

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)**

First Respondent

(Registration Number: 1960/001900/06)

PIERS MARSDEN N.O.

Second Respondent

DANIEL TERBLANCHE N.O.

Third Respondent

(in their representative capacities as the joint business
rescue practitioners of Evraz Highveld Steel and
Vanadium Limited (in business rescue))

**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

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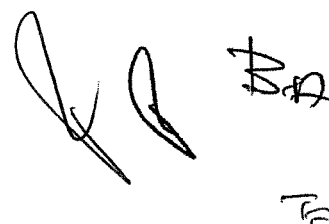
FIRST - THIRD RESPONDENTS' ANSWERING AFFIDAVIT

I, the undersigned,



PIERS MICHAEL MARSDEN,

do hereby make oath and state that:

1. I am a major male practising as a business rescue practitioner at Matuson & Associates (Pty) Limited at One on Ninth, corner of Glenhove Road and Ninth Street, Melrose Estate, Johannesburg. I am the second respondent herein.
2. The third respondent and I are cited herein in our capacities as the joint business rescue practitioners ("the practitioners") of the first respondent ("Highveld").
3. The third respondent supports the opposition to the applicants' urgent application under the above case number ("the urgent application") and has authorised me to depose to this affidavit on his behalf. In this regard, I refer to the confirmatory affidavit of the third respondent filed herein.
4. The facts deposed to in this affidavit are within my personal knowledge and belief, save where the context indicates to the contrary, and are furthermore true and correct. Where I refer to information conveyed to me by others, I verily believe such information to be true. Where I make submissions of a legal nature, I do so on the advice of my legal representatives.
5. I have read the founding affidavit deposed to by Tania Mostert ("Mostert") on behalf of the applicants on 26 October 2015.

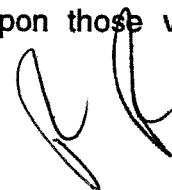
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6. I depose to this affidavit in response to the founding affidavit in the urgent application. To the extent that I have not dealt with any allegation it is denied.
7. In paragraph 5 of the founding affidavit its deponent refers to the founding affidavit in the main application. Mostert says that it will be indexed, paginated and placed in the court file when this application is heard. On the strength thereof she requests, in respect of this urgent application, that its founding affidavit is read with the founding affidavit in the main application.
8. The applicants have not incorporated the main application in this one. They have not identified what parts of the main application are relied on in this application or in respect of what points in this application the main application is relied upon. The applicants have simply purported to lump the entire main application into this one.
9. The main application runs to 336 pages. That application, if part of this one, would preclude this Honourable Court from hearing the matter on the basis that the papers would exceed the 500 page rule. If, for instance, the respondents answered the main application herein, the combined papers would extend beyond what the rule allows.
10. The applicants elected to bring the main application on long form and in the normal course. In so doing they acknowledged that the main application is not urgent. That acknowledgment incorporates another acknowledgement – that is that the respondents could not reasonably be called upon to deliver answering affidavits in the main application on an urgent basis.
11. If this Honourable Court were to allow the applicants to incorporate the main application herein, it would mean that, notwithstanding what I have stated in the

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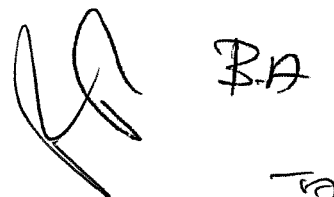
previous paragraph, the respondents would be obliged, in extremely limited time, to answer each and every allegation in the main application.

12. Effectively, the applicants have thrown 336 pages at the respondents and this Honourable Court and expect that somewhere within those 336 pages, the respondents and this Honourable Court will find the basis upon which this application is launched. I have been advised and respectfully submit that this is not the way South African Courts deal with motion matters. The respondents oppose this form of ambush by attempted incorporation and will apply, at the hearing of this matter, for every reference to the main application to be struck out.
13. The applicants have further brought an urgent application for substituted service on all affected persons in respect of the main application. A copy of the notice of motion is attached hereto, marked "AA1". The application for substituted service has been set-down for hearing in the urgent Court on 17 November 2015, being the same date as the urgent application.
14. No specific prayer is sought in respect of the substituted service of the urgent application. It appears from prayer 5 of the notice of motion to the application for substituted service that the applicants will seek to obtain an order that all subsequent proceedings be served by publication on the website on Highveld. This would, in effect, include the urgent application.
15. In fact the covering email from the applicants' attorneys makes it clear that the application for substituted service is, in fact, for substituted service of the urgent application. I attach hereto, marked "AA2", a copy of the covering email. This means that this Court will be asked to simultaneously make an order against interested parties and make an order in respect of service upon those very

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interested parties. On that basis the purpose of service will be defeated. In whatever form the envisaged service occurs, it will only happen after argument of the matter in which they have an interest in being heard.


16. I submit that this does not constitute proper service of the urgent application on affected persons. I have been advised that the effect of this approach is that the applicants seek to hear the urgent application prior to effecting proper service on the creditors of Highveld. This is not only irregular but severely prejudicial to the affected persons of Highveld in that an order will be sought preventing the implementation of the plan which has far reaching effects on affected persons.
17. By way of example, on 2 November 2015, I attended a meeting with Solidarity, one of the trade unions representing certain of Highveld's employees. The meeting was held at Solidarity's request to discuss the main application. At the meeting, I discussed the urgent application with the representative of Solidarity and they informed me that they were very concerned about the relief sought in the urgent application and the effect that an interdict would have on their members and Highveld.
18. Solidarity informed us that they wished to file a supporting affidavit setting out the potential prejudice should the relief sought in the urgent application be granted. I attach hereto, marked "AA3", a copy of an affidavit by Solidarity supporting the first to third respondents' opposition to the urgent application.
19. I submit that the urgent application cannot proceed until proper service on all affected persons has been effected.

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20. The founding affidavit contains numerous untrue allegations. The applicants have been selective in what, and how, information has been disclosed to this Honourable Court and in so doing have misled this Honourable Court in an attempt to cast a disparaging light on the practitioners and the business rescue plan published in respect of Highveld ("the plan"). I attach hereto, marked "AA4", a copy of the plan.

A. THE APPLICATION IS NOT URGENT

21. The main application was launched on 21 October 2015. In the main application the applicants asserted that it was not urgent.
22. On 26 October 2015 this application was launched. The grounds of urgency relied upon by the applicants are those contained in paragraphs 26 to 50 of the founding affidavit. I have been advised and respectfully submit that not one of those paragraphs, read individually or cumulatively, contains a single sentence to justify the proposition that this application is urgent. In fact, what the applicants contend is that, after the main application was launched, they sought undertakings from the practitioners. Those undertakings should have been sought before the main application was launched. No explanation is advanced for the applicants' failure to do so.
23. Had those undertakings been sought timeously even this urgent application could have been launched on more reasonable time limits. In short, the urgency alleged by the applicants is of their own making. On that basis the application should be dismissed.
24. A perusal of the allegations in paragraphs 26 to 50 discloses anything but urgency. There are two points that I wish to make in this regard, the first is that, if the

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applicants are to be believed (which I deny) this business rescue has taken a leisurely pace. The plan was adopted at a meeting on 13 October 2015, 13 days before the launch of this urgent application. There is no explanation for any part of the 13 day delay.

25. Secondly, the allegations of urgency made by the applicants may have justified an urgent application by the practitioners. They do not justify an urgent application by the applicants.

26. The matter cannot be urgent from the point of view of the applicants. The plan is subject to conditions precedent which require fulfilment by 31 January 2016. In paragraph 30 of the founding affidavit the applicants say of those conditions precedent that they “.. *are unlikely to be fulfilled and are commercially untenable...*”.

27. In these circumstances the applicants are effectively saying that they are not at risk. By 31 January 2016, so they say, the plan will have failed.

B. NON-DISCLOSURE: SARS

28. It is evident from the founding affidavit that the applicants' main objection is in respect of the inclusion of SARS' claims.

29. SARS has submitted the following claims:

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

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

30. The applicants allege that the practitioners have failed to disclose the second claim. This is incorrect.

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31. 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.
32. 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.
33. 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.
34. I attach hereto, marked "**AA5**", 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 **AA5**:

- "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*

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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).

35. 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.

36. The practitioners were not willing to accede to the applicants' unlawful request. I attach hereto, marked "AA6", 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).

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

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- 37.1. the second applicant has been the major shareholder of Highveld since 2007 and accordingly has been in board and operational control of Highveld for over 7 years;
- 37.2. the applicants have intimate knowledge about the issues with SARS as appears below;
- 37.3. the applicants requested the practitioners to consult with KPMG, who were *"previously instructed by the ... [the second applicant], to give tax advice in regard to the issues... raised in the SARS correspondence"* (annexure AA5), as same would obviate the need for the practitioners *"to peruse the voluminous documentation pertaining to the SARS claim"*. I attach hereto, marked **"AA7"**, examples of such requests being made;
- 37.4. the applicants have held numerous meetings and telecons with the practitioners where SARS and its claims were on the agenda and discussed. Representatives of the applicants and their attorneys participated in these meetings and telecons. Since the commencement of business rescue, the practitioners have been in communication with the applicants and their attorneys (previously CDH and now Baker McKenzie) regarding SARS and other issues in the business rescue, including Eskom and the environmental liabilities; and
- 37.5. 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. I attach hereto, marked **"AA8"**, examples of such requests and responses;

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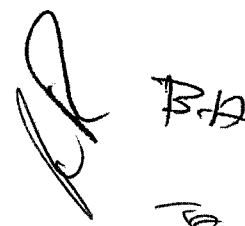
37.6. the applicants received the correspondence addressed by SARS to the practitioners, including the letter of audit findings. Due to the applicants' knowledge of the issues relating to SARS, the applicants were given an opportunity to give their input into the practitioners' response sent to SARS in respect of its letter of audit findings, which they duly did. I attach hereto, marked "AA9", the correspondence exchange with the applicants' attorneys and their comments on the response to SARS.

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

39. As dealt with more fully below in paragraph 40, 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 40. 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.

40. I attach hereto, marked "AA10", 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."

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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 skuldeler wat in 'n klas anders as die algemene klas van preferente skuldelsers 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".

41. The applicants' attorneys did not respond to the aforesaid email. No issue had been taken with the legal position.
42. As is evident from the case law quoted in annexure AA10, the practitioners were obliged to include SARS' claim in the voting interests.
43. 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.

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44. 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 "AA11", email correspondence exchanged between myself and SARS.
45. 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 "AA12", a copy of the aforesaid letter.
46. The practitioners' decision to include SARS' claim in the voting interests that voted at the s151 meeting was accordingly not done to manipulate the vote or dilute the applicants' voting interest.
47. Therefore in respect of SARS:
- 47.1. 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;
- 47.2. the applicants are fully aware of the issues relating to SARS, have held various meetings and telecons with the practitioners and further gave their input into correspondence addressed by the practitioners to SARS;

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47.3. 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

47.4. 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"*. I attach hereto, marked "AA13", a copy of the relevant page from the main application.

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

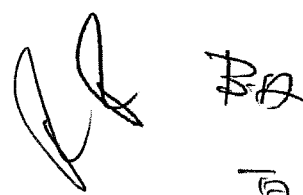
49. The allegation of non-disclosure of the SARS claim, which is central to the main application, is untrue.

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

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

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

51.1. 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



51.2. 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.

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

53. In essence, the applicants attack the validity of the plan on the basis that the quantum of creditors' claims stated in annexure B 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.

54. 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.

55. 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.

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56. 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. As will be demonstrated below the applicants have included substantial claims which in fact were dealt with in the plan.

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

57.1. SARS:

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

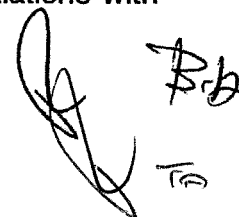
57.2. Eskom:

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

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

57.2.3. 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 "AA14", a copy of the September statement;

57.2.4. 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

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Eskom in regard to the interim payment arrangement with Eskom during the business rescue. I refer to the correspondence attached as annexure AA8;

57.2.5. 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 "AA15", a copy of the amendment; and

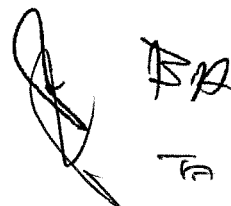
57.2.6. there was accordingly no need for Eskom to submit a "*claim in a cognizable form*" as the Companies Act does not prescribe same and the practitioners were already in possession of Eskom's statements and signed the aforesaid amendment reflecting the details of the amounts due to Eskom.

57.3. Mapochs:

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

57.3.2. 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

57.3.3. in compliance with the practitioners' uniform approach to all creditors, as set out in paragraph 66 below, Mapochs was allowed

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to vote on the claim submitted, subject to the reservation of the practitioners' rights to dispute the claims.

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

	CREDITOR	\$151 VOTE	VOTE
1	GUARDRISK INSURANCE COMPANY	63,332,809	YES
2	NATIONAL UNION OF METAL WORKERS	30,807,260	YES
3	RAND MUTUAL ADMIN SERVICES	19,323,109	YES
4	RAPID TRANSFER	850,000	YES
5	SOLIDARITY	10,265,234	YES
6	SWAN ELECTRICAL DISTRIBUTORS	33,720	YES
7	UNPAID VOLUNTARY SEVERANCE PACKAGES	9,940,928	YES
8	VANCHEM VANADIUM PRODUCTS (PTY) LTD (REFLECTED IN ANNEXURE B WITHOUT AN AMOUNT)	18,000,000	NO
		152,553,061	

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


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

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61. Dividends payable to creditors under the plan remain within the 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.
62. There was therefore no need, nor was there a request, 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.
63. 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. Secondly, creditors are required to establish a valid lien over the assets before they can be acknowledged and classified as secured creditors.
64. 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.

D. THE VOTING INTERESTS

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

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	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%

66. 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.


67. 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.

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

68.1. SARS;

68.2. Eskom;

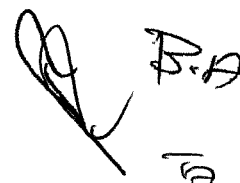
68.3. Mapochs;

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68.4. NUMSA; and

68.5. IDC.

69. 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.
70. 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 in a liquidation.
71. 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.
72. 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.

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73. 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.
74. A general meeting of affected persons was held on 8 October 2015 for the purpose of, *inter alia*, 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.
75. 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.
76. 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.
77. In the circumstances, the applicants' allegations in regard to the voting by certain creditors at the s151 meeting are incorrect and without merit.

E. SHAREHOLDERS' VOTE: NON-COMPLIANCE WITH SECTION 152(3) OF THE COMPANIES ACT

78. 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

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Companies Act (the first proposal), failing which, the sale of Highveld's business and assets as a going concern (the second proposal).

79. 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.

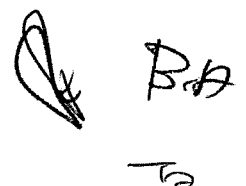
80. Even the scheme of arrangement in itself does not contemplate the alteration of rights of the shareholders but contemplates a disposal of *inter alia* the second applicant's shares subject to the second applicant agreeing to such disposal.

81. 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.

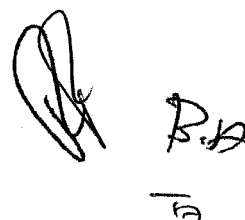
82. In all of the circumstances, the applicants have failed to establish any entitlement to the relief sought in their notice of motion.

F. THE PROPOSED TRANSACTION

83. 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.

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84. 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.
85. By way of background, the practitioners embarked on an accelerated sales process to ascertain whether it was a viable option to sell a part of 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.
86. The sales process entailed an accelerated and rigorous process whereby an initial number of twenty seven interested parties were narrowed down to essentially three preferred bidders who submitted final binding offers for Highveld as a going concern.
87. 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 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.
88. At the end of the stringent 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.

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89. In this regard IRP:

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

89.2. 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;

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

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

89.5. 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

89.6. has engaged with:

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

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

89.6.3. various key suppliers to Highveld.

90. 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.
91. 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.
92. 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.
93. 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.
94. 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 "AA16".
95. The practitioners are of the opinion that the remaining conditions precedent are achievable.
96. 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

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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.

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

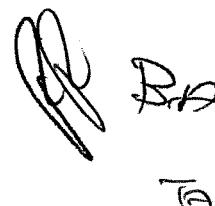
97.1. Vanadium: Dr Wen Heng Mu, the former Chairman and CEO of Cheng De Iron & Steel ("CDIS"), being one of the two major steel mills in China;

97.2. 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;

97.3. Steel: Mr Ji Bin Liu, the former Executive Vice President of CDIS, President of Tangshan Stainless Steel. Mr. Liu has 20+ years' operating experience in integrated steel mills, including production, maintenance, equipment design, plant construction and project management, and;

97.4. 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.

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

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- 98.1. 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;
- 98.2. 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
- 98.3. 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.
99. 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.

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100. 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.
101. 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.
102. IRP plans to restore 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 V₂O₅. 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.
103. 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.
104. As set out above in paragraph 65, 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

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proposed transaction with IRP. Furthermore, over 90% in value of independent creditors (i.e. excluding the first applicant) voted in favour of the plan.

105. 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.

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

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

106.2. the support in submitting an application to International Trade Administration Commission (ITAC) for steel protection.

107. The benefits of accepting the IRP offer include:

107.1. 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 "AA17", a copy a letter confirming the undertaking; and

107.2. 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.


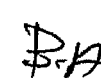
108. As set out above, there is no prejudice to the applicants should the IRP offer not be concluded for whatever reason. Given the urgent need to restore Highveld to

solvency and commercial viability, the IRP offer needs to become unconditional on or before 31 January 2016. Should the IRP offer fail for whatever reason on or before that date, the plan provides at page 47 for the default position of an orderly wind-down in business rescue.

109. I reiterate that the wind-down is not the preferred route for obvious reasons.
110. 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.
111. 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.
112. 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.
113. In the circumstances, the IRP offer is a preferred option in business rescue and is reasonably capable of implementation.

INTERDICTION REQUIREMENTS

114. The applicants have failed to establish the requirements for an interim interdict.

 
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Prima facie right

115. I deny that the applicants have established a *prima facie* right. It is not clear what the right is that the applicants rely upon. The first applicant had a right to vote at the s151 meeting. It exercised that right. It was outvoted. That does not give rise to any further right. The second applicant's rights were not altered by the plan and therefore had no right to vote at the s151 meeting.

Irreparable harm

116. The applicants do not demonstrate irreparable harm if the implementation of the plan is proceeded with.
117. As will be demonstrated below, the only scenario in which the applicants will suffer any harm is if this application succeeds, leading to the failure of the plan and the inevitable liquidation of Highveld.
118. 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.
119. If the third proposal of winding-down is implemented in accordance with the plan, the first applicant will receive between 10 and 14 cents.
120. If the implementation of the plan does not take place, this will result in a liquidation of Highveld in which circumstances creditors are likely to receive no dividends in light of SARS' preferent status.

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Balance of convenience

121. I deny that the balance of convenience favours the applicants. Indeed, it favours the respondents.
122. The applicants have failed to properly address the balance of convenience and in particular the prejudice which will result if the interdict is granted. I have dealt with the impact of the successful implementation of the plan and the consequences of a liquidation.
123. The plan seeks to provide for the efficient rescue and recovery of a financially distressed company in a manner that balances the rights and interests of all relevant stakeholders.
124. I reiterate that the adoption of the plan was supported by:
- 124.1. over 90% of independent creditors who voted at the meeting;
 - 124.2. Solidarity and NUMSA, representing over 1560 Highveld employees; and
 - 124.3. various government departments.
125. 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.
126. 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:

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126.1. 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.

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

126.3. 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;

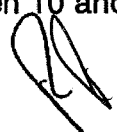
126.4. Mapochs enforces a policy that contract miners must staff their operation from the community surrounding the mine and also source goods and services preferentially from the Roossenekal community and is supporting around 600 businesses in the eMalahleni and Roossenekal area;

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

126.6. 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;

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

126.8. 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

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20 graduate level bursaries in engineering and metallurgy and around 20 technicon level bursaries; and

126.9. 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.

127. The practitioners estimate that Highveld only has funding to maintain its current holding costs until the January 2016. The effect of an order as prayed for by the applicants would be to extend the period that the holding costs would have to be incurred. It would also make it impossible for the conditions precedent to be timeously fulfilled. It would preclude the practitioners from taking any further steps in the implementation of the plan. In short, an order in the terms sought would in all probability cause the plan and the business rescue to fail.

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

129. In addition, an interdict, if granted, may well result in the CCMA training lay-off scheme ("TLS") not being implemented.

130. 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 "AA18". 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.

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131. 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:

131.1. be in distress or facing distress;

131.2. be contemplating the retrenchment of workers;

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

131.4. be compliant with its statutory obligations.

132. 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.

133. Accordingly, on 2 October 2015, Highveld and the representative trade union 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 "AA19". 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.

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134. 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 could be avoided for the 6 (six) month duration of the TLS, resulting in significant job loss and unemployment being prevented.
135. Any delays in the approval and/or implementation of the TLS and/or any deviations from the implementation of the business rescue plan places Highveld at a real risk of liquidation. In such circumstances, 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. 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.
136. This application is therefore severely prejudicial to Highveld and its employees and, insofar as there is a real risk that it may jeopardise the approval and/or successful implementation of the TLS, if it is granted, the balance of convenience is clearly in favour of Highveld and its employees.
137. I refer to annexure AA3 being the affidavit of Solidarity in which they confirm the prejudice that Highveld would suffer if the interdict was granted.
138. 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.

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No alternative remedy

139. The applicants' allegation that they have no alternative remedy and cannot realistically seek damages, has no factual foundation.

THE FOUNDING AFFIDAVIT

140. 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 and 2

141. The deponent to the founding affidavit is the financial director of Evraz Vametco Holdings (Pty) Ltd ("EVH") which is a completely separate entity from the applicants.

142. I have neither heard of the deponent before reading the main application nor has the deponent or EHV been involved in the business rescue of Highveld.

143. It is denied that the deponent has personal knowledge of the facts contained in the affidavit and the applicants are put to the proof thereof.

144. Highveld's board of directors consisted of 9 directors at the time of commencement of business rescue. Of the 9 directors, 4 were nominated by the second applicant, including the CFO.

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Ad paragraph 5

145. This is a self-standing application. The practitioners object to other papers being placed before this Honourable Court.

146. Simultaneously with delivery of this answering affidavit, I will cause to be delivered a notice to strike out every reference in the founding affidavit to the main application.

147. I refer to what I have stated in paragraphs 7 to 12 above.

Ad paragraphs 11.2 and 12.3

148. I deny that the first applicant is the largest creditor or that the second applicant was required to vote on the adoption of the plan.

Ad paragraphs 19 and 20

149. I have already dealt with service of the urgent application above.

150. The practitioners have no knowledge of the allegations in paragraph 20, do not admit them and put the applicants to the proof thereof.

Ad paragraphs 24 and 25

151. I deny that leave of this Court is not required to overcome the moratorium.

152. No case is established in this application for leave to proceed in the face of the moratorium.

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Ad paragraphs 29 to 31 and 34

153. I deny that the conditions precedent are unlikely to be fulfilled and that the proposals are commercially untenable for the reasons set out above. This allegation is further contradictory to the applicants' reason for bringing the urgent application.

154. The whole business of Highveld can be saved in terms of the first and second proposals. I do not understand the "*sentence*" in paragraph 30.

155. Save for the foregoing, I deny the allegations herein.

Ad paragraph 32

156. The allegations in this paragraph are not correct and are misleading.

157. First, it is unlikely that proposal 3 will be resorted to. In terms of proposals 1 and 2, the creditors will received dividends ranging between 16 and 29 cents in the Rand. It is obvious that, in liquidation, concurrent creditors will not receive any dividend. SARS, as preferent creditor, will in all likelihood receive all funds that are not secured.

158. The plan seeks to balance the interests of all stakeholders.

Ad paragraph 37

159. Save for what is set out in the ensuing paragraphs of this paragraph I deny the allegations herein.

160. I deny, in particular, that the plan has irregularities or that the vote was irregular.

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161. I refer to annexure TM5, the letter from ENS explaining why the practitioners were unable to give the undertakings sought.

162. I also refer to what I have said earlier herein about the fact that the applicants delayed seeking such undertakings until after the main application had been launched.

163. Neither in annexure TM5, nor anywhere else, have the practitioners asserted that they seek to implement the plan urgently. We have consistently maintained that we are required to implement the plan in accordance with the Companies Act and the terms of the plan.

Ad paragraph 38

164. I deny the allegations in the second sentence of this paragraph.

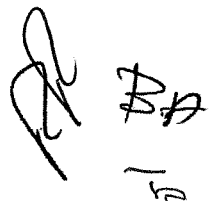
Ad paragraph 39

165. This is contradictory to the applicants' allegations in paragraph 30 of the founding affidavit.

Ad paragraph 40

166. I deny the allegations herein.

167. The applicants seek to urgently achieve exactly the opposite of what is set out herein. The status *quo* entails acceptance of the fact that a plan has been approved. The Companies Act demands of the practitioners that they implement it.

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168. The applicants seek to overturn the status *quo* by asking this Honourable Court to prevent the practitioners doing what the creditors and the Companies Act require them to do.

Ad paragraphs 41 and 42

169. It is denied that numerous extensions have been sought. Only two extensions were sought. The first was until the end of August 2015. The second extension sought was until the end of September 2015 but the applicants refused any extension beyond 15 September 2015.

170. Based on current forecasts, Highveld can only fund the holding costs until January 2016. That is the date by which the conditions precedent have to be fulfilled.

Ad paragraphs 43 and 49

171. I deny that the plan is deficient.

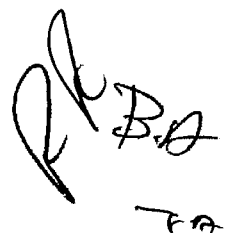
172. I have not professed urgency. I have professed the importance of implementing the plan in accordance with its terms and the requirements of the Companies Act.

173. If implementation of the plan does not proceed the conditions precedent will be incapable of fulfilment and, at or before the end of January 2016, the business rescue of Highveld will probably fail.

174. Save for the foregoing I deny the remaining allegations in these paragraphs.

Ad paragraph 50

175. The offer made by the applicants to expedite the hearing of the main application is not *bona fide*.

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176. The applicants' application for substituted service was furnished to the first to third respondents' attorneys on 2 November 2015, some 12 days after the main application was launched.

177. In terms of the notice of motion to the application for substituted service (AA1):

177.1. the hearing of the application for substituted service is set-down for Tuesday, 17 November 2015; and

177.2. affected persons are granted a period of "*fifteen days after substituted service to oppose the main application*" (prayer 7).

178. In the circumstances, an agreement to expedite the hearing of the main application will in all likelihood not achieve finality in the foreseeable future.

179. I deny that the applicants are seeking to preserve the status *quo* and I refer to paragraphs 168 and 169 herein.

Ad paragraphs 51 to 80

180. I deny that the applicants have established a prima facie right and refer to what I have stated above.

181. In regard to the applicants' voting interest of 32%, this estimated calculation was furnished to the applicants pursuant to a request made by the applicants' attorney on 23 September 2015, being four business days before the s151 meeting convened on 28 September 2015. I attach hereto, marked "AA20", a copy of the request.

182. 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

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further claims may be submitted at the s151 meeting convened on 28 September 2015. I attach hereto, marked "AA21", a copy of the letter from the practitioners' attorneys.

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

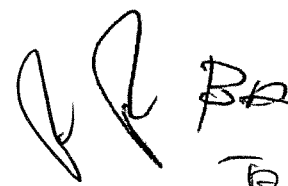
184. In the circumstances, over two weeks passed since the applicants' letter of 25 September 2015. Despite the applicants being specifically advised that the 32% voting interest was subject to no further claims being submitted, the applicants, as represented by a team of attorneys at the adjourned s151 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.

185. 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 200 creditors.

186. On 14 October 2015, being a day after the s151 meeting, the applicants' attorneys specifically acknowledged that the 32% voting interest was "*subject to the caveat that further creditors may submit additional claims, which could affect EMAG's voting interest*". I attach hereto, marked "AA22", a copy of the aforesaid letter.

187. The applicants are accordingly attempting to blame the practitioners for the applicants' failure to confirm its position before or at the s151 meeting.

188. Save for the foregoing I deny the allegations herein.

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Ad paragraphs 81 to 84

189. Save for what is set out in the immediately ensuing paragraphs of this paragraph, I deny the allegations herein.

190. I refer to what I have stated earlier herein concerning the SARS claim. Highveld will continue to deal with the SARS claim as provided for in the plan.

191. Paragraphs 12.8 and 27.2 of the plan clearly explain the potential impact of the SARS claim on the dividends.

192. The anticipated dividend available to creditors remains within the range identified in the plan.

Ad paragraphs 85 and 86

193. This is denied.

194. The second applicant has no interest in the first proposal, as is evidenced in paragraph 30 of the founding affidavit.


195. The applicants are merely paying lip service to the requirements for an interim interdict.

Ad paragraph 87

196. This is denied for the reasons already stated herein.

Ad paragraph 88

197. This is denied. I refer to what I have stated in paragraph 88 above.

 B.B.
T.A.


Ad paragraph 89

198. This is denied.

199. I have dealt with these aspects in paragraphs 122 to 139 and paragraphs 168 and 169 above.

CONCLUSION


200. I respectfully submit that the urgent 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 2 November 2015.


COMMISSIONER OF OATHS

Bongani Abram Nkabinde
Commissioner of Oaths
Reference: 27/11/2012 Randburg
165 West Street, Sandton



**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.

Third Respondent

(in their representative capacities as the joint business
rescue practitioners of Evraz Highveld Steel and
Vanadium Limited (in business rescue))

**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 INTERDICT APPLICATION**

I, the undersigned,


PIERS MICHAEL MARSDEN,

do hereby make oath and state that:

1. I deposed to the answering affidavit in the urgent interdict 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 urgent interdict application I dealt with the two claims of SARS. In particular, I dealt with the status of SARS as a creditor prior to an assessment being raised in respect of SARS' 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 issue of assessments having been raised in the papers, and same having been received after the filing of the answering affidavit in the urgent interdict application, 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

"SA1"

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


T

Large Business
Centre



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

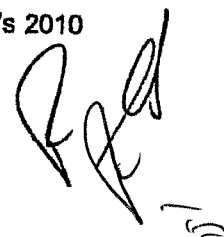
- 2.1 In terms of section 9D of the Act, unless an exemption or exclusion applies, an amount equal to the net income of a CFC must be included in each South African resident's income in the proportion of the participation rights of the South African resident in the CFC to the total participation rights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

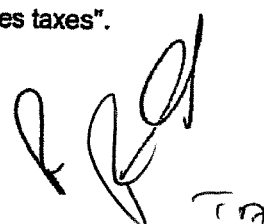
- 3.1 We respond to the contentions contained in the ENS letter dated 10 July 2015 as follows:

- 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

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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:

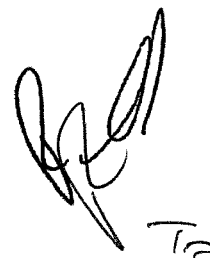
4.1.3.1 the Commissioner's satisfaction in terms of section 79(1)(i) is a substantive and far-reaching determination which should be communicated to the taxpayer; and

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:



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- 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 The FBE exemption and the materiality of facts about the nature of a CFC's activities.

- 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 ferrovandium 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.

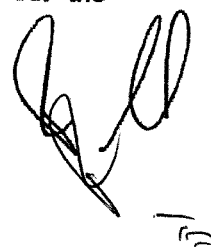
4.6.6.2 The manufacturing and marketing activities were outsourced by HH to Treibacher, an independent third party located in Austria; and

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



"SAZ"

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	1808718119.00
Taxable income	1808718119.00
Tax calculation	
Assessed tax after rebates	550328502.01
Tax credits and adjustments	-297334207.28
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 252777396.51. 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.

- 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.
- 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.
- 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

Reference Number 9250026607

ITA34_RO

2015.04.00

01/03

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



INCOME TAX

ITA34

Notice of Assessment

Reference number: 9250026607

Document number: 30308

Year of assessment: 2007

Income			
Capital gain - local			23883971.00
4250	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 owned in community of property is applicable.		
	Capital gain local	4777 18142.00	23883971.00
	Apply inclusion rate	-23883971.00	
Business, trade and professional income (incl. rental)			15698394.00
1204	Description: Description: NONE		
	Unique identifier: Unique Identifier: 000000000000		
	Determination of profit / loss		
4276	Steel tubes	115272324.00	115272324.00
	Description: Description: NONE		
	Unique identifier: Unique Identifier: 000000000000		
4276	Determination of profit / loss		
	Imputed net income from etc		
		417135784.00	417135784.00
			1808271819.00

Deductions allowed	
	0.00

Taxable income	
Taxable income - subject to normal tax	1808271819.00

Tax calculation			
	Normal tax		92500266.07
	Foreign Tax Credits Refunded/Discharged		0.00
	Additional tax / Understatement Penalty		230855717.71
	Omission of income	12086037.73	
	Penalty		30703110.52
	Under estimation - Provisional tax	13703340.37	
Subtotal			300000000.00
	Previous assessment result		20000000.00
Current assessment - before provisional tax credits and Section 89 Qual Interest *			320000000.00
	Provisional tax credits *		300000000.00
	1=Provisional payment	-175784000.48	
	2=Provisional payment	-230855717.71	
	Section 89Qual(2) interest on underpayment of provisional tax *		1022400.00
			300000000.00

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

Notes	
1 Information declared that impacts this assessment:	

**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

1526

Tel: 0800007277

Website: www.sars.gov.za

Details

Reference number: **9250026607**
Document number: **30308**
Date: **2015-11-18**
Year of assessment: **2008**
Type of assessment: **Additional Assessment**
Period (days): **368**
Due date: **2016-01-01**
Second date: **2016-01-31**

Always quote this
reference number
when contacting
SARS

Assessment summary information

Income	3684758620.00
Taxable income	3684758620.00
Tax calculation	
Assessed tax after rebates	1068292751.00
Tax credits and adjustments	-704772281.80
Net amount payable under this assessment after allowable credits	383520489.20

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 383520489.20. 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.

- 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.
- 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.
- 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

Reference Number 9250026607

ITA34_RO

2015.04.00

01/03

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



INCOME TAX

ITA34

Notice of Assessment

Reference number: 9250026607

Document number: 30309

Year of assessment: 2008

Income			
Capital gain - local			58446710.00
4250	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.		
	Capital gain tax: local	112053420.00	58446710.00
	CGT PROFIT	-58046710.00	
Business, trade and professional income (incl. rental)			3830713110.00
0200	Description: Description: NONE Unique Identifier: Unique Identifier: 0000000000000000 Determination of profit / loss Other not specified		
		2051421178.00	2051421178.00
	Description: Description: NONE Unique Identifier: Unique Identifier: 0000000000000000 Determination of profit / loss		
4270	Imputed net income from etc	876291836.00	876291836.00
			3830713110.00

Deductions allowed	
	0.00

Taxable income	
Taxable income - subject to normal tax	3830713110.00

Tax calculation			
	Normal tax		1056202751.00
	Foreign Tax Credits Refunded/Discharged		0.00
Subtotal			1056202751.00
	Previous assessment result		14795505.78
Current assessment - before provisional tax credits and Section 89 Quat Interest *			1103997756.78
	Provisional tax credits *		882965100.00
	1= Provisional payment	-340575312.44	
	2= Provisional payment	-510281381.88	
	Section 89 Quat(2) interest on underpayment of provision of tax *		132187251.14
			882965100.00

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

Notes	
1 Information declared that impacts this assessment:	



INCOME TAX Notice of Assessment

ITA34

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: 9250026807
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	167908317.00
Taxable income	167908317.00
Tax calculation	
Assessed tax after rebates	4606328.78
Tax credits and adjustments	-3839802.31
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:

- 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.

- 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.
- 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.
- 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

Reference Number 9250026807

ITA34_RO

2015.04.00

01/03

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

Reference Number 9250026607

ITA34_RO

2015.04.00

02/03
TA



INCOME TAX

ITA34

Notice of Assessment

Reference number: 9250026607

Document number: 30310

Year of assessment: 2009

Income			
Business, trade and professional income (incl. rental)			
0286	Description: Description: NONE Unique Identifier: Unique Identifier: 000000000000 Determination of profit / loss Other not specified		11770188.00
		11770188.00	11770188.00
0286	Description: Description: NONE Unique Identifier: Unique Identifier: 000000000000 Determination of profit / loss Other not specified		28952.00
		28952.00	28952.00
4278	Description: Description: NONE Unique Identifier: Unique Identifier: 000000000000 Determination of profit / loss Imputed net income from c/c		158005177.00
		158005177.00	158005177.00
			167804317.00

Deductions allowed	
	0.00

Taxable income	
Taxable income - subject to normal tax	167804317.00

Tax calculation			
	Normal tax		4646521.76
	Foreign Tax Credits Refunded/Discharged		0.00
Subtotal			4646521.76
	Previous assessment result		34254446.56
Current assessment - before provisional tax credits and Section 89 Quat Interest *			11195317.24
	Provisional tax credits *		3070925.60
	1=Provisional payment	-25327096.62	
	2=Provisional payment	-32541829.00	
	Section 89 Quat(4) Interest on overpayment of provisional tax *		1810023.11
			4314826.45

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

Notes	
1 Information declared that impacts this assessment:	