

IN THE HIGH COURT OF SOUTH AFRICA
(SOUTH GAUTENG HIGH COURT, JOHANNESBURG)

CASE NO: 39646/12

In the matter between:

VAAL ENVIRONMENTAL JUSTICE ALLIANCE

Applicant

and

**COMPANY SECRETARY OF ARCELORMITTAL
SOUTH AFRICA LIMITED**

First Respondent

ARCELORMITTAL SOUTH AFRICA LIMITED

Second Respondent



FILING SHEET

DOCUMENTS SERVED AND FILED HEREWITH:

Applicant's replying affidavit

SIGNED AT HERMANUS THIS 19TH DAY OF DECEMBER 2012

CENTRE FOR ENVIRONMENTAL RIGHTS

Applicant's attorneys

223 Lower Main Road

Observatory

Cape Town

Tel: 021 447 1647

Fax: 086 730 9098

Email: rhugo@cer.org.za

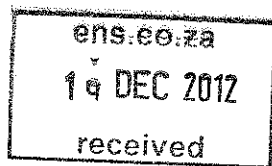
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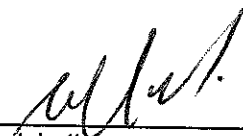
c/o CENTRE FOR APPLIED LEGAL STUDIES
1st Floor, DJ Du Plessis Building
West Campus
University of the Witwatersrand
1 Jan Smuts Avenue
Braamfontein
Tel: 011 717 8600
Fax: 011 717 1702
Ref: Lisa Chamberlain

TO: EDWARD NATHAN SONNENBERGS

Respondents' attorneys
150 West Street
Sandton
Tel: 011 269 7600
Fax: 011 269 7899
Email: lchristie@ens.co.za
Ref: Lloyd Christie

Received copy hereof on this the 19th day of
December 2012





Respondents' attorneys

AND TO: The Registrar
South Gauteng High Court
Johannesburg

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REPLYING AFFIDAVIT

I, the undersigned –

SAMSON MOKOENA

do hereby make oath and say that –

1. I am an adult male and the Co-ordinator of the Applicant. I am duly authorised to depose to this affidavit.
2. The facts and circumstances set out in this affidavit fall within my personal knowledge, except where the context indicates otherwise, and are true.

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Where I make submissions of a legal nature, I do so on the advice of my legal representatives, which advice I believe to be true and correct.

3. I was the deponent to the founding affidavit in respect of this application. I have read the answering affidavit deposed to by Adriana Cecilia Taljaard ("Taljaard") on behalf of the second respondent ("AMSA") and the annexures thereto. I respond to the answering affidavit on behalf of the applicant as follows below. Insofar as any allegations in the answering affidavit are not responded to directly in this affidavit, such allegations are denied, insofar as they are inconsistent with what is set out in this affidavit and in the founding affidavit.
4. Before I respond to the allegations in Taljaard's affidavit *ad seriatim*, I address the following issues:
 - 4.1 The applicant's entitlement to the requested information to exercise and protect the environmental right under section 24 of the Constitution;
 - 4.2 The history of AMSA's non-compliance with environmental legislation;
 - 4.3 The relevance of the Environmental Management Plan ("EMP") to the exercise and protection of the applicant's environmental rights; and
 - 4.4 The nature and effect of AMSA's refusal to the applicant's request for information.

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THE APPLICANT IS ENTITLED TO THE REQUESTED INFORMATION TO EXERCISE AND PROTECT THE RIGHT UNDER SECTION 24 OF THE CONSTITUTION

5. In its answering affidavit, AMSA suggests that, by requesting access to records that may evidence its compliance or violation of environmental laws, the applicant:
- 5.1 is assuming a right to monitor and enforce AMSA's compliance with environmental laws;
 - 5.2 is "usurping" the role of authorities in ensuring AMSA's statutory compliance;
 - 5.3 "seeks to establish what amounts to a parallel enforcement agency"; and
 - 5.4 attempts to "bypass statutory mechanisms and processes that have been put in place for ensuring statutory compliance".
6. As I understand paragraphs 15 to 17 of the answering affidavit, AMSA contends that the applicant's right to an environment not harmful to health or well-being under section 24 of the Constitution does not entitle it to the requested information for the purpose of compliance monitoring. It reasons that:

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- 6.1 such information may only be sought under section 24(b) of the Constitution, since the request is necessarily premised on the allegation that the State has failed in its constitutional obligation to take all reasonable enforcement measures as required under section 24(b); and
- 6.2 that the applicant cannot rely on section 24(b) without the joinder of the State.
7. I am advised that this is a matter for legal argument, and that the AMSA's interpretation of section 24 of the Constitution will be addressed at the hearing. However, the following express, alternatively implicit, allegations are denied:
- 7.1 That the requested information may only be sought under section 24(b) of the Constitution;
- 7.2 That section 24(b) of the Constitution applies only vertically to bind the State and does not bind private bodies such as AMSA;
- 7.3 That requesting the information for the purpose of compliance monitoring is necessarily premised on the allegation that the State has failed in its constitutional obligation to take all reasonable enforcement measures as required under section 24(b);
- 7.4 That the applicant cannot rely on section 24(b) of the Constitution without joining the State;

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- 7.5 That the applicant was obliged to request the information from the State, and that it failed to do so.
8. With regard to the last allegation, I point out that the applicant did indeed request the information from the relevant State authorities.
- 8.1 The Department of Water Affairs ("DWA") refused the request for the Master Plan records on the basis that it was not in possession of the records, and referred the applicant's request to AMSA, in accordance with section 23 of PAIA. I attach hereto correspondence from the DWA marked "**SM42**", which includes an affidavit from Mr Singh of the DWA and copies of his correspondence with Ms Taljaard of AMSA.
- 8.2 The Master Plan records were also requested by the applicant from the Gauteng Department of Agriculture and Rural Development ("GDARD"). On 6 February 2012, GDARD refused this request on the basis of section 23 of PAIA – i.e. that it had no record of the information requested. This appears from "**SM43**" attached hereto.
- 8.3 The applicant also requested the Master Plan records and information relating to the Vaal disposal site from the Department of Environmental Affairs ("DEA"). The DEA transferred both requests to GDARD in terms of section 20 of PAIA. This appears from "**SM44**" and "**SM45**", delivered to the applicant's attorneys on 31 January 2012 and 20 March 2012, respectively.

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- 8.4 As explained at paragraph 54.1 of the founding affidavit, the applicant also requested information from GDARD in respect of the Vaal Disposal site, which request was refused. On 7 December 2012, the applicant also launched proceedings in this regard against GDARD.
- 8.5 Notwithstanding the above, I submit that any obligations the State may have to provide information under PAIA have no bearing on the present application, since the State's duties do not absolve AMSA of its own obligations under PAIA. AMSA is obliged under section 32(2) of the Constitution, and section 50(1) of PAIA, to provide information to which the requester is entitled.
9. AMSA's statements (cited at paragraph 5 above) misstate and obfuscate the critical issue: the applicant's right, as a non-profit voluntary association acting in the public interest, to have access to information about the way in which the activities undertaken by AMSA impact on the environment; whether those impacts are harmful to health or wellbeing; whether or not those impacts constitute pollution or ecological degradation; and whether measures have or are being taken to prevent, minimise and rectify such pollution or degradation.
10. Access to such information is required, and may be requested, by the applicant in the exercise and protection of the section 24(a) constitutional right to live in an environment that is not harmful to people's health or well-being, and in the exercise and protection of the section 24(b) right to have the environment protected through reasonable legislative and other measures that *inter alia* prevent pollution and ecological degradation.

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11. The importance of public access to information on pollution, hazardous materials and activities, and environmental impacts, for the exercise and protection of environmental rights, has been widely recognised under international and foreign law. The relevant authorities will be addressed in argument.
12. The applicant's exercise and protection of the right to an environment not harmful to health or well-being does indeed entail it playing an active role in environmental governance. This includes, at the very least, assessing the compliance status of any enterprise or facility that carries on activities that impact on the environment. This role is *complementary* to the duties and functions of the State; it does not entail civil society "usurping" the role of the State.
13. Moreover, by exercising such a role, civil society does not "bypass" the statutory mechanisms for enforcement. To the contrary, civil society relies upon these very enforcement mechanisms, and ensures their effectiveness in doing so. In order to know whether the section 24 right has been infringed and to invoke the statutory mechanisms – for example, to report instances of environmental compliance to the authorities – civil society requires access to environmental information.
14. By requesting information, the applicant does not purport to take the law into its own hands. It seeks the information to exercise the powers and responsibilities afforded civil society and the public at large under the relevant

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- environmental laws, to work with the authorities to protect the right to a environment not harmful to health or well-being.
15. The Constitution and environmental legislation expressly contemplate that civil society plays an important role in environmental governance. The relevant statutory provisions will be addressed in legal argument.
16. The environmental authorities have also incorporated in their strategy plans a model of environmental governance that permits and encourages participation and compliance monitoring by civil society and local communities. For example:
- 16.1 The National Waste Management Strategy ("NWMS"), promulgated in November 2011 in terms of section 6 of the National Environmental Management: Waste Act 59 of 2008 ("Waste Act"), provides as follows:

"Implementing the waste management hierarchy and achieving the objects of the Waste Act will require coordinated action by many players, including households, businesses, community organisations, NGOs, parastatals and the three spheres of government. This means that a consultative and partnership based approach is essential for realising the NWMS: government action alone cannot be effective. Therefore, government is committed to following a co-regulatory and consensual approach that brings different actors on board and allows scope for local initiative and creativity. . . .

Even in the more traditional government area of regulatory compliance, partnerships are needed for compliance monitoring. Both business and civil society play a crucial role in identifying areas of risk and alerting government to the need for enforcement or legal action." (pp. 19-20)

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"While the Waste Act creates a comprehensive legal framework for waste management, its provisions would be meaningless without measures to monitor and, where necessary, enforce compliance. Government cannot do this alone. Business and civil society have a vital role to play in creating a culture of compliance, and in reporting instances of non-compliance. For its part, government will systematically monitor compliance with the Waste Act, which includes regulations published in terms of the Act, licences, industry waste management and integrated waste management plans." (p. 33).

16.2 A copy of the relevant pages of the NWMS is attached hereto as Annexure "**SM46**".

16.3 The 2007 National Framework for Air Quality Management in the Republic of South Africa (contemplated in section 7 of the National Environmental Management: Air Quality Act 39 of 2004), provides as follows:

Finally, the public may be directly affected by air pollution. The public and civil society groups therefore contribute local perspectives and also have an important watchdog role to play in bringing to the attention of the authorities through their municipal [Air Quality Officer], matters of concern or of non-compliance". (pp 21-22)

17. A copy of the relevant pages of the Framework is attached hereto as Annexure "**SM47**".

THE HISTORY OF AMSA'S NON-COMPLIANCE WITH ENVIRONMENTAL LAWS

18. AMSA concedes at paragraph 60.1 of the answering affidavit that its operations at Vanderbijlpark Works have *"historically had a significant*

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environmental impact". It further admits at paragraph 64 that "*pollution levels in the Vanderbijlpark area are of concern*".

19. However, AMSA suggests at paragraph 64 that it is complying with its statutory environmental obligations. This allegation is not supported by the facts.
20. Violations of environmental laws by AMSA have featured repeatedly in the National Environmental Compliance and Enforcement Report ("NECER") published by the Environmental Management Inspectorate in the DEA. In these annual reports, serious non-compliance by all four steelworks owned and operated by the AMSA has been reported, and AMSA continues to be on the list of companies facing criminal investigations into alleged contraventions of environmental laws.
21. The NECER for 2010/2011 summarises repeated findings of non-compliance with environmental laws (including statutory provisions requiring compliance with conditions of licences issued under those laws) for three of AMSA's works, including Vanderbijlpark and Vereeniging, since 2007.
 - 21.1 At Vanderbijlpark, findings of a November 2008 inspection included undertaking various activities without authorisation, non-compliance with authorisations and "environmentally harmful activities". In August 2010, a follow-up inspection revealed further violations. This appears from pages 44 and 45 of the 2010/2011 NECER, attached as "SM48".

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- 21.2 At Vereeniging, a May 2008 inspection found continued dumping of hazardous waste despite instructions to cease; particulate emissions to air linked to significant and serious pollution of the environment; and “*significant and serious pollution of surface and groundwater with phenols, iron, oil, fluoride and other hazardous substances*” (Annexure “SM36” to my founding affidavit).
22. The NECER for 2011/2012 (published in November 2012) records environmental management inspectors’ findings that the same three facilities of AMSA continue to operate in violation of environmental laws.
- 22.1 Page 44 of the Report discusses the initiation of a criminal investigation for non-compliance at AMSA’s Vereeniging site for the period 1 April 2011 to 31 March 2012:
- “ArcelorMittal has still not submitted an application to the DEA for the rehabilitation of the Vaal disposal site and there remains a dispute in relation to the legal interpretation and whether or not a licence is required.*
- The NPA has requested the Department to undertake further investigation in relation to the criminal case”.*
- I attach hereto the relevant page of the NECER 2011/2012, marked “SM49”.
- 22.2 Page 42 of the Report also states that a criminal investigation has been initiated in respect of various non-compliances and ongoing incidents

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at AMSA's Vanderbijlpark site. The relevant page of the NECER 2011/2012 is attached marked "**SM50**".

23. In October 2012 this year, GDARD issued a compliance notice to AMSA in relation to the Vanderbijlpark plant due to non-compliance with its atmospheric emission licence. AMSA reportedly shut down the offending furnaces in response. We attach hereto a media article reporting the shut-down, marked "**SM51**".
24. AMSA has failed to obtain a valid waste management licence in terms of the Waste Act for the Vaal disposal site, despite repeated instructions from the DEA. AMSA was advised by the DEA on 26 May 2010, 9 June 2011 and again on 8 August 2012 that an application for such licence should be submitted to the DEA as a matter of urgency. AMSA has continued to dispute the requirement of such a licence, and has thus not applied for a waste management licence. I attach hereto a letter from the applicant's attorneys (without its annexures, which already form part of these proceedings) as Annexure "**SM52**", in which clarity was sought from the DEA regarding compliance and enforcement at the Vaal disposal site. The relevant correspondence from the DEA to AMSA, under cover of a letter to the applicant's attorneys dated 13 December 2012, is attached as "**SM53**".
25. While the GDARD has approved AMSA's rehabilitation plan for the Vaal disposal site, the DEA has refused to do so. In a letter to AMSA dated 9 June 2011 (Annexure B to "**SM53**"), the DEA reminded AMSA that the Vaal disposal site still required DEA authorisation in terms of the Waste Act, and

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that closure and rehabilitation could not commence without a waste management licence. Any rehabilitation plan could only be approved by the DEA through a formal legal process, being the waste management licence application for the closure and rehabilitation of the site.

26. AMSA fails to take the Court into its confidence and explain why it is that the DEA has not approved the closure and rehabilitation.
27. In the light of the above, it cannot plausibly be suggested that the applicant's concern over harmful pollution at and around Vanderbijlpark Steelworks and the Vaal disposal site, and its related concerns about AMSA's non-compliance with its environmental obligations, are premised on mere "speculation".

THE RELEVANCE OF THE ENVIRONMENTAL MASTER PLAN FOR THE EXERCISE AND PROTECTION OF ENVIRONMENTAL RIGHTS

28. AMSA contends that the Master Plan cannot afford the applicant a substantial advantage in the exercise or protection of its environmental right on the basis that the Master Plan is, first, "*outdated and irrelevant*" and, second, "*scientifically and technically flawed*".
29. On the first allegation, AMSA points to the fact that the Master Plan was based on studies conducted between 2000 and 2002, which it contends have been "replaced" by more recent studies conducted for licensing purposes.

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30. This answer does not address the applicant's reason for requiring the Master Plan. As indicated at paragraph 44 of the founding affidavit, the Master Plan will provide a valuable *baseline of data* in respect of the pollution levels at the Vanderbijlpark site, derived from at least two years of numerous, specialist environmental tests and investigations conducted by AMSA.
31. Both the focus and findings of the more recent studies allegedly conducted by AMSA, and the subsequent rehabilitation measures it has taken, can only properly be assessed in the light of a baseline of scientific data. Given the manifest scope of the Master Plan, and the scientific investigations that informed it, it remains a vital source of data against which the applicants can make such assessments. Thus, even if it is accepted that the Master Plan is "outdated" (which is not accepted given that the applicants has not had sight of the Master Plan), it does not follow that it is "irrelevant".
32. On the second allegation, AMSA explains that the alleged 'scientific and technical flaws' on the basis of two main reasons:
- 32.1 *"Inappropriate standards"* were used to quantify the level of risk - in particular, reliance was placed on international standards based on overly stringent 'worst-case'? scenarios (paragraph 32.5 of the answering affidavit); and
- 32.2 *"The studies upon which the Master Plan was based reached conclusions that were simply scientifically unfounded"* (paragraph 32.6).

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33. Neither of these explanations suggests that the underlying data – i.e. the measurements of pollution levels taken in the numerous studies conducted to inform the Master Plan – is scientifically flawed. AMSA’s explanation suggests only that the *conclusions* drawn from such measurements were skewed by the application of erroneous standards, or were otherwise ‘scientifically unfounded’.
34. In any event, it does not suffice for the respondents to make bald allegations that the findings in the studies that informed the Master Plan were scientifically inaccurate.
35. As far as the applicant can discern, AMSA never gave any indication to its own shareholders that the Master Plan was scientifically inaccurate. On the contrary, as indicated at paragraph 16 of my founding affidavit, the Master Plan is mentioned regularly in the AMSA’s Annual Reports and these reports indicate that the Master Plan constitutes the AMSA’s primary environmental management strategy document. The 2002 report indicated that “*these environmental master plans drive our entire environmental management strategy*”. The 2004 report referred to “*the all-encompassing environmental master plan . . . completed in December 2002*”. It was only in 2010 that AMSA suggests in its Annual Report that the Master Plan was “outdated and irrelevant”. It was never, however, indicated that it was “scientifically inaccurate”.
36. In addition, when the Executive Report of the Master Plan was made publically available in 2003, there was no indication that it was scientifically

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inaccurate. As explained at paragraph 15.3 of my founding affidavit, it was indicated that the Master Plan methodology was informed by *“a holistic integrated management philosophy, which concentrated on technologies and measures to bring about pollution prevention”*.

37. Moreover, it is evident that AMSA submitted the Master Plan to the State authorities, and relied upon the Master Plan to obtain authorisations and licences. The regulatory authorities in turn relied upon the Master Plan, or parts thereof, in providing authorisations and licences. In particular:

37.1 The Master Plan was relied upon in relation to its current water use licence dated 23 October 2009. Its current long-term water use licence is attached as **“SM54”**. As indicated in paragraph 17 of the founding affidavit, during the Licensing Forum process in late 2003 - which involved negotiating AMSA's current water use licence - both AMSA and the DWA made extensive reference to the Master Plan and its findings.

37.2 In December 2006, the DWAF issued a directive to govern AMSA's water use, pending the new licence being issued. This appears from an AMSA memorandum dated July 2008, available at: <http://www.bohlweki.co.za/img/File/power%20generating/Appendix%20L.pdf> (**“SM55”**). The directive states that the Vanderbijlpark Works waste disposal site may only be operated until 31 December 2010.

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37.3 The Master Plan was relied upon by the Gauteng Department of Agriculture, Conservation and Environment ("GDACE") in authorising the closure of the existing waste disposal site and establishment of a new waste disposal site at Vanderbijlpark Steelworks on 22 February 2007. I attach hereto a copy of the RoD ("GDACE's 2007 RoD"), marked Annexure "**SM56**". This appears from the first bullet-point under paragraph 2.2(a) of Annexure SM56, which notes that the *Master Plan Specialist Report: Identification of Secondary Sources of Pollution, Environmental and Human Risk Assessment*, compiled by Ockie Fourie Toxicologists (Pty) Ltd, dated December 2002, informed the GDACE's 2007 RoD.

37.4 The GDACE's 2007 RoD has continued to inform waste management at Vanderbijlpark, as evidenced by two waste management licences issued by GDACE in 27 October 2011, extracts of which are attached as "**SM57**" and "**SM58**".

37.5 The current water use licence ("SM54") confirms, at clause 2.1, that solid waste and sludge may be disposed of into the existing dump until 31 December 2010, to allow the construction and operation of a new waste disposal site by that date. The water use licence ("SM54") and GDACE's 2007 RoD ("SM56") are therefore linked, and, in relation to both, AMSA relied on the Master Plan.

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38. Given that I have not had sight of the Master Plan, I am unable to confirm or deny AMSA's specific allegations in respect of its contents or that of the studies that informed it, but I do not admit these allegations.

AMSA'S REFUSAL UNDER SECTION 50(1) OF PAIA

39. AMSA contends, at paragraph 76 of the answering affidavit, that if the applicant establishes that it requires access to the requested records to protect or exercise a right, AMSA is entitled to consider the requests further to determine whether any of the grounds of refusal apply in terms of section 50(1)(c) of PAIA.

40. AMSA accordingly contends for a three or four-stage process of determining requests for information under PAIA under section 50(1) of PAIA:

40.1 First, that it considers only whether the so-called "threshold requirement" that the requested record is required to protect or exercise a right is met;

40.2 Second, that the validity of any refusal on this ground may be determined by a court;

40.3 Third, that it then considers whether any grounds of refusal listed under Part 3, Chapter 4 of PAIA apply; and

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- 40.4 Fourth, that the validity of any refusal on a listed ground may be determined by a court.
41. Full argument will be addressed at the hearing as to why such an interpretation is incorrect as a matter of law, and contrary to the scheme and objects of PAIA, read with section 32 of the Constitution.
42. In the event that AMSA was of the view that any of the grounds of refusal applied, it was required to allege this in its answering affidavit, as an alternative to its primary argument, and make out the necessary case in this regard. It has failed to do so and is not entitled to any further opportunity in this regard.
43. In the final section of this affidavit, I address the pertinent allegations in the answering affidavit which have not been dealt with above. To the extent that I have not dealt with any of AMSA's allegations, they are denied.

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44. AD PARAGRAPH 32.1

- 44.1 I deny the contents of this paragraph. I deny, in particular, any suggestion that the Master Plan is legally privileged.

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44.2 AMSA makes the allegations concerned in the baldest possible terms with no explanation of, for example, which litigation it is referring to or what the status of the litigation.

44.3 Moreover, it is plain that, whatever the intention with which the Master Plan was compiled, it has been used by AMSA for a series of purposes and submitted by it to various bodies, including state authorities. I refer to what is stated above in this regard. Thus even if the document were legally privileged, such privilege has been waived.

45. AD PARAGRAPHS 32.2 AND 32.3

45.1 The applicant has no knowledge regarding the peer review or draft status of the Master Plan. However, the applicant notes that AMSA admits that the studies that informed the Master Plan were completed between 2000 and 2002, and that the results thereof were consolidated and incorporated in the Master Plan.

45.2 The applicant denies that the peer review and/or draft status of the Master Plan has any relevance to this application, given that AMSA relied upon the Master Plan for a series of purposes and submitted it to various bodies, including state authorities.

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46. AD PARAGRAPH 32.6.1

46.1 Having not had sight of the groundwater assessment incorporated in the Master Plan, I am unable to confirm or deny AMSA's allegations in respect of its contents.

46.2 Since AMSA neither describes nor makes available the "wealth of data" allegedly now available on concentrations of Manganese and Iron in the groundwater, I am also unable to confirm or deny this allegation, but I invite AMSA to make such information available before the hearing of this application.

46.3 I note further that the critical allegation is qualified by AMSA, which affirms only that "*the concentration and location of these elements does not necessarily pose a risk to human health*".

47. AD PARAGRAPH 32.6.2

47.1 I observe that AMSA does not deny that the effluent it discharged into the Rietspruit canal and the Leeuspruit had "*an unacceptable impact on human health*".

47.2 I dispute the allegation that since the Vanderbijlpark Works became a zero effluent discharge facility, the impacts identified in the Master Plan are out of date. In particular, I dispute that the Vanderbijlpark Works have "achieved zero effluent discharge status". The minutes of the

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Rietspruit Forum evidence that there have been numerous problems with this so-called Zero Effluent Discharge ("ZED") since 2006, when such status was allegedly achieved. In support of this, I refer to the following minutes of the meetings of the Rietspruit Forum:

- 47.2.1 The February 2006 minutes, the first page and relevant extract of which are attached as "**SM59**", indicates that although AMSA was a zero effluent plant from 1 January 2006, *"the high rainfall over the past two months has caused a few problems with this process but commissioning of the plant is still on-going"*;
- 47.2.2 The February 2012 minutes, the first page and relevant extract of which are attached as "**SM60**", indicates that AMSA has *"experienced problems with their [ZED] since July 2011 and they were unable to maintain it, however they are working on it, currently the plant is not operating at 100% efficiency, therefore not able to maintain ZED. A ZED restoration plan in process. However, most parameters are complying with the relaxed interim limits specified in the [water use licence]"*;
- 47.2.3 The May 2012 minutes, the first page and relevant extract of which are attached as "**SM61**", indicates that a query was made as to when the ZED would be repaired, and that AMSA's representative indicated it would be fully operational from July 2012; and

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47.2.4 The August 2012 minutes, the first page and relevant extract of which are attached as "SM62", indicate that AMSA's representative advised the participants that its ZED had not been working for the previous three months;

48. **AD PARAGRAPH 32.6.3**

48.1 I note that AMSA admits that the geological report "*accurately describes the geology underlying Vanderbijlpark's Works and its surrounds*".

48.2 I am unable to comment on whether the conclusions reached in the geological report are speculative, and observe that AMSA provides no evidence in support of its allegations in this paragraph.

49. **AD PARAGRAPH 32.6.4**

49.1 The allegations in this paragraph are not admitted, and it is noted that AMSA provides no evidence in support of the allegations contained in this paragraph.

50. **AD PARAGRAPH 32.6.5**

50.1 I have no knowledge of the contents of the air quality study. However, it is noted that AMSA admits that "*deteriorating air quality is a significant issue in the Vaal Triangle and is presently AMSA's top*

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environmental priority". It is noted further that AMSA admits that air quality is "*a major concern at the [Vanderbijlpark] site*".

50.2 If this is so, it is telling that the AMSA is failing to meet its obligations as contained in the Vaal Triangle Airshed Priority Area Air Quality Management Plan. AMSA has not engaged fully with communities to communicate its emissions and air quality results in Vanderbijlpark. Communities can therefore not quantify if there is any reduction or improvement in emissions. As appears from "SM63" attached hereto, which is an extract of the 23 May 2012 Vaal Triangle Airshed Priority Area Multi-Stakeholder Reference Group meeting, AMSA undertook to present on their Air Quality Improvement Project in the next meeting. However, AMSA failed to attend the meeting and, to date, has not made this presentation to the Multi-Stakeholder Reference Group.

51. **AD PARAGRAPH 32.6.6**

The allegations in this paragraph have already been addressed. I emphasise, however, that the subsequent completion of projects by AMSA has no bearing on the baseline data captured in the specialist studies that informed the Master Plan.

52. **AD PARAGRAPHS 32.7.1 - 32.7.11**

The applicant is not aware of, alternatively has not had access to copies of, the alleged 'new studies' referred to in this paragraph. I invite AMSA to

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provide the applicant with a copy of the studies it relies upon in this paragraph before the hearing of this application.

53. AD PARAGRAPH 33

53.1 For the reasons stated at paragraph 47.2 above, the applicant denies that achieving ZED at Vanderbijlpark is no longer a priority for AMSA.

53.2 I have no knowledge of the effectiveness or otherwise of the measures taken in pursuance of the other priority areas described in this paragraph. Accordingly, I do not admit that they are no longer relevant to the environmental management at Vanderbijlpark, nor that the impacts and unacceptable risks sought to be addressed in the priority areas have in fact been satisfactorily addressed.

53.3 In any event, I reiterate that the mere fact that environmental management initiatives have been taken since the Master Plan was prepared, does not render irrelevant the assessment data in the Master Plan.

54. AD PARAGRAPH 34

The applicant accepts that the Master Plan may no longer be directly relied upon by AMSA in its environmental management process. However, this does not imply that the Master Plan has "no bearing" on such environmental

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management processes, and the level and sources of pollution at the Vanderbijlpark Steelworks site.

55. AD PARAGRAPHS 35.1 - 35.3

55.1 The applicant has not been provided with a copy of AMSA's atmospheric emission licences or its waste management licences, to which AMSA refers in paragraphs 35.2 and 35.4. I invite AMSA to provide the applicant with copies of these licences.

55.2 The applicant received a copy of the water use licence for Vanderbijlpark mentioned in paragraph 35.3 from the DWA in 2009. The licence was produced during a meeting with the DWA, groundWork and European journalists interested in learning from the DWA how it monitored AMSA's water use.

56. AD PARAGRAPHS 65.1-65.2

56.1 It is admitted that the applicant is a member of the Rietspruit Forum and the Waste Disposal Site Monitoring Committee referred to by AMSA. However, it is denied that the applicant has access in these forums to adequate reliable information on AMSA's environmental impact and the status of the receiving environment. Despite the fact that the Waste Disposal Site Monitoring Committee was established as a condition of GDACE's 2007 RoD ("to monitor the short-term operation with a view to closure, remediation and opening of a new

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waste disposal facility", as appears from paragraph 3.2.2.1 of "SM56"), and that the Master Plan informed the 2007 GDACE's RoD, the Master Plan has never been made available to the applicant.

56.2 At the Rietspruit Forum, if non-compliance is reported, the applicant is not provided with any details or supporting documents to enable the community to quantify the extent of the harm and environmental impact or to assess the rehabilitation measures taken to address such harm. As a result, it is unable to participate or monitor AMSA's conduct effectively. I reiterate that the applicant's ability to participate effectively in these forums is hampered by its limited access to information, particularly the Master Plan, which informed AMSA's applications for the water use licence and the waste disposal initiatives at AMSA's Vanderbijlpark (monitored by the Waste Disposal Site Monitoring Committee). In this regard, I refer to paragraph 37 above.

56.3 It is denied that the annual air quality open day and ad hoc site visits are an adequate substitute for the environmental information contained in the Master Plan.

57. AD PARAGRAPH 67

57.1 I deny that the Master Plan is not relevant to the waste management licence at Vanderbijlpark, and refer to the contrary evidence at paragraph 37 above.

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57.2 I reiterate the relevance of the Master Plan to the functions of the Waste Disposal Site Monitoring Committee. As set out above, the Waste Disposal Site Monitoring Committee was established as a condition of GDACE's 2007 RoD, which provides that "a multi stakeholder monitoring committee as required by the DWAF's minimum requirements must be established to monitor the short-term operation with a view to closure, remediation and opening of a new waste disposal facility... Significant environmental issues identified in the committee meetings as well as plans for their resolution must be forwarded to [GDACE]"

57.3 A copy of the terms of reference of the Committee dated 9 June 2009 is attached hereto as Annexure "SM64". It describes the objectives of the Committee as follows:

- *Enabling the community to effectively participate in and monitor the operation, rehabilitation, closure and ongoing monitoring of a landfill;*
- *Discussing and addressing the concerns of the community regarding the landfill site, especially those people living in the immediate vicinity".*

57.4 To this end, the mandate or functions of the Waste Disposal Site Monitoring Committee are set out as follows:

"The landfill monitoring committee will:

- *Act as a representative of, and official means of communication, with the community;*
- *Act as "eyes and ears" of the Department (GDACE, DWAF, DEAT);*

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- *Monitor compliance or non-compliance to permit conditions and the minimum requirements;*
- *Observe and monitor the impacts of the disposal site on the environment.”*

57.5 The Waste Disposal Site Monitoring Committee is thus tasked with monitoring the immediate and ongoing impacts of the disposal site on the environment and the effectiveness or otherwise of the rehabilitation measures taken.

57.6 The terms of reference of the Waste Disposal Site Monitoring Committee have subsequently been updated. I do not have a copy of the amended terms of reference in my possession, but shall endeavour to produce a copy thereof at the hearing of this application. My recollection is that the objectives and mandate of the Committee - as set out above - have not been amended.

58. AD PARAGRAPHS 69 AND 71

58.1 I dispute the allegation that I quoted selectively from the Compliance and Enforcement Report. In paragraph 49 of the founding affidavit, I described the enforcement action taken by GDARD in response to AMSA's dumping of hazardous waste on the site, and "the significant and serious pollution" that resulted. I further noted that such enforcement was reaping positive results, and that by 2010, AMSA was complying with the provincial authority's directives. I refer also to the additional information from the DEA which appears from "SM53",

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addressed above. The DEA had advised AMSA that it is required to apply for a waste management licence. AMSA apparently disputes this and has failed to apply for such licence. It is submitted that AMSA should have disclosed this information to the Court.

58.2 Notwithstanding the apparent efforts of AMSA to comply (although not with the requirement to apply for a waste management licence), I reiterate that information pertaining to the levels of pollution and its impact on the environment is not publicly accessible, and is required by the applicant to protect and exercise the right to an environment not harmful to health and well-being for all the reasons set out at paragraphs 56 to 62 of the founding affidavit.

58.3 To the extent that these allegations are contrary to what is set out above and in "SM53", they are denied.

59. **AD PARAGRAPHS 72 - 75**

59.1 For the reasons given at paragraphs 7 to 16 above, I dispute the allegation that applicant is attempting to "intervene in the statutory process" and "to usurp the role of the inspectorate". The applicant is seeking to protect the right to an environment not harmful to health and well-being and to exercise its entitlement to participate in environmental governance in the exercise of the right under section 24 of the Constitution.

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59.2 I deny that the applicant's concern is based on "pure speculation" as to the impact of the AMSA's environmental impacts. Such impacts appear in the National Environmental Compliance and Enforcement Report 2010-2011 cited at paragraphs 49.1 and 55 of the founding affidavit.

59.3 The applicant denies that its request for records pertaining to the Vaal Disposal Site is a "fishing expedition". It is clear that the applicant seeks the information in order to take effective steps to ensure that the environment at and around the Vaal disposal site is not harmful to the health and well-being of the communities in the vicinity. The applicant's concerns over the impact of AMSA's activities at the Vaal Disposal Site are of a serious nature, and the requested information would afford it a substantial advantage, and may indeed be decisive, to its exercise and protection of the right to an environment that is not harmful to health or well-being.

CONDONATION

60. Although AMSA delivered its answering affidavit on 29 November 2012, its due date, the affidavit was incorrectly served on the Wits Law Clinic instead of on the Centre for Applied Legal Studies ("CALS"), who are the correspondent attorneys.

61. As a result, CALS only received the affidavit on Tuesday, 4 December 2012 (three working days after it was delivered). The affidavit was forwarded to the applicant's attorneys of record on the same day.

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62. The applicant's attorneys addressed an email to AMSA's attorneys, seeking confirmation that there was no objection to the delivery of this replying affidavit by 19 December 2012 (three working days after it was received by CALS). AMSA's attorneys confirmed that this was in order. I refer to "SM65" attached hereto.
63. To the extent that condonation is required for the late filing of this affidavit, it is submitted that it is in the interests of justice for condonation to be granted. The extent of the delay is minimal, a reasonable explanation has been provided for the delay, and no prejudice has been caused to the respondents. On the other hand, if condonation were refused, the applicant would suffer serious prejudice in that it would be denied the opportunity to address pertinent allegations in the respondents' answering affidavit.
64. Accordingly it is submitted that, to the extent that it may be necessary, condonation should be granted for the late filing of this affidavit.
65. In the premises, I pray for an order as set out in the notice of motion.



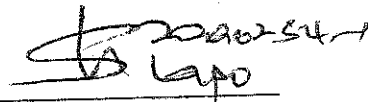
SAMSON MOKOENA

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I certify that:

1. the deponent acknowledged to me that –
 - (a) he knows and understands the contents of this declaration;
 - (b) he has no objection to taking the prescribed oath;
 - (c) he considers the prescribed oath to be binding on his conscience;
2. the deponent thereafter uttered the words "I swear that the contents of this declaration are true, so help me God";
3. the deponent signed this declaration in my presence at the address set out hereunder on 18th December 2012.

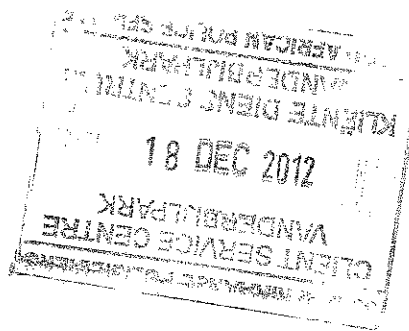


Commissioner of Oaths

Name: Simon Nkomo

Address: 24th GENERAL HERTZOG

Capacity: Constable



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