent's tax liability to be reflected in the first respondent's assessments.

6. On 19 November 2015, the first to third respondents received a copy of the assessments issued by SARS in respect of the 2007 to 2009 tax period. I attach hereto, marked "**SA2**", a copy of the assessments. In terms of the assessments, the total amount claimed by SARS for the 2007 to 2009 tax period is R679 861 291.

7. Due to the assessments having been raised by the applicants in their founding affidavit, and the assessments having been received after the filing of the answering affidavit, I request the Court to allow the filing of this affidavit.

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 27th November 2015.

CAROLE SHILL
Commissioner of Oaths in terms of
Section 5(1), Justices of the Peace and
Commissioners of Oaths Act, 1963,
(Act 16 of 1963)
9/1/8/2 Randburg, 14/7/2003
Office Manager Group One
3rd Floor Block A, Sandown Village
Cnr Gwen & Maude Street Sandton
Tel 011 290 4000

COMMISSIONER OF OATHS

Letitia Field

Subject: FW: Evraz Highveld
Attachments: image001.jpg; ATT00001.htm; Evraz Letter of assessment.PDF; ATT00002.htm

From: Thabang Mochusi <TMochusi@sars.gov.za>
Date: 18 November 2015 at 17:13:58 SAST
To: "businessrescue@mazars.co.za" <businessrescue@mazars.co.za>, "Daniel.Terblanche@mazars.co.za" <Daniel.Terblanche@mazars.co.za>
Cc: "Ntebaleng Sekabate (nsekabate@ensafrica.com)" <nsekabate@ensafrica.com>, "Andries Myburgh (amyburgh@ensafrica.com)" <amyburgh@ensafrica.com>, "Tebogo Mathosa" <TMathosa@sars.gov.za>, Nonkululeko Ntombela <NNtombela@sars.gov.za>
Subject: Evraz Highveld

To whom it may concern:

Attached please find the audit finalisation letter for Evraz Highveld Steel. Kindly contact me should you have any queries.

Best Regards

Thabang Mochusi
International Tax: Assurance
Large Business Centre
Megawatt Park, Sunninghill
Telephone: 011-602 3764
email:Tmochusi@sars.gov.za

Large Business Centre

SARS

South African Revenue Service

Office
Megawatt Park

Enquiries
Thabang Mochusi

Switchboard
(011)602-2000

Direct line
(011)602-3764

E-mail
tmochusi@sars.gov.za

Reference
9250/026/60/7

Date
18 November 2015

The Public Officer
c/o Edward Nathan Sonnerbergs Incorporated
Evraz Highveld Steel & Vanadium Ltd
Private Bag 9
PARKTOWN
2122

Large Business Centre

1st Floor, Blocks A and B
Megawatt Park, Maxwell Drive
Sunninghill, Sandton
(No postal deliveries to this address)

Private Bag, X170, Rivonia, 2128

SARS online: www.sars.gov.za

Attention: businessrescue@mazars.co.za
amyburgh@ensafrica.com

EVRAZ HIGHVEL STEEL & VANADIUM LTD
FINALISATION OF AUDIT : INCOME TAX
YEARS OF ASSESSMENT: FY2007 – FY 2009

The South African Revenue Service ("SARS", "we" or "our") has completed the audit for the tax type and tax periods listed below:

Tax type	Taxpayer reference number	Tax periods
Income Tax	9250/026/60/7	2007 – 2009

Based on our letter of findings dated 27 May 2015 and your response dated 10 July 2015, the following adjustments will be made to your taxable income for the determination of the amount of your tax liability to be reflected in your assessments.

Summary and explanation of adjustments made:

Tax period	Tax type	Description	Amount
2007	Income Tax	Income of CFC included in income by virtue of Section 9D(2) of the Income Tax Act 58 of 1962	R417 135 784
2008	Income Tax	Net income of CFC included in income by virtue of Section 9D(2) of the Income Tax Act 58 of 1962	R879 291 938
2009	Income Tax	Net income of CFC included in income by virtue of Section 9D(2) of the Income Tax Act 58 of 1962	R156 005 177
Total			**R1 452 432 899**

Details with regard to the manner in which the above amounts have been calculated are furnished in the Annexure to this document.

This letter follows the completion of an audit in respect of Evraz Highveld Steel and Vanadium Ltd's ("Evraz Highveld") compliance with the provisions of the Income Tax Act No.58 of 1962 ("the Act").

Below is an explanation of the adjustments:

1. **Background facts**

From the audit conducted, we are of the view:

1.1 That the exemption provided for in section 9(D)(9)(b) of the Act, that was claimed by Evraz Highveld in relation to the income of a controlled foreign company ("CFC") of Evraz Highveld during the relevant years of assessment is not applicable.

1.2 There was a non-disclosure of material facts in the 2007-2009 tax returns and accordingly the assessments have been reopened for audit.

2. **The Law**

2.1 In terms of section 9D of the Act, unless an exemption or exclusion applies, an amount equal to the net income of a CFC must be included in each South African resident's income in the proportion of the participation rights of the South African resident in the CFC to the total participation rights in the CFC.

One such exemption is the foreign business establishment ("FBE") exemption provided for in section 9D(9)(b) of the Act. It provides that in determining the net income of a CFC there must not be taken into account any amount which is attributable to any FBE of that CFC.

3. **Response to Letter of Audit Findings**

3.1 We respond to the contentions contained in the ENS letter dated 10 July 2015 as follows:

3.1.1 In paragraph 4.1 of the letter, it is stated that identical queries raised in the letter of findings in respect of the 2007 to 2009 years of assessment have been raised with regard to Evras Highveld's 2010

to 2012 years of assessment and that our letter appears to be a "copy and paste" of the said letter. In this regard, we highlight that the business model of Evraz Highveld remained the same even prior to 2007 and the toll manufacturing contract with Treibacher Industrie Aktiengesellschaft ("Treibacher") has been in force since November 2004. It therefore follows that the issues as contained in the 2010 to 2012 letter of audit findings are the same as those contained in the letter of audit findings for the 2007 to 2009 years of assessment.

3.1.2 We highlight that SARS personnel applied their minds to the facts on hand, which were identical to those in the later years, and then applied the law, which was applicable during the period in question.

3.1.3 As pointed by ENS, the law, effective in the 2007 assessment period differed from that in the 2008 and 2009 years of assessment and it was therefore necessary for us to consider the law applicable to each period separately.

3.1.4 This was done and the conclusion reached was that it was also not possible in 2007 for a taxpayer to outsource its services to a third party and to qualify for the FBE exemption. The only difference in this regard between the position in 2007 and that in 2008 and 2009 is that a ruling from the Commissioner was required in the event that the resources of another CFC within the same group could be taken into account in determining whether an FBE existed.

3.1.5 The statement made by ENS that the 2007 net income of the CFC was estimated is incorrect. The net income that was to be imputed was set out in the IT10, which was submitted by the taxpayer. It is correct that the expenses for 2007 were estimated based on the future years. At the time that the letter of audit findings was issued, the financial statements had not yet been submitted by the taxpayer despite SARS' numerous requests. The financial statements were only submitted to SARS on 17 July 2015, and therefore these figures have been used in the letter of assessment and not the estimated figures as contained in the letter of findings.

3.1.6 In paragraphs 4.3 and 4.4 of the ENS letter, reference is made to the expenses incurred in 2008 and 2009 which SARS has disallowed. These expenses have been described in the financial statements of Hochvanadium Handels Gmbh ("HH") as "operating expenses taxes".

SARS disallowed the expenses on the basis that taxes are not expenses incurred in the production of income as required by section 11(a) of the Act.

4. **Re Opening of the assessments:**

4.1 Our response to paragraph 9 of the ENS letter is as follows:

4.1.1 We agree with your contention that Section 79(1) of the Income Tax Act 58 of 1962, Act, as it read at the time, should be applied in the present circumstances.

4.1.2 Section 79 precludes the raising of assessments after the expiration of three years from the date of the assessment unless the Commissioner is satisfied that the fact that the amount which should have been assessed to tax was not so assessed or the fact that the full amount of tax chargeable was not so assessed, was due to fraud, misrepresentation or non-disclosure of material facts.

4.1.3 We are aware that:

4.1.3.1 the Commissioner's satisfaction in terms of section 79(1)(i) is a substantive and far-reaching determination which should be communicated to the taxpayer; and

4.1.3.2 the taxpayer should be informed of the particular conduct in respect of which the Commissioner is satisfied.

4.2 We accordingly set out below the reasons why we are satisfied that the full amount of tax chargeable to Evraz Highveld in its 2007, 2008 and 2009 assessments was not assessed due to non-disclosure of material facts by the taxpayer.

4.3 We, however, consider it appropriate to first examine the meaning of the term "non-disclosure" and "material facts" and to explain why facts about the nature of a CFC's activities are material in the context of the FBE exemption contained in section 9D(9)(b) of the Act.

4.4 *Non-disclosure of material facts*:

4.4.1 There is no clear legislative or judicial guidance as to the constituent elements of the expression "non-disclosure of material facts" although the Courts have made reference to "the reasonable reader" in this context.

4.4.2 In ITC 1459 51 SATC 142, the Court, having examined the disclosures made in the tax return and the supporting documents found that they contained nothing *"which in the slightest measure afforded the Commissioner information regarding the circumstances and salient features of the transaction in issue. It seems to us that anyone reading that return and supporting documents would conclude that the 'loss on share-dealing' referred to was confined to losses sustained in unsuccessful endeavours to earn taxable income, that is to say, income as defined in the Act. Nothing in all this documentation would convey to the reasonable reader the impression that the loss claimed referred to or included any loss sustained in the production of exempt income".*

4.4.3 The same Court rejected the argument that the Commissioner should have been alerted to make further enquiries by what he saw in the return and the accompanying documents. In this regard, the Court stated that:

> *"The question is whether he had all the material facts when he issued all the original assessments. If not, whatever the reason, then caedit quaestio. It does not matter that his ignorance was partly due to a failure to make enquiries regarding the present transaction and comparing that information with the paucity of detail in the returns read with their supporting documents, it is manifest that the Commissioner or his officer did not have all the material facts. Clearly it was the absence of those facts which led to the issue of the original assessments."*

4.4.4 What constitutes compliance with the duty to disclose material facts will depend on the facts of each particular case, but it has been held that an "elliptical description" of the relevant transaction or activities is not sufficient to enable a proper determination by the Commissioner. In ITC 1594 57 SATC 259 it was held that:

"An obligation rests upon a taxpayer to render an accurate and full return on which he can be assessed and not do so in a vague or ambiguous manner casting the onus on the Revenue authorities to elicit the complete picture by a series of queries".

"....the elliptic description 'consulting fees in the running of the factory' does not set out the circumstances or salient features of the transaction entered into between appellant company (taxpayer) and F (the consultant) or the extent of the activities undertaken by F on which the Commissioner could make a proper determination of the liability to taxation of the deduction sought to be claimed. To this extent in our opinion there was a non-disclosure of all the material facts which led to the non-assessment of the deductions it is not suggested that such non-disclosure was intended to defraud or misrepresent the position but this is immaterial except possibly in relation to penalties imposed or interest claimed".

4.4.5 Whether a fact is material is also a matter that is fact dependant. It has been held that:

"materiality is not a relative concept; something is either material or it is not. Etymologically the word 'material' denotes substance, as opposed to form. In legal parlance it bears a corresponding meaning: "Of such significance as to be likely to influence the determination of a cause (The Shorter Oxford English Dictionary vol.2 at 1289)".

4.5 <u>*The FBE exemption and the materiality of facts about the nature of a CFC's activities*</u>.

4.5.1 In relation to foreign companies that are controlled by South African residents, the general rule is that their profits must be taxed in the hands of those residents. There are, however, a number of exemptions that are granted where it is evident that the CFC's profit-making operations are not at the expense of the South African tax base.

4.5.2 One such exemption is the FBE exemption, which essentially acknowledges that genuine businesses operating abroad pose no

threat to South Africa's tax base. On the other hand, mobile businesses that do not have sufficient economic substance in the foreign country to justify operating there, and which could have been conducted from South Africa are not entitled to the exemption. A FBE is comprehensively defined in section 9D of the Act. Essentially, a FBE is a fixed place of business that is used for the carrying on of the business of the CFC, where that business is suitably equipped with its own on-site management and employees and has its own suitable facilities and equipment for conducting the primary operations of that business.

4.5.3 Economic substance and locational permanence are at the heart of this exemption. It follows that the nature of a CFC's activities are integral to the determination of whether the requisite economic substance and locational permanence exists.

4.5.4 With regard to the 2007 year of assessment only, where a CFC utilised the resources of a group CFC within the same jurisdiction, the first mentioned CFC could potentially, if subject to a ruling, be considered a FBE. .

4.5.5 In 2009, the rulings regime was replaced by a proviso to the definition of a FBE contained in section 9D, that allowed for a pooling of resources in specific circumstances. No third party utilisation of resources or outsourcing was or is allowed.

4.6 A review of the facts:

4.6.1 HH is a CFC in relation to Evraz Highveld. For the 2007 to 2009 years of assessment Evraz Highveld submitted an IT10, in which it claimed an exemption, from South African tax on the income earned by HH. The exemption claimed was the FBE exemption provided for in section 9D(9)(b) of the Act

Part 1 of the IT10 is entitled "CFC information", under which certain details, including "Nature of Business" of the CFC are required to be disclosed. In each of the IT10's completed by Evraz Highveld in respect of HH, the "Nature of Business" in Part 1 was stated to be: "Manufacturing of vanadium and ferrovanadium and marketing thereof".

4.6.2 Part 6 of the IT10 is entitled "Exclusions in terms of section 9(D)(9)". Under this heading the taxpayer is required to indicate the "Section applicable and the Types of income as listed in the financial statements (of the CFC) and the Amount in foreign currency".

4.6.3 For the relevant years of assessment, and under part 6 of the IT10, section 9D(9)(b) of the Act was stated to be the applicable section and was claimed in relation to the following amounts:

Year	Type of income	Amount
2007	Business Income	€44 280 781/ R427 677 067
2008	Business Income	€80 970 780/ R977 932 692
2009	Sales and Other Income	€65 884 380/ R 775 966 462

4.6.4 Pre-printed on each page of the IT10 is the note: "If space is insufficient, attach a separate schedule". No separate schedule accompanied the IT10's submitted by Evraz Highveld for the relevant years of assessment.

4.6.5 For relevant years of assessment, Evraz Highveld submitted the financial statements of HH together with the relevant IT10.

4.6.6 In October 2013, SARS conducted a transfer pricing risk review of Evraz Highveld. During this process, the following facts emerged:

4.6.6.1 The manufacturing of vanadium and ferrovanadium and the marketing thereof was not conducted by HH. As a matter of fact HH did not have the employees, management, facilities or equipment required to manufacture anything.

4.6.6.2 The manufacturing and marketing activities were outsourced by HH to Treibacher, an independent third party located in Austria; and

4.6.6.3 The primary functions of HH encompassed logistics management, administration, creditor's management process development, quality control and procurement planning. It was only for these functions that HH was

suitably equipped in terms of employees, facilities and equipment.

4.7 Application of the general principles to the facts

4.7.1 The question that arises is whether the fact that HH outsources both the manufacturing and the marketing activities to a third party, are material facts.

4.7.2 Put another way, is the fact that HH does not, itself, conduct the manufacturing of vanadium and ferrovanadium nor the marketing thereof of "such significance as to be likely to influence the determination of a cause." Bear in mind that the Commissioner is not required to make further enquires to see if what the taxpayer has told them reflects the true state of affairs.

4.7.3 It is our view that the fact that HH outsources these activities to a third party is a material fact because it is critical to a determination of whether or not HH has the characteristics of a FBE to which its active income can be attributed. The outsourcing to a third party indicates a fully mobile business which is exactly the type of business that the CFC legislation intends to cover. The only outsourcing allowed during the period was intergroup CFC pooling of assets, employees and facilities.

4.7.4 To give the impression that a CFC engages in manufacturing, an activity which by its nature has locational permanence and is operationally equipped i.e. is not a mobile business, is to give the impression that the CFC has economic substance and is therefore of a type that the legislation was not intended to include under the CFC rules. Such permanence would indicate to the assessor that the active income of the CFC was likely to be exempted under the FBE test. The statement that HH engaged in manufacturing and marketing was to give the reasonable reader of the IT10 return, comfort that the income that HH earned was attributable to a substantial business operation in Austria.

4.7.5 There was no indication in the IT10 that HH outsourced the manufacturing or marketing activities to another party. It is our view that the description "manufacturing of vanadium and ferrovanadium and marketing thereof" does not set out the

circumstances and salient features or activities of HH's business from which the Commissioner could make a proper determination of the exemption from taxation that was sought to be claimed.

4.7.6 As it is clear that the IT10 did not disclose the material fact that HH outsourced its main business activity to a third party, the question arises whether this was apparent from the accompanying documents.

4.7.7 As mentioned above, the financial statements of HH were submitted with the relevant IT10's. The financial statements of HH do not contain any written explanation of the activities in which HH was engaged and do not state that all of its marketing and manufacturing functions were outsourced.

4.7.8 During the relevant years of assessment, the legislation made it possible (by virtue of a ruling process in 2007 and in terms of the proviso to the FBE exemption in 2008 and 2009) for a CFC to qualify for the FBE exemption if it used the resources of another CFC in the same country and within the same group. It follows that an assessor would have reasonably assumed that a taxpayer would have correctly applied the law, and knowing that no outsourcing to a third party was possible, would not have claimed the FBE exemption, unless the outsourcing was to a CFC within the same group of companies and within the same jurisdiction. It is not reasonable to have expected the assessor to have assumed that HH outsourced to a third party and incorrectly claimed the FBE exemption. If the IT10 had stated the correct set of facts, those being that HH merely acted as a logistics operator or administrator, and the manufacturing and marketing was outsourced to a third party, a reasonable assessor would have requested additional information on the tolling arrangement and would have rejected the FBE exemption claimed.

Conclusion

4.7.9 It was the filing position of HH in each of the 2007,2008 and 2009 years of assessment that the nature of its business was the manufacturing and marketing of ferrovanadium. The facts that both the manufacturing and the marketing activities were outsourced to

a third party are material to an assessment of whether HH qualified for the FBE exemption as it read at the relevant time.

4.7.10 These facts were not disclosed. We are therefore satisfied that such non-disclosure led to the granting of the FBE exemption, in relation to the income of the CFC which should have been subject to tax in South Africa. It therefore follows that the Commissioner is satisfied that the fact that the relevant amounts which should have been assessed to tax during the relevant years of assessment were not so assessed was due to the non-disclosure by Evraz Highveld of material facts as envisaged in terms of the proviso to section 79(1) of the Act, as it read at the relevant time and the assessments in respect of the 2007 to 2009 years of assessment have been issued on this basis.

4.7.11 It is our view that HH does not have a FBE in Austria. In calculating the taxable income for the 2007, 2008 and 2009 years of assessment, SARS has added back the net income of HH as per the attached Annexure.

4.7.12 Interest will be levied in terms of section 89quat of the Act. You have the right to lodge an objection in terms of section 105 of the Tax Administration Act No. 28 of 2011.

4.7.13 The objection must be in writing in the prescribed form (NOO) which is available from any SARS office or can be accessed on the SARS website at www.sars.gov.za. The objection must be lodged with this office, within 30 days of the date of assessment. Please email the objection to Gtompa@sars.gov.za and Tmochusi@sars.gov.za.

Please do not hesitate to contact us should you require any further explanations.

Yours faithfully

Thabang Mochusi
Operational Specialist: Assurance

Tebogo Mathosa
Manager: Assurance

CALCULATION OF THE INCOME ATTRIBUTABLE TO EVRAZ HIGHVELD STEEL AND VANADIUM PTY LTD IN TERMS OF SECTION 9D OF THE INCOME TAX ACT

YEAR OF ASSESSMENT: 31 DECEMBER 2007

		EURO
Net Income/Loss per the annual financial statements	Line 11	-34 982 881.05
Operating taxes	Not an expense incurred in the production of income	37 933.67
Amortisation of Intangibles	No allowance granted in terms of the SA Income Tax Act	79 681 845.40
Net Income (Euro) of HH attributable to Evraz in terms of section 9D(2A)		44 736 898.02
ZAR/ Euro average exchange rate)	SARS website	9.3242
Net Income (ZAR) of HH attributable to Evraz in terms of section 9D(2A)		417 135 784.52

YEAR OF ASSESSMENT: 31 December 2008

Net Income/Loss per the annual financial statements	Line 11 of the Income Statement	29 168 597.36
Income taxes	Not an expense incurred in the production of income	9 487 521.95
Operating taxes	Not an expense incurred in the production of income	35 021.73
Amortisation of Intangibles	No allowance granted in terms of the SA Income Tax Act	42 500 000.00
Net Income (Euro) of HH attributable to Evraz in terms of section 9D(2A)		81 191 141.04
ZAR/ Euro average exchange rate)	SARS website	10.8299
Net Income (ZAR) of HH attributable to Evraz in terms of section 9D(2A)		879 291 938.35

YEAR OF ASSESSMENT: 31 DECEMBER 2009

Adjustments made to the taxable income of HH in terms of section 9D(2A) of the Income Tax Act

		EUR
		2009
Net income/loss per the annual financial statements	Line 11 of the Income Statement	(28 670 276.21)
Income Taxes	Not an expense incurred in the production of income	1 750.00
Operating expenses: Taxes	Not an expense incurred in the production of income	39 228.58
Amortisation of intangible fixed assets	No allowance granted in terms of the SA Income Tax Act	42 500 000.00
Net income (Euro) of HH attributable to Evraz in terms of section 9D(2A) of the Income Tax Act.		13 870 702.37
ZAR: EURO average exchange rate	SARS website	11.2471
Net income (ZAR) of HH attributable to Evraz in terms of section 9D(2A) of the Income Tax Act.		**R156 005 177**

SARS

INCOME TAX **ITA34**

Notice of Assessment

EVRAZ HIGHVELD STEEL & VANADIUM LIMITED
PO BOX 111
WITBANK
1035

Enquiries should be addressed to SARS:

Contact Centre

ALBERTON
1528

Tel: 0800007277 Website: www.sars.gov.za

Details

Reference number:	**9250026607**
Document number:	**30308**
Date:	**2015-11-18**
Year of assessment:	**2007**
Type of assessment:	**Additional Assessment**
Period (days):	**365**
Due date:	**2016-01-01**
Second date:	**2016-01-31**

Always quote this reference number when contacting SARS

Assessment summary information

Income	1906718119.00
Taxable income	1906718119.00
Tax calculation	
Assessed tax after rebates	550326502.61
Tax credits and adjustments	-297334207.26
Net amount payable under this assessment after allowable credits	252994295.35

Compliance information

Unprocessed payments	0.00	**Registered provisional taxpayer**	Y
Selected for audit or verification	N		

Dear EVRAZ HIGHVELD STEEL & VANADIUM LIMITED

Thank you for submitting your income tax return for the 2007 year of assessment. Your assessment has been concluded and reflects an amount payable by you of R 252994295.35 . Payment should be made by 2016-01-31 after which interest will accrue on this assessment as from 2016-01-01

Please note that this amount only reflects your income tax assessment and does not reflect tax payable under any previous assessment or any other balances on your account. The current balance on your assessed account is R 257277396.51. For a statement reflecting your final balance (including all amounts payable or refundable under any previous assessment, refunds, payments, additional taxes/ understatement penalties, penalties and interest), please request your statement of account from SARS through the following channels:

- Electronically via eFiling
- Call the SARS Contact Centre
- At your nearest SARS branch

The final balance is reflected on the remittance advice at the bottom of the Statement of Account. Please note that interest accrues on all taxes payable after the due date so you are advised to pay in full on or before the due date.

The reference to additional tax/understatement penalty in this notice of assessment depends upon the circumstances.
(i) If additional tax was imposed before the commencement date of the Tax Administration Act (TAA) then adjustment to that additional tax may be made by an assessment issued in terms of the TAA after the commencement date of the TAA
(ii) An assessment issued after the date of commencement of the TAA, in respect of any period that preceded the commencement date of the TAA, may be subject to the imposition of an Understatement Penalty in terms of the TAA as an "understatement" is considered to be a continuing act or omission in terms of the TAA
(iii) An assessment issued after the commencement date of the TAA, for a period that commences after the commencement date of the TAA, may include the levy of an Understatement Penalty.

According to the information you declared in your income tax return, you were liable to pay provisional tax for this year of assessment. Kindly note that should your tax circumstances remain the same for the next tax year, as a provisional taxpayer you are required to submit an IRP6 tax return that reflects an estimate of your taxable income for that tax year. A provisional tax payment based on the estimated taxable income must also accompany the IRP 6 tax return. For more information on provisional tax, how you can obtain your IRP6 tax return and submission due dates you can visit the SARS website www.sars.gov.za, or you can contact the SARS Call Centre on 0800 00 SARS (7277).

Below you will find the amounts of income included and deductions allowed in calculating this assessment. It is very important that you check these amounts to ensure:
1. They are correct

2. They reflect all your taxable income and allowable deductions for the year

If you are of the view that the assessment contains a processing, calculation or other error, you should submit a revised return.

If you are unsure as to how the assessment was concluded or the reasons for any of the adjustments made, you may write a letter requesting SARS to provide further information as to how the assessment was concluded. This letter must be delivered to your nearest SARS branch within 30 days of the date of this assessment or sent via registered mail to the address at the top of this notice.

If you are aggrieved by this assessment, you may submit a Notice of Objection (NOO) using the form available from eFiling or your nearest branch to you or by calling 0800 00 SARS (7277). You have 30 days from the date of this assessment in which to do this.
NOTE: Your obligation to pay any amount due is not suspended by any objection or appeal. However, SARS will consider a motivated application for the suspension of payment pending the finalisation of an objection or appeal as stipulated in the Tax Administration Act.

Sincerely
ISSUED ON BEHALF OF THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE

SARS

INCOME TAX ITA34

Notice of Assessment

Reference number: 9250026607
Document number: 30308
Year of assessment: 2007

Income

Code	Description		Amount
Capital gain - local			238859071.00
	Note for Individuals: The calculation of the aggregate capital gain / loss of a CGT transaction relating to a primary residence will be impacted where the property is held jointly or in partnership and / or married in community of property is applicable.		
4250	Capital gain tax local	477718142.00	238859071.00
	Apply inclusion rate	-238859071.00	
Business, trade and professional income (incl. rental)			1569859048.00
	Description: Description: NONE		
	Unique identifier: Unique identifier: 000000000000		
	Determination of profit / loss		
1204	Steel tubes	1152723264.00	1152723264.00
	Description: Description: NONE		
	Unique identifier: Unique identifier: 000000000000		
	Determination of profit / loss		
4278	Imputed net income from cfc	417135784.00	417135784.00
Income			1808718119.00

Deductions allowed

Code	Description		Amount
Deductions allowed			0.00

Taxable income

Code	Description	Amount
	Taxable income – subject to normal tax	1808718119.00

Tax calculation

Code	Description		Amount
	Normal tax		524528254.51
	Foreign Tax Credits Refunded/Discharged		0.00
	Additional tax / Understatement Penalty		12096937.73
	Omission of income	12096937.73	
	Penalty		13703310.37
	Under estimation - Provisional tax	13703310.37	
Subtotal			550328502.61
	Previous assessment result		8060940.04
Current assessment - before provisional tax credits and Section 89 Quat interest *			558389442.65
	Provisional tax credits *		408199817.19
	1=Provisional payment	-175784099.48	
	2=Provisional payment	-23065717.71	
	Section 89Quat(2) Interest on underpayment of provisional tax *		106224660.89
Net amount payable / refundable on assessment			252994285.35

*This amount is separately reflected on your Statement of Account.

Notes

1 Information declared that impacts this assessment:

SARS

INCOME TAX **ITA34**

Notice of Assessment

EVRAZ HIGHVELD STEEL & VANADIUM LIMITED
PO BOX 111
WITBANK
1035

Enquiries should be addressed to SARS:

Contact Centre

ALBERTON
1528

Tel: 0800007277 Website: www.sars.gov.za

Details

Reference number:	**9250026607**
Document number:	**30309**
Date:	**2015-11-18**
Year of assessment:	**2008**
Type of assessment:	**Additional Assessment**
Period (days):	**366**
Due date:	**2016-01-01**
Second date:	**2016-01-31**

Always quote this reference number when contacting SARS

Assessment summary information

Income	3886759826.00
Taxable income	3886759826.00
Tax calculation	
Assessed tax after rebates	1088292751.00
Tax credits and adjustments	-704772281.80
Net amount payable under this assessment after allowable credits	383520469.20

Compliance information

Unprocessed payments	0.00	Registered provisional taxpayer	Y
Selected for audit or verification	N		

Dear EVRAZ HIGHVELD STEEL & VANADIUM LIMITED

Thank you for submitting your income tax return for the 2008 year of assessment. Your assessment has been concluded and reflects an amount payable by you of R 383520469.20 . Payment should be made by 2016-01-31 after which interest will accrue on this assessment as from 2016-01-01

Please note that this amount only reflects your income tax assessment and does not reflect tax payable under any previous assessment or any other balances on your account. The current balance on your assessed account is R 643180922.50. For a statement reflecting your final balance (including all amounts payable or refundable under any previous assessment, refunds, payments, additional taxes/ understatement penalties, penalties and interest), please request your statement of account from SARS through the following channels:

- Electronically via eFiling
- Call the SARS Contact Centre
- At your nearest SARS branch

The final balance is reflected on the remittance advice at the bottom of the Statement of Account. Please note that interest accrues on all taxes payable after the due date so you are advised to pay in full on or before the due date.

The reference to additional tax/understatement penalty in this notice of assessment depends upon the circumstances.
(i) If additional tax was imposed before the commencement date of the Tax Administration Act (TAA) then adjustment to that additional tax may be made by an assessment issued in terms of the TAA after the commencement date of the TAA
(ii) An assessment issued after the date of commencement of the TAA, in respect of any period that preceded the commencement date of the TAA, may be subject to the imposition of an Understatement Penalty in terms of the TAA as an "understatement" is considered to be a continuing act or omission in terms of the TAA
(iii) An assessment issued after the commencement date of the TAA, for a period that commences after the commencement date of the TAA, may include the levy of an Understatement Penalty.

Below you will find the amounts of income included and deductions allowed in calculating this assessment. It is very important that you check these amounts to ensure:
1. They are correct
2. They reflect all your taxable income and allowable deductions for the year

If you are of the view that the assessment contains a processing, calculation or other error, you should submit a revised return.

If you are unsure as to how the assessment was concluded or the reasons for any of the adjustments made, you may write a letter requesting SARS to provide further information as to how the assessment was concluded. This letter must be delivered to your nearest SARS branch within

30 days of the date of this assessment or sent via registered mail to the address at the top of this notice.

If you are aggrieved by this assessment, you may submit a Notice of Objection (NOO) using the form available from eFiling or your nearest branch to you or by calling 0800 00 SARS (7277). You have 30 days from the date of this assessment in which to do this.
NOTE: Your obligation to pay any amount due is not suspended by any objection or appeal. However, SARS will consider a motivated application for the suspension of payment pending the finalisation of an objection or appeal as stipulated in the Tax Administration Act.

Sincerely
ISSUED ON BEHALF OF THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE

SARS

INCOME TAX ITA34

Notice of Assessment

Reference number: **9250026607**
Document number: **30309**
Year of assessment: **2008**

Income

Code			
Capital gain - local			56046710.00
	Note for individuals: The calculation of the aggregate capital gain / loss of a CGT transaction relating to a primary residence will be impacted where the property is held jointly or in partnership and / or married in community of property is applicable.		
4250	Capital gain tax local	112093420.00	56046710.00
	CGT PROFIT	-56046710.00	
Business, trade and professional income (incl. rental)			3830713115.00
	Description: Description: NONE		
	Unique identifier: Unique identifier: 000000000000		
	Determination of profit / loss		
0298	Other not specified	2951421178.00	2951421178.00
	Description: Description: NONE		
	Unique identifier: Unique identifier: 000000000000		
	Determination of profit / loss		
4278	Inputed net income from cfc	879291938.00	879291938.00
Income			3886759825.00

Deductions allowed

Code			
Deductions allowed			0.00

Taxable income

Code			
	Taxable income – subject to normal tax		3886759825.00

Tax calculation

Code			
	Normal tax		1088292751.00
	Foreign Tax Credits Refunded/Discharged		0.00
Subtotal			1088292751.00
	Previous assessment result		14765685.75
Current assessment - before provisional tax credits and Section 89 Quat interest *			1103058436.75
	Provisional tax credits *		-859858894.40
	1=Provisional payment	-346575312.44	
	2=Provisional payment	-513283581.96	
	Section 89Quat(2) interest on underpayment of provisional tax *		133318725.84
Net amount payable / refundable			376518269.20

*This amount is separately reflected on your Statement of Account.

Notes

1 Information declared that impacts this assessment:

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SARS

INCOME TAX **ITA34**

Notice of Assessment

EVRAZ HIGHVELD STEEL & VANADIUM LIMITED
PO BOX 111
WITBANK
1035

Enquiries should be addressed to SARS:

Contact Centre

ALBERTON
1528

Tel: 0800007277 Website: www.sars.gov.za

Details

Reference number:	**9250026607**
Document number:	**30310**
Date:	**2015-11-18**
Year of assessment:	**2009**
Type of assessment:	**Additional Assessment**
Period (days):	**365**
Due date:	**2016-01-01**
Second date:	**2016-01-31**

Always quote this reference number when contacting SARS

Assessment summary information

Income	167868317.00
Taxable income	167868317.00
Tax calculation	
Assessed tax after rebates	48966328.76
Tax credits and adjustments	-3619802.31
Net amount payable under this assessment after allowable credits	43346526.45

Compliance information

Unprocessed payments	0.00	**Registered provisional taxpayer**	Y
Selected for audit or verification	N		

Dear EVRAZ HIGHVELD STEEL & VANADIUM LIMITED

Thank you for submitting your income tax return for the 2009 year of assessment. Your assessment has been concluded and reflects an amount payable by you of R 43346526.45 . Payment should be made by 2016-01-31 after which interest will accrue on this assessment as from 2016-01-01

Please note that this amount only reflects your income tax assessment and does not reflect tax payable under any previous assessment or any other balances on your account. The current balance on your assessed account is R 689824389.50. For a statement reflecting your final balance (including all amounts payable or refundable under any previous assessment, refunds, payments, additional taxes/ understatement penalties, penalties and interest), please request your statement of account from SARS through the following channels:

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(iii) An assessment issued after the commencement date of the TAA, for a period that commences after the commencement date of the TAA, may include the levy of an Understatement Penalty.

Below you will find the amounts of income included and deductions allowed in calculating this assessment. It is very important that you check these amounts to ensure:
1. They are correct
2. They reflect all your taxable income and allowable deductions for the year

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NOTE: Your obligation to pay any amount due is not suspended by any objection or appeal. However, SARS will consider a motivated application for the suspension of payment pending the finalisation of an objection or appeal as stipulated in the Tax Administration Act.

Sincerely
ISSUED ON BEHALF OF THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE

SARS

INCOME TAX — ITA34

Notice of Assessment

Reference number: **9250026607**
Document number: **30310**
Year of assessment: **2009**

Income

Business, trade and professional income (incl. rental)			167808317.00
	Description: Description: NONE Unique identifier: Unique identifier: 000000000000 Determination of profit / loss		
0298	Other not specified	11778188.00	11778188.00
	Description: Description: NONE Unique identifier: Unique identifier: 000000000000 Determination of profit / loss		
0298	Other not specified	26952.00	26952.00
	Description: Description: NONE Unique identifier: Unique identifier: 000000000000 Determination of profit / loss		
4276	Imputed net income from cfc	156005177.00	156005177.00
Income			167808317.00

Deductions allowed

Deductions allowed		0.00

Taxable income

	Taxable income – subject to normal tax	167808317.00

Tax calculation

	Normal tax		46986328.76
	Foreign Tax Credits Refunded/Discharged		0.00
Subtotal			46986328.76
	Previous assessment result		54084046.48
Current assessment - before provisional tax credits and Section 89 Quat interest *			101070375.24
	Provisional tax credits *		-58268925.65
	1st Provisional payment	-25327096.62	
	2nd Provisional payment	-32941829.06	
	Section 89Quat(4) Interest on overpayment of provisional tax *		-334923.11
Net amount payable under this assessment			43346526.45

*This amount is separately reflected on your Statement of Account.

Notes

1 Information declared that impacts this assessment: