

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

Case number: 26911/16

In the matter of :

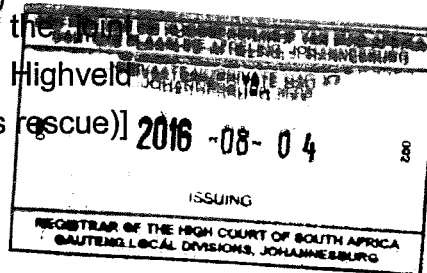
DANIEL TERBLANCHE N.O.

FIRST APPLICANT

PIERS MICHAEL MARSDEN N.O.

SECOND APPLICANT

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



and

AIR LIQUIDE PROPRIETARY LIMITED

RESPONDENT

NOTICE OF MOTION

BE PLEASED TO TAKE NOTICE THAT the applicants will apply on a date and time to be allocated by the Registrar of the above Honourable Court for an order in the following terms: -

1. That the obligations of Evraz Highveld Steel and Vanadium Limited (in business rescue) ("the Company") in terms of the agreement concluded between the Company and the respondent on 7 December 2011, as amended on 9 October 2012 ("the agreement"), save for the obligations relating to the supply of utilities in terms of the agreement, be cancelled in terms of section 136(2)(b) of the

Companies Act, 71 of 2008 ("the Companies Act"), with effect from the date of this Order.

2. Declaring:

2.1. The applicants' suspension, in terms of section 136(2)(a) of the Companies Act, of the Company's obligation in terms of the agreement to take from the respondent product and pay the minimum product purchase obligations, regardless of whether or not the Company actually receives or requires such product, to be valid and effective from 2 October 2015.

2.2. The applicants' suspension, in terms of section 136(2)(a) of the Companies Act, of the Company's obligation in terms of the agreement to pay the monthly fee, to be valid and effective from 15 July 2016.

2.3. To the extent that prayers 1, 2.1 and 2.2 are granted, that any claim for damages that the respondent may assert pursuant thereto:

2.3.1. will not constitute a cost of business rescue or post-commencement finance;

2.3.2. will constitute a concurrent claim;

2.3.3. will be limited in accordance with the provisions of:

2.3.3.1. paragraph 24.2 of the Company's business rescue plan;
and

2.3.3.2. clause 20.12 of the agreement;

2.3.4. will be the lesser of the damages provided for in terms of:

2.3.4.1. paragraph 24.2 of the Company's business rescue plan;

or

2.3.4.2. clause 20.12 of the agreement.

3. That the costs of this application be costs in the business rescue of the Company, save if opposed by the respondent, in which event, the costs of this application be paid by the respondent, including the cost of two counsel.
4. For such further and/or alternative relief as the above Honourable Court may deem fit.

BE PLEASED TO TAKE NOTICE FURTHER that the affidavit of **PIERS MICHAEL MARSDEN**, together with annexures, will be used in support of this application.

TAKE NOTICE FURTHER that the applicants have appointed **EDWARD NATHAN SONNENBERGS INC.** as their attorneys of record of 150 West Street, Sandton and nominate that address as the address at which they will receive service of all process in these proceedings.

TAKE NOTICE FURTHER that if you intend to oppose the relief sought in terms of this application, you are required to notify the applicants' attorneys in writing on or before **16 August 2016** and within 15 days after you have indicated your intention to oppose to file your answering affidavit, if any.

TAKE NOTICE FURTHER that you are required to appoint in such notification an address referred to in rule 6(5)(b) at which you will accept notice and service of all documentation in these proceedings

TAKE NOTICE FURTHER that if no intention to oppose is filed, the application will be heard on 13 SEP 2016.

KINDLY ENROL THE MATTER FOR HEARING ACCORDINGLY.

DATED AT SANDTON ON 2 August 2016.



EDWARD NATHAN SONNENBERGS INC

Applicants' Attorneys

150 West Street

Sandton

Email: lfield@ens.co.za

Ref: L Field

TO: THE REGISTRAR OF THE ABOVE HONOURABLE COURT
Johannesburg

AND TO: THE RESPONDENT
Cnr Vereeniging & Andre Marais Streets
Alrode
Gauteng
C/O: WERKSMANS ATTORNEYS
155 5th Street
Sandton
Email: elevenstein@werksmans.com / lbecker@werksmans.com
Ref: E Levenstein/L Becker/lb/AIRL26674.3

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

Case number:

In the matter of :

PIERS MICHAEL MARSDEN N.O.

FIRST APPLICANT

DANIEL TERBLANCHE N.O.

SECOND APPLICANT

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

and

AIR LIQUIDE PROPRIETARY LIMITED

RESPONDENT

FOUNDING AFFIDAVIT

I, the undersigned,

PIERS MICHAEL MARSDEN,

do hereby make oath and state that:

FIRST APPLICANT

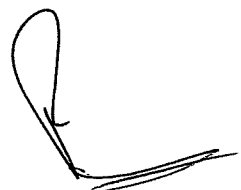
1. I am a major male practising as a business rescue practitioner at Matuson & Associates (Pty) Limited at Ninth Street, Melrose Estate, Johannesburg. I am the first applicant herein.



2. I am cited herein in my capacity as the joint business rescue practitioner of Evraz Highveld Steel and Vanadium Limited (in business rescue) ("Evraz"). Evraz is a company duly registered and incorporated with limited liability in accordance with the company laws of the Republic of South Africa with its registered office at Old Pretoria Road, Portion 93 of the Farm Schoongezicht 308, JS, eMalahleni. I attach hereto, marked "FA1", a copy of the notice of appointment filed with the Companies and Intellectual Property Commission of South Africa ("CIPC") on 15 April 2015.
3. The facts deposed to in this affidavit are within my personal knowledge, save where the context indicates to the contrary, and are furthermore to the best of my belief true and correct.
4. My co-business rescue practitioner, the second applicant, supports the relief sought herein and has authorised me to institute these proceedings on his behalf. In this regard, I refer to the confirmatory affidavit of the second applicant filed herein.

SECOND APPLICANT

5. The second applicant is Daniel Terblanche an adult male practising as a business rescue practitioner at Deloitte & Touche (Pty) Limited at 3rd Floor, The Square, Cape Quarter, 27 Somerset Road, Green Point, Western Cape.
6. The second applicant is cited herein as the joint business rescue practitioner of Evraz. I attach hereto, marked "FA2", a copy of the notice of appointment filed with CIPC on 15 April 2016.
7. I shall hereafter refer to myself and the second applicant as "the practitioners".



THE RESPONDENT

8. The respondent is Air Liquide (Pty) Limited, a company duly registered and incorporated with limited liability in terms of the company laws of South Africa with its registered address at corner Vereeniging and Andre Marais Streets, Alrode, Gauteng, within the area of jurisdiction of this Honourable Court.

THIS APPLICATION

9. This is an application in terms of which the practitioners seek, *inter alia*, the following relief:

9.1. the cancellation, in accordance with the provisions of section 136(2)(b) of the Companies Act, 71 of 2008 ("the Companies Act"), of certain contractual obligations of Evraz arising under a written supply agreement concluded between Evraz and the respondent on or about 7 December 2011, as amended on 9 October 2012 ("the supply agreement");

9.2. a declarator that:

9.2.1. the practitioners' suspension, in accordance with the provisions of section 136(2)(a) of the Companies Act, of certain of Evraz's contractual obligations in terms of the supply agreement is valid; and

9.2.2. any claim for damages that the respondent may assert pursuant to the aforesaid suspension and/or cancellation:

9.2.2.1. will not constitute a cost of business rescue or post-commencement finance ("PCF");



9.2.2.2. will constitute a concurrent claim; and

9.2.2.3. will be limited as set out herein.

BACKGROUND

10. Evraz's business consists of the production of iron and steel products as well as vanadium bearing slag.
11. Evraz purchased magnetite iron ore from its subsidiary, Mapochs Mine Proprietary Limited ("Mapochs"), for the processing and production of iron. The vanadium slag is a by-product from the iron production process.
12. Evraz accordingly has separate plants for the various stages of production of iron, steel and vanadium bearing slag as well as rolling mills for flat and structural products.

THE BUSINESS RESCUE PROCEEDINGS

13. Evraz suffered financial losses for several years. Its poor financial performance was attributable to, *inter alia*:
 - 13.1. historical operational difficulties and sustained financial losses within a capital constrained operating environment;
 - 13.2. weakened global steel and vanadium markets; and
 - 13.3. the reduction of domestic steel demand.
14. Notwithstanding management's attempts to improve Evraz's position through the implementation of a turnaround plan during November 2014, Evraz did not have



sufficient funds to meet its financial obligations in the short term to complete the implementation of the turnaround plan.

15. On 13 April 2015, and as a consequence of the aforesaid lack of funding, Evraz was placed in business rescue pursuant to the filing of a resolution in terms of section 129 of the Companies Act. I attach hereto, marked "FA3", a copy of the resolution.
16. On 20 April 2015, and as a consequence of, *inter alia*, Evraz's business rescue, Mapochs was placed in business rescue pursuant to the filing of a resolution in terms of section 129 of the Companies Act.

The Business Rescue Plan

17. On 13 October 2015, the business rescue plan in respect of Evraz, as amended, was adopted in terms of section 152 of the Companies Act ("the plan"). I attach hereto, marked "FA4", a copy of the plan, presentation used at the meeting convened in terms of section 151 of the Companies Act and the update report reflecting the amendments to the plan.
18. The plan provides for the following three proposals to rescue Evraz, as contemplated in section 128 of the Companies Act:
- 18.1. Proposal 1: the purchase of Evraz's shares by International Resources Project Limited ("IRPL") through a scheme of arrangement;
- 18.2. Proposal 2: the sale of Evraz's business as a going concern to IRPL in the event of the scheme being unsuccessful; and



18.3. Proposal 3: the wind-down of Evraz in the event of the aforesaid proposals (i.e. Proposals 1 and 2) by IRPL ("the proposed transaction") failing for any reason, or no acceptable alternative proposal on similar terms being made.

19. The proposed transaction was subject to the fulfilment of various suspensive conditions on or before 31 January 2016. One of the suspensive conditions included the cancellation, modification or restructuring of various contracts, including the supply agreement concluded with the respondent.

20. Due to Evraz's rescue as a going concern (i.e. through the implementation of the proposed transaction) depending on the continuation of Mapochs, IRPL also submitted an offer to Mapochs' business rescue practitioners. The offer was ultimately accepted upon the adoption of Mapochs' business rescue plan on 30 November 2016. On 2 December 2015 Mapochs' business rescue proceedings ended.

21. Notwithstanding the aforesaid, the proposed transaction failed for lack of fulfilment of the suspensive conditions by 31 January 2016.

THE CURRENT POSITION

22. The practitioners are accordingly proceeding in terms of proposal 3 of the plan, being the wind-down of Evraz.

23. The failure of the proposed transaction had a devastating impact on Evraz, Mapochs and their respective employees, contractors, customers and the local communities of eMalahleni and Roossenekal.



24. In this regard:

24.1. Evraz:

24.1.1. was the cornerstone employer of the eMalahleni area as well as the town of Roossenekal over the past 50 years. Highveld employed approximately 3700 employees comprising 2300 permanent employees and 1400 contractors. All of these employees were retrenched (and still await payment of their unpaid salaries and severance pay) and the contractors lost their contracts; and

24.1.2. spent approximately R788 million during 2014 on the eMalahleni community. This funding has ceased. Numerous small to medium enterprises relied either directly or indirectly on Evraz as a source of income, which income has now ceased.

24.2. Mapochs:

24.2.1. was a major employer in the Roossenekal area and spent approximately R297 million during 2014 on community development;

24.2.2. enforced 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. It supported approximately 600 businesses in the eMalahleni and Roossenekal area;



24.2.3. provided critical ongoing support to the local municipality which included the supply of potable water; and

24.2.4. was placed in provisional liquidation on 17 May 2016 resulting in the suspension of employees' contracts and cessation of support to the local community.

25. These devastating consequences impacted on approximately 20 000 people.

26. In addition, the Industrial Development Corporation of South Africa Limited ("the IDC") proceeded to perfect its general notarial bond in accordance with the provisions of the PCF agreement concluded between Evraz and the IDC during the business rescue proceedings.

27. Pursuant to the aforesaid perfection, and in accordance with the terms of the order granted by the Honourable Court, an agreement was concluded between Evraz and the IDC regarding the sale of Evraz's assets in terms of the wind-down plan.

THE CREDITORS' MEETINGS AND PROPOSED WIND-DOWN PLAN

28. Over and above the practitioners' obligation to convene the first meeting of creditors as contemplated in section 147 of the Companies Act, the practitioners convened further meetings of affected persons to ensure that affected persons remained fully informed of the business rescue proceedings.

29. For the purpose of this application, I will deal specifically with the meetings held on 17 March 2016 ("the March meeting") and 11 July 2016 ("the July meeting"). Copies of the presentations to the March meeting and the July meeting are attached hereto, marked "FA5" and marked "FA6" respectively.



30. As will be noted from annexure FA5, affected persons were advised, *inter alia*, of:

30.1. the failure of the proposed transaction by virtue of the non-timeous fulfilment of the last two remaining suspensive conditions, being Competition Commission approval and an agreement being reached with the Department of Environmental Affairs on a remedial action plan (slide 6);

30.2. the actions taken by the practitioners since the adoption of the plan (slides 7 to 9);

30.3. Evraz having commenced identifying agreements that require cancellation, which the practitioners will first attempt to cancel by way of agreement, failing which, application to Court (slide 7);

30.4. the proposed way forward in terms of proposal 3, being the wind-down plan (slides 9 to 12); and

30.5. the cash flow forecast and holding costs (slides 13 to 15).

31. As will be noted from the wind-down plan, Evraz's assets have been categorised into three classes and will be sold over a period of three years in order to maximise the proceeds and return to creditors.

32. Evraz will incur monthly holding costs, which are anticipated to average R12.5 million a month during the first year and total R443 million over the three year period.

33. In addition to these holding costs, Evraz is required to make payment to:

33.1. employees for unpaid salaries and retrenchment related claims, which exceed R328 million; and



33.2. the IDC as repayment for the PCF, which exceeds R150 million.

34. Annexure FA6 provides for further details relating to the aforesaid amounts, an update in regard to the wind-down process and confirmation that cancellation applications would be instituted to reduce ongoing obligations.

35. The cash flow forecast, projected monthly holding costs and ultimate payment to employees and creditors inevitably depend on the ability to reduce all unnecessary costs and limit possible damages claims against Evraz.

○ 36. The practitioners accordingly identified various contracts in terms of which unnecessary and/or onerous obligations, in particular fixed costs obligations imposed on Evraz and proceeded to engage with the relevant contracting parties to reduce the unnecessary and/or onerous costs to Evraz.

37. Two significant monthly fixed costs were in respect of:

37.1. the electricity supply agreement concluded with Eskom; and

37.2. the supply agreement with the respondent.

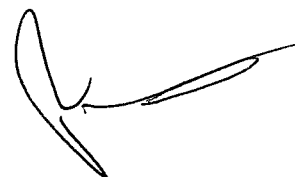
○ 38. Given the national importance of ensuring the successful business rescue of Evraz, as well as the devastating impact of the business rescue on affected persons, Eskom agreed to a reduction of Evraz's nominated maximum demand which resulted in the saving of a fixed cost of over R5 million a month.

39. The respondent, however, has been unwilling to assist the practitioners in their attempts to reduce the fixed costs associated with the supply agreement, which is dealt with further below.



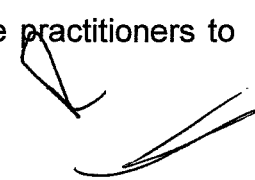
THE SUPPLY AGREEMENT CONCLUDED BETWEEN EVRAZ AND THE RESPONDENT

40. Prior to the cessation of production, Evraz required the supply of oxygen, nitrogen and argon ("product") in order to conduct the operations at its plants.
41. On 7 December 2011, Evraz and the respondent concluded the supply agreement. A copy of the supply agreement is attached hereto, marked "FA7".
42. In terms of the supply agreement, *inter alia*:
- 42.1. Evraz would provide the facility site for the purposes of the construction and operation of the facility from which the respondent would operate on Evraz's premises ("the facility") (clause 6);
- 42.2. Evraz would supply the utilities required by the respondent to operate the facility (clause 13.2 and clause 13.3); and
- 42.3. the respondent would supply the product to Evraz (clause 9).
43. In regard to the respondent's supply of the product, clause 9.2 of the supply agreement provides as follows:
- "...[Evraz] shall take from the... [respondent] the Products and shall pay the Price for the... [minimum product purchase obligation], regardless of whether or not... [Evraz] actually receives or requires such Product".*
44. The aforesaid clause is commonly referred to as the "take or pay" clause. The effect of same is a minimum monthly purchase obligation for product, irrespective of whether or not it is actually received, consumed or required.



45. As at the date of Evraz's business rescue, this minimum product purchase obligation equated to over R6 million a month.
46. In addition, Evraz is obliged to pay a monthly fee in terms of clause 14 of the supply agreement. As at the date of Evraz's business rescue, this monthly fee equated to over R1.3 million a month.

THE SUSPENSION OF EVRAZ'S OBLIGATIONS IN TERMS OF SECTION 136(2)(a) OF THE COMPANIES ACT

- 47. Evraz ceased production at its plants during July 2015. This was necessitated by severe working capital constraints and poor market conditions.
48. Evraz accordingly did not require or consume the same quantities of product from the respondent.
49. In light of Evraz's parlous financial position, the cessation of production in July 2015 and the consequent reduction in Evraz's requirement for the product, the practitioners had no option but to suspend Evraz's obligations in terms of section 136(2) of the Companies Act to pay the minimum fee associated with the take or pay in terms of the supply agreement.
- 50. Various meetings were held between the practitioners and representatives of the respondent during which the supply agreement was discussed and the practitioners advised of the suspension of Evraz's obligations to pay the fixed fees provided for in the supply agreement in accordance with the provisions of section 136(2) of the Companies Act.
51. The suspension of the minimum product purchase obligation was further confirmed in a letter addressed by the attorneys representing Evraz and the practitioners to
- 

the respondent's attorneys on 2 October 2015. I attach hereto, marked "FA8", a copy of the letter which states as follows:

- "1. *We refer to our previous meetings and discussions regarding clause 9 of the supply agreement concluded between our clients.*
2. *As previously advised, our clients have elected in terms of s136 of the Companies Act... to suspend Evraz's obligation in terms of the supply agreement to pay for product that it does not take, receive or require from your client".*

52. The practitioners' suspension of Evraz's obligation to pay the monthly fee was confirmed in a letter dated 15 July 2016. I attach hereto, marked "FA9", a copy of the letter.

53. I attach hereto, marked "FA10", certain correspondence exchanged subsequent to the aforesaid suspensions in terms of which the respondent disputed the practitioners':

53.1. suspensions; and

53.2. limitation and treatment of the damages claim as a concurrent damages claim as opposed to a PCF claim or cost of business rescue claim.

54. At the time of the suspension of the take or pay obligation, the practitioners were still intending to proceed in terms of the proposed transaction contemplated in the plan. As set out above, one of the suspensive conditions of the proposed transaction was the cancellation, modification or restructuring of various contracts, including the supply agreement concluded with the respondent.

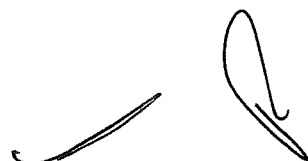


55. The practitioners attempted to assist the respondent through facilitating negotiations between the respondent and IRPL for the continued supply of product on "modified" or "restructured" terms in the event of the proposed transaction being implemented.
56. It was accordingly not necessary at the time for the practitioners to apply to Court to cancel Evraz's obligations in terms of the supply agreement as the intention was for Evraz to resume production and for the supply agreement to be amended in accordance with terms to be agreed upon between the respondent and IRPL.

THE PRACTITIONERS' ATTEMPTS TO CONSENSUALLY CANCEL EVRAZ'S OBLIGATIONS IN TERMS OF THE SUPPLY AGREEMENT

57. By virtue of the proposed transaction failing on 31 January 2016 and the practitioners having to proceed in terms of proposal 3 of the plan, the practitioners had to reconsider all of Evraz's obligations in terms of its existing contracts with third parties, including the supply agreement with the respondent.
58. In terms of the plan, paragraph 24 deals with the effect of the plan on creditors. In particular, paragraph 24.1 deals with contracts and provides as follows:
- "... In the event that the Business Rescue proceeds in terms of the 3rd Proposal, there will be no continuation of the Business and no continuation of Contracts, save for those Contracts which may be assigned".*
59. There is no prospect of the supply agreement being assigned. The practitioners accordingly had to proceed with seeking the cancellation of the supply agreement.
60. As set out above, the supply agreement provides for the supply of:

60.1. product by the respondent to Evraz; and



60.2. utilities by Evraz to the respondent.

61. In regard to the supply of utilities, numerous meetings were held and correspondence exchanged throughout the business rescue proceedings relating to the continuous supply of utilities. These meetings and correspondence were mainly necessitated by Evraz's inability to timeously pay its electricity consumption to Eskom and the consequent receipt of termination notices from Eskom.
62. The supply of utilities is crucial to the respondent, however, Evraz could not fund the costs associated with supplying same to the respondent. In this regard, although the respondent pays for its actual consumption of electricity and water, the respondent makes use of Evraz's water and electricity infrastructures and Evraz has to dedicate personnel to ensure that same are maintained and operated properly.
63. The practitioners accordingly advised the respondent, *inter alia*, that:
- 63.1. Evraz was no longer in a position to fund the supply of utilities to the respondent given Evraz's parlous financial position and retrenchment of all of its employees, who would have to be contracted to conduct the required maintenance and operations to ensure supply to the respondent; and
- 63.2. a new agreement should be concluded between Evraz and the respondent regulating the continuous supply of utilities.
64. On 26 February 2016, the first draft of the interim agreement was circulated to the respondent. The first draft included the supply of utilities to both the respondent and another third party, namely African Oxygen Limited ("Afrox"). Upon the request



of the respondent, however, separate interim agreements were prepared and circulated for comment on 9 March 2016.

65. The revised draft interim agreement provided for the termination of the supply agreement and the regulation of the supply of utilities to the respondent.
66. The respondent disputed the inclusion of the clause recording the termination of the supply agreement. This became a contentious issue between the parties and resulted in subsequent correspondence and meetings being held to resolve the issue.
67. The reasons for the proposed termination of the supply agreement were communicated to the respondent on numerous occasions. In this regard, Evraz was not in a position to continue with the supply agreement by virtue of:
- 67.1. the business rescue proceeding in terms of proposal 3 and the fact that there would be no continuation of contracts;
 - 67.2. the accrual of the monthly damages associated with the suspension of the fixed costs provided for in the supply agreement;
 - 67.3. the dispute regarding the status of the aforesaid suspension and damages; and
 - 67.4. the costs associated with the supply of the utilities by Evraz to the respondent in circumstances where Evraz ceased operations and retrenched all of its employees.
68. Due to the financial position of Evraz and the delay in the finalisation of the interim agreement, the practitioners' attorneys advised the respondent's attorneys that the



practitioners would proceed to cancel Evraz's obligations to supply the utilities in terms of the supply agreement by way of application to Court should the interim agreement not be finalised by Friday, 29 April 2016. I attach hereto, marked "FA11" a copy of the email dated 13 April 2016.

69. The aforesaid email resulted in further correspondence being exchanged between the parties, pursuant to which the parties ultimately agreed to the following:

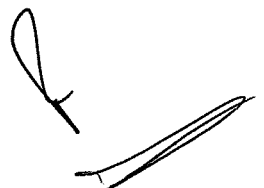
69.1. the practitioners would not suspend or cancel Evraz's obligation to supply the utilities to the respondent, on condition that the respondent agreed to pay a monthly costs contribution and signed an interim agreement regulating the supply of utilities to the respondent; and

69.2. the interim agreement would not provide for the termination of the supply agreement, however, the practitioners would reserve their rights to apply to court to cancel Evraz's obligations to pay the fixed fees provided for in the supply agreement.

70. The interim agreement was finally signed on 23 May 2016. I attach hereto, marked "FA12, a copy of the supply agreement.

THE CANCELLATION OF EVRAZ'S OBLIGATIONS IN TERMS OF S136(2)(b) OF THE COMPANIES ACT

71. In the light of the aforesaid, the practitioners have no option but to apply to this Honourable Court in terms of section 136(2)(b) of the Companies Act to cancel the obligations of Evraz to pay the following fixed fees in terms of the supply agreement:



71.1. to take from the respondent the product and pay the price for the minimum product purchase obligation regardless of whether or not Evraz actually receives or requires such product (clause 9); and

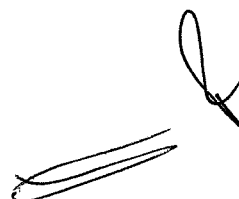
71.2. to pay the monthly fee (clause 14).

72. It is imperative that the practitioners immediately reduce the accrual of all unnecessary costs and damages claims. In this regard, the cancellation of Evraz's obligations in terms of the supply agreement will result in a significant reduction of accrued monthly damages claims. This saving will, in turn, facilitate the business rescue process in terms whereof the practitioners remain of the view that there is a reasonable prospect of a better return for Evraz's creditors than what would result from the immediate liquidation of Evraz, as envisaged in s128(1)(b)(iii) of the Companies Act.

73. Despite the plan confirming that there would be no continuation of contracts (which plan was voted in favour of by the respondent), as well as the practitioners' attempts to consensually cancel the supply agreement, the respondent has refused the cancellation for no justifiable reason.

74. I attach hereto, marked "**FA13**", schedules reflecting the product actually consumed by Evraz from October 2015 to February 2016. It will be noted from annexure FA13 that the highest monthly value of Evraz's actual consumption of product was approximately R206 000, which was consumed during the month of October 2015.

75. Since March 2016, Evraz has not consumed any product.



76. Evraz is further able to obtain the product from Afrox (also situated on Evraz's premises) and is likely to obtain the product at a better price from Afrox in the event of Evraz requiring low volumes of product during its business rescue.
77. In addition, and as will be dealt with separately below, the respondent not only disputes the validity of the suspension of Evraz's obligations but further alleges that any damages suffered by the respondent constitute a cost of business rescue or PCF as contemplated in section 135 of the Companies Act.
78. In the circumstances, it is inconceivable that the respondent expects Evraz, in its parlous financial position and in circumstances where it is no longer consuming any product and is winding-down in terms of the plan, to continue with a contract imposing fixed payment obligations exceeding R7 million a month and where there is uncertainty as to the status of any damages claims in terms of the supply agreement.
79. It appears that the respondent's primary motive for refusing to agree to the cancellation of the supply agreement (in circumstances where the interim agreement could have independently regulated the supply of utilities to the respondent) is to maximise its claim against Evraz PLC which issued a guarantee in favour of the respondent in respect of Evraz's obligations in terms of the supply agreement.
80. I attach hereto, marked "FA14", a copy of the guarantee in terms whereof it will be noted from clause 3.2 that Evraz PLC's liability in terms of the guarantee is limited in terms of damages but is not limited in terms of payments due by Evraz under, *inter alia*, clause 14 of the supply agreement.



81. It is accordingly submitted for the reasons set out herein that it is just and reasonable on the terms set out herein that all of Evraz's obligations, excluding the obligations relating to the supply of utilities, in terms of the supply agreement be cancelled, as contemplated in section 136(2)(b) of the Companies Act. In this regard, section 136(2)(b) of the Companies Act specifically makes provision for business rescue practitioners to apply to Court during business rescue proceedings for the cancellation of any obligations of the company under business rescue that arises under an agreement to which the company was a party at the commencement of business rescue proceedings.

DECLARATOR

82. As set out above, the respondent:

82.1. disputes the validity of the suspension of Evraz's obligations; and

82.2. contends that any damages claim pursuant to the suspension and/or any cancellation constitutes a cost of business rescue or PCF.

83. I deal separately below with the aforesaid.

Validity of the suspensions

84. I submit that section 136(2) of the Companies Act empowers the practitioners to suspend any provision of a contract to which Evraz was a party prior to the commencement of business rescue proceedings.

85. I further submit that section 136(2) of the Companies Act does not prescribe any formalities for the purpose of suspending an obligation as aforesaid.



86. The practitioners formally confirmed the suspension of Evraz's obligations in terms of the:

86.1. take or pay clause on 2 October 2015 (annexure FA8); and

86.2. monthly fee on 15 July 2016 (annexure FA9).

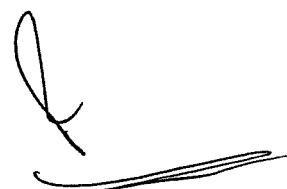
87. It is accordingly submitted that the aforesaid suspensions of obligations constitute valid suspensions of Evraz's respective obligations as contemplated in terms of section 136(2) of the Companies Act.

The purported damages claim

88. Section 136(3) of the Companies Act provides that any party to an agreement that has been suspended or cancelled in terms of section 136(2) may only assert a claim for damages against the company in business rescue.

89. It is submitted that such damages claim constitutes a concurrent damages claim as opposed to a cost of business rescue or PCF, as contemplated in section 135 of the Companies Act and as contended by the respondent. If the respondent's contention is correct, there would be no purpose in suspending or cancelling obligations of a company in business rescue.

90. It is further submitted that section 135 of the Companies Act deals with "*claims arising out of the costs of business rescue proceedings*" (i.e. for actual costs incurred by a company during its business rescue proceedings) as opposed to claims arising from damages suffered by a third party pursuant to a suspension or cancellation of obligations.



91. In the circumstances, any claim for damages that the respondent may assert pursuant to the suspension and/or cancellation in terms of this application would be a concurrent claim for damages and not a cost of business rescue or PCF.

Limitation of damages

92. The respondent contends that any claim for damages that it may have is unlimited.

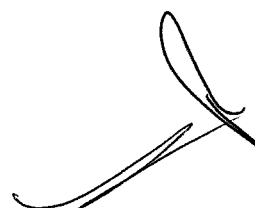
93. In its letter of 30 November 2015 (annexure FA10), the respondent contends that it:

93.1. has a claim in respect of the suspension (and/or cancellation) of the fixed monthly costs set out herein; and

93.2. a damages claim in the event of a cancellation of the supply agreement in an amount of not less than R1.4 billion.

94. In terms of the supply agreement, clause 20.12 provides as follows:

"Without limiting the provisions of clauses 14 and 16, each Party's liability to the other in respect of direct damages suffered by it and caused by the other Party, is limited to a maximum amount of R10,000,000 (ten million rand) in aggregate per year and R50,000,000 (fifty million rand) in aggregate for the duration of this Agreement. Beyond these maximum amounts, each Party waives any right of recourse against the other Party, its employees, agents and representatives and insurers and shall obtain an equivalent waiver by its insurers of its rights of subrogation with respect to its claims against the other Party".



95. Clause 14 deals with the price/amount, calculation and adjustment of the monthly fee and minimum product purchase obligation (i.e. the take or pay). Clause 16 deals with the availability of product.

96. In terms of the plan, and as already stated above, paragraph 24 deals with the effect of the plan on creditors. In particular:

96.1. Paragraph 24.1 is headed "Contracts" and provides as follows:

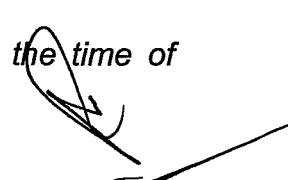
"... In the event that the Business Rescue proceeds in terms of the 3rd Proposal, there will be no continuation of the Business and no continuation of Contracts, save for those Contracts which may be assigned. Creditors' Claims for damages will be limited as contemplated in paragraph 24.2".

96.2. Paragraph 24.2 is headed "Damages" and provides as follows:

"24.2. In the event that Creditors claim damages, whether contractual or delictual, against the Company, which damages Claim is accepted by the BRPs or proved by way of the Dispute Mechanism or by Court or similar proceedings, such damages Claims:

24.2.1. shall be a concurrent Claim, unless the Creditor holds security for such claim;

24.2.2. will be deemed to be limited to general damages suffered over the lesser of 6 (six) months from the date on which the alleged damages Claim arose or the balance of the Contract duration. For purposes hereof, general damages are those which, on an objective basis, would be reasonably foreseeable at the time of



entering into the relevant Contract as a probable consequence of, and with a sufficiently close connection to, any breach by the Company of such Contract so as to be said to flow naturally and generally and not to be too remote;

24.2.3. *will be deemed to exclude all consequential (including loss of profit) and indirect damages; and*

24.2.4. *if disputed, will be resolved in terms of the Dispute Mechanism, detailed in paragraph 38".*

97. In the circumstances, the respondent's damages are limited to the lesser of:

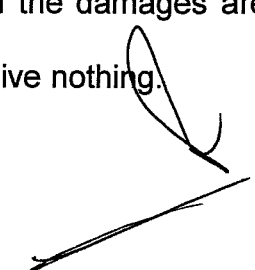
97.1. R10,000,000 (ten million rand) in aggregate per year and R50,000,000 (fifty million rand) in aggregate for the duration of the supply agreement; or

97.2. the general damages suffered over the lesser of 6 (six) months from the date on which the alleged damages Claim arose or the balance of the Contract duration and as further provided for in paragraph 24.2 of the plan.

98. The limitations in the supply agreement are clear and apply in this instance.

99. In addition, irrespective of the respondent's reservation in regard to the treatment of damages in the plan (annexure FA10), the provisions of the plan are binding on the respondent, who voted in favour of the plan.

100. It would be detrimental to all affected persons if the respondent's damages are not limited as provided for herein. In this regard, and particularly if the damages are classified as a cost of business rescue, affected persons will receive nothing.



101. It is accordingly submitted for the reasons set out herein that the respondent's right to claim damages is limited in terms of the provisions of the supply agreement as well as the adopted plan.

DISPUTE RESOLUTION PROCESS AND INSTITUTION OF PROCEEDINGS

102. Paragraph 38 of the plan deals with the dispute resolution mechanism in the event of a dispute arising in respect of creditors' claims and provides as follows:

"38.4. The BRPs may in their sole and absolute discretion decide that the dispute mechanism is not appropriate for resolving the dispute and/or that the application of the dispute mechanism may result in prejudice to other Creditors or employees or the Company. In such event, the Creditor or Employee concerned shall be entitled in terms of 133 of the Companies Act to refer the dispute to Court and if an expert has already been nominated, such nomination shall lapse and be of no further force or effect."

103. The respondent proposed the dispute resolution process to resolve the issues of the validity of the suspension and the status of the damages claim. I attach hereto, marked "FA15", a copy of a letter from the respondent's attorneys dated 8 June 2016.

104. The practitioners are of the opinion that the aforesaid dispute mechanism is not appropriate for resolving all of the issues between the parties for the following, *inter alia*, reasons:

- 104.1. the practitioners require the cancellation of the supply agreement. Only the Court is empowered to cancel the supply agreement in terms of section 136 of the Companies Act;



104.2. the issues regarding the suspension and treatment of damages claims requires clarity in our law; and

104.3. it would be an unnecessary incurrence of costs in running two parallel legal proceedings to resolve related issues.

105. The practitioners exercised their discretion provided in paragraph 38.4 of the plan and advised the respondent that this application would be instituted to resolve all of the issues. I attach hereto, marked "FA16", a copy of the email dated 15 July 2016.

SERVICE OF THIS APPLICATION

106. In terms of the Companies Act, the practitioners are required to give notice of each court proceeding to affected persons, being:

106.1. every registered trade union representing any employees of Evraz and any employee who is not so represented (s144(3));

106.2. creditors (s145(1)); and

106.3. shareholders (s146(a)).

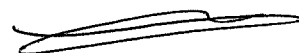
107. The practitioners will ensure that the aforesaid notice is furnished to affected persons and that a copy of this application is served on the respondent.

CONCLUSION

108. In all of the circumstances, the practitioners pray for an order in terms of the notice of motion to which this affidavit is attached.



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 August 2016.



COMMISSIONER OF OATHS

COMMISSIONER OF OATHS

Lisa Nichoile Metzger - Admitted Attorney (RSA)
One on Ninth, First Floor, Corner of
Glenhove Road & Tottenham Avenue
Rosebank, Johannesburg, South Africa, 2196
Main line: +27 (0) 11 684 9000
Facsimile: +27 (0) 11 696 6350



Companies and Intellectual Property Commission
Republic of South Africa

Notice of Appointment of Business Rescue Practitioner

Date: 14 April 2015
Customer Code: BQWMC7

Form CoR 123.2

About this Form

- This form is issued in terms of section 129 and 131 of the Companies Act, 2008, and Regulation 123 of the Companies Regulations, 2011.
- This notice must be published to every affected person within:
 - (a) 2 business days after it has been filed, if the company appointed the Practitioner; or
 - (b) 5 business days after the court order, in such a case.
- If this notice is issued following a company appointment, any affected person may apply to a court in terms of section 130 for an order setting aside the appointment, or requiring the practitioner to provide security.
- The fee for filing this Notice is R0.

Concerning

(Name and Registration Number of Company)

Name: EVRAZ HIGHVELD STEEL AND VANADIUM LIMITED

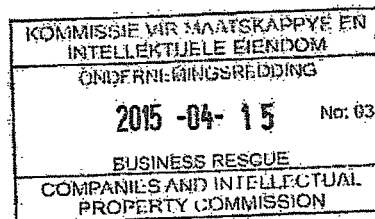
Registration No: 1960/001900/06

The above named company commenced business rescue proceedings on 13 April 2015.

The following person has been appointed as the business rescue practitioner:
Piers Marsden.

☒ By the company, in terms of section 129(3)(b).

☐ By the court, in terms of section 131(5).



Contacting the Commission

The Companies and Intellectual Property Commission of South Africa

Postal Address
PO Box 429
Pretoria
0001
Republic of South Africa
Tel: 086 100 2472

www.cipc.co.za

Name and Title of person signing on behalf of the Company:

J. J. Burger
Authorised Signature: DIRECTOR

This form is prescribed by the Minister of Trade and Industry in terms of section 223 of the Companies Act, 2008 (Act No. 71 of 2008).

Companies and Intellectual Property Commission
Republic of South Africa

Notice of Appointment of Business Rescue Practitioner

Date: 14 April 2015
Customer Code: BQWMCT

Form CoR 123.2

About this Form

- This form is issued in terms of section 129 and 131 of the Companies Act, 2008, and Regulation 123 of the Companies Regulations, 2011.
- This notice must be published to every affected person within --
 - (a) 2 business days after it has filed, if the company appointed the Practitioner, or
 - (b) 5 business days after the court order, in each case.
- If this notice is issued following a company appointment, any affected person may apply to a court in terms of section 130 for an order setting aside the appointment, or requiring the practitioner to provide security.
- The fee for filing this Notice is R0.

Concerning

(Name and Registration Number of Company)

Name: EVRAZ HIGHVELD STEEL AND VANADIUM LIMITED

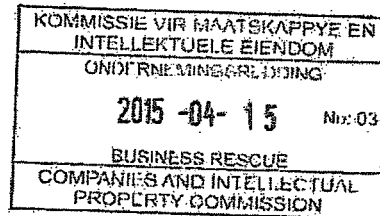
Registration No: 1960/001800/06

The above named company commenced business rescue proceedings on 13 April 2015.

The following person has been appointed as the business rescue practitioner:
Daniel Terblanche.

☒ By the company, in terms of section 129(3)(b).

☐ By the court, in terms of section 131(5).



Contacting the Commission

The Companies and Intellectual Property Commission of South Africa

Postal Address
PO Box 428
Pretoria
0001
Republic of South Africa
Tel: 085 100 2472

www.cipc.co.za

Name and Title of person signing on behalf of the Company:

Authorised Signature:

This form is prescribed by the Minister of Trade and Industry in terms of section 223 of the Companies Act, 2008 (Act No. 71 of 2008).

111124439

Companies and Intellectual Property Commission
Republic of South Africa

Notice of Beginning of Business Rescue Proceedings

Form CoR 123.1

About this Form

- This form is issued in terms of section 129 and 131 of the Companies Act, 2008, and Regulation 123 of the Companies Regulations, 2011.
- A company resolution to commence business rescue proceedings has no force or effect until it has been filed with this notice.
- This notice must be published to every affected person within 5 business days after:
 - (a) it has been filed, in the case of a resolution; or
 - (b) the date of the court order, in such a case.
- If this notice is issued following a board resolution:
 - (a) the company must appoint a business rescue practitioner within 5 business days after filing this notice; and
 - (b) any affected person may apply to a court in terms of section 130 for an order setting aside the resolution.
- The fee for filing this notice is R0.

Contacting the Commission

The Companies and Intellectual Property Commission of South Africa

Postal Address
PO Box 429
Pretoria
0001
Republic of South Africa
Tel: 086 100 2472
www.cipc.co.za

Date: 13 April 2015
Customer Code: BOWMCT

Concerning

(Name and Registration Number of Company)

Name: EVRAZ HIGHVELD STEEL AND VANADIUM LIMITED

Registration number: 1990/001800/06

The above named company advises that business rescue proceedings have commenced in terms of Chapter 6 of the Companies Act, as a result of:

☒ The Board of the company having adopted the attached resolution in terms of section 129, on 13 April 2015.

☐ A court having made the attached order in terms of section 131, on

In terms of section 132(1)(a), the company's business rescue proceedings commenced on 13 April 2015, being the date on which:

☒ This notice was filed with the Commission.

☐ The court issued the attached order.

(Only in the case of a company resolution)

In support of this Notice, the company has attached a sworn statement of the relevant facts upon which the resolution was founded by a director representing the Board.

KOMMISSIE VIR MAATSKAPPE EN INTELLEKTUELE EIENDOMME	
ONDERNEEMERSKAP	
2015-04-13	Nr. 01
BUSINESS RESCUE	
COMPANIE SAAN INTELLEKTUELE PROPERTEIT KAN HAD	

Name and Title of person signing on behalf of the Company:

Authorised Signature:

I. S. Burger (Director)

**MINUTES OF A MEETING OF THE DIRECTORS OF EVRAZ HIGHVELD STEEL AND
VANADIUM LIMITED**

**REGISTRATION NUMBER 1960/001900/06 (the Company) HELD ON 13 APRIL 2015 AT
SANDTON**

PRESENT: Mr B Petersen (Chairman)
Mr M Bhabha
Mr T Mosoloi
Mr AP Maralack
Mr IJ Burger (Chief Executive Officer)

TELECONFERENCE: Mr T Yanbukhtin
Mr P Tatyarin
Mr D Scuka
Mr V Borisov

IN ATTENDANCE: Ms A Weststrate (Company Secretary)

BY INVITATION: Mr Dmitriy Melnikov (EVRAZ plc)
Ms C van Zuylen (Legal representative from Bowman
Gilfillan)
Mr C Douglas (Legal representative from Bowman Gilfillan)
Mr J Jones (Cliffe Decker Hofmeyer attorneys)

NOTICE AND CONSTITUTION:

There being a majority of directors present and notice to all directors having been given in terms of clause 5.1 and 5.2 of schedule 2 of the Company's Memorandum of Incorporation and section 73(5)(a) of the Companies Act, 2008 (the Companies Act), the Chairman declared the meeting to have been properly convened and constituted.

The following resolutions were then passed, with each resolution being dated 13 April 2015, and each resolution being sequentially numbered in the order it was passed:

Evraz Highveld Steel and Vanadium Limited
Registration No.: 1960/001900/06, incorporated in the Republic of South Africa
Certified in accordance with the requirements of DIN EN ISO 9001:2008 and DIN EN ISO 14001:2004 Quality and Environmental Management Systems
P.O. Box 111, Wilbank 1035, Tel: +27 (0) 13 690 9911, Fax: +27 (0) 13 690 9293, www.evrazhighveld.co.za, general@evrazhighveld.co.za
DIRECTORS: B Petersen (Chairman), IJ Burger (Chief Executive Officer), M Bhabha
V Borisov (Russian), A P Maralack, T Mosoloi, D Scuka (Czech), P S Tatyarin (Russian)

COMPANY SECRETARY: Ms A Weststrate

INTELLIGENCE DIVISION	
2015-04-13	
COMPANIES AND CORPORATE PROPERTY DIVISION	

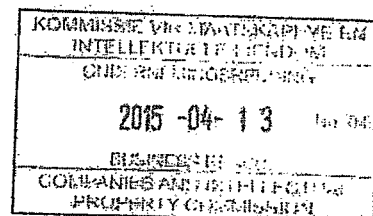
RESOLUTIONS:

1. **RESOLVED THAT** the Company voluntarily begins business rescue proceedings and the Company is placed under supervision in terms of section 129(1) of the Companies Act 71 of 2008, it being recorded that the board has reasonable grounds to believe that:
 - 1.1 the Company is in financial distress in that it is reasonably unlikely to be able to pay its debts as and when they become due within the immediately ensuing six months; and
 - 1.2 there appears to be a reasonable prospect of rescuing the Company.
2. **RESOLVED THAT** Daniel Terblanche and Piers Marsden be and are hereby appointed as the joint business rescue practitioners of the Company.
3. **RESOLVED THAT** Izak Johannes Burger (and any other director of the Company) be and is hereby authorised on behalf of the Company, to do or cause to be done, all such things, and sign, and cause to be signed, all such documentation, as may be necessary or desirable to give effect to the foregoing, and insofar as any director has done any of the foregoing prior to the passing of this resolution, such action be and is hereby ratified and approved.

There being no further business the meeting was closed.


CHAIRPERSON

Barend Petersen



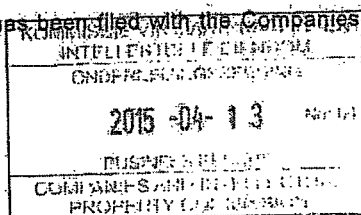
SWORN AFFIDAVIT IN TERMS OF SECTION 129(3)(a) OF THE COMPANIES ACT 71 OF 2008 (as amended) IN RELATION TO THE BUSINESS RESCUE PROCEEDINGS OF EVRAZ HIGHVELD STEEL AND VANADIUM LIMITED

I, the undersigned,

IZAK JOHANNES BURGER
(ID number: 610910 5105 087)

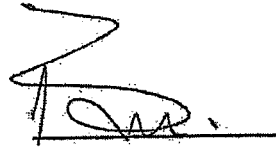
do hereby state under oath as follows:-

1. I am a director of EVRAZ HIGHVELD STEEL AND VANADIUM LIMITED, registration number: 1960/001900/06 (the Company). The Company runs its operations from Old Pretoria Road, Portion 93 of the Farm Schoongezicht No. 308 JS, eMalaheni (Witbank), Mpumalanga.
2. Save where the contrary is stated or appears from the context, the facts to which I depose in this affidavit are within my personal knowledge and are to the best of my belief both true and correct.
3. On 13 April 2015, the board of directors of the Company adopted a resolution, *inter alia*, for the Company to voluntarily begin business rescue proceedings and place itself under supervision. As appears from the resolution, I am authorized to represent the Company and sign all required documents to give effect to the business rescue resolution.
4. I make this affidavit setting out the facts relevant to the grounds on which the business rescue resolution was founded -
 - 4.1 The Company does not have adequate funding to meet its obligations for the short term. This is primarily as a result of historical operational difficulties and sustained financial losses within a capital constrained operating environment. This is despite the current operational stability achieved through the recent implementation of the Company's operational turnaround plan.
 - 4.2 The Company's financial position has further been negatively impacted by weakened global steel and vanadium markets and a severe reduction of domestic steel demand.
 - 4.3 The Board has accordingly resolved that it will be in the best interest of The Company and its stakeholders to commence with voluntary business rescue proceedings in terms of section 129 of the Companies Act, 2008 (as amended). The resolution to this effect has been filed with the Companies and Intellectual



Property Commission.

5. In light of the above, the Company is reasonably unlikely to be able to pay its debts that are due and payable within the ensuing six months.
6. Accordingly, the Company resolved that the business is in financial distress and to consider what options are open to it. The Board has decided that voluntary business rescue is in the best interest of the Company as it will allow for the following:
- 6.1.1 the Board believes that implementation of voluntary business rescue will afford the business practitioner the opportunity to consider the continued implementation of the operational turnaround plan and successfully re-establish the Company;
- 6.1.2 a better return for the creditors of the Company than would be achieved in a liquidation of the Company;
- 6.1.3 the collection of the all debts owed to the Company in the ordinary course (whilst under business rescue proceedings); and
- 6.1.4 the possibility of selling the Company or its assets as a going concern – again achieving a better outcome for the Company's creditors.
7. The Company is not currently involved in any litigation.



IZAK JOHANNES BURGER

I certify that this affidavit was signed and sworn to before me at JOHANNESBURG on this the 13th day of APRIL 2015; the deponent who acknowledged that HE knew and understood the content of this affidavit, had objection to taking this oath, considered this oath to be binding on her conscience and who uttered the following word: "I swear that the content of this affidavit are true, so help me God".

Sanofon on 2015-04-13 at 22:110

270624-3

(Mandekenin) COMMISSARIS VAN EDE
(Signature) COMMISSIONER OF OATHS

Mmoloki Batlang

FULL FIRST NAMES AND SURNAME IN BLOCK LETTERS

170 2 Summit Road

RES. PRE. ADRES (STREET ADDRESS)
BUSINESS ADDRESS (STREET ADDRESS)

MORNINGSIDOE

C85

CLIENT SERVICES CENTRE

13 APR 2015

RECEIVED

NOUMINIE VIR LAKSAPPE EN
INTELLIGENTIELE EIGENDOM
OOR-REGERINGSREKING

2015-04-13 No. 01

BUSINESS INQUIRY
COMPANIES AND INTL. F. I. C.
PROPERTY COMMISSION