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. **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**

FILING SHEET

HEREWITH PRESENTED FOR FILEING –

1. Respondent's Answering Affidavit.

DATED AT **SANDTON** ON THIS THE 23RD DAY OF NOVEMBER 2016.

VAN HULSTEYNS ATTORNEYS
Respondent's Attorneys
3rd Floor, Katherine & West Building
Cnr. Katherine and West Streets
Sandton
Email: andrew@vhlaw.co.za
Ref: Mr Legg/MAT10034

TO: **THE REGISTRAR OF THE ABOVE HONOURABLE COURT JOHANNESBURG**

AND TO: EDWARD NATHAN SONNENBERGS INC
Applicants' Attorneys
150 West Street
Sandton
Email: lfield@ens.co.za
Ref: L Field

Received a copy hereof on this the ____ day of November 2016.

For: Applicants' Attorneys

Received copy hereof without prejudice
11:50AM
25 NOV 2016
For ENSafrica.com

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[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**

RESPONDENT'S ANSWERING AFFIDAVIT

I, the undersigned,

Amine Houssaim

do hereby make oath and say that:

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1. I am the Director of Large Industries of the respondent ("**Air Liquide**") and I am duly authorised to depose to this affidavit on its behalf. I oversee Air Liquide's Large Industries business which I explain later. I have dealt with the applicants from the beginning of their relationship with Air Liquide.

2. The facts contained in this affidavit are, save where the contrary appears from the content, within my personal knowledge and are, to the best of my belief, true and correct. Where I make legal submissions, I do so on the advice of Air Liquide's legal representatives. I believe that advice to be correct.

3. I have read the notice of motion setting out the relief sought in this application as well as the founding affidavit deposed to by the first applicant ("**Marsden**") on behalf of himself and the second applicant in their representative capacities as the business rescue practitioners of Highveld Steel ("**the founding affidavit**"). I depose to this affidavit for the purpose of answering the founding affidavit.

INTRODUCTION AND OVERVIEW

Summary of Air Liquide's main points

4. Before answering *seriatim* to the founding affidavit, I set forth a summary of Air Liquide's position in regard to this matter so as to give proper perspective to Air Liquide's case and to illustrate why it is that these proceedings are misguided and ill-conceived.

5. In summary:

   5.1 The basic undisputed facts, which will, where necessary, be elaborated upon below, are the following:

      5.1.1 On 7 December 2011, Air Liquide and Highveld Steel concluded an oxygen, nitrogen and argon supply agreement ("**the Supply Agreement**")

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which was to endure for a period of 22 years. The Commencement Date, as that term is defined in the Supply Agreement, was 19 February 2014.

5.1.2 Pursuant to the conclusion of the Supply Agreement, Air Liquide constructed a Facility on the site allocated to it by Highveld Steel, for the supply of gases to Highveld Steel's plant. The cost to Air Liquide of constructing the Facility was in the region of R630 million, due in part, to the need to ensure a reliable supply of the gases to Highveld Steel in accordance with its requirements.

5.1.3 On 13 April 2015, no more than 14 months after the Commencement Date, Highveld Steel, as a result of lack of funding, was placed into business rescue.

5.1.4 In terms of the Supply Agreement, Highveld Steel has:

5.1.4.1 a Take or Pay or Minimum Product Purchase Obligation ("**MPPO**") which is payable monthly and covers the cost to Air Liquide of operating a plant at the technical or minimum turndown; and

5.1.4.2 an obligation to pay a monthly fee to cover, *inter alia*, Air Liquide's investment cost and a minimum return on its investment calculated on the basis of a twenty-two year contract.

Both of these obligations are mandatory and are payable regardless of whether or not Highveld Steel requires the MPPO. The Supply Agreement was structured on this basis.

5.1.5 Initially, the applicants recognised Highveld Steel's obligation to make payment of the MPPO and the monthly fee which they paid without demur

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for the months of April to September 2015. However, on 2 October 2015 the applicants purported to suspend Highveld Steel's obligation to pay the MPPO. On 15 July 2016, the applicants also purported to suspend Highveld Steel's obligation to pay the monthly fee.

5.1.6 From the time of the purported suspension of Highveld Steel's obligation to pay the MPPO, the applicants have only effected payment to Air Liquide of the gases actually consumed by Highveld Steel at the prices provided for in the Supply Agreement. These prices are discounted prices having regard to the terms of the Supply Agreement and are significantly lower than the prices at which Air Liquide would have supplied the gases to Highveld Steel on an *ad hoc* basis. In the result, the payments effected by the applicants for the period from October 2015 represent only 3% to 4% of the MPPO. Although the obligation to pay the monthly fee was only suspended on 15 July 2016, no amount has been paid on account thereof since October 2015.

5.1.7 In terms of the Supply Agreement Highveld Steel was obligated to supply certain utilities to Air Liquide at no cost. In April 2016, the applicants threatened to terminate Highveld Steel's obligation to supply the utilities. Faced with this threat, Air Liquide had no choice but to agree to effect payment of a monthly utilities charge of R1 million to ensure the continued supply of the utilities. The applicants continue to exact payment of the monthly utilities charge in full from Air Liquide.

5.1.8 By being:

5.1.8.1 obliged in terms of the Supply Agreement to at all times make available to Highveld Steel the full extent of the gases Air Liquide is required to supply, while being compelled by Highveld Steel to receive a monthly payment only for the gases

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actually consumed by it at the same discounted prices provided for in the Supply Agreement; and

5.1.8.2 saddled with the monthly utilities charge of R1 million;

Air Liquide is, unlike any of Highveld Steel's several hundred other concurrent creditors (with the exception of two creditors who Air Liquide was advised on 14 November 2016 have, in comparison with Air Liquide, insignificant damages claims against Highveld Steel which are disputed), being required to make a substantial contribution to the cost of the business rescue proceedings.

5.1.9 Worst of all:

5.1.9.1 the Business Rescue Plan (**"the Plan"**) which was adopted on 13 October 2015, contains a paragraph at 24.2 which purports to impose a limitation on damages claims of concurrent creditors. Air Liquide's mitigated damages claim, which will arise from a cancellation of Highveld Steel's obligations under the Supply Agreement on the terms sought in this application, discounted to a present day value, is not less than R1.35 billion.

5.1.9.2 If paragraph 24.2 of the Plan is enforced against Air Liquide, its claim for damages would be limited to a fraction of its worth i.e. to R43 million. This would result in a dividend payment to Air Liquide of approximately R5.6 million in respect of its damages claim of R1.35 billion. However, if Air Liquide's damages claim is admitted in full, the dividend payment which Air Liquide could expect to receive would be approximately R108 million.

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the company is party and subsequently to pick and choose which obligations to suspend or cancel, as is the case in the present matter.

5.3

5.3.1 An order cancelling Highveld Steel's obligations under the Supply Agreement in terms of paragraph 1 of the notice of motion will, if granted, give rise to a claim for damages on the part of Air Liquide.

5.3.2 In terms of paragraph 24.2 of the Plan, such damages claim will be limited to a fraction of its worth. There is no possible justification for treating Air Liquide in this grossly discriminatory fashion and to do so would offend against section 136(2)(b) of the Act.

5.4

5.4.1 In addition, Chapter 6 of the Act is to be interpreted in the light of sections 2 and 39 of the Constitution. Section 25(1) read with section 39(2) of the Constitution requires the above Honourable Court to interpret Chapter 6 of the Act in a manner that prevents the arbitrary deprivation of Air Liquide's property.

5.4.2 Paragraph 24.2 of the Plan, which purports to impose a limitation on Air Liquide's damages claim amounts to an arbitrary deprivation of Air Liquide's property.

5.5

5.5.1 The applicants contend that Air Liquide's claim for damages, arising from a cancellation of Highveld Steel's obligations under the Supply Agreement (on the terms set out in paragraph 1 of the notice of motion), is also subject to the limitation in respect of direct damages suffered by either party to the

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Supply Agreement imposed by clause 20.12 of the Supply Agreement. This is opportunistic and incorrect.

5.5.2 As will be demonstrated with reference to what follows, clause 20.12 simply does not arise and the purported reliance by the applicants on this provision is without any foundation. Moreover, it would have made no sense for Air Liquide to have invested several hundred million Rand in erecting a plant, at the risk of being confronted with a limited damages claim at a fraction of the revenues to be derived over the 22 year term of the Supply Agreement and its initial capital investment.

5.6 Even if paragraph 24.2 of the Plan limits Air Liquide's claim for damages (which is denied), the applicants are not entitled to the declaratory relief sought in paragraph 2.3 read with paragraphs 2.3.3 and 2.3.4 of the notice of motion, as paragraph 24.3.3 of the Plan renders such claim for relief premature.

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Background to the conclusion of the Supply Agreement

6. L'Air Liquide Société Anonyme (SA) ("**Air Liquide SA**") is a French company founded in 1902. It is headquartered in Paris, France, listed on the French Stock Exchange and is a component of the Euro Stoxx 50 stock market index. The Air Liquide group (the "**Group**") is the world leader in the supply of industrial gases, technologies and services to various industries including the medical industry and chemical and electronic manufacturers. The Group is the world's first and largest supplier of industrial gases by revenue and has operations in over 80 countries.

7. Air Liquide is a wholly owned subsidiary of Air Liquide Afrique Société Anonyme which, in turn, is an indirect subsidiary of L'Air Liquide SA. Air Liquide's main business is the supply of industrial gases to large industries through a pipeline in four market sectors in South Africa, namely the oil and gas, chemicals, metals and energy sectors. It also supplies gas to small industrial merchants, health care businesses such as hospitals and homecare.

8. Air Liquide employs a 'Build, Own, Operate and Design' model through which it brings value to a large industrial customer by reducing its upfront capital requirements and by implementing Air Liquide's Industrial Management System ("**IMS**") (a database of operational, technical, safety, reliability and design knowledge that is applied throughout the Air Liquide Group's network of Air Separation Units ("**ASU's**") worldwide).

9. For a period of approximately fifteen years prior to the conclusion of the Supply Agreement, Highveld Steel acquired all of its industrial gases from Afrox. While its contract with Afrox was in place, Highveld Steel experienced issues regarding the reliability of supply of such gases, which significantly hampered its production of steel products. In the circumstances, when its contract with Afrox came to an end, Highveld Steel, as part of its transparent tender process, put out to tender the supply of its industrial gas needs with an emphasis on reliability of supply on the most competitive terms. On 7 June 2011 the tender was awarded to Air Liquide.

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10. Air Liquide won the tender based on a competitive price coupled with an Air Separation Unit (ASU) designed, *inter alia*, to ensure reliability of supply for the duration of the Supply Agreement by catering for a store of critical spare parts and a storage facility that would provide a critical reserve of liquid oxygen at all times (as I explain below). This was well in excess of that which would normally be provided by Air Liquide. The Facility comprised the ASU and its related equipment to be installed, owned, operated and maintained by Air Liquide on the site allocated to it by Highveld Steel ("**the Plant**") from which oxygen, nitrogen and argon was to be produced, compressed and supplied to Highveld Steel's plant. It also catered for redundancy of equipment, viz. the doubling up of equipment so that in the event of the primary equipment failing, the secondary equipment would take over.

11. That reliability in the supply of gas was of paramount importance to Highveld Steel can be demonstrated with reference to Annexure 5 to the Supply Agreement which is entitled "*REDUNDANCY LIST BASED ON 380 TONS PER DAY*". Annexure 5 would not have been included in the Supply Agreement had Highveld Steel not wished to ensure that Air Liquide would at all times be in a position to supply at least the volumes corresponding to the minimum product purchase obligation on the part of Highveld Steel in terms of the Supply Agreement.

12. At the time when Air Liquide was awarded the tender, Highveld Steel's daily consumption of gaseous oxygen was 400 tons. It was imperative as far as Highveld Steel was concerned, that a critical reserve of gaseous oxygen be maintained at all times. It is for this reason that Air Liquide at all times maintains a critical reserve of 2000 tons of liquid oxygen and therefore has a minimum back-up for five days. The cost of doing so as well as the doubling up of equipment significantly increased the cost of Air Liquide's investment in the Plant and resulted in the Plant being even more uniquely customised for Highveld Steel's specific needs.

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The costs associated with the Plant

13. In constructing the Plant, Air Liquide expended in the region of R630 million and expected a return on its capital investment. Air Liquide's repayment liability to its bankers, which is fixed, is significant.

14. In operating the Plant:

14.1 Air Liquide has fixed costs. Normal fixed costs include maintenance costs (generally calculated as a percentage of the investment over the term of the contract), labour and administration costs and the cost of insurance.

14.2 Air Liquide employs an operational team which is dedicated to the Plant and ultimately Highveld Steel in order to achieve the required production levels and plant reliability.

15. In Air Liquide's model, the MPPO covers the cost to Air Liquide of operating a plant at the technical minimum turndown. This is a standard requirement imposed by Air Liquide for all of its large industry customers worldwide. Highveld Steel set a level of expectation regarding its off-take of gases. Air Liquide designed the Plant with a technical minimum turndown to provide for Highveld Steel's minimum daily requirements. "*Turndown*" refers to the lowest level at which the Plant can be run. The minimum turndown of the Plant is 380 tons of gaseous oxygen which is slightly below Highveld Steel's daily requirement of 400 tons. This design was aimed at providing Highveld Steel with the maximum available capacity, as Highveld Steel had indicated that it intended increasing its manufacturing output which would entail a greater offtake of gases.

16. A typical supply agreement includes both an MPPO and a monthly fee to cover the following:

16.1 The maintenance costs.

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16.2 Labour and administration costs.

16.3 Energy and other related operating costs at the technical or minimum turndown of the Plant.

16.4 The cost of insurance.

16.5 The investment cost.

16.6 A minimum return on the investment.

17. The risks assumed by Highveld Steel and Air Liquide under the Supply Agreement are well balanced and it is incorrect for the applicants to assume, as they seem to be doing, that the MPPO and the monthly fee shift all of the risk to Highveld Steel.

18. While Highveld Steel's principal obligations under the Supply Agreement are the supply of utilities and the payment obligation, Air Liquide assumed the following risks under the Supply Agreement:

18.1 The risk of continuously investing in order to maintain the Plant at maximum equipment capabilities at all times and comply with reliability guarantees.

18.2 Penalties if its production of gases fell below the threshold of product availability set in the Supply Agreement and for delays.

18.3 The possible, albeit remote, adverse effect on its solvency and liquidity requirements resulting from any breach on its part of the bank covenants.

18.4 The fact that its assessment of the profitability of the Supply Agreement was, of necessity, based on estimates and quotes, and construction costs are an area of the

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budget which is difficult to control especially since cost overruns lead to a degradation of projected returns.

18.5 The cost of having to retrench the major portion of its operational team in the event of early termination of the Supply Agreement.

19. In order to achieve a reduction in the price of the gases to be purchased by Highveld Steel, by lowering the cost of Air Liquide's investment, Highveld Steel agreed that Air Liquide should have the use of its internal infrastructure and that it would supply utilities to Air Liquide including electricity, water and water effluents treatment. This type of arrangement is not unusual as it permits the supplier to maximise synergies within an industrial site for the benefit of the final user.

20. It was accordingly agreed that:

20.1 Air Liquide would construct the Plant on the property belonging to Highveld Steel on which its steel mill is situated.

20.2 Because Highveld Steel has its own electricity infrastructure (consisting, *inter alia*, of a substation and transformers) extending up to the Plant, the Plant would be connected to and derive its supply of electricity through such infrastructure. This avoided the need for Air Liquide to provide its own electricity infrastructure. Eskom supplies Highveld Steel with electricity and Air Liquide pays Highveld Steel a price equal to the price that Air Liquide would pay if it was connected to the Eskom grid directly.

20.3 Air Liquide would also derive its supply of water from Highveld Steel. The latter's steel mill is situated in a remote area from a water perspective. Water is supplied to the entire area through a pipeline belonging to Highveld Steel, which it built some fifty years ago, into which water is pumped from a reservoir approximately twenty kilometres away from the steel mill.

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20.4 Effluents resulting from the manufacturing process conducted in the Plant would be diverted to the Highveld Steel effluent treatment station. This avoided the need for Air Liquide to construct its own effluent treatment station.

21. Air Liquide, in its design of the Plant, also provided for gas in liquid form to be produced and supplied to the other customers referred to in paragraph 7 above. This enhances the value of the Plant as far as Highveld Steel is concerned, by reducing the overall cost of gas through economy of scale. Highveld Steel benefits from Air Liquide's internal synergies as the return burden on the investment is shared between all of Air Liquide's customers and not by Highveld Steel alone. The result is that Highveld Steel was (and continues to be) benefitted by a lower cost at which Air Liquide supplies the product to it. It is self-evident that should all of the obligations under the Supply Agreement be cancelled, other than the obligations relating to utilities, it is Air Liquide that will be severely and manifestly prejudiced thereby.

22. Air Liquide's recoupment of its costs and capital investment and its return on its investment are calculated on the basis of a twenty-two year contract. As is amply demonstrated by this matter, an early termination of the Supply Agreement therefore has potentially devastating consequences for Air Liquide. This is so regardless of whether or not Air Liquide's claim for damages is subject to any limitation.

The Supply Agreement

23. The Supply Agreement, in relevant part, provides as follows:

"*2. **INTERPRETATION** ...*

*2.1.6 **'ASU'** means the air separation unit, being the equipment to be installed by the Seller for the production of the Product;...*

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*2.1.15 '**Commencement Date**' means, the date on which the Facility begins Commercial Operation, ...*

*2.1.22 '**Facility**' means the ASU and its related equipment to be installed, owned, operated and maintained by the Seller at the Facility Site for the production, compression of the Product and the storage of Supplementary Product, including any additions, extensions or replacements thereto;*

*2.1.23 '**Facility Site**' means the site, as well as the security fencing surrounding such site to be provided by the Seller (at its own cost) which site is to be provided by the Purchaser to the Seller...*

*2.1.27 '**Interim Period**' is the period between the Signature Date and the date immediately preceding the Commencement Date...*

*2.1.30 '**Maximum PNMax**' means the maximum quantities of the applicable Product to be supplied by the Seller to the Purchaser, as increased by the Purchaser in terms of clause 9.10...*

*2.1.32 '**Minimum Product Purchase Obligation**' or '**MPPO**' shall bear the meaning ascribed thereto in clause 14.8;*

*2.1.33 '**Monthly Fee**' means the fee to be paid by the Purchaser to the Seller each month for the duration of the Term as consideration for the quantities of the Product reserved for the Purchaser as set forth in clause 14, but subject to clauses 20, 14.10 and 22 ...*

*2.1.41 '**PNMax**' or '**Product Nominated Maximum Quantities**' means the maximum quantities of the applicable Product to be supplied by the Seller to the Purchaser as specified in clause 9.9 which quantities can only be*

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increased by the Purchaser in accordance with the provisions of clauses 9.10 and 9.12...

*2.1.47 '**Price**' means the purchase price payable by the Purchaser to the Seller for the Products as set out in clause 14; ...*

*2.1.49 '**Product(s)**' means, individually or collectively, (as the context may require) oxygen, nitrogen and argon...*

*2.1.51 '**Purchaser**' means [Highveld Steel]; ...*

*2.1.53 '**Seller**' means [Air Liquide] ...*

*2.1.60 '**Term**' shall bear the meaning ascribed thereto in clause 5 ...*

*2.1.64 '**Utilities**' means the utilities required by the Seller and to be provided by the Purchaser in accordance with the Utilities Specifications and clauses 7.6 and 10.2; ...*

4. TERMINATION OF TERM SHEET AND LOI

For the avoidance of doubt, with effect from the Signature Date, this Agreement terminates and supersedes the Term Sheet and the LOI in their entirety and no Party shall have any claim against the other Party arising therefrom.

5. TERM

*5.1 Subject to clauses 20, 21 and 22, the initial term of this Agreement shall commence on the Signature Date and shall endure for a period of 264 ... months thereafter ('**Term**') ...*

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6. *FACILITY SITE*

6.1 *The Parties record that:*

6.1.1 *the Purchaser will provide the Facility Site for the purposes of the construction and operation of the Facility; and*

6.1.2 *the expiration or termination of this Agreement will not affect the availability of the Facility Site to the Seller as per clause 6.1.1 and as agreed by the Parties.*

6.2 *Should this Agreement be terminated in accordance with this Agreement by either Party, or should this Agreement expire at the end of the Term, then –*

6.2.1 *at the request of the Seller, the Purchaser shall use its reasonable endeavours to continue to provide the Seller with the Utilities for a period of 12 ... months after the termination of this Agreement if such provision is technically and economically feasible for the Purchaser; and*

6.2.2 *the Parties shall in good faith discuss the purchase by the Seller of equipment used in the delivery of Utilities owned by the Purchaser*

...

7.6 *The Purchaser shall provide the following...at its cost (except for the supply of electricity and water which will be supplied in accordance with clauses 13.2 and 13.3) on or before the dates specified below:...*

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7.6.10 Return water pipeline at the Battery Limit, 70 weeks after the Signature Date; and

7.6.11 Electrical power supply to the transformers in clause 7.6.3 for the operation of the Facility as per the Utilities Specifications, 87 weeks after the Signature Date...

7.12 The Seller shall have the right to produce Product at the Facility for sale to third parties utilising the Utilities, provided that such supply to third parties shall not prejudice the supply of the Products to the Purchaser under this Agreement in any manner whatsoever including the ability of the Purchaser to nominate the Maximum PNMax as set forth in clause 9.10.

7.13 The Seller shall have the right to install on the Facility Site, as reasonably required, dedicated Product storage, distribution facilities, buildings and road works for the Product to be offered for sale to third parties.

8. CONSTRUCTION OF FACILITY

8.1 The Seller shall, at its sole cost and responsibility, construct and commission the Facility upon the Facility Site in accordance with the requirements of this Agreement...

9. PRODUCT SUPPLY AND PURCHASE OBLIGATIONS

9.1 With effect from the Commencement Date and for the duration of the Term and in accordance with the terms and conditions of this Agreement, the Seller shall sell and deliver by means of Pipeline Systems (or by road tanker for argon), and the Purchaser shall

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purchase and receive from the Seller, the Product requirements of the Plant from the first cubic meter up to the PNMax or Maximum PNMax (if applicable).

9.2 *Unless the Seller is prevented from providing the Product ... with effect from the Commencement Date and monthly during the Term, the Purchaser shall take from the Seller the Products and shall pay the Price for the MPPO, regardless of whether or not the Purchaser actually receives or requires such Product...*

9.4 *The Purchaser shall not purchase Product up to the Maximum PNMax from a party other than the Seller during the Term, save as expressly provided otherwise in this Agreement...*

9.16 *The Seller acknowledges that it is critical that the Purchaser is at all times supplied with the Product and therefore, subject to clause 22 and any reason attributable to the Purchaser, the Seller must be able to supply 100% of the Purchaser's requirements as notified in accordance with clause 9.6 or as otherwise stated in this Agreement. The Seller shall reserve for the Purchaser the following amounts of Supplementary Product in storage tanks located at the Facility Site:*

9.16.1 2,000 ... Tons of liquid oxygen; and

9.16.2 400 ... Tons of liquid nitrogen...

10. ***PRODUCT AND UTILITIES WARRANTIES AND SPECIFICATIONS***

...

10.2 ***Utilities***

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10.2.1 The Purchaser warrants and undertakes to the Seller that Utilities supplied to the Seller hereunder shall conform in all respects to the Utilities Specifications...

12. ***DELIVERY POINT***

...

12.2 The Purchaser shall be solely liable and responsible for the Utilities supplied up to the Facility, at which point ownership, benefit and risk shall pass, and the Seller shall be solely liable and responsible for the Utilities supplied from the Facility...

13. ***MEASUREMENT***

...

13.2 ***Electricity***

13.2.1 The Purchaser will be responsible for the installation and maintenance of the electricity meter and shall measure the electricity provided by the Seller...The Seller will be invoiced on the same basis, according to Eskom Megaflex Diversity tariff structure or such other tariff description as issued by Eskom from time to time...and in the same amounts as the Purchaser is invoiced by Eskom...

13.3 ***Water***

13.3.1 The Purchaser will install 3 (three) water meters to measure the amount of water provided to the Seller. These water meters will measure the supply of raw water from the Purchaser to the Seller, the return water from the Seller to

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the Purchaser and the supply of potable water from the Purchaser to the Seller...

14. ***PRICE, MONTHLY FEE AND PRICE AND MONTHLY FEE ADJUSTMENT AND MINIMUM PRODUCT PURCHASE OBLIGATION***

14.1 *The Purchaser shall pay to the Seller, with effect from the Commencement Date, the Monthly Fee as set out in Table 14.1...*

14.8 *The Minimum Product Purchase Obligation shall be equivalent to the respective PNQs multiplied by the number of days in a relevant month. Should the Purchase request supply above the PNQ as per clause 9.6 then the Purchaser shall pay the Price for all the Product requested above the PNQ for the remainder of the period of the request...*

15. ***PAYMENT***

15.1 *From the Commencement Date, the Seller shall invoice the Purchaser in respect of the Monthly Fee and the Product as calculated in terms of clause 14.*

15.2 *The first Monthly Fee shall be invoiced by the Seller together with the amount of the Products for the first month on the 10th ... day of the month following the first month.*

15.3 *The Seller shall provide the Purchaser with a consolidated invoice in respect of the supply of the Product and the Monthly Fee relating to the same period, which invoice will show how the invoice amount is calculated...*

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20. *BREACH AND LIMITATION OF LIABILITY*

20.1 Subject to clause 22, it is recorded that should the Seller:

20.1.1 not commence operations by the Commencement Date due to its fault, then the Seller shall be liable to pay to the Purchaser the amounts set out in clause 14.12...

20.1.2 fail to supply 100% of the Product required by the Purchaser...due to its fault, the Seller shall be liable to pay to the Purchaser the amounts set out in clause 16.6...

20.2 Subject to clauses (sic) 22:

20.2.1 if the Commencement Date is delayed by more than 3 ... months; or

20.2.2 the Availability is less than 95% during the Availability Period, or

20.2.3 <u>either Party commits any other breach (other than a breach contemplated in clauses 20.2.1 and 20.2.2) of any provision of this Agreement,</u>

*then the Party claiming the breach ('**Aggrieved Party**') shall provide notification to the other Party ('**Defaulting Party**') to remedy the breach within 30 ... days of written notice to do so ('**Breach Notice**').*

20.3 For the avoidance of doubt, should an event set out in clause 20.2 occur, the Parties shall first attempt to resolve such matter in accordance with the provisions of this clause 20 before invoking the provisions of clause 24.

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20.4 *If the breach referred to in clause 20.2 cannot reasonably be remedied within 30 ... days of the Breach Notice, the Defaulting Party shall within a further 30 ... days provide to (sic) the Aggrieved Party with a plan ('**Action Plan**') setting out:*

20.4.1 *the steps which have been initiated by the Defaulting Party to remedy the breach; and*

20.4.2 *the time frames (which shall be no longer than 6 (six) months from the date of the breach and 3 (three) months in the case of late supply) required to remedy the breach and the steps which will be taken by the Defaulting Party to remedy the breach.*

20.5 *The Defaulting Party shall implement the Action Plan as soon as possible after such plan was presented to the Defaulting Party.*

20.6 *Should the breach not be remedied, and the breach continues for a period longer than is stipulated in the Action Plan ... then the Parties shall appoint a ... independent expert ('**Expert**') ...*

20.8 *The Expert appointed ... shall be tasked to revise and/or amend the action plan ...*

20.9 *The Expert's determination shall be binding on the Parties ...*

20.10 *The Defaulting Party shall take all steps necessary to implement the Action Plan, as revised or amended by the Expert ... Should the breach continue for a longer period than stipulated in the Action Plan (as revised or amended by the Expert) to rectify such breach*

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(sic) ... <u>then the Defaulting Party has committed a material breach of this Agreement entitling the Aggrieved Party to exercise its rights in terms of clause 20.11</u>.

20.11 *If the Defaulting Party has committed a material breach in terms of clause 20.10, the Aggrieved Party shall be entitled to:*

20.11.1.1 *(sic) sue for immediate specific performance of any of the Defaulting Party's obligations under this Agreement; and/or*

20.11.1.2 *(sic) terminate this Agreement, in which case written notice of the termination shall be given by the Aggrieved Party to the Defaulting Party and the termination shall take effect on the giving of such notice; and/or*

20.11.1.3 *(sic) <u>in either event the Aggrieved Party shall be entitled to claim damages it has suffered as a result of the material breach, subject to clauses 20.9, 20.10 and 20.11</u>.*

20.12 *<u>Without limiting the provisions of clauses 14 and 16</u>, each Party's liability to the other Party in respect of direct damages suffered by it and caused by the other Party, is limited to a maximum amount of R10,000,000 ... in aggregate per year and R50,000,000 ... in aggregate for the duration of this Agreement. Beyond these maximum amounts, each Party waives any right of recourse against the other Party.*

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20.13 In the event a Party makes a claim under clause 20.12, the claiming Party must demonstrate that any direct damage has been caused by the other Party and shall provide to the other Party a reasonably detailed description and documentary proof of the amount and nature of the damage incurred.

20.14 Notwithstanding anything to the contrary in this Agreement <u>but without limiting the provisions of clauses 14 and 16</u>, neither Party shall have any liability to the other Party for any consequential, indirect, special or incidental loss or damage of any kind, suffered by it and caused by the other Party in connection with this Agreement, including loss of profit, loss of production, loss of productivity and efficiency, loss of revenue, loss of goodwill, interest and finance charges, loss of use of goods, additional labour costs of third party claims ...

24. DISPUTE RESOLUTION

24.1 Mediation

24.1.1 In the event of there being any dispute (excluding any dispute for which the Agreement provides a specific procedure for resolution) between the Parties arising out of this Agreement which cannot be resolved by the Managing Director of the Seller and the CEO of the Purchaser within a period of 10 (ten) business days from the date on which the dispute is referred to them by either Party, the said dispute shall on written demand by either Party be submitted to mediation as set out in clauses 24.1.2 to 24.1.7...

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24.2 ***Arbitration***

24.2.1 Should the Parties not be able to settle the matter through mediation in terms of clause 24.1, then the said dispute shall on written demand by either Party be submitted to arbitration in Johannesburg in accordance with the AFSA rules, which arbitration shall be administered by AFSA...

28. ***APPLICABLE LAW AND JURISDICTION***

This Agreement will in all respects be governed by and construed under the laws of the Republic of South Africa."

(my emphasis).

24. The Commencement Date, when the first molecules of gas were supplied by Air Liquide to Highveld Steel, happened some two years after the signature date. Commissioning of the Plant occurred on 19 February 2014 when the Plant commenced Commercial Operation.

The Plan

25. The proposed Plan was published by the applicants on 15 September 2015.

26. On 28 September 2015, Air Liquide's previous attorneys of record, Werksmans Attorneys ("**Werksmans**"), addressed a letter to the attorneys representing the applicants, ENSafrica, a copy of which is annexed marked **"AA1"**. **"AA1"**, in relevant part, reads as follows:

"5. *We and our client are in receipt of the business rescue plan published by your clients... on 15 September 2015 ('plan')...*

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6. *We confirm that at the meeting, it was agreed that your client will cause an amendment of the plan to be proposed at the meeting to consider and vote on the plan on 28 September 2015, which amendment preserves the right of affected persons to proceed against any sureties and guarantees <u>for the full amount of their claims</u>, notwithstanding the adoption and implementation of the provisions of the plan.*

7. *It is ours and our client's considered view that as a key supplier of product to Highveld Steel, and an entity who had invested significant capital, in the amount of over R600 000 000 in a plant which is principally devoted to the supply of product to Highveld Steel, the plan does not adequately deal with our client.*

8. *More particularly, whilst your clients have indicated that they have no intention to terminate our client's Supply Agreement with Highveld Steel, there is no indication in the plan that they will not attempt to do so. In such event, your client has endeavoured to limit the damages claims of affected persons to a period of 6 months in terms of clause 24.2 without having provided any rational explanation for same. Such limitation is not permitted by the provisions of Chapter 6 of the ...Act... or by law. This limitation of 6 months is significantly less than the remaining term of the Supply Agreement which has another 20 years left of its term.*

9. *Our client's right to challenge the limitation of its potential damages claim (to the extent that it becomes necessary to do so) is fully and strictly reserved.*

10. *We trust that you understand that whilst our client has been supportive, and remains supportive, of the business rescue of Highveld Steel, it has a duty to protect its interests."*

(my emphasis).

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27. The Plan, which was adopted in terms of section 152 of the Act by a requisite majority of creditors on 13 October 2015, retained paragraph 24.2 as referred to in the Werksmans letter of 28 September 2015.

28. On the strength of the reservation of Air Liquide's rights to challenge paragraph 24.2 of the Plan as raised by Werksmans in paragraphs 8 and 9 of their letter of 28 September 2015, Air Liquide voted in favour of the adoption of the Plan. Its reasons for doing so were the following:

28.1 The applicants had indicated that they had no intention of terminating the Supply Agreement. Given this assurance, Air Liquide was not averse to accepting the Plan as, without the Supply Agreement, there was no prospect of Highveld Steel being rescued in terms of either of Proposals 1 or 2 of the Plan.

28.2 The applicants had even gone so far as to indicate that they would arrange for Air Liquide to meet with the successful bidder, International Resources Project Limited ("**IRL**") in order to discuss the continued supply of gases to IRL in terms of the Supply Agreement on the basis that Proposals 1 or 2 of the Plan were given effect to. Meetings were indeed arranged and representatives of the applicants, IRL and Air Liquide, who included me, attended the meetings. During the meetings there was no mention of the cancellation of the Supply Agreement nor that any of the obligations, which the applicants now seek the termination of, would be cancelled. On the contrary, I was given to understand that the Supply Agreement remained central to the success of the implementation of Proposals 1 or 2 of the Plan and that it would be honoured. Thus it was clearly in Air Liquide's best interests for Highveld Steel to be rescued.

28.3 Air Liquide was also advised by Werksmans that the validity or otherwise of paragraph 24.2 of the Plan was a question of law and that if Air Liquide voted in

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favour of the adoption of the Plan, it would not forego the right to challenge the validity of this clause on any legal ground. Air Liquide accepted this advice.

29. The Plan, in relevant part, provides as follows:

"*1.2.57* ***'Proposed Transaction'*** *means the transaction to be concluded with the Successful Bidder as more fully dealt with in paragraph 20;*

1.2.58 ***'Publication Date'*** *means the date on which this Business Rescue Plan is published to Affected Persons in terms of section 150(5) of the Companies Act, being 15 September 2015;*

20. ***THE SUCCESSFUL BIDDER'S PROPOSED TRANSACTIONS***

20.1 The Successful Bidder submitted its Final Order on the 28th of August 2015 in accordance with the timelines determined by the BRP's in the Sales process.

20.2 Pursuant to receipt of the Successful Bidder's Final Offer, and as requested by the members of the Creditors Committee, the BRP's engaged with the Successful Bidders and negotiations ensued which resulted in the Successful Bidder revising certain salient terms of its Final Offer to the benefit of stakeholders.

20.3 In this regard, the Successful Bidder submitted an improved and revised offer on 15 September 2015, the terms of which are included in the Business Rescue Plan.

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21. ***PROPOSAL 1: THE IMPLEMENTATION OF THE SCHEME***

21.1 *The first proposal to rescue the Company is the implementation of the Scheme ...*

22. ***PROPOSAL 2: SALE OF THE BUSINESS AS A GOING CONCERN***

22.1 *The second proposal to rescue the Company is ...the sale of the Business in terms of the Business Acquisition...*

23. ***PROPOSAL 3: WIND-DOWN OF THE COMPANY***

23.1 *In the event of the Proposed Transaction failing for any reason ...the BRPs propose that the Business Rescue proceeds in accordance with the third proposal ...being the wind-down of the Company ...*

23.2 *The 3rd Proposal would entail the sale of all of the Company's assets ...as opposed to the sale of the Company as a going concern ...*

23.6 *In the circumstances, the 3rd Proposal will result in a better return than upon a liquidation and will balance the interests of all stakeholders.*

24. ***EFFECT ON CREDITORS***

24.1 ***Contracts***

24.1.1 *In the event that the Business Rescue proceeds in terms of the Proposed Transaction (whether in terms of the 1st Proposal or 2nd*

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Proposal ...[T]o the extent that Contracts are cancelled, Creditors' Claims for damages will be limited as contemplated in paragraph 24.2.

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

24.2 ***Damages***

24.2.1 In the event that Creditors claim damages, whether contractual or delictual against the Company, which damages Claim is accepted by the BRPs ...such damages Claims:

24.2.1.1 shall be a concurrent Claim...;

24.2.1.2 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..."

(my emphasis)

30. At the 13 October 2015 meeting of creditors and other holders of a voting interest, various amendments to the Plan, two of which are relevant to the determination of the issues in this application, were approved. These are:

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"***Amendment 2***

The insertion of a new paragraph 24.3.4:

'The Business Rescue Plan shall not prejudice or affect or compromise any Affected Person's rights or claims against any third party including any claim or right of whatsoever nature in terms of any guarantee or suretyship executed in favour of any Affected Person by any third party.'

Amendment 3

By the insertion of a new paragraph 24.3.3:

'Any compromise contemplated in this business rescue plan is conditional upon the Company fully meeting its obligations to Creditors as set out in this business rescue plan. In the event of any breach by the Company of its payment obligations to creditors in terms of the Distribution and remains (sic) in default for a period of 30 days, the full balance due to Creditors in terms of their original claims against the Company shall immediately become due, owing and payable by the Company to the Creditors.

In the event that the Company is placed in liquidation then the full balance due to Creditors in terms of their original claims shall immediately become due and payable by the Company to the Creditors...'"

31. Inserted paragraph 24.3.4 preserved the right of Air Liquide to proceed against any sureties and guarantors for the full amount of its damages claim notwithstanding the limitation purportedly imposed by paragraph 24.2 of the Plan which would only apply in the business rescue proceedings.

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The effect of paragraph 24.2 of the Plan on Air Liquide

32. I am advised that if the above Honourable Court grants an order cancelling the obligations of Highveld Steel under the Supply Agreement in the terms set out in paragraph 1 of the notice of motion in this application:

    32.1 This will amount to a repudiatory breach of the Supply Agreement on the part of Highveld Steel.

    32.2 Air Liquide will have a claim for damages resulting from such repudiatory breach against Highveld Steel for the balance of the duration of the Supply Agreement which is expressly preserved in terms of section 136(3) of the Act.

33. Air Liquide's claim for damages for the balance of the duration of the Supply Agreement, discounted to a present day value, is in the sum of approximately R1.8 billion.

34. Highveld Steel's steel mill is in Emalahleni. There are a number of coal mines which operate in the area but these do not consume large volumes of industrial gases. There are no other large industrial customers in Emalahleni which consume anything resembling the high volume of gases provided for in the Supply Agreement. As such gases are delivered to a customer through a pipeline, the cost of constructing a pipeline to supply a high volume of gases from the Plant to a distantly situated customer will render the price which Air Liquide would be obliged to charge totally uncompetitive.

35. Air Liquide cannot cease production of gases at the Plant in the light of its obligations to supply gases to third party customers which include State hospitals in Mpumalanga, the North West and the Free State and private hospitals in Mpumalanga, the North West, the Free State, Limpopo and Gauteng Provinces and the Medupi and Kusile power stations. The only way in which Air Liquide can mitigate its claim for damages is by lowering the technical minimum turndown of the Plant which will reduce the costs of operating the

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Plant. Air Liquide has calculated that this will result in a claim for damages of not less than R1.35 billion.

36. Air Liquide's damages claim, if subject to the limitation imposed by paragraph 24.2 of the Plan, would be R43 million i.e. only 3.19% of its R1.35 billion damages claim. As appears from paragraph 27 of the Plan, the dividend which the applicants estimated was likely to accrue to concurrent creditors pursuant to the implementation of the wind-down in terms of Proposal 3 was a low of 10 cents and a high of 14 cents, depending on the potential SARS claim (which I address hereunder). This has subsequently been revised to 13 cents.

37. At a feedback meeting of the creditors of Highveld Steel convened by the applicants on 28 October 2016 which was attended by, *inter alia,* Air Liquide's attorney Andrew Legg ("**Legg**") of Van Hulsteyns:

37.1 Marsden advised that the claims of concurrent creditors, excluding Air Liquide's damages claim of R1.35 billion, aggregated to approximately R2.365 billion, which included approximately R544 million worth of claims that are in the process of being reconciled. (On 14 November 2016, Letitia Field ("**Field**") of ENSafrica addressed a letter to Legg from which it emerged that the applicants have received 403 claims having (i) a combined value of R1 117 998 503.05 which have been accepted, and (ii) R698 904 701.61 worth of claims from 10 creditors that have been rejected (including a claim from SARS for R689 million), and that claims of a further 120 creditors totalling some R548 970 218.51 are yet to be reconciled. A copy of such letter is annexed marked "**AA2**". The amounts referred to in "**AA2**" total to approximately R2.365 billion.)

37.2 Marsden indicated that the likely dividend to be paid to concurrent creditors is 13 cents in the Rand.

37.3 Legg requested Marsden to advise what the effect on the dividend to be paid to concurrent creditors would be if Air Liquide's damages claim of R1.35 billion was to be admitted in full.

37.4 Thinking on his feet, Marsden estimated that the dividend to be paid to concurrent creditors in those circumstances would be reduced by about one third which for illustrative purposes would mean from 12 cents in the Rand to 8 cents in the Rand.

38. In the circumstances, if the limitation imposed on Air Liquide's damages claim in terms of paragraph 24.2 of the Plan is enforceable (which is denied), this will mean that Air Liquide will actually end up contributing approximately R102.4 million to the dividend amount to be paid to all of the other concurrent creditors, none of whose claims (with the possible exception of the two creditors mentioned below) are so limited. This is an iniquitous and entirely unacceptable outcome.

39. Assuming a dividend of 13 cents in the Rand, the payment which Air Liquide can expect to receive on a damages claim of R43 million is approximately R5.6 million. If Air Liquide's damages claim of R1.35 billion is admitted in full and the dividend to be paid to concurrent creditors is reduced from 13 cents in the Rand to 8 cents in the Rand, the payment which Air Liquide can expect to receive would be approximately R108 million.

40. By way of example and in order to illustrate the prejudice which Air Liquide would suffer if clause 24.2 of the Plan is enforceable against it, there would be no limitation on Air Liquide's claim for damages in a winding-up. Accordingly, a dividend of approximately slightly in excess of one third of a cent in the Rand would result in a payment to Air Liquide of R5.6 million.

41. As appears from Annexure B to the Plan, claims of concurrent creditors at the date of the commencement of the business rescue aggregated R942 158 113.59 per Highveld Steel's accounts and R1 176 335 460.76 per claims received. The highest of the received claims is R85 816 778.80. Air Liquide's claim was reflected as a concurrent claim in an amount of R6 955 192.69 as at the date of voting. This was in respect of the MPPO and monthly fee owing for the month of September 2015 (albeit that it was only payable at the end of October 2015), as there was no question of Air Liquide being possessed of a damages claim at that stage, the applicants having informed Air Liquide that they had no intention of terminating the Supply Agreement.

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42. It was not possible to determine from Annexure B to the Plan whether any of the claims of the concurrent creditors reflected therein are damages claims and, if so, whether the limitation imposed by paragraph 24.2 of the Plan would apply to any of such claims.

43. On 6 September 2016, Air Liquide's current attorneys of record, Van Hulsteyns, addressed a letter to ENSafrica in which certain information was requested. A copy of the letter is annexed marked **"AA3"**. The relevant paragraphs of **"AA3"** read as follows:

> *"4. In addition, we also request that you provide the following information to us which is similarly required for purposes of enabling us to draft our client's answering affidavit:*
>
> *4.1 ....*
>
> *4.2 A list of all creditors whose contracts have been cancelled since the inception of the business rescue to date who have lodged claims against the company, together with the full amounts of their claims and whether and to what extent any such claim has been accepted by the business rescue practitioners.*
>
> *4.3 Annexure B to the Business Rescue Plan is a list of creditors of the company at the Commencement Date. It is not possible to discern from the list whether any of those claims is a claim for damages. Kindly identify which of the claims is a claim for damages and in respect of each claim, state what the full amount of the claim is and whether and to what extent the claim has been accepted by the BRPs ..."*

44. ENSafrica responded to **"AA3"** in a letter dated 8 September 2016, a copy of which is annexed marked **"AA4"**. As appears from **"AA4"**, the applicants contended that the

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documents requested in paragraphs 4.2 and 4.3 of **"AA3"** *"... are irrelevant to these proceedings."*

45. The information requested in each of paragraphs 4.2 and 4.3 of **"AA3"** is clearly highly relevant to these proceedings. This is particularly so in the light of the fact that until 14 November 2016 Air Liquide was advised by the applicants that it was the only concurrent creditor in the business rescue proceedings which is possessed of a claim for damages. It was therefore unsurprising that the applicants sought to withhold such information from Air Liquide. The applicants have since come to their senses as more fully appears below.

46. If Air Liquide is required to give up almost its entire damages claim (and accordingly its dividend) in favour of almost all other concurrent creditors whose claims are not so limited, this would not only amount to the unequal treatment of concurrent creditors but it would result in Air Liquide being discriminated against grossly unfairly which cannot in any circumstances be just and reasonable.

47. The legality of paragraph 24.2 of the Plan under the Act is also challenged on the grounds set out below.

THE MAIN EVENTS WHICH HAVE OCCURRED SINCE THE APPROVAL OF THE PLAN

The purported suspension by the applicants of certain of Highveld Steel's obligations under the Supply Agreement

48. Following Highveld Steel being placed into business rescue the applicants recognised Highveld Steel's obligation to make payment of the MPPO and monthly fee which they did in respect of the months of April to September 2015. Clearly the applicants elected to be bound by the Supply Agreement.

49. On 2 October 2015 the applicants suspended Highveld Steel's obligation to pay the MPPO. This was confirmed in a letter addressed by ENSafrica to Werksmans on 2 October 2015

("FA8" to the founding affidavit). At this stage the applicants intended to proceed with Proposals 1 or 2 of the Plan.

50. During the period October 2015 to February 2016 the applicants unilaterally elected to pay for the product actually consumed by Highveld Steel, which is reflected in schedule "FA13" to the founding affidavit. The highest monthly value of Highveld Steel's actual consumption of product was approximately R206 000 which occurred in the month of October 2015. Air Liquide disputed that Highveld Steel was entitled to only pay for the product that it consumed and drew this to the attention of the applicants by way of Werksmans' letters dated 4 November 2015, 30 November 2015 and 28 July 2016, all of which form part of annexure "FA10" to the founding affidavit.

51. The payments effected by the applicants in respect of the product actually consumed by Highveld Steel for the period from October 2015 to February 2016 represent 3% to 4% of the MPPO and monthly fee.

52. In spite of the fact that it was known to the applicants that the prices for the product set out in the Supply Agreement were preferential prices that had been specially calculated with reference, *inter alia*, to the duration of the Supply Agreement and Highveld Steel's obligation to effect payment of the MPPO and the monthly fee, the applicants continued to effect payment for the product actually consumed at the prices set out in the Supply Agreement.

53. It is necessary to point out that clause 9.16 of the Supply Agreement stipulates that it is crucial that Highveld Steel is at all times supplied with the product by Air Liquide and that it at all times maintains 100% redundancy in relation to such supply. Air Liquide acknowledged, in terms of this provision, that it was not only critical that Highveld Steel was at all times supplied with the product but also that it must be able to supply 100% of Highveld Steel's requirements which included reserving supplementary product for Highveld Steel in storage tanks located at the Facility Site at all times. Clauses 11.1 and 16.6 are of similar effect and were designed to ensure that for the full term of the Supply

Agreement Air Liquide deliver at least 95% of the product it was contracted to supply during any 12 month period measured after the first 3 (three) months of the commencement date, failing which it would be severely penalised. The obligation on Air Liquide to consistently perform under the Supply Agreement is clear.

54. Air Liquide would not have agreed to the favourable rates in the Supply Agreement on the basis that Highveld Steel could merely pay for the quantity of product it consumed at such preferential rates. The prices for the product which would apply on the basis of a spot sale are substantially higher than the prices for the product set out in the Supply Agreement.

55. Air Liquide is, notwithstanding the partial suspension by the applicants of the MPPO, obliged to continue incurring the cost of running the Plant at the minimum turndown. In the circumstances, since October 2015, the Plant has been run at a huge loss to Air Liquide which has been obliged to vent the excess gases not consumed by Highveld Steel. Air Liquide has commenced reconfiguring the Plant in order to reduce its production of gases. The extent to which it is able to do so has been taken into account in determining the quantum of Air Liquide's mitigated claim for damages.

56. On 15 July 2016, in terms of annexure "FA9" to the founding affidavit, the applicants also suspended Highveld Steel's obligation to pay the monthly fee, although the last time that the monthly fee was paid was for the month of August 2015.

57. Having agreed to abide the Supply Agreement, it was not open to the applicants to purport to invoke the right to suspend the obligation to pay the MPPO and, some ten months later, the obligation to pay the monthly fee, nor is it now open to the applicants to apply to the above Honourable Court to cancel Highveld Steel's obligations under the Supply Agreement – with the exception of its obligations in respect of utilities.

58. Air Liquide will be severely prejudiced by an order cancelling all of Highveld Steel's obligations in terms of the Supply Agreement, with the exception of its obligations in respect of the utilities. The income generated from operating the Plant in terms of the Supply Agreement forms a significant component of Air Liquide's South African revenue.

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Not only will Air Liquide's annual turnover be appreciably affected by an order cancelling Highveld Steel's obligations, but, in addition, the operational team which Air Liquide employs to operate the Plant, stand to lose their jobs.

Utilities

59. I refer, in this regard, to paragraphs 61 to 70 of the founding affidavit in which the events leading up to the conclusion of an interim agreement between Highveld Steel and Air Liquide on 23 May 2016 ("FA12" to the founding affidavit), regulating the continuous supply of utilities by the former to the latter, are set out.

60. The potential for an interruption of the continuous supply of utilities by Highveld Steel to Air Liquide was a cause of great concern to Air Liquide from the onset of business rescue. Air Liquide was primarily concerned that, should the supply of utilities cease at any point in time, the third parties supplied by Air Liquide from the Plant would be placed at risk, particularly hospitals which rely upon the supply of oxygen from the Plant for the benefit of their patients, as more fully set out below.

61. This issue featured prominently in the meetings and discussions between representatives of Air Liquide and Highveld Steel which occurred from time to time and spanned in excess of 12 months.

62. On 4 March 2016, ENSafrica furnished Werksmans with a draft Interim Agreement to be entered into between Highveld Steel, Afrox and Air Liquide which included a clause 4 reading as follows:

> *"4 TERMINATION OF THE AFROX SUPPLY AGREEMENT AND THE AIR LIQUIDE SUPPLY AGREEMENT*
>
> *4.1 With effect from the Date of Signature, this Agreement terminates and supercedes the ... Air Liquide Supply Agreement in its entirety."*

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63. This was followed by a threat made by ENSafrica to Werksmans in an email dated 13 April 2016, "FA11", that should the draft Interim Agreement not be finalised by 29 April 2016, the applicants would immediately proceed to cancel Highveld Steel's obligations to supply the utilities by way of a court application in terms of section 136 of the Act.

64. Further correspondence and discussions between ENSafrica and Werksmans then ensued which culminated in the conclusion of the Interim Agreement being "FA12", on 23 May 2016.

65. The threat by the applicants to cancel Highveld Steel's obligations to supply utilities in terms of the Supply Agreement to Air Liquide by way of an application to this Honourable Court should Air Liquide not agree to a termination of the Supply Agreement was potentially disastrous for Air Liquide.

66. As pointed out in the founding affidavit, EVRAZ plc has provided a "*DEED OF GUARANTEE AND INDEMNITY*" ("**the Guarantee**") in favour of Air Liquide ("FA14" to the founding affidavit).

67. As alleged in the founding affidavit:

67.1 Air Liquide's "*...primary motive for not agreeing to the cancellation of the supply agreement...is to maximise its claim against Evraz PLC (sic)...*".

67.2 "*...it will be noted from clause 3.2 [of the Guarantee] that Evraz PLC's (sic) liability in terms of the guarantee is limited in terms of damages but is not limited in terms of payments due by [Highveld Steel] under, inter alia, clause 14 of the supply agreement.*"

68. Clause 3.2 of the Guarantee clearly includes a claim for damages on the part of Air Liquide against Highveld Steel. The applicants' contention that the liability of EVRAZ plc under the Guarantee is limited in terms of clause 4.3 in terms of damages is no doubt based on

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the provision in clause 3.2 that the aggregate liability of EVRAZ plc under the Guarantee "*...shall in no event exceed the limits and exclusions set out in Clause 20.12 to 20.14 of the [Supply] Agreement, except when the liability of the Guarantor arises under or in relation to [Highveld Steel's] obligations to make any payment in terms of Clauses 14, 15 and 22 of the [Supply] Agreement*".

69. Such attempted reliance on clause 3.2 in this way is not only erroneous and a complete misconstruction of the Guarantee – which falls to be interpreted under English law, but it has no place in the present application, Highveld Steel not even being a party to the Guarantee. In any event, it does not arise that clause 20.12 of the Supply Agreement will limit Air Liquide's claim for damages against Highveld Steel if Highveld Steel's obligations under the Supply Agreement are cancelled in terms of paragraph 1 of the notice of motion in this application. I will address this topic separately below.

70. As the applicants are well aware, if Air Liquide had consented to a termination of the Supply Agreement, it would not have any claim for damages against Highveld Steel. The insistence on the part of the applicants that Air Liquide consent to a termination of the Supply Agreement would have resulted in Air Liquide foregoing its damages claim of R1.35 billion.

71. The interim agreement, "FA12" to the founding affidavit, unlike the first draft of the interim agreement circulated to Air Liquide on 26 February 2016, provides that:

   71.1 The applicants would not suspend or cancel Highveld Steel's obligation to supply the utilities to Air Liquide on condition that Air Liquide pays the monthly costs contribution regulating the supply of utilities

   71.2 The supply of utilities by Highveld Steel to Air Liquide would not be terminated.

72. The monthly costs contribution which Air Liquide is required to pay in terms of the Interim Agreement is R1 million. This is grossly unfair. Air Liquide's objections to this monthly

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charge were drawn to the attention of the applicants at a meeting held on 5 April 2016 at which both Air Liquide and Afrox were represented. This appears from the Meeting Report, a copy of which is annexed marked "**AA5**". As Marsden advised at the feedback meeting on 28 October 2016, the applicants are in the process of seeking to revive production at the structural mill and, should that occur, will be employing approximately 400 members of staff. Production at the structural mill will require utilities, and result in revenue. Air Liquide should thus be entitled to a reduction in the amount it is paying for the supply of utilities. At present, the applicants continue to exact payment of the monthly utilities charge of R1 million in full from Air Liquide.

73. Notwithstanding Air Liquide's contention that the applicants were not lawfully entitled to suspend Highveld Steel's obligation to pay the MPPO and the monthly fee and to now seek a cancellation of Highveld Steel's obligations under the Supply Agreement in terms of paragraph 1 of the notice of motion, Air Liquide must ensure that it receives an uninterrupted supply of utilities.

74. To that end, Air Liquide hopes to reach autonomy in terms of the supply of utilities within the next twelve months. To this end it has embarked upon the process of obtaining a supply of electricity directly from Eskom. A direct connection of an electricity supply from Eskom to the Plant will cost Air Liquide no less than R26 million. The transformers which Air Liquide has already purchased from the applicants cost some R4 million. There are other infrastructural costs for which Air Liquide is liable but which have not yet been finally determined.

75. The situation regarding the supply of water and off-take of waste water is more complicated. The Emalahleni municipality does not have the infrastructure in place to supply water directly to the Plant and it relies for its water supply on the water pipeline owned by Highveld Steel through which Air Liquide also obtains its supply of water.

76. The only way in which Air Liquide can achieve autonomy as far as the supply of water is concerned, is if it connects directly to the Highveld Steel water pipeline upstream and as far as the off-take of waste water is concerned, if this is managed through Highveld Steel's

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waste water treatment facility. However, what will become of this water pipeline and the waste water treatment facility in the future remains uncertain. Highveld Steel produced steel rails for railway lines in its structural mill. This part of its business remains profitable. As far as I am aware, the applicants are engaged in the process of reviving the production of steel rails in the structural mill and, to that end, concluding an agreement with a third party or third parties. This will necessitate the continued use of the pipeline and of the waste water treatment facility. I am unaware of the precise nature of the corporate structure in which the steel mill business will be held. Whatever the position, Highveld Steel may not retain ownership of the pipeline and the waste water treatment facility.

77. On 24 October 2016, Legg held a telephone discussion with Field regarding such agreement and the parties to it. Field advised Legg as follows:

77.1 although a Term Sheet had been signed, no agreement has yet been concluded and the Term Sheet is of a non-binding nature;

77.2 until such time as a final agreement is signed by the parties to the joint venture, the applicants are not willing to disclose the identities of the parties to the Term Sheet; and

77.3 the applicants will in all likelihood be agreeable to furnishing an undertaking or signing an addendum to the Utilities Agreement to address prayer 4 of the notice of counter-application to which I refer below.

78. As the continued supply of water to the Plant (and off-take of waste water) is crucial to Air Liquide, it is essential for Air Liquide to be included in any discussions or negotiations which concern the ownership and continued operation of the pipeline and waste water treatment facility in order that it may secure its right to connect directly to the pipeline and be able to manage its waste water under whatever agreement is concluded regarding the steel mill and/or the disposal of the pipeline and waste water facility by Highveld Steel. This will also form the subject matter of Air Liquide's counter application.

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79. Upon the furnishing of a satisfactory undertaking or the conclusion of a satisfactory addendum to the Utilities Agreement, the relief sought in Prayer 4 of the notice of counter-application will no longer be necessary. Until then however, Air Liquide persists with its claim for such relief.

CLAUSE 20.12 OF THE SUPPLY AGREEMENT

80. In terms of paragraph 2.3.3 read with paragraph 2.3.3.2 of the notice of motion in this application, the applicants seek an order declaring that any claim for damages which Air Liquide might assert will be limited in accordance with the provisions of clause 20.12 of the Supply Agreement.

81. As appears from the above quoted clause 20 of the Supply Agreement, that clause is concerned with a material breach of the Supply Agreement by either party resulting in, *inter alia*, a termination of the Supply Agreement by the aggrieved party giving rise to a claim for damages suffered as a result of such breach. The clause provides a complex mechanism for remedying the breach as a precursor to cancellation which can only occur if the implementation of the mechanism does not result in the breach being remedied.

82. As emerges from clause 20.12, this clause is only concerned with a limitation on the aggrieved party's claim for direct damages arising under the clause. Accordingly, the words in clause 20.12 "*[W]ithout limiting the provisions of clauses 14 and 16, each Party's liability to the other Party in respect of direct damages...*" are to be construed in the context of a claim for direct damages suffered by an aggrieved party pursuant to a breach of the Supply Agreement but without limiting the provisions of clauses 14 and 16 of the Supply Agreement.

83. Clause 14 of the Supply Agreement provides for the mandatory payment by Highveld Steel to Air Liquide of the monthly fee with effect from the commencement of the Supply Agreement. Clause 14 also expressly provides that the Minimum Product Purchase Obligation (MPPO) shall be equivalent to the quantities of oxygen, nitrogen and argon

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(whether individually or collectively) nominated by Highveld Steel in terms of clause 9.6 of the Supply Agreement, which will not be less than nor exceed the thresholds stipulated in the Supply Agreement.

84. Although the obligation to pay the MPPO arises under clause 9 of the Supply Agreement, clause 14 and the MPPO are so closely linked that the reference to clause 14 in clause 20.12 should be interpreted to include a reference to the MPPO which is expressly dealt with in clause 14.8. Put differently, in the context of the MPPO, clause 14 cannot be construed without reference to clause 9. To interpret clause 20.12 in the manner suggested by the applicants would result in an insensible and unbusinesslike interpretation.

85. In any event, clause 20.12 imposes no limitation on a damages claim which arises outside of the provisions of clause 20 such as under clauses 14 (and axiomatically clause 9 with reference to the MPPO) and clause 16 (which relates to Availability). It would be equally absurd to suggest that clause 20.12 would impose any limitation in respect of the Availability Credit of up to R200 million and the Purchaser's Settlement Fee (an amount equal to the present value of the then prevailing Monthly Fee for twenty years) referred to in clauses 16.6, 22.16 and 22.17 of the Supply Agreement.

86. In the present matter, Air Liquide's damages claim arises as a result of the exercise by the applicants of their purported right in terms of section 136(2)(b) of the Act to apply to a court to entirely, partially or conditionally cancel any obligation of Highveld Steel that arises under the Supply Agreement and not in consequence of a breach of the Supply Agreement, which in all events requires the specific procedure set out in clause 20.2 of the Supply Agreement to be followed.

87. Section 136(3) of the Act clearly preserves the right of Air Liquide to assert a claim against Highveld Steel for damages resulting from the suspension or cancellation of the Supply Agreement or any provision of the Supply Agreement pursuant to section 136(2).

88. There can be no question of such claim for damages being limited by clause 20.12 of the Supply Agreement.

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89. As the applicants are well aware, Air Liquide disputes that its damages claim is limited by clause 20.12 of the Supply Agreement. Clause 24 of the Supply Agreement contains specific provisions regarding the resolution of any dispute between the parties arising out of the Supply Agreement. In those circumstances, I have been advised that the dispute concerning clause 20.12 of the Supply Agreement is not cognisable by this Honourable Court.

THE JUST AND REASONABLE PROVISION IN SECTION 136(2)(b) OF THE ACT

90. In terms of section 136(2)(b) of the Act any cancellation granted in terms thereof must be "*...just and reasonable in the circumstances...*".

91. In the circumstances set out above, it would be grossly unjust and unreasonable if Air Liquide's claim for damages against Highveld Steel arising from a cancellation of Highveld Steel's obligations under the Supply Agreement in the terms set out in paragraph 1 of the notice of motion is to be limited in terms of paragraph 24.2 of the Plan.

92. The fact that Air Liquide has a claim against EVRAZ plc under the Guarantee does not address the prejudice caused to Air Liquide by paragraph 24.2 of the Plan which reduces its damages claim in the business rescue proceedings by in excess of 96%.

93. In terms of clause 15 of the Guarantee, the Guarantee is to be governed by, interpreted and construed in accordance with English law. Presumably EVRAZ plc will contend (as do the applicants), that clause 3.2 of the Guarantee imposes a limitation on Air Liquide's claim for damages under the Guarantee.

94. This entails an interpretation of clause 3.2 of the Guarantee in accordance with English law. This will give rise to a dispute between Air Liquide and EVRAZ plc and it is not the task of the above Honourable Court to indulge in speculation regarding its outcome.

95. Chapter 6 of the Act is to be interpreted in the light of sections 2 and 39 of the Constitution.

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96. Section 25(1) of the Constitution states that "*No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.*".

97. Section 39(2) read with section 25(1) of the Constitution imposes an obligation on the above Honourable Court to interpret Chapter 6 of the Act in a manner that avoids arbitrary deprivation of property.

98. In terms of section 5(1) of the Act it "*...must be interpreted and applied in a manner that gives effect to the purposes set out in section 7*". In terms of section 7 of the Act, one of its purposes is to "*...(a) promote compliance with the Bill of Rights as provided for in the Constitution, in the application of company law...*". Section 5(1) of the Act thus insists on a purposive interpretation of its provisions. This means that the above Honourable Court must prefer an interpretation that best promotes the purposes listed in section 7 in general and the purpose of business rescue more particularly.

99. In terms of section 136(2) of the Act "*[s]ubject to subsection (2A), and despite any provision of an agreement to the contrary, during business rescue proceedings, the practitioner may – ...(b) apply urgently to a court to entirely, partially or conditionally cancel <u>on any terms that are just and reasonable in the circumstances</u>, any obligation of the company contemplated in paragraph (a).*"

(my emphasis)

100. In terms of section 145(4) of the Act "*In respect of any decision contemplated in this Chapter that requires the support of the holders of creditors' voting interest – (a) a secured or unsecured creditor has a voting interest <u>equal to the value of the amount owed to that creditor by that company</u>...*"

(my emphasis)

101. Accordingly, in the light of the purpose of the Act provided in section 7, the Plan must be interpreted in a manner that creates optimum conditions for the aggregation of capital for

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productive purposes, and for the investment of that capital in enterprises and the spreading of economic risk, and that balances creditors' rights with those of other stakeholders. This serves to promote the fundamental purpose of the Act, being to encourage investment and economic growth and to regulate companies efficiently. Creditors play an important role in the economy, and if the full extent of their claims are not protected their own solvency may be imperilled. Air Liquide entered into the Supply Agreement on the basis that it would be fully complied with, alternatively, that in the event that it was not fulfilled for reasons that are not its fault, it would be properly compensated.

102. An order cancelling Highveld Steel's obligations under the Supply Agreement in terms of paragraph 1 of the notice of motion will give rise to a claim for damages on the part of Air Liquide calculated over the remaining term of the Supply Agreement viz. 18 years. Air Liquide's mitigated claim for damages, discounted to a present day value, is not less than R1.35 billion. However, in terms of paragraph 24.2 of the Plan, Air Liquide's claim for damages would be limited to a fraction of its worth. Moreover, this is not consistent with section 128(1)(b)(iii) of the Act insofar as the section defines business rescue as a proceeding to facilitate a better return for the company's general body of creditors than would result from the immediate liquidation of the company.

103. Air Liquide's claim for damages at the time when the Plan was approved, was entirely conditional upon the cancellation of the Supply Agreement pursuant to section 136(2) of the Act. Accordingly, when the Plan was approved, Air Liquide's voting interest, which was commensurate to the debt then due to it (R6 955 192.69 as at the date of voting), was not commensurate with the extent to which its damages claim would be compromised by paragraph 24.2 of the Plan in the event of a cancellation of the Supply Agreement pursuant to section 136(2).

104. At the time of the grant of an order in terms of paragraph 1 of the notice of motion, Air Liquide would have a damages claim which accrued to it by virtue of the common law and section 136(3) of the Act. This accrued claim for damages would be protected by section 25(1) of the Constitution.

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105. One of the purposes of business rescue is to balance the rights and interests of all relevant stakeholders. Where the interests of one of the concurrent creditors with a damages claim are sacrificed to a much greater degree than all of the other concurrent creditors, including those with damages claims, this does not result in the fair balancing of rights and interests.

106. Section 136(3) of the Act does not place a limitation on damages. The damages claim has been limited by paragraph 24.2 of the Plan which if valid and enforceable would bind creditors by virtue of section 152(4) of the Act. The applicants therefore seek to limit Air Liquide's damages claim by incorporating paragraph 24.2 of the Plan in the order for cancellation which they seek.

107. It could never be "*...just and reasonable in the circumstances...*" for Air Liquide to be bound by a business rescue plan on which it could not vote with an influence commensurate with its claim for damages.

108. If Chapter 6 of the Act were to be interpreted to allow the applicants to use paragraph 24.2 of the Plan to reduce Air Liquide's damages claim by over 95%, this would amount to a procedurally unfair and substantively arbitrary deprivation of Air Liquide's property.

109. I now turn to deal *seriatim* with the allegations in the founding affidavit to the extent necessary.

AD SERIATIM

110. As the preceding portion of this affidavit indicates the manner and extent to which Air Liquide takes issue with the allegations contained in the paragraphs comprising the founding affidavit, I do not intend dealing with each and every allegation in the founding affidavit. Any failure to do so is however not to be taken as an admission thereof and to the extent that any of the averments set out in the paragraphs of the founding affidavit which I have chosen to deal with are inconsistent with the general narration to which I have

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referred, such allegations are denied. Similarly, my failure in each of the paragraphs which now follow to record a general denial in regard to any matter which is not dealt with, is to be taken as having been denied.

111. **Ad paragraph 3**

I deny that all of the facts deposed to by Marsden are within his personal knowledge and to the best of his belief both true and correct.

112. **Ad paragraph 9**

I note the relief sought by the applicants. I deny however that such relief is justified for all the reasons contained in this Answering Affidavit and in Air Liquide's counter-application which is set out below.

113. **Ad paragraph 17**

"FA4" does not incorporate the amendments referred to in paragraph 33 above. It also does not refer to Air Liquide's reservations in Werksmans' letter of 28 September 2015 (**"AA1"**), quoted above.

114. **Ad paragraph 23**

The failure of the proposed transaction also had a devastating effect on Highveld Steel's concurrent creditors and, more particularly, on Air Liquide.

115. **Ad paragraph 30.3**

115.1 It is of paramount importance for Air Liquide and the above Honourable Court to be provided with the following information:

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115.1.1 The identities of all of the concurrent creditors whose claims against Highveld Steel have been admitted by the applicants and the amount in which each such claim has been admitted.

115.1.2 The identities of all of the concurrent creditors, if any, who have lodged claims against Highveld Steel which have not been admitted by the applicants and the amount of each such claim.

115.1.3 The identities of the concurrent creditors whose pre-business rescue contracts with Highveld Steel have either been cancelled by agreement with the applicants or in respect of which the applicants have sought or will seek a cancellation order and in respect of each such agreement:

115.1.3.1 what the remaining term of the agreement was at the date of cancellation or at the date on which the applicants' application for cancellation was brought or will be brought;

115.1.3.2 whether in terms of a consensual or other cancellation of the agreement, the concurrent creditor concerned has a claim for damages against Highveld Steel and, if so, what the quantum of the damages claim is and what the extent, if any, of the reduction in the claim pursuant to paragraph 24.2 of the Plan is; and

115.1.3.3 whether the damages claim has been admitted by the applicants and, if so, in what amount.

115.2 On 6 September 2016 Van Hulsteyns addressed a letter to ENSafrica, a copy of which is annexed marked "**AA3**", in which the following information was, *inter alia*, requested:

"*4.2 A list of all creditors whose contracts have been cancelled since the inception of the business rescue to date who have lodged damages claims*

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against the company, together with the full amounts of their claims and whether and to what extent any such claim has been accepted by the business rescue practitioners.

4.3 *Annexure B to the Business Rescue Plan is a list of creditors of the company as at the Commencement Date. It is not possible to discern from the list whether any of those claims is a claim for damages. Kindly identify which of the claims is a claim for damages and in respect of each claim, state what the full amount of the claim is and whether and to what extent the claim has been accepted by the BRPs.*"

115.3 ENSafrica responded to "**AA3**" on 8 September 2016 by way of a letter, a copy of which is annexed marked "**AA4**". As appears from "**AA4**" the response to paragraphs 4.2 and 4.3 quoted in paragraph 109.2 above was "*The documents requested are irrelevant to these proceedings.*". Apart from the fact that this response is in adequate as paragraphs 4.2 and 4.3 were not confined to documents, the response was also ill-advised.

115.4 However, the attitude of the applicants to the provision of such information has changed. Annexed marked "**AA6**" and "**AA7**" are copies of letters addressed by Legg to Field and by Field to Legg on 7 October 2016 and 24 October 2016 respectively.

115.5 As appears from "**AA7**", on 24 October 2016:

115.5.1 there were said to be no concurrent creditors, apart from Air Liquide, who had claims for damages against Highveld Steel; and

115.5.2 apart from the order sought in paragraph 1 of the notice of motion in this application, no other cancellation order has been sought by the applicants.

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115.6 However, the facts were updated on 14 November 2016 in a further letter addressed by ENSafrica to Van Hulsteyns (being "**AA2**") in which Field informed Legg that:

115.6.1 Hochvanadium Handels GMBH has submitted a claim for prepayment of slag and a claim for damages following its termination of a supply agreement concluded with Highveld Steel. According to the updated schedule of claims which accompanied the letter, this claim, which is disputed by the applicants, is reflected at R49 358 010.47.

115.6.2 SA Roll Company (Pty) Ltd has submitted an amended claim form in terms of which, damages in the sum of R2 721 436.53 are being claimed arising from the cancellation of a purchase order.

115.6.3 Vesuvius South Africa (Pty) Ltd and Vesuvius GMBH have submitted claim forms for, *inter alia*, the non-delivery of purchase orders for amounts reflected in the claims schedule of R33 436 770.46 and R1 158 987.49 respectively.

115.6.4 Samancor Chrome Limited has submitted a claim form for, *inter alia*, rehabilitation costs regarding a dump. In regard to this claim further information is apparently being sought by the applicants to establish whether there are any projected costs included in this claim, which amounts to R48 895 303.22.

115.7 Paragraph 24.2 of the Plan reads as follows:

"*24.2* ***Damages***

24.2.1 In the event that Creditors claim damages, whether contractual or delictual, against the Company, which damages Claim is accepted by

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the BRPs or proved by way of the Dispute Mechanism or by Court or similar proceedings, such damages Claims:

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

24.2.1.2 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;

24.2.1.3 will be deemed to exclude all consequential (including loss of profit) and indirect damages…"

115.8 It is not possible to determine from the information provided in "**AA2**":

115.8.1 Whether and, if so, to what extent the damages claims of Hochvanadium Handels GMBH and SA Roll Company (Pty) Ltd are limited in terms of paragraph 24.2 of the Plan.

115.8.2 Whether any portion of the claims of Vesuvius South Africa (Pty) Ltd, Vesuvius GMBH and Samancor Chrome Limited is a damages claim and, if so, whether and to what extent such damages are limited in terms of paragraph 24.2 of the Plan.

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115.9 Given the paucity of information furnished by the applicants regarding such claims, I am advised that they should be ignored for present purposes. However, Air Liquide reserves its right to supplement this affidavit if further relevant information regarding such claims, or for that matter, any other damages claims which have been or might be asserted by creditors against Highveld Steel, is furnished by the applicants in their replying affidavit which it is considered requires to be dealt with by Air Liquide.

116. **Ad paragraph 35**

While I do not dispute that the ultimate payment to employees and creditors will depend on the ability to reduce all unnecessary costs, I dispute, for the reasons set out above, that paragraph 24.2 of the Plan is enforceable against Air Liquide.

117. **Ad paragraph 38**

Eskom's position is markedly different from that of Air Liquide. The primary differences are that:

117.1 The Supply Agreement, since Commercial Operation commenced, has run for approximately two and a half years. In contradistinction, Eskom has been supplying Highveld Steel for decades and has in all likelihood recouped its capital investment in full.

117.2 Eskom's business model differs from Air Liquide's business model. Eskom's assets are employed in servicing the needs of a large volume of customers whereas the Plant is largely dedicated to servicing the needs of Highveld Steel.

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118. **Ad paragraph 39**

I deny that Air Liquide has been unwilling to assist the applicants in their attempts to reduce the fixed costs associated with the Supply Agreement. What Air Liquide has not been prepared to do is to agree to a reduction of the fixed costs on the extortionate terms insisted upon by the applicants as set out above.

119. **Ad paragraphs 40 to 46**

I refer to what is set out above with regard to Air Liquide's obligations regarding ensuring a continuous supply of product to Highveld Steel under the Supply Agreement and the balancing of the risks borne by the parties under the Supply Agreement. The reference by the applicants to the 'Take or Pay' clause in isolation creates a distorted picture.

120. **Ad paragraph 50**

I similarly refer to what is set out above in relation to the various meetings held between the applicants and Air Liquide's representatives and what was discussed. The contrary impression created by the applicants is denied.

121. **Ad paragraph 53**

I refer to what I have stated above with regard to certain of the correspondence of which "FA10" is comprised.

122. **Ad paragraphs 54 to 56**

The "*modified*" or "*restructured*" terms to which reference is made were the subject of negotiation on the basis that Highveld Steel would be rescued and that the Supply Agreement would not be cancelled. This is an entirely different situation to the one which

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now confronts Air Liquide. As regards the meetings held with IRPL, I refer to what I have set out above.

123. **Ad paragraphs 61 to 67**

I refer to what I have set out above regarding the supply of the utilities and the attempts on the part of the applicants to coerce Air Liquide to agree to a termination of the Supply Agreement in return for concluding the Interim Agreement with it. Threatening to discontinue Highveld Steel's obligations in terms of the Supply Agreement regarding utilities by way of a court application should Air Liquide not agree to a termination of the Supply Agreement, was grossly unreasonable.

124. **Ad paragraph 72**

124.1 I do not understand how the cancellation of Highveld Steel's obligations in terms of the Supply Agreement "*...will result in a significant reduction of accrued monthly damages claims...*". If this assertion is somehow based on paragraph 24.2 of the Plan, it is misconceived as paragraph 24.2 of the Plan is not enforceable against Air Liquide on the grounds set out above. Nor, for the reasons set out above, does clause 20.12 of the Supply Agreement impose any limitation on Air Liquide's claim for damages and any reliance on this clause would also be misplaced.

124.2 The effect of paragraph 24.2 of the Plan on Air Liquide's claim for damages would be to compel Air Liquide, at its expense, to part fund the amount payable to all of the other concurrent creditors, with the possible exception of the two creditors referred to above. In no way can this be fair and reasonable.

125. **Ad paragraph 73**

125.1 I refer to what I have stated above with regard to Air Liquide's reservation of rights regarding paragraph 24.2 of the Plan at the time when it voted in favour of the

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adoption of the Plan. In those circumstances, it cannot be contended that Air Liquide waived its rights to contend that paragraph 24.2 of the Plan is invalid and not even the applicants go so far as to suggest this.

125.2 I deny that Air Liquide has no justifiable reason for refusing to agree to the cancellation of the Supply Agreement. As the applicants well appreciate this would in effect amount to an abandonment by Air Liquide of its R1.35 billion claim for damages against Highveld Steel and against EVRAZ plc under its guarantee.

126. **Ad paragraph 76**

I note the suggestion that Highveld Steel "*...is likely to obtain the product at a better price from Afrox in the event of [Highveld Steel] requiring low volumes of product during its business rescue...*". I would be astonished if this is the case and I refer to what is set out above in this regard. In the circumstances, the applicants are requested to support their supposition with the concrete facts.

127. **Ad paragraph 78**

Air Liquide objects to the expedient attitude adopted by the applicants in procuring a drastically reduced quantity of product from Air Liquide at the prices contained in the Supply Agreement on the basis of a purported suspension of Highveld Steel's obligation to pay the MPPO. I refer to what I have stated above in this regard.

128. **Ad paragraph 79**

In the event that Highveld Steel's obligations under the Supply Agreement are cancelled in terms of paragraph 1 of the notice of motion, Air Liquide has every right to pursue a claim against EVRAZ plc under the Guarantee and no criticism can be levelled against it in this regard. The attempt by the applicants to coerce Air Liquide to abandon its claim for damages is nothing short of astonishing.

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129. **Ad paragraph 80**

As set out above, the Guarantee is to be construed and interpreted in accordance with English law and I do not know what the basis is on which the deponent to the founding affidavit feels that he is qualified to express an opinion regarding the proper construction of clause 3.2 of the Guarantee. In any event, his opinion is both self-serving and irrelevant.

130. **Ad paragraph 81**

I deny that it is just and reasonable for Highveld Steel's obligations under the Supply Agreement to be cancelled on the terms set out in paragraph 1 of the notice of motion subject to a limitation on Air Liquide's resultant claim for damages in terms of paragraph 24.2 of the Plan. In fact, the opposite is the case.

131. **Ad paragraph 86**

Although the applicants purported to suspend Highveld Steel's obligation to pay the monthly fee on 15 July 2016, no monthly fee has been paid to Air Liquide since August 2015.

132. **Ad paragraph 88**

I point out that section 136(3) of the Act does not impose any limitation on the damages claims referred to in the section.

133. **Ad paragraph 93**

As set out above, Air Liquide's mitigated damages claim, at a present day value, is not less than R1.35 billion.

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134. **Ad paragraph 94**

For the reasons set out above, clause 20.12 of the Supply Agreement does not impose any limitation on Air Liquide's claim for damages.

135. **Ad paragraph 96**

For the reasons set out above, paragraph 24.2 of the Plan is invalid.

136. **Ad paragraphs 97 and 98**

Air Liquide is entitled to participate in the business rescue proceedings to the full extent of its damages claim. I refer to what I have said above in this regard.

137. **Ad paragraph 99**

Whether or not paragraph 24.2 of the Plan is binding on Air Liquide is a question of law and Air Liquide has not waived any of its rights in that regard.

138. **Ad paragraph 100**

It would, for the reasons set out above, be unjust and unreasonable if Air Liquide's damages claim were to be reduced in the manner contemplated in terms of paragraph 24.2 of the Plan.

139. **Ad paragraphs 102 to 105**

The dispute resolution mechanism provided for in clause 38 of the Supply Agreement is appropriate for resolving any dispute which the applicants might raise with regard to the quantum of Air Liquide's claim for damages.

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140. Air Liquide relies, for the relief sought in this counter application, on the content of this affidavit.

141. I have been advised that:

141.1 The relief sought in paragraph 3 of the notice of counter-application will, if granted, impact on the legal interests of the creditors and employees of and shareholders in Highveld Steel in the business rescue proceedings.

141.2 Such creditors, employees and shareholders are accordingly required to be joined as respondents in the counter-application. No relief will be sought against such creditors, employees and shareholders save in the event that any of them oppose the grant of the relief sought in paragraph 3 the counter-application.

141.3 An application will be made to the above Honourable Court in advance of the hearing of the main and counter-applications for an order granting leave to serve the counter-application by way of various forms of substituted service.

141.4 The necessary joinder and substituted service applications will be brought by Air Liquide prior to the hearing of the main application and counter-application.

COUNTER-APPLICATION

142. Air Liquide relies on the content of this affidavit for the relief sought in its counter-application, which is delivered herewith.

143. The BRPs have consented in writing to the bringing of the counter-application, as required by section 133(1)(a) of the Act. In this regard I refer to paragraph 8 of ENSafrica's letter dated 24 October 2016, already attached as "**AA7**".

144. I have been advised that:

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144.1 the relief sought in paragraph 2 of the notice of counter-application will, if granted, impact on the legal interests of the creditors, employees and shareholders of Highveld Steel in the business rescue proceedings.

144.2 Such creditors, employees and shareholders are accordingly required to be joined as respondents by way of the counter-application, and Air Liquide shall make such application in advance of the hearing of the main and counter-applications. No relief will be sought against such persons, save in the event that any of them oppose the grant of the relief sought in paragraph 2 of the counter-application.

145. An application will be made to the above Honourable Court in advance of the hearing of the main and counter–applications for an order joining the creditors, employees and shareholders, and granting leave to serve the counter-application by way of various forms of substituted service.

146. Annexed marked "**AA8**" is an affidavit deposed to by Legg in which he confirms the truth and correctness of all allegations in this affidavit which relate to him.

Wherefore I humbly pray that it may please the above Honourable Court to dismiss the main application and insofar as the above Honourable Court cancels Highveld Steel's obligations under the Supply Agreement in terms of paragraph 1 of the notice of motion, that it grant the counter-application with costs, such costs to include the costs consequent upon the employment of two counsel.

DEPONENT

I HEREBY CERTIFY THAT THE DEPONENT HAS ACKNOWLEDGED THAT HE KNOWS AND UNDERSTANDS THE CONTENTS OF THIS AFFIDAVIT, WHICH WAS SIGNED AND SWORN TO BEFORE ME, A COMMISSIONER OF OATHS, AT SANDTON ON THIS THE ~~23~~ 22ND DAY OF NOVEMBER 2016, THE REGULATIONS CONTAINED IN GOVERNMENT NOTICE NO. R1258 OF 21 JULY 1972, AS AMENDED, AND GOVERNMENT NOTICE NO. R1648 OF 19 AUGUST 1977, AS AMENDED, HAVING BEEN COMPLIED WITH.

COMMISSIONER OF OATHS

Riaan Becker
Ex Officio
Commissioner of Oaths
Practising Attorney
Suite 24 Katherine & West
114 West Street, Sandton, South Africa