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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: 85549/15

In the matter between:

EAST METALS AG	First Applicant
MASTERCROFT S.A.R.L	Second Applicant
And	
EVRAZ HIGHVELD STEEL AND VANADIUM LIMITED (IN BUSINESS RESCUE) (Registration Number: 1960/001900/06)	First Respondent
PIERS MARSDEN N.O.	Second Respondent
DANIEL TERBLANCHE N.O. (in their representative capacities as the joint business rescue practitioners of Evraz Highveld Steel and Vanadium Limited (in business rescue)	Third Respondent
COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	Fourth Respondent
THE CREDITORS OF THE FIRST RESPONDENT LISTED IN ANNEXURES "A" AND "B" TO THE NOTICE OF MOTION	Fifth Respondent
THE EMPLOYEES OF THE FIRST RESPONDENT	Sixth Respondent
NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA	Seventh Respondent
SOLIDARITY UNION	Eighth Respondent
RMB SECURITIES	Ninth Respondent
THE REMAINING SHAREHOLDERS OF THE FIRST RESPONDENT	Tenth Respondents
SOUTH AFRICAN REVENUE SERVICES	Eleventh Respondent
INTERNATIONAL RESOURCES PROJECT LIMITED	Twelfth Respondent

NOTICE OF INTENTION TO OPPOSE

BE PLEASED TO TAKE NOTICE that the first to third respondents hereby give notice of their intention to oppose the main and urgent applications under the above case number.

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

DATED AT PRETORIA ON THIS THE 30TH DAY OF OCTOBER 2015.

EDWARD NATHAN SONNENBERGS INC.
First to Third Respondents' Attorneys
150 West Street
Sandown
Sandton
JOHANNESBURG
Tel: 011 269 7600
Fax: 011 269 7899
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(Ref: L Field / 0347687)
C/O JACOBSON AND LEVY INC.
215 Orient Street
Arcadia
Pretoria
Tel: 012 342 3311
Fax: 012 342 3313
(Ref: J Levy / D Brooks / 42316)

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

AND TO: **BAKER & MCKENZIE ATTORNEYS**
Applicants' Attorneys
By email

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SOUTH AFRICAN REVENUE SERVICES	Eleventh Respondent
INTERNATIONAL RESOURCES PROJECT LIMITED	Twelfth Respondent

P.A

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.

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

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

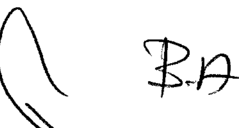
interested parties. On that basis the purpose of service will be defeated. In whatever form the envisaged service occurs, it will only happen after argument of the matter in which they have an interest in being heard.

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.



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.

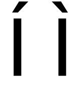
A. THE APPLICATION IS NOT URGENT

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



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.

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.

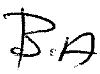
32. The applicants have full knowledge of the basis of SARS' claim and the issues relating to SARS. In fact, the applicants have been the parties who attempted to manipulate the business rescue process having such knowledge.

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, <u>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</u>. Given the tight time frames within which you and your team have to work, can you please confirm today that you will make the necessary arrangements to meet with KPMG, who were previously instructed by the shareholders of the company, to provide tax advice in regard to the



issues now raised in the SARS correspondence. <u>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</u>" (emphasis added).

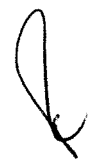
35. The practitioners were taken aback by the request by the applicants to deliberately frustrate SARS from pursuing its claims so as to ensure that the applicants controlled the voting interests. Such request is unlawful.

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, <u>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</u>" (emphasis added).

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



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;

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.

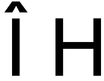
38. The applicants have not disclosed the aforesaid and have brought this application premised on the feigned lack of knowledge on the part of the applicants as to the claims of SARS. Plainly this is untrue.

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.*

B.K



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:

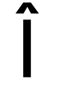
uitgereik is.[28] Dié betoog is gegrond. Uit bedoelde beslissings blyk dit dat hoewel die uitreiking van 'n aanslag 'n vereiste vir die afdwingbaarheid van 'n belastingskuld mag F wees, die skuld as sulks reeds voor daardie gebeurlikheid bestaan. Dit is dus nie onderhewig aan 'n voorwaarde die vervulling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

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

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.



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.

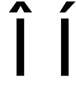
45. I further reiterate what was stated in the letter sent to the applicants' attorneys on 15 October 2015 advising that the practitioners had no indication of what amount would be submitted by SARS in its claim form or the way in which SARS would vote at the s151 meeting, particularly given that SARS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



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.

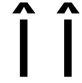
49. The allegation of non-disclosure of the SARS claim, which is central to the main application, is untrue.

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



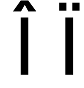
51.2. the plan did not contain all the information reasonably required to enable affected persons to decide whether or not to accept or reject the plan, including the inclusion of R1.4 billion of alleged creditors.

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.



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

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

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	S151 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.

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.

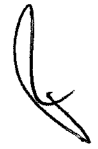
62. There was therefore no need, nor was there a request, to adjourn the s151 meeting to consider the effect of such inclusion of voting interests as same was already provided for in the plan. There was further no need to consider the practitioners' intention in respect of SARS' claims as it is clear 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. <u>THE VOTING INTERESTS</u>

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



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

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.

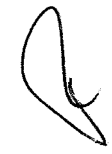
67. The applicants allege that the vote was irregular and manipulated at the s151 meeting due to the practitioners including certain voting interests at the s151 meeting.

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;



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.

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

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

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.

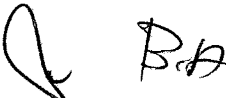
80. Even the scheme of arrangement in itself does not contemplate the alteration of rights of the shareholders but contemplates a disposal of *inter alia* the second applicant's shares subject to the second applicant agreeing to such disposal.

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. <u>THE PROPOSED TRANSACTION</u>

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.



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.

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

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:

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.

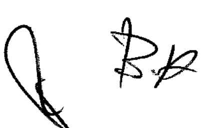
100. Numerous meetings have been held with senior management and the management of IRP in respect of the required upgrading and new technologies to be invested in Highveld post-acquisition with the prospect of returning Highveld, and particularly its steel plant, to commercial viability.

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



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

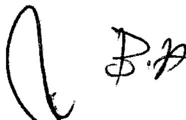
106.2. the support in submitting an application to International Trade Administration Commission (ITAC) for steel protection.

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.

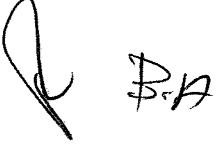
111. The independent reports reflect substantial environmental liabilities that need to be addressed and remedied. If Highveld is wound-down, the State would have to rehabilitate the assets to mitigate the current environmental damage being done.

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.

INTERDICT REQUIREMENTS

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



***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.

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:

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;

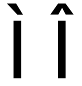
126.4. Mapochs enforces a policy that contract miners must staff their operation from the community surrounding the mine and also source goods and services preferentially from the Roossenekal community and is supporting around 600 businesses in the eMalahleni and Roossenekal area;

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



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

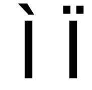
126.9. significant progress has been made with the developing of a business plan to produce rail tracks as Highveld is most ideally positioned to produce rail tracks in South Africa, resulting in the creation of high skill job opportunities.

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.



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;

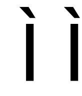
131.2. be contemplating the retrenchment of workers;

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.



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.

<u>**No alternative remedy**</u>

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

<u>**THE FOUNDING AFFIDAVIT**</u>

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.

<u>**Ad paragraphs 1 and 2**</u>

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.

JЄ

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.

<u>**Ad paragraphs 29 to 31 and 34**</u>

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 aforegoing, I deny the allegations herein.

<u>**Ad paragraph 32**</u>

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.

<u>**Ad paragraph 37**</u>

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.

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.

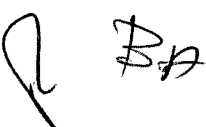
Ad paragraph 39

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.



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 aforegoing 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*.

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.

<u>Ad paragraphs 51 to 80</u>

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

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 aforegoing I deny the allegations herein.

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.

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~~ 3rd November 2015.

COMMISSIONER OF OATHS

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