

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

CASE NO:

In the matter between:

GLOBAL RENEWABLE ENERGY LIMITED

Applicant

And

PIERS MICHAEL MARSDEN N.O.

First Respondent

(in his capacity as the duly appointed joint business rescue practitioner of EVRAZ HIGHVELD STEEL AND VANADIUM LIMITED (Registration No. 1960/001900/06)

DANIEL TERBLANCHE N.O.

Second Respondent

(in his capacity as the duly appointed joint business rescue practitioner of EVRAZ HIGHVELD STEEL AND VANADIUM LIMITED (Registration No. 1960/001900/06)

EVRAZ HIGHVELD STEEL AND VANADIUM LIMITED Third Respondent

NOTICE OF MOTION

BE PLEASED TO TAKE NOTICE that **GLOBAL RENEWABLE ENERGY LIMITED** ("the applicant") will make application to the above Honourable Court at 10h00 on Friday 25 September 2015 for an order in the following terms:

- (a) Dispensing with the forms and service provided for in the Uniform Rules pursuant to the provisions of Rule 6(12)(a) and that the matter be dealt with on an urgent basis.
- (b) Interdicting and restraining the respondents from proceeding with the meeting

of creditors of Evraz Highveld Steel and Vanadium Limited ("Highveld") called for 10h00 on Monday 28 September 2015 for the purposes of considering a proposed business rescue plan pursuant to the provisions of section 151(1) of the Companies Act 71 of 2008 ("the Act").

- (c) Alternatively to (a) above interdicting and restraining the respondents from introducing the proposed business rescue plan for consideration by creditors in accordance with section 152(1)(a) of the Act.
- (d) Further alternatively to postpone the meeting of creditors called in accordance with section 151(1) of the Act for the purposes of considering the proposed business rescue plan for a period of 3 (three) weeks.
- (e) That the relief sought in paragraphs (a) and (b) above operate as an interim interdict pending the full disclosure to the creditors of Highveld of the final and binding offer made by the applicant to Highveld as contained in annexure "ER23" for their consideration in any business rescue plan under section 150 of the Act, alternatively at any meeting of creditors called under section 151 of the Act;

Alternatively pending the outcome of proceedings to be instituted by the applicant within 10 (ten) days from the date of this order for the following relief:

- (i) Setting aside the business rescue plan prepared in terms of section

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150 of the Act published on 15 September 2015.

FURTHER TAKE NOTICE that the affidavit of **EUGENE ROSSOUW** together with annexures will be used in support of the relief sought.

AND FURTHER TAKE NOTICE that the applicant has appointed Faber Goërtz Ellis Austen Incorporated of 1st Floor, Block D, St Andrews Office Park, Meadowbrook Lane, Epsom Downs, Bryanston (Reference: Diaan Ellis, Email address – diaan@fgea.co.za Telephone 010 590-3378, GSM 082 904-1734) as the address at which it will accept notice and service of all process in these proceedings.

TAKE NOTICE FURTHER that if you intend opposing this application you are required:

- (a) to notify applicant's attorneys in writing or telephonically forthwith; and
- (b) file your answering affidavits, if any, by 08h30 on 25 September 2015;

AND 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 process herein.

DATED AT BRYANSTON ON THIS THE 23RD DAY OF SEPTEMBER 2015


FABER GOËRTZ ELLIS AUSTEN
INC

Applicant's Attorneys
1st Floor, Block D
St Andrews Office Park

Meadowbrook Lane
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REF: Diaan Ellis
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TO:
THE REGISTRAR OF THE
ABOVE HONOURABLE COURT
JOHANNESBURG

AND TO:
PIERS MICHAEL MARSDEN
First Respondent
c/o **MATUSON & ASSOCIATES (PTY) LTD**

AND TO:
DANIEL TERBLANCHE
Second Respondent
c/o **MAZARS RECOVERY & RESTRUCTURING**
(PTY) LTD

AND TO:
EVRAZ HIGHVELD STEEL AND VANADIUM LIMITED
Third Respondent
c/o Edward Nathan Sonnenbergs Inc

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EVRAZ HIGHVELD STEEL AND VANADIUM LIMITED

Third Respondent

FOUNDING AFFIDAVIT

I, the undersigned,

EUGENE ROSSOUW

do hereby make oath and declare as follows:

1. I am an adult male businessman and director of Global Renewable Energy Limited, a company duly incorporated under the Companies Act 2006 of the

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Isle of Man more fully described below.

2. The facts contained fall within my personal knowledge, unless indicated to the contrary, and are both true and correct.
3. I am duly authorised to act on behalf of the applicant in these proceedings.

THE APPLICANT

4. The applicant is **GLOBAL RENEWABLE ENERGY LIMITED**, a public company incorporated according to the laws of the Isle of Man with Registration No. 008400V which has its principal place of business at 19/21 Circular Road, Douglas, Isle of Man, British Isles. The applicant was incorporated in May 2012.
5. The business of the applicant is that of a holding company for a number of investments specifically focused on renewable energy and the industrial and engineering assets that would support its renewable energy initiatives to create sustainable energy generation and usage models.

THE RESPONDENTS

6. The first and second respondents are respectively **PIERS MICHAEL MARSDEN** and **DANIEL TERBLANCHE**, cited herein in their capacity as the duly appointed joint business rescue practitioners appointed in terms of section

129(3)(b) of the Companies Act 71 of 2008 ("the Act") who were so appointed in relation to Evraz Highveld Steel and Vanadium Limited (Registration No. 1960/001900/06), being the third respondent herein ("Highveld"). The second respondents are referred to, collectively, as "the BRPs".

7. Highveld is a public company incorporated in accordance with the laws of the Republic of South Africa and listed on the Johannesburg Securities Exchange. Its shares are currently suspended from trading and which has been placed under supervision and business rescue in accordance with Chapter 6 of the Act.
8. The first and second respondents' practise from their respective enterprises known as Matuson & Associates, and Mazars. Their email addresses are pmarsden@matusonassociates.co.za and daniel.terblanche@mazars.co.za. In addition, the respondents are all represented by attorneys Edward Nathan Sonnenbergs in Sandton, the responsible partner in question being Mr Gary Oertel with email address goertel@ensafrica.com. Our attorney of record will, upon serving these papers upon the respondents and Mr Oertel by email, ensure by means of telephonic confirmation that these papers have come to the respondents and Mr Oertel's attention.

PURPOSE OF APPLICATION

9. The purpose of the application is to interdict the respondents from proceeding

with a meeting of creditors of Highveld called for 10h00 on Monday 28 September 2015 in accordance with section 151 of the Act to consider a proposed business rescue plan published under section 150 of the Act

10. The meeting is sought to be postponed until such time as a final and binding offer made by the applicant to the BRPs has been disclosed to and placed before the creditors of Highveld for their consideration, alternatively until such time as the unilateral and unlawful decision by the BRPs to reject the final and binding offer and exclude it from the sales process of Highveld has been reviewed and/or set aside.

CHRONOLOGY OF EVENTS

11. Pursuant to a meeting which took place on Tuesday 12 May 2015, between Cornelius Fourie Myburgh ("Myburgh") representing the applicant together with Johannes Frederick Klopper ("Klopper") and the first respondent, an interest was expressed by the applicant to acquire a controlling shareholding of Highveld and the shareholding of various Highveld subsidiaries including Evraz Mapochs Mine (Proprietary) Limited ("Mapochs") and Vanchem Vanadium Products (Proprietary) Limited ("Vanchem").
12. The interest was expressed by way of a letter dated 13 May 2015 sent by Myburgh as corporate law legal counsel to the applicant in South Africa. A copy of the letter is annexed hereto marked Annexure "ER1" and its contents

is sought to be incorporated herein by reference.

13. The following was, *inter alia*, recorded in the said letter:

“20. Mr Marsden has indicated that he is not yet in a position to provide timelines in regard to the commencement of due diligence processes and/or bidding processes. Mr Marsden indicated that he plans to be in a position to provide timeframes in regard to bidding processes, due diligence processes, and the providing of proof of available funding processes, towards the end of May 2015 with a view to concluding final transactions within a five month period, i.e. during the period June 2015-October 2015.

21. It is therefore not necessary for any proof of available funding to be finalised by GRE prior to the end of May 2015, but such proof of available funding will in all probability be needed to have been finalised and provided by GRE by the middle to the latter part of June 2015, to the satisfaction of Mr Marsden, and in order for GRE to obtain its front running, if not preferred bidder status.”

14. Pursuant to the meeting in May, on 6 June 2015 Myburgh was provided with a so-called process letter with regards to Highveld ("the first process letter"). A copy of the first process letter together with the e-mail cover sheet is annexed hereto marked Annexure "ER2" and its contents sought to be incorporated herein by reference.
15. In accordance with "ER2" it was provided *inter alia* that the applicant would be required to:
 - 15.1 sign a confidentiality agreement; and
 - 15.2 pay a non-refundable fee of R50 000,00;
16. An information memorandum would be made available to the applicant upon complying with the abovestated requirements.
17. It was recorded that:

"The business rescue sales process comprises of two phases:

A first phase during which the applicant would be required to submit an indicative offer; and

A second phase during which the applicant would be granted an opportunity to undertake a detailed due diligence of Highveld and

whereafter it would be required to submit a binding offer.”

18. It was provided furthermore that:

“Please note that at the end of Phase 1 the BRPs, in consultation with the management of the company and the Creditors Committee will assess your indicative offer. The BRPs in their sole discretion will be entitled to invite you into Phase 2 should your indicative offer be within the required valuation range and should you be able to demonstrate a reasonable likelihood of implementation of the proposed transaction.”

(Emphasis added)

19. The first process letter also provided that:

“Following the receipt of the indicative offers in Phase 1, a limited number of bidders are likely to be selected to continue to Phase 2, with a view to submitting a final and binding offer (the “binding offer”). If you are invited into Phase 2, you will be notified of the full details of the process to be followed through to completion of the proposed transaction in accordance with the steps outlined in paragraph 5 of this letter.

Following Phase 2, bidders will be requested to submit a binding

offer on a fully funded basis including a draft transaction agreement, for consideration by the BRPs."

20. In accordance with paragraph 5 of the first process letter it was *inter alia* provided that bidders who were invited to participate in Phase 2 may be required to provide certain additional information to support their indicative offer and would be allowed an opportunity to access a virtual data room. This would enable a bidder to engage in a due diligence of Highveld.
21. The applicant duly signed the confidentiality agreement provided to it by the respondents and paid the R50 000,00 deposit.
22. The timeline as provided for in the first process letter was extended by the respondents on numerous occasions.
23. I record that Standard Bank of South Africa was appointed by Evraz PLC, the controlling shareholder of Highveld, to advise in relation to the envisaged sales process of Highveld, hence their prominence position in the first process letter and in correspondence that followed.
24. On 30 June 2015 Myburgh addressed a letter to the first respondent, a copy of which is annexed hereto marked Annexure "ER3" and the contents whereof are sought to be incorporated herein by reference.
25. In "ER3" it is recorded, *inter alia*, that the confidentiality agreement had been

signed on behalf of the applicant and the required deposit paid. Consequently it was recorded that the applicant was now involved in Phase 1 of the business rescue sales process.

26. On 7 July 2015 Myburgh in writing requested certain information from the BRPs for the purposes of formulating and quantifying its indicative offer as provided for in the first process letter. A copy of Myburgh's letter of 7 July 2015 is annexed hereto marked Annexure "~~ER4~~" and its contents incorporated herein by reference.
27. On 8 July 2015 the applicant was informed that as a result of a delay in the circulation of the information memorandum as provided for in the first process letter the timelines for Phase 1 and Phase 2 of the business rescue sales process had been amended. From time to time further extensions occurred.
28. On 14 July 2015 Myburgh received an update with regard to the sale process of Highveld, a copy of which is annexed hereto marked Annexure "~~ER5~~" and on the same date the applicant furnished its non-binding indicative offer in respect of Highveld to the BRPs. A copy of the indicative non-binding offer together with its covering e-mail is annexed hereto marked Annexure "~~ER6~~" and its contents sought to be incorporated herein by reference.
29. The non-binding indicative offer provides *inter alia* for a purchase consideration excluding additional post final offer acceptance working capital of

R2 660 617 063,00 (TWO BILLION SIX HUNDRED AND SIXTY MILLION SIX HUNDRED AND SEVENTEEN THOUSAND AND SIXTY THREE RAND) and in paragraph 15.5 it was provided that:

"15.5 GRE has been capitalised by its shareholders with funds adequate to cover the purchase consideration and the additional strategic working capital without resorting to external funders."

30. On 16 July 2015 Mr Michael Ralston ("Ralston"), a representative of the applicant, provided information on the applicant pursuant to a request by the first respondent by way of e-mail, a copy of which is annexed hereto marked Annexure "ER7"
31. Pursuant thereto on 17 July 2015 a joint letter was received from Matuson & Associates and Standard Bank addressed to Myburgh, a copy of which is annexed hereto marked Annexure "ER8" and its contents sought to be incorporated ("the second process letter").
32. The joint letter was in the form of an invitation to proceed to the second phase of the bidding process in respect of the business rescue sales process and recorded *inter alia* as follows:

"2. We are pleased to inform you that you have been

selected to participate in the second phase of the bid process in respect of the business rescue sales process as a preferred bidder for the company. You are therefore invited subject to the requirements contained in paragraph 5 to undertake a due diligence investigation in respect of the company and to submit a final binding offer ("final offer") on the basis of and in accordance with the timetable set out in paragraph 11 of this letter."

(Emphasis added)

33. It furthermore recorded as follows:

"5. Payment of refundable deposit

5.1 Please note that in order to participate in Phase 2 of the business rescue sales process you will be required to pay a refundable cash deposit of US\$ 10 000 000 (ten million dollars) (the "deposit") into the bank account of an Escrow agent to be agreed upon and on terms acceptable to the BRPs ("Escrow account") or deliver to the BRPs an unconditional guarantee of US\$ 10 000 000 (ten million dollars) ("guarantee") in a form acceptable to the BRPs in their sole discretion."

(Emphasis added)

34. It also provided that:

"5.3 By no later than Monday 27 July 2015 the BRPs must receive proof that the deposit has been paid into the Escrow account or delivery of the guarantee in the form previously agreed with and acceptable to the BRPs, as the case may be. For the sake of clarity, the payment of the deposit must "reflect" in the Escrow account on 27 July 2015 or alternatively the guarantee must have been finalised and agreed to by the BRPs and the final guarantee must be delivered to the BRPs by no later than 27 July 2015."

(Emphasis added)

35. On 21 July 2015, pursuant to a request by Myburgh the BRPs provided a draft template of the unconditional guarantee in a form acceptable to them. A copy of the proposed draft template and covering letter from the respondents is annexed as annexure "ER9". 1

36. On 22 July 2015 the BRPs again provided a draft template guarantee document by way of e-mail communication pursuant to which Myburgh

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addressed an e-mail to the respondents enquiring whether his assumption was correct that the draft guarantee document enclosed with the respondents' 22 July 2015 letter was the same as the document sent to Myburgh by e-mail the previous day on 21 July 2015. A copy of this correspondence is annexed as Annexure "ER9"[✓] and its contents sought to be incorporated herein by reference.

37. The applicant is in possession of a draft report emanating from the BRPs dated 23 July 2015 wherein the applicant's initial offer was apparently presented to the Creditors Committee of Highveld, however the offer evaluation therein contained in respect of bidder no. 2, being the applicant, is materially misrepresented. The page dealing with the offer evaluation is annexed hereto as Annexure "ER10". . 1
38. Thus, the applicant's initial offer was for an amount of R2 500 000 000,00 and not for R350 000 000,00 as indicated and concurrent creditors were offered 100 cents in the rand and not "TBC" an acronym for to be confirmed.
39. On 24 July 2015 the applicant, in accordance with paragraph 5 of the second bid process letter dated 17 July 2015, and pursuant to the communications with the BRPs concerning the acceptable form of the guarantee, provided a guarantee confirming the US\$ 10 000 000 deposit. A copy of the letter addressed by the applicant to the respondents in this regard is annexed hereto marked Annexure "ER10"², inclusive of the proof of funds letter by PLG Capital

Bank Limited ("PLG").

40. On 27 July 2015 the first respondent acknowledged receipt of the applicant's confirmatory letter by PLG confirming the US\$ 10 000 000 deposit in accordance with paragraph 5 of the second bid process letter dated 17 July 2015 stating, in respect of PLG, that:

"We are going through our verification process this morning, please let them know we will be calling them."

A copy of the e-mail of 27 July 2015 is annexed hereto marked Annexure "ER~~2~~". 11

41. Thereafter at the request of the first respondent Myburgh made arrangements for the first respondent to be able to contact Mr Charles Williams of PLG telephonically by providing the first respondent with Williams' telephonic detail in Michigan, USA. A copy of the e-mail confirming these assertions is annexed hereto marked Annexure "ER12".
42. On the same day, 27 July 2015, the applicant provided further information to the first respondent concerning the applicant and its activities. The applicant confirmed, *inter alia*, that one of the first projects due to fall under the applicant's banner was the Breeze Energy Lesotho Highlands Power Project which is a joint venture with the Lesotho Government to develop the natural

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renewable energy resources of that country and that an amount in excess of R108 000 000,00 had already been spent on the initial development costs of this project. The further information provided included detail concerning the personalities involved to manage Highveld if the applicant's bid should be successful and to reconfirm the applicant's intention to procure payment of a purchase consideration consisting of:

- 42.1 a payment to shareholders of some R180 000 000,00;
- 42.2 a payment to creditors of an amount of R1 500 000 000,00 subject only to downward adjustment as guided by the BRPs in their process of verifying creditors' claims;
- 42.3 repayment of post-BRP funding; and
- 42.4 providing working capital in two phases:
 - 42.4.1 R350 000 000,00 upon acceptance of the final offer by the applicant; and
 - 42.4.2 some R2.2 billion post-ownership takeover.
- 43. In addition, the applicant confirmed the conversation between Myburgh and the first respondent to the effect that the applicant was in the process of arranging to bring into the Republic a first tranche of working capital *inter alia* to serve as

a possible “break fee” for exclusivity to the applicant on the purchase of Highveld and to provide the applicant with working capital in South Africa during the finalisation of the Highveld acquisition process. The letter dealing with these issues is annexed as “ER13”.

44. On 28 July 2015 the first respondent confirmed to Myburgh that he would be applying formally to the “*guarantee/cash escrow requirements*”. Myburgh and Michael Ralston representing the applicant were invited on the same day 28 July 2015 at 14h00 to meet at the offices of ENS Africa where they met the first respondent and representatives of ENS Africa, the respondents’ attorneys.
45. To the surprise of Myburgh and Ralston they were informed by those present that “*We don’t know who your bank is*” and that “*The people we use as international correspondents cannot get hold of these people*”. Contrary to the process as set out in the first and second process letters, the first respondent informed Myburgh and Ralston that the BRPs had now decided that guarantees from offshore banks were not acceptable and consequently it was now a requirement that all bidders had to bring in cash into South Africa to be held in trust by one of the big five banking institutions. Myburgh and Ralston were informed that, as a consequence thereof, the respondents would not accept the applicant’s guarantee with the consequence that the applicant would not have access to the data room as recorded in the first process letter. The first respondent stated that despite the foregoing, Myburgh and Ralston were free to address him with any questions that they might have concerning

Highveld and which he would respond to.

46. It bears mention that the day after the aforesaid meeting on 29 July 2015 during a meeting between Myburgh, Ralston and Sandra du Toit of Standard Bank she was able on the very first telephonic attempt to reach the aforesaid Mr Charles Williams of PLG.
47. On 29 July 2015 the first respondent recording that he had not discussed the matter with his joint business rescue practitioner, the second respondent, recorded that:

"In the meantime please will you urgently advise by when you can arrange for the USD 10 mn (sic) money to be deposited with ABSA, Standard Bank, Nedbank, Investec or RMB here in South Africa?

You will be allowed immediate and full access to the data room on confirmation from any of the abovementioned banks that the USD 10 mn (sic) reflects in its account and that it will remain there until either GRE withdraws from the process or if you are advised that GRE is not the successful bidder."

A copy of the e-mail is annexed as Annexure "ER14".

48. Thereafter on 31 July 2015 the applicant provided a series of questions to the first respondent as invited by him, a copy of which is annexed hereto marked

Annexure "ER15".

49. To the surprise of the applicant, the first respondent, on 3 August 2015, informed Myburgh and Ralston that, pertaining to the information requested, the majority of that information was to be obtained in the so-called data room. The first respondent in addition again sought confirmation when the funds would be in South Africa in reference to his e-mail of 29 July 2015. A copy of the first respondent's related e-mail is annexed as Annexure "ER16".
50. On 9 August 2015 the applicant felt constrained to address a letter to the BRPs, a copy of which is annexed hereto Annexure "ER17" and its content is sought to be incorporated by reference. It is recorded therein that the conduct of the BRPs was questioned in the light of the applicant's position as preferred bidder, the proof of funding letter lodged on behalf of the applicant, the refusal by the respondents to accept the proof of funding letter, the refusal of the BRPs to allow the applicant access to the data room and the refusal by the BRPs to respond to and provide the applicant with the information requested from the BRPs as referred to before pursuant to an invitation from the first respondent to the applicant.
51. It was also recorded that the applicant was of the view that it had performed in line with all the stipulated requirements of the sale process within the stipulated timeframes. The BRPs were requested to reconsider their position and to allow the applicant to participate in the due diligence process and obtain the

information as previously requested.

52. On 14 August 2015, as required from preferred bidders and in line with the applicant's status as such, the applicant completed a competition law merger questionnaire and delivered the same to the respondents. A copy of the covering letter and the completed questionnaire is annexed hereto as "ER18".
53. On 14 August 2015 the applicant was informed that the deadline for the submission for binding offers had been moved from 21 August to 28 August 2015. A copy of this communique is annexed as "ER19".
54. Likewise on 14 August 2015 a communique was received from the BRPs in response to the applicant's letter of 9 August 2015 in which the following was *inter alia* recorded:
- 54.1 That the applicant was still a preferred bidder in the sales process;
- 54.2 That access to the data room had been offered against proof from any one of the major banks in South Africa that it holds US \$10 000 000 deposit in trust;
- 54.3 That pursuant to legal advice sought and obtained:

"... It is in the best interests of all stakeholders to require the proof of deposit to emanate from a South African

bank thereby ensuring that the funds are readily available should GRE be the successful bidder. GRE is not the only preferred bidder who has been asked to bring the deposit funds into South Africa. It is however, the only preferred bidder who has failed to do so despite numerous requests."

A copy of the communicate is annexed as Annexure "ER20".

55. The applicant records here that whatever advice the BRPs sought and obtained from ENS Africa as stated hereinbefore the requirement that a deposit needs to be paid into a South African bank is contradictory to the requirements as agreed in the first process letter of 6 June 2015 and the second process letter of 17 July 2015. More in particular:

55.1 The first process letter provides that a bidder would be invited into Phase 2 should its indicative offer be *"within the required valuation range and should you be able to demonstrate a reasonable likelihood of implementation of the proposed transaction"*. Having been invited into Phase 2 as a preferred bidder and having acquired that status, it is clear that the applicant's indicative offer was:

55.1.1 within the required valuation range; and

55.1.2 the applicant had demonstrated a reasonable likelihood of implementation of the proposed transaction.

55.2 Furthermore, having been invited into Phase 2 there would arise an opportunity to undertake a detailed due diligence of Highveld whereafter a preferred bidder would be required to submit a binding offer.

56. Pursuant to the second process letter dated 17 July 2015, wherein the applicant was invited to proceed to the second phase of the bid process the requirements for the payment of a refundable deposit, alternatively a guarantee were set out in paragraph 5 thereof. The cash deposit was required to be paid into the bank account of an Escrow agent to be agreed upon and on terms acceptable to the BRPs, alternatively deliver to the BRPs an unconditional guarantee in a form acceptable to the BRPs in their sole discretion. It has already been demonstrated that the latter event took place subsequent to the form of the guarantee having been agreed as between the applicant and the BRPs.

57. The new and contradictory deposit requirements as recorded in the respondents' letter of 14 August 2015, amounts to a unilateral alteration of the first and second process letters and cannot bind the applicant and neither can it form the basis of the non-acceptance of the applicant's final offer as referred to below.

58. On 25 August 2015 the applicant, still being a preferred bidder, confirmed its intention to submit a binding offer in a communique of even date annexed hereto as Annexure “ER21” and the contents whereof are sought to be incorporated herein by reference.

59. The following is, *inter alia*, recorded:

59.1 The applicant was a preferred bidder;

59.2 The applicant would be submitting a final and binding offer in accordance with the business rescue sale process conducted by the respondents and Standard Bank following the applicant's indicative non-binding offer and the acceptance thereof;

59.3 Prior to submitting its final offer the applicant recorded that:

59.3.1 it was not afforded the opportunity to participate in the due diligence process afforded to other bidders notwithstanding full compliance with all of its obligations towards the respondents;

59.3.2 the BRPs had not provided the specific information sought by the applicant from the respondents (as alluded to before);

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59.3.3 the applicant reserved its rights in relation to the actions of the BRPs;

59.3.4 the BRPs were requested to reconsider their stance and refusal.

60. On 25 August 2015 the applicants were provided with suggested guidelines for its final offer by the BRPs. A copy of this communique is annexed as Annexure "ER22". On 28 August 2015 the applicant delivered its final binding offer in respect of Highveld and Mapochs, a copy of which is annexed hereto as Annexure "ER23" and its contents sought to be incorporated herein by reference. The offer speaks for itself and provides, *inter alia*, for the payment in full of trade and other creditors of Highveld including damages claims in the sum of R1 500 000 000,00, working capital invested into Highveld of R350 000 000,00 as at the final implementation date and working capital invested into Highveld post the final implementation date of some R2 400 000 000,00. In addition it provides for the payment to shareholders of R181 500 000,00 as well as shareholders' loans to the extent of some of R379 000 000,00.

61. On 28 August 2015 the applicant received from the BRPs an acknowledgment of the final offer in the following oblique terms:

"We have received your letter dated 25 August 2015 and your letter

64. Subsequent thereto Myburgh addressed a letter to the BRPs cautioning them not to announce the identity of the successful bidder. It was inconceivable that the applicant's offer could be bettered since the applicant's offer in reality amounted to a payment of 100 cents in the rand to concurrent creditors and shareholders. A copy of this letter is annexed as "ER26".
65. On 16 September 2015 the applicant became aware of the publication of the business rescue plan in relation to Highveld. The plan is voluminous and is not attached to avoid prolixity. It will be made available at the hearing of the matter. For now I annex as "ER27", paragraph 18 thereof.
66. The business rescue plan is in material respects misleading and incorrect. In particular:
- 66.1 In paragraph 18.2.2 it is recorded that the second process letter (being the letter of 17 July 2015) a requirement was reiterated for a preferred bidder to furnish the respondents *"with proof to the satisfaction of the BRPs that it had the financial ability to conclude and implement a transaction"*. There is no such a requirement to be found in the second process letter. Indeed if regard is had to the first process letter of 6 June 2015 it is apparent that once a bidder's indicative offer was found by the respondents to be within the required valuation range and an ability to demonstrate a reasonable likelihood of the implementation of the proposed transaction is

already shown at that stage, a bidder would be invited into Phase 2.

- 66.2 In paragraph 18.3.2 reference is made to the applicant when the following is incorrectly recorded: *"Another preferred bidder had not provided proof to the satisfaction of the BRPs that the Phase 2 deposit requirements had been complied with"*. This is untrue. The applicant had fully complied with the so-called Phase 2 deposit requirements as has been referenced hereinabove. The following is in addition recorded namely that the preferred bidder was *"accordingly also requested to bring the Phase 2 deposit into South Africa to be held with any first tier bank"*. The second process letter contained no such a requirement and any such requirement constituted a unilateral amendment to the process by the respondents allegedly pursuant to legal advice received during or about 14 August 2015. The applicant is not bound by such legal advice and their final offer should have been put to the creditors for consideration and not have been rejected on the basis of an alleged failure to meet the Phase 2 deposit requirements.
67. In addition if the failure to comply with the alleged Phase 2 deposit requirement had been of any material significance, the applicant should have been informed that it was no longer a preferred bidder at the outset. The respondents' conduct all along is indicative thereof that they at all times regarded the applicant as a preferred bidder having met the requirements as set out in the

sales process.

68. The successful bidder's offer is materially inferior to that of the applicant and to the prejudice of the creditors of Highveld. The notice to convene the meeting was published on Highveld's website on 18 September 2015. The notice is annexed marked "ER28". I also annex, marked "ER29" and "ER30", the confirmatory affidavits of Myburgh and Ralston.

PRIMA FACIE RIGHT

69. The applicant has fully met the requirements as set out in the sales process. As such the applicant's final and binding offer should have been considered and put to the creditors for their consideration whether at the level of the third creditor's committee meeting on 1 September 2015 or whether at the level of the proposed meeting to consider the business rescue plan in terms of section 151 of the Companies Act to be held on 28 September 2015.
70. The applicant has an entitlement in law to have their final and binding offer properly considered by the respondents and not to have their final and binding offer left unconsidered and closed out for spurious reasons to the detriment of not only the applicant but also the company under supervision, Highveld.

BALANCE OF CONVENIENCE

71. The balance of convenience clearly favours the applicant in that it has to date

expended a considerable amount of money (in excess of US\$ 200 000) in expenditure related directly to taking part in the sales process from the non-binding initial offer to the final and binding offer stages. This expenditure would be wasted if the final and binding offer were not to be considered properly and in accordance with the agreed sales process. In the context of Highveld being under supervision in terms of Chapter 6 of the Act the interests of the creditors of Highveld cannot be ignored when the issue of the balance of convenience is to be considered. The proper consideration of the final and binding offer is not only in the interests of the applicant but also materially affects the interests of the creditors and affected parties in relation to Highveld. The respondents as joint business rescue practitioners cannot act unilaterally and wilfully against the interests of the affected parties as defined in Chapter 6 of the Act.

NO ALTERNATIVE REMEDY

72. The applicants have no other remedy than to approach the Court on an urgent basis in order to ensure that their final and binding offer is properly considered in terms of the agreed sales process and that it be put to and/or considered properly by the creditors. This will not happen if the business rescue plan as it presently stands is put to creditors for a vote on Monday 28 September 2015. The business rescue plan is misleading in that it informs the creditors that it was the applicant's failure to adhere to the sales process which excludes consideration of its final and binding offer. This is untrue.

IRREPARABLE HARM

73. The applicant will suffer irreparable harm if due process is not followed by the respondents in relation to its final and binding offer. It must be readily apparent from the magnitude of the offer that the applicant is committed to transaction fees and establishment costs as a client of the guarantor, PLG in relation to the proof of funding letter provided (the wording of which I repeat was the precise wording sought and provided by the respondents) as well as the loss of business opportunity for the applicant resulting from the unlawful conduct of the respondents. The damage that will be suffered is of such a magnitude that the applicant could never be compensated by a damages award.

URGENCY

74. Despite being informed on 3 September 2015 that the applicant's final and binding offer had not been accepted, the applicant only became aware, upon having sight of the proposed business rescue plan, of the spurious rationale for the rejection of its final and binding offer and the alleged basis for the withholding of that offer from the creditors of Highveld. The publication date of the business rescue plan is 16 September 2015 and I for the first time had sight thereof thereafter. In addition, the notification of the meeting was only published on 18 September 2015.
75. The applicant immediately proceeded to prepare lever arch files containing the

relevant documentation and correspondence relevant to the sales process and a consultation was arranged with counsel for Tuesday 22 September 2015 after the applicant was unable to retain the services of senior counsel who had peripherally been involved in a related matter due to religious commitments for the whole of the week of 22 September 2015.

76. These present papers were drafted at the earliest possible opportunity in order to bring the matter before Court at 14h00 on Friday 25 September 2015.
77. Under the circumstances I am advised that the abbreviation of time periods are commensurate with the measure of urgency.

WHEREFORE I pray for the relief as set out in the Notice of Motion to which this affidavit is attached.

DEPONENT

SIGNED AND SWORN TO BEFORE ME AT JOHANNESBURG ON THIS THE
DAY OF SEPTEMBER 2015, THE DEPONENT HAVING ACKNOWLEDGED
THAT HE/SHE KNOWS AND UNDERSTANDS THE CONTENTS OF THIS AFFIDAVIT,
HAS NO OBJECTION TO TAKING THE PRESCRIBED OATH AND CONSIDERS THE
OATH BINDING ON HIS/HER CONSCIENCE

COMMISSIONER OF OATHS

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JS0523 corrected (003)/VL

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NAME:

CAPACITY:

ADDRESS: