IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case No: **26911/2016**

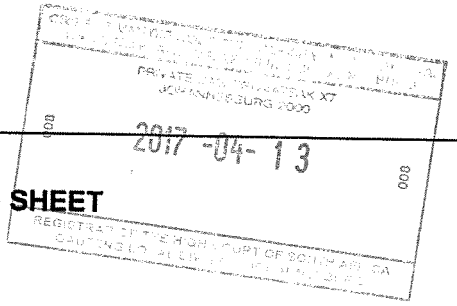
In the matter between:

PIERS MICHAEL MARSDEN N.O. First Applicant

DANIEL TERBLANCHE N.O. Second Applicant

And

AIR LIQUIDE PROPRIETARY LIMITED Respondent



FILING SHEET

BE PLEASED TO TAKE NOTICE THAT the applicants hereby present their replying affidavit for service and filing.

Dated at Johannesburg on this the 31 day of March 2017

EDWARD NATHAN SONNENBERGS INC.

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TO: **THE REGISTRAR OF THE**

ABOVE HONOURABLE COURT

JOHANNESBURG

AND TO: **VAN HULSTEYNS ATTORNEYS**

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13/04/2017

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case number: 26911/16

In the matter of :

PIERS MICHAEL MARSDEN N.O.	**FIRST APPLICANT**
DANIEL TERBLANCHE N.O. [in their representative capacities as the joint business rescue practitioners of Evraz Highveld Steel and Vanadium Limited (in business rescue)]	**SECOND APPLICANT**

and

AIR LIQUIDE PROPRIETARY LIMITED	**RESPONDENT**

REPLYING AFFIDAVIT

I, the undersigned,

PIERS MICHAEL MARSDEN,

do hereby make oath and state that:

1. I deposed to the founding affidavit.

2. The facts deposed to in this affidavit are within my personal knowledge and belief, save where the context indicates to the contrary, and are furthermore true and

correct. Where I refer to information conveyed to me by others, I verily believe such information to be true.

3. I have read the answering affidavit deposed to by Amine Houssaim on behalf of the respondent on 21 November 2016 ("the answering affidavit").

4. The answering affidavit is filed in support of the respondent's opposition to the main application under the above case number, as well as the respondent's relief sought in terms of its counter-application. This affidavit is the reply to the answering affidavit and the answering affidavit to the counter-application.

5. The answering affidavit goes into much detail regarding, *inter alia*, the background to the conclusion of the supply agreement between Evraz Highveld Steel and Vanadium Limited (in business rescue) ("Highveld") and the respondent ("the supply agreement"), the costs of the respondent's plant, the contents of Highveld's adopted business rescue plan ("the plan"), the events subsequent to the adoption of the plan and the alleged quantum of damages.

6. Notwithstanding the length and detail, albeit one-sided, most of the answering affidavit contains irrelevant information and mainly attempts to deflect this Honourable Court's attention to an irrelevant issue relating to the alleged quantum of damages, instead of the legal issues before this Honourable Court. The respondent is only concerned with its own interests, whereas the applicants, as Highveld's business rescue practitioners ("the practitioners"), are concerned about the general body of creditors and a better return to all stakeholders. In fact, it is even in the respondent's own interest that the relief sought by the practitioners is granted.

7. Save to deny that the respondent will suffer the alleged quantum of damages stated in its answering affidavit, the actual quantum of damages is not an issue before this Honourable Court and accordingly this affidavit will not address this issue and the practitioners' reserve their rights to do so at a later stage if and when it arises.

8. Irrespective of the quantum of the respondent's damages, it appears from the answering affidavit that the business rescue proceedings are more beneficial to the respondent than liquidation proceedings, where the respondent can receive as little as zero cents in the Rand due to SARS having issued assessments (SARS' claims and the liquidation dividend are further detailed in paragraphs 7.5.5 and 12 of the plan, annexure FA4 to the founding affidavit).

9. Since the filing of the founding affidavit, the practitioners have made substantial progress with the implementation of the wind-down contemplated in the business rescue plan. This progress has resulted in the anticipated dividend to concurrent creditors increasing from 10 to 15 cents in the Rand and a knock-on effect of a potential creation of up to 400 employment opportunities.

THIS APPLICATION

10. The legal issues before this Honourable Court are as follows:

    10.1. The entitlement of the practitioners to apply to this Honourable Court and obtain an order for the cancellation of onerous obligations imposed on Highveld in the supply agreement in terms of section 136(2) of the Companies Act, 71 of 2008 ("the Companies Act").

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10.2. Whether the practitioners are entitled to an order declaring that:

10.2.1. the practitioners' suspensions in terms of section 136(2) of the Companies Act of certain obligations in the supply agreement are valid and effective; and

10.2.2. the respondent's damages claim pursuant to the suspensions and cancellation will be a concurrent claim, limited in terms of the provisions of the plan and the supply agreement and will be further limited to the lesser thereof.

11. For the purpose of this affidavit, I will first deal with the respondent's "*main points*" raised in the answering affidavit. I will thereafter deal with the remaining allegations in the answering affidavit *ad seriatim*, to the extent necessary.

THE RESPONDENT'S OPPOSITION

12. The salient points of the respondent's opposition to the relief sought by the practitioners are set out in paragraph 5 of the answering affidavit as follows:

12.1. the respondent is allegedly being required to make a substantial "*contribution*" to the costs of the business rescue proceedings (paragraphs 5.1.8 and 5.1.9 of the answering affidavit);

12.2. the practitioners have allegedly made an "*election*" to be bound by the supply agreement and accordingly no longer have the rights afforded in terms of section 136(2) of the Companies Act (paragraph 5.2 of the answering affidavit);

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12.3. the enforcement of the limitation provisions in the plan would allegedly be "*grossly discriminatory*", "*offend*" against the Companies Act and result in an "*arbitrary deprivation*" of the respondent's property in terms of the Constitution (paragraphs 5.3 and 5.4 of the answering affidavit);

12.4. the limitation provisions in the supply agreement allegedly do not apply to the respondent's damages (paragraph 5.5 of the answering affidavit); and

12.5. the relief claimed in terms of the limitation of damages is allegedly premature due to paragraph 24.3.3 of the plan (paragraph 5.6 of the answering affidavit).

13. I deal below with the aforesaid points.

The "*contribution*" and "*election*"

14. The terms "*contribution*" and "*election*" are notions found in the context of liquidations and find no application in the context of business rescues. The respondent's opposition based on these main points is accordingly without merit and further irrelevant to the determination of the legal issues before this Honourable Court.

15. Notwithstanding the aforesaid, the respondent's allegations relating to the aforesaid contribution and election are plainly untrue for the reasons set out below.

The "*contribution*"

16. The respondent contends that the alleged "*contribution*" is due to the respondent being:

16.1. "*obliged*" in terms of the supply agreement to make gases available to Highveld and "*compelled*" by Highveld to only receive payment for the gases actually consumed at the same prices provided for in the supply agreement;

16.2. "*saddled*" with a monthly utilities charge; and

16.3. the only concurrent creditor whose damages claim is allegedly limited in terms of the plan.

17. In regard to the supply of gases:

17.1. Pursuant to the commencement of business rescue and the practitioners' suspensions, the respondent at all times had, and still has, the normal contractual rights available to it.

17.2. As such, the respondent was not "*obliged*", "*required*" or "*compelled*" to make the full extent of the gases, or any amount thereof, available to Highveld.

17.3. In fact, it is Highveld that is obliged to purchase the gases exclusively from the respondent in terms of the supply agreement. This is an obligation which the respondent has and continues to enforce on Highveld.

17.4. It is telling that the respondent has had the right to refuse the supply of any gases and to cancel the supply agreement but specifically chose not to do so. This evidences that the true motive of the respondent in not exercising its contractual rights and further refusing to agree to a mutual cancellation is

not as alleged in its answering affidavit. The true motive is as I have said in the founding affidavit that the respondent is guaranteed by Evraz PLC and it is that claim which it wishes to rack up. The respondent's allegations that a mutual cancellation would have resulted in any damages claim falling away is incorrect. The parties could at all times agree to the terms of the mutual cancellation, the respondent was simply unwilling to entertain any discussions regarding same.

18. In regard to the monthly utilities charge:

18.1. As set out in the founding affidavit:

18.1.1. due to Highveld's financial position, it could no longer fund the infrastructure required to supply the utilities to the respondent;

18.1.2. the utilities charge is to ensure that the respondent receives the utilities it requires for its operations; and

18.1.3. the respondent is not the only party paying the monthly utilities charge. The monthly utilities charge has been split between both the respondent and African Oxygen Limited ("Afrox").

18.2. Evidently, this is not a contribution towards the costs of Highveld's business rescue. It is a payment made by the respondent to ensure it receives the utilities it requires for its operations (i.e. it is a payment made to its own costs, not the costs of Highveld).

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19. In regard to the limitation of the damages claim:

19.1. The practitioners have no knowledge of how the respondent arrives at its alleged mitigated damages, neither does the respondent set out any details as to how it has been calculated.

19.2. Notwithstanding the aforesaid, the limitation provisions do not have the effect of compelling a contribution by the respondent. No payment will be made by the respondent to concurrent creditors or to the dividend payable to concurrent creditors.

19.3. The respondent will further have recourse in terms of the guarantee issued in its favour by Highveld's ultimate holding company, namely, Evraz PLC (annexure FA14).

19.4. The respondent is not the only creditor that has been subjected to the limitation provisions of the plan. The respondent cannot simply ignore the existence of such other creditors. The practitioners have in fact already advised one of the two creditors referred to in sub-paragraph 5.1.9.3 of the answering affidavit, namely, Hochvanadium Handels GMBH, that its claim of approximately €7 million would not only be limited but completely rejected due to same being in respect of loss of profit.

20. The respondent's contentions regarding an alleged "*contribution*" are consequently without merit.

The "*election*"

21. The respondent alleges that the practitioners have made an "*election*" to be bound by the supply agreement and accordingly no longer have the rights afforded in

terms of section 136(2) of the Companies Act to suspend or cancel the onerous obligations.

22. The practitioners did not make any "*election*".

23. As already stated above, the notion of an "*election*" finds no application in business rescue proceedings.

24. The Legislature would have specifically provided for the notion of an election if it was its intention to include same in the context of business rescues. It did not.

25. The respondent accordingly cannot simply read in and rely on a notion that only applies in the context of liquidations.

26. The language conferring the power to suspend or cancel in terms of section 136(2) of the Companies Act is clear and wide. The practitioners are entitled at any time during the business rescue to:

26.1. suspend any obligation; and

26.2. apply to this Honourable Court to cancel any obligation on any terms that are just and reasonable in the circumstances.

27. The Companies Act does not qualify the type of obligation that may or may not be suspended or cancelled. It also does not qualify the timing or context within which the practitioners may or may not suspend or cancel.

28. The background leading up to the suspensions as well as this application has already been set out in the founding affidavit. The practitioners were entitled to suspend the relevant obligations and are entitled to apply to this Honourable Court

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to cancel the obligations imposed on Highveld in terms of the supply agreement, save for those relating to the supply of utilities.

The enforcement of the limitation provision in the plan

29. The enforcement of the limitation provisions in the plan is not "*grossly discriminatory*", does not "*offend*" against the Companies Act and does not result in an "*arbitrary deprivation*" of the respondent's property in terms of the Constitution.

30. The plan does not remove the respondent's right to claim damages. It regulates same through the limitation provisions.

31. The limitation provisions of the plan apply to all creditors, not just the respondent. The practitioners have enforced, and will continue to enforce, the provisions of the plan uniformly.

32. The respondent has further failed to set out any case in respect of the alleged deprivation of property. To the contrary, the respondent will:

32.1. still have a claim for damages;

32.2. have recourse in terms of the guarantee issued by Evraz PLC;

32.3. have the opportunity to mitigate its damages by supplying to other parties;

32.4. not lose its R600 million plant, it remains the owner;

32.5. not cease production or operation, it continues to operate its plant and supply to third parties; and

32.6. continue to receive utilities to operate its plant.

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33. The plan seeks to provide for the efficient rescue and recovery of a financially distressed company in a manner that balances the rights and interests of all relevant stakeholders, as contemplated in section 7(k) of the Companies Act.

34. In the circumstances, the practitioners have not discriminated against the respondent and the plan does not offend the provisions of the Companies Act or the Constitution.

The supply agreement's limitation provisions

35. It is denied that the limitation provisions of the supply agreement do not apply to the respondent's claim against Highveld.

36. The provisions of clause 20.12 relate to each party's liability to the other in respect of any direct damages suffered in terms of the supply agreement. It does not distinguish between the cause or source of damages (i.e. a contractual breach or legislative suspension or cancellation). Irrespective of the aforesaid, the damages are in respect of the supply agreement.

37. At the very least, the respondent concedes in paragraph 84 of the answering affidavit that, taking into account the respondent's interpretation of clause 20.12, the take or pay obligation (i.e. the MPPO) is not excluded from the limitation imposed in this clause. It is opportunistic for the respondent to later attempt to read in additional provisions into this clause in an attempt to evade the limitation provisions being applicable to the take or pay obligation. For the avoidance of doubt, the practitioners remain of the view that the limitation applies to both the monthly fee and the take or pay obligation.

38. This aspect will be dealt with further in legal argument.

The relief is premature

39. The respondent alleges that the relief claimed in terms of the limitation of damages is allegedly premature due to paragraph 24.3.3 of the plan.

40. Paragraph 24.3.3 of the plan provides that any compromise in the plan is subject to Highveld meeting its obligations in terms of the plan. Any breach by Highveld of it payment obligations in terms of the distribution will result in the full balance due to creditors in terms of their original claims against Highveld being fully payable.

41. If anything, the respondent's reliance on this point is either opportunistic or based on a lack of understanding of the respective provision in the plan.

42. Paragraph 24.3.3 was an amendment requested by SARS. The amendment relates and is subject to any compromise contemplated in the plan. The plan specifically provides that no claims will be compromised.

43. Even if it did, the declaratory relief would not be premature and the practitioners would remain entitled to apply for the declaratory relief sought. The implementation of the limitation provisions is not subject to the occurrence of any event or the fulfilment of any other provisions in the plan.

44. In all of the circumstances, the respondent's points are without merit and the respondent has failed to set out any basis upon which the relief sought by the practitioners should be dismissed or any basis for the relief sought in terms of its counter-application.

45. The respondent persists with its attempts to frustrate the cancellation of the onerous obligations in the supply agreement and evade the application of the provisions of the plan in circumstances where it voted in favour thereof.

46. It is submitted that the opposition to the application is nothing more than an attempt to rack up damages against a company in business rescue in circumstances where the practitioners are attempting to obtain a better result for all affected persons, as contemplated in section 7(k) of the Companies Act.

THE ANSWERING AFFIDAVIT

47. I now turn to deal with the paragraphs in the answering affidavit. To the extent that I omit to deal with any particular allegation in the answering affidavit, if it is inconsistent with what I state herein or in my founding affidavit, I deny it.

Ad paragraphs 1 – 3 of the answering affidavit

48. Save to deny that all of the allegations and facts contained in the answering affidavit are true and correct the allegations in these paragraphs are noted.

Ad paragraph 4 thereof

49. It is denied for the reasons set out in the founding affidavit and in this replying affidavit that the application is misguided or ill-conceived. The respondent has failed to set out any case in support of its opposition to the relief sought by the practitioners or for the relief sought in its counter-application.

Ad sub-paragraphs 5.1.1 and 5.1.2 thereof

50. Save to state that the Commencement Date was meant to be during December 2013, however, Commercial Operation only commenced during February 2014, the remaining allegations in these sub-paragraphs are noted.

Ad sub-paragraph 5.1.3 thereof

51. The allegations contained in this sub-paragraph are admitted.

Ad sub-paragraph 5.1.4 thereof

52. Save to state that the supply agreement specifically records that the monthly fee is in respect of the cost to reserve the nominated product, as opposed to the investment cost, the remaining allegations contained in this sub-paragraph, to the extent that it accords with the terms of the supply agreement, are admitted.

Ad sub-paragraphs 5.1.5 and 5.1.6 thereof

53. The practitioners suspended, as opposed to purported to suspend, the respective obligations. I refer to paragraphs 47 onwards of the founding affidavit which set out the background to the suspension of the respective obligations.

54. I further refer to what I have stated above in regard to the supply and purchase of gases pursuant to the respective suspensions.

Ad sub-paragraph 5.1.7 thereof

55. I refer to paragraphs 57 onwards of the founding affidavit which set out the background to and reasons for the utilities charge imposed on both the respondent and Afrox.

Ad sub-paragraph 5.1.8 thereof

56. The allegations contained in this sub-paragraph are denied for the reasons already set out herein.

Ad sub-paragraphs 5.1.9.1 and 5.1.9.2 thereof

57. The plan, as amended and adopted, is binding on the respondent. The plan imposes, as opposed to purports to impose, a limitation on damages claims.

58. As stated in paragraph 26 of the answering affidavit, prior to the adoption of the plan the respondent proposed an amendment to the plan. This amendment was given effect to in paragraph 24.3.4 of the plan, which provides that the plan will not affect or compromise any affected person's rights to claim against any third party in terms of any guarantee or suretyship. This was evidently done to preserve the respondent's rights in terms of its guarantee against Evraz PLC.

59. The respondent, however, did not propose an amendment to the limitation provisions of the plan, despite being aware of the practitioners' position in regard to same, and proceeded to vote in favour of the amended plan.

60. The respondent cannot now attempt to rely on an alleged reservation of rights stated in its prior correspondence in circumstances where it was afforded the opportunity to propose an amendment to the limitation provisions contained in the plan and specifically chose not to do so. The respondent was a creditor at the time of voting on the plan and accordingly cannot attempt to hide behind allegations that its damages claim had not yet arisen, particularly in circumstances where it had proposed an amendment to the plan.

61. The practitioners have no knowledge of how the respondent arrives at its alleged mitigated damages, neither does the respondent set out any details as to how it has been calculated. In any event, the alleged quantum of the respondent's damages is

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irrelevant for the purposes of this application and the determination of the issues before this Honourable Court.

Ad sub-paragraphs 5.1.9.3 and 5.1.9.4 thereof

62. The allegations contained in these sub-paragraphs are denied for the reasons already set out herein.

Ad sub-paragraph 5.2 thereof

63. I reiterate that the respondent is confusing liquidation proceedings with business rescue proceedings. There is no notion of an "*election*" in business rescue proceedings.

64. The allegations contained in this sub-paragraph are denied for the reasons already set out herein.

Ad sub-paragraphs 5.3 to 5.5 thereof

65. It is admitted that the respondent will have a claim for damages pursuant to the cancellation sought. The respondent already has a claim for damages in respect of the suspensions in terms of section 136(2) of the Companies Act. Both of the aforesaid claims will be subject to the limitation provisions of the plan and the supply agreement.

66. The remaining allegations contained in these sub-paragraphs are denied for the reasons already set out herein.

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Ad sub-paragraph 5.6 thereof

67. The allegations contained in this sub-paragraph are denied for the reasons already set out herein.

Ad paragraphs 6 – 12 thereof: *"Background to the conclusion of the Supply Agreement"*

68. Save to state that the practitioners have no knowledge of the respondent's group company structure and that the respondent did not win the tender based on competitive pricing, the allegations contained in these paragraphs relate to the background to the supply agreement and are irrelevant for the determination of the issues before this Honourable Court.

Ad paragraphs 13 to 22 thereof: *"The costs associated with the Plant"*

69. The respondent raises various allegations in these paragraphs in respect of which the practitioners have no knowledge, including the respondent's: liability to its bankers; fixed costs; employment of operational teams; standard requirements imposed on large industry customers; standard terms contained in its supply agreements; and assumed risks.

70. Notwithstanding the aforesaid, it is submitted that the allegations contained in these paragraphs are not only irrelevant but also do not provide any bases upon which the respondent can rely in opposition to the relief sought by the practitioners or in support of the relief sought by the respondent in its counter-application.

71. The cancellation sought is on terms that are just and reasonable. I reiterate that the respondent will:

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71.1. still have a claim for damages;

71.2. have recourse in terms of the guarantee issued by Evraz PLC;

71.3. have the opportunity to mitigate its damages by supplying to other parties;

71.4. not lose its R600 million plant, it remains the owner;

71.5. not cease production or operation, it continues to operate its plant and supply to third parties; and

71.6. continue to receive utilities to operate its plant.

72. The respondent conveniently fails to mention that Highveld is not continuing business and is in the process of winding-down. Highveld is simply not in a position to comply with the onerous obligations imposed on it in terms of the supply agreement. Highveld is only able to supply the utilities to the respondent on the basis that the respondent pays for same. The supply of utilities is, in truth, sufficiently regulated by the interim agreement attached to the founding affidavit as FA12.

73. In the circumstances, it is Highveld and the general body of creditors that are being prejudiced by the respondent's opposition to the relief sought as well as the respondent's relief sought in its counter-application.

Ad paragraphs 23 and 24 thereof: "*The Supply Agreement*"

74. To the extent that the terms cited in paragraph 23 accord with the terms of the supply agreement annexed as FA7 to the founding affidavit, same are admitted.

Ad paragraphs 25 to 31 thereof: "*The Plan*"

75. The allegations regarding the respondent's failure to propose an amendment to the limitation provisions of the plan and its alleged reliance on the reservation of its rights to challenge same in annexure AA1 are denied for the reasons already set out herein.

76. The respondent was fully aware of the provisions of the plan, the proposals therein and the consequences of same:

76.1. If the plan proceeded in terms of the proposed transaction, then there would in all likelihood have been a continuation of the supply by the respondent to the new purchaser to the exclusion of Highveld. To this extent, the practitioners attempted to facilitate negotiations between the respondent and the purchaser to provide for the continuation of supply by the respondent to the purchaser.

76.2. If the proposed transaction failed, however, then the plan would proceed in terms of a wind-down and there would be no continuation of contracts.

77. The respondent expressly stated in paragraph 8 of annexure AA1 to the answering affidavit that the practitioners "*gave no indication in the plan that they will not attempt to [terminate the supply agreement]*".

78. The respondent accordingly cannot allege that it decided not to propose any amendment to the limitation provisions based on an indication that there was no intention to terminate the supply agreement or that it would be entitled to challenge same at a later stage.

79. To the extent that the provisions of the plan, amendments thereto and effect thereof are correctly stated in paragraphs 29 to 31, same are admitted.

Ad paragraphs 32 to 47 thereof: *"The effect of paragraph 24.2 of the Plan on Air Liquide"*

80. It is denied that a cancellation in terms of section 136(2) of the Companies Act constitutes a repudiatory breach.

81. The allegations regarding the respondent's entitlement to claim damages have already been dealt with herein.

82. The allegations regarding the alleged "*contribution*" are denied for the reasons already set out herein.

83. As already stated herein, the allegations regarding the alleged quantum of damages are denied and are further irrelevant to the legal issues before this Honourable Court. Irrespective of the quantum of the respondent's alleged damages claim, and as is evident from these paragraphs, the business rescue and limitation provisions provided for in the plan will ensure a better return for all stakeholders.

84. The allegations regarding the calculation of the potential liquidation dividend are denied. The respondent fails to take into account that in a liquidation the dividend may be as little as zero cents in the Rand due to SARS' claim. The respondent is better off in the business rescue even with the limitation provisions of the plan.

85. The allegations relating to the respondent's requests for information regarding the other creditors' claims was and remains irrelevant for the purpose of this application, which seeks:

85.1. the cancellation of the supply agreement;

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85.2. a declaration relating to the suspensions of certain obligations in terms of the supply agreement and the limitation of damages pursuant to the cancellation and suspension.

86. It is for this reason that the practitioners' attorneys stated that the information requested was irrelevant. It further appeared to be nothing more than a delaying tactic on the part of the respondent to rack up further damages.

87. Notwithstanding the irrelevance, the practitioners furnished all of the information sought. It is accordingly denied, and plainly wrong of the respondent to allege, that the practitioners "*sought to withhold such information*" and "*have since come to their senses*".

88. The limitation provisions of the plan have been applied to all creditors with a damages claim. The respondent is not being treated unequally and is not being discriminated against.

89. The respondent has accordingly failed to set out any bases to challenge the legality of the limitation provisions of the plan.

90. The respondent has further failed to set out any grounds upon which the cancellation sought is not just and reasonable. I reiterate what has already been stated herein.

91. The practitioners note that the respondent supplies gases to a number of parties other than Highveld and the absence of disclosure by the respondent in regard to same.

Ad paragraphs 48 to 58 thereof: "*The purported suspension by the applicants of certain of Highveld Steel's obligations under the Supply Agreement*"

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92. In regard to the allegations relating to the background to the suspensions, I refer to what has already been set out in the founding affidavit.

93. The allegations regarding the alleged "*election*" are denied and have already been dealt with above.

94. The respondent was advised of Highveld's position at all times during the business rescue and was fully aware that Highveld did not require the supply of gases pursuant to production having ceased. The remaining allegations regarding the supply of gases to Highveld and the respondent allegedly being "*obliged*" to supply same are denied and have already been dealt with above.

95. The respondent is attempting to force Highveld to remain bound by onerous conditions imposed in terms of the supply agreement in circumstances where Highveld is winding-down, is unable to comply with the onerous obligations, does not require the gases and has already suspended the onerous obligations. In addition, an as stated above, the respondent could have cancelled the agreement, whether contractually or mutually, and claimed damages but refused to do so.

96. The respondent's opposition to the cancellation sought is plainly nonsensical and further demonstrates the fact that the respondent has an ulterior motive.

Ad paragraphs 59 to 79 thereof: "*Utilities*"

97. As is evident from the first draft of the supply agreement, the practitioners attempted to cancel the supply agreement mutually and provide for the supply of utilities through the interim agreement. The respondent refused to agree to same.

98. The respondent wrongly attempts to create the impression in paragraph 63 of the answering affidavit that the draft interim agreement, which provided for the

cancellation, was immediately followed by a "*threat*" to apply to this Honourable Court to cancel the obligations to supply utilities if the interim agreement was not signed. I refer to paragraphs 61 to 70 of the founding affidavit setting out the background to the interim agreement.

99. It is denied that the respondent would not have any claim for damages against Highveld if it consented to the termination. As already stated herein, the parties could have agreed to the terms of the termination.

100. In regard to the allegations relating to the guarantee, it is submitted that the respondent's opposition to the cancellation of the supply agreement evidences an ulterior motive and that the respondent is indeed attempting to rack up its claim against Evraz PLC in terms of the guarantee.

101. It is denied that the monthly utilities charge is grossly unfair. This allegation and the remaining allegations relating to the supply of utilities are irrelevant for the purposes of this application, particularly in light of the fact that there is an interim agreement regulating same and that the practitioners have advised the respondent that it will furnish an undertaking regarding the pipeline.

Paragraphs 80 to 89 thereof: "*Clause 20.12 of the supply agreement*"

102. The allegations contained in these paragraphs are denied.

103. It is denied for the reasons already stated above that the limitations imposed in terms of clause 20.12 of the supply agreement do not apply to the respondent's claim against Highveld.

104. The allegations contained in paragraph 89 of the answering affidavit are denied. The practitioners are statutorily entitled to suspend the onerous obligations and

apply to this Honourable Court to cancel same. The provisions of clause 20.12 of the supply agreement accordingly still find application.

105. There is no question of the respondent's claim being limited by clause of 20.12 of the supply agreement.

Ad paragraphs 90 to 108 thereof: *"The just and reasonable provision in section 136(2)(b) of the Act"*

106. The practitioners seek the cancellation of the onerous obligations imposed on Highveld in terms of the supply agreement on just and reasonable grounds. All allegations to the contrary contained in these paragraphs, and elsewhere in the answering affidavit, are denied for the reasons already set out herein and in the founding affidavit.

107. The respondent conveniently disregards the rights of all affected persons; the obligation on the practitioners to balance those rights; and the effect of liquidation of Highveld on the respondent.

Ad paragraphs 110 to 141: *"Ad seriatim"*

108. Most of the allegations contained in these paragraphs have already been dealt with herein. I will accordingly only deal with certain allegations contained in these paragraphs. To the extent that I do not deal with any allegation contained in these paragraphs, or where any allegation contained in these paragraphs is inconsistent with the allegations contained in the founding affidavit or in this replying affidavit, same is denied.

109. It is denied that the facts deposed to in the founding affidavit are not within my personal knowledge or are not to the best of my belief both true and correct.

110. In regard to paragraph 113 of the answering affidavit:

110.1. No amendments are referred to in paragraph 33 of the answering affidavit. Annexure FA4 to the founding affidavit comprises the plan as published, the presentation used at the s151 meeting as well as the update report reflecting the amendments to the plan.

110.2. There was no requirement to reflect the respondent's alleged reservation in terms of annexure AA1 and it is uncertain why the respondent is raising this point.

111. In regard to paragraph 114 of the answering affidavit, and with respect, the respondent has not suffered the same "*devastating effect*" as other concurrent creditors. The respondent is still operating and has additional recourse in terms of its guarantee.

112. In regard to paragraph 115 of the answering affidavit:

112.1. It is uncertain why the respondent reiterates the information requested as the respondent was furnished with all of the information prior to the filing of its answering affidavit.

112.2. The practitioners have and will continue to apply the limitation provisions of the plan to all damages claims. As already set out herein, the practitioners have already rejected the claim of Hochvanadium Handels GMBH in accordance with the provisions of the plan.

112.3. The practitioners accordingly remain of the view that the information relating to other creditors' claims are irrelevant for the purpose of this application.

113. In regard to paragraphs 117 and 118 of the answering affidavit:

113.1. It is denied that Eskom's position is "*markedly different*" from that of the respondent's. The undisputable fact is that Eskom agreed to reduce its nominated maximum demand resulting in a saving of a fixed monthly cost of over R5 million.

113.2. It is denied that the practitioners insisted on "*extortionate terms*". The respondent further fails to specify same. The respondent was simply not willing to assist with any reduction in the fixed fees imposed in terms of the supply agreement.

114. In regard to paragraphs 123 and 128 of the answering affidavit, it is denied that the practitioners attempted to "*coerce*" the respondent to agree to a termination of the supply agreement in return for concluding the interim agreement or that the practitioner's attempted to "*coerce*" the respondent to abandon its claim. I refer to what has already been set out in the founding affidavit and herein.

115. In regard to paragraph 124 of the answering affidavit, the allegations contained in this paragraph are denied for the reasons already set out herein.

116. In regard to paragraph 132 of the answering affidavit, the provisions of section 136(3) of the Companies Act similarly do not exclude the limitation of damages.

117. In regard to paragraph 133 of the answering affidavit, it is denied that the respondent has mitigated any damages, that it has indeed so suffered or will suffer such damages and that it is in the amount stated.

Ad paragraphs 142 to 146 thereof: *"The Counter-application"*

118. It is denied that the relief sought in the counter-application is competent.

CONCLUSION

119. It is submitted that the respondent has failed to set out any grounds in opposition to the relief sought by the practitioners or in support of the relief sought by the respondent in its counter-application.

120. The practitioners accordingly pray for an order in terms of the notice of motion to this application and for an order dismissing the counter-application with costs, including the costs of two counsel.

PIERS MICHAEL MARSDEN

I certify that:

I. the Deponent acknowledged to me that :
   a. He knows and understands the contents of this declaration;
   b. He has no objection to taking the prescribed oath;
   c. He considers the prescribed oath to be binding on his conscience.

II. the Deponent thereafter uttered the words, "I swear that the contents of this declaration are true, so help me God".

III. the Deponent signed this declaration in my presence at the address set out hereunder on 31 March 2017.

Commissioner of Oaths
Practising Attorney-RSA
3rd Floor, One On Ninth
Cnr. Glenhove Road & 9th Street
Rosebank

NTUPU FREICKIE MOSIMA
COMMISSIONER OF OATHS