

THE 1873 NETWORK – CASE STUDY SERIES – THE SMM MATTER

BACKGROUND

The 1873 NETWORK is an open forum for reflecting, thinking, formulation and critiquing of ideas, free exchange of experiences and connecting for effective action, debate of ideas by individuals, groups and movements of civil society on questions relating to the role that companies and their actors can play in building just, caring, sustainable, prosperous, inclusive and cohesive societies.

After 22 years of democracy, the challenges of poverty, unemployment and inequality in South Africa as it is the case in many African states remain intractable and stubborn.

The promise of inclusive and equal societies has yet to be backed by changes in behaviour and actions by individual actors in the continent.

More fundamentally, the promissory note of greater opportunity for the majority excluded has and continues to bounce when tested.

The constitution offered a new bank of justice but in practice the justice system operates as if insufficient funds are available in the supply chain of justice.

So the Network has been established to ensure that the riches of freedom and the security of justice are delivered in our lifetime.

The Network is a plural, diversified, inclusive, non-state and non-party formation engaged in concrete actions to support the democratization of the economic system.

As a platform for debate, the Network is a movement informed by critical ideas that should to any rational person prompt reflection and introspection, and lead to the transparent dissemination and circulation of the results of that reflection, on the alternatives available to solve the problems of exclusion, and social inequality that the post-colonial dispensation has failed to discharge.

As framework for the exchange of experiences, the Network encourages understanding and mutual recognition amongst its stakeholders and places special value on the exchange among them, particularly on key post-colonial developments that have taken place in many African states including Zimbabwe, the country in focus where a 92 year old President has yet to be convinced that under his watch, the true promise of independence has been betrayed and undermined.

As a context for lobbying and interrelations, the Network seeks to strengthen and create links with the state and its actors as well as non-state institutions and their actors with a view to increasing the capacity and space for positive and sustainable change.

The Network is a platform that should encourage its stakeholders and members to situate their actions to introduce onto the national agenda the change-inducing practices and actions that will drive the society towards inclusivity and economic and social justice.

SHARED EXPERIENCES – THE SMM HOLDINGS PRIVATE LIMITED - CASE STUDY

The last 22 years of democracy and 36 years of Zimbabwean independence have produced experiences both positive and negative on the complex subject of economic justice and inclusivity using various models to assimilate the historically excluded onto the economic mainstream.

The constitutional and legal framework has had to be altered to provide for the economic inclusive agenda yet the attitudes of advantaged white males have not changed to adjust to the new order.

SMM CASE STUDY

The following is some background information on the experiences of Mr. Mutumwa Dziva Mawere, a Zimbabwean-born naturalised South African citizen.

Mr Mawere was born in 1960 in Zimbabwe. Mr. Mawere graduated with a First Class B.Sc. (Econ) degree in 1983 at the University of Zimbabwe. He commenced his professional career as an Actuarial Trainee with Old Mutual (Zimbabwe) in 1984.

In the same, year he joined the Industrial Development Corporation of Zimbabwe Limited (“the IDC (Z)”) as a Research Economist.

In 1984, he completed two diplomas in Project Management and Project Analysis at the Arthur D. Little Management Education Institute (“ADLMEI”). In 1985, he was sent by the IDC for graduate studies at ADLMEI (now part of Hult University) where he completed an M. Sc (Management) in 1986.

On completion, he returned to the IDC where he was prompted to the position of Senior Research Economist.

In 1987, he joined the Merchant Bank of Central Africa (“MBCA”) as a Corporate Finance Executive.

In 1988, he joined the World Bank as a Young Professional. In 1989, he joined the International Finance Corporation (“IFC”), the private sector wing of the World Bank as an Investment Officer. He rose through the ranks and resigned from the IFC in 1995 as a Senior Investment Officer.

While at the World Bank, he completed in 1992 an MBA degree specializing in Finance & Investments at the George Washington University, Washington DC.

In 1995, he founded Africa Resources Limited (“ARL”), a company registered in the British Virgin Island (“BVI”), as the sole shareholder.

He immigrated to South Africa in November 1995 and has been a resident of South Africa since then. In 2002, he acquired South African citizenship by registration.

THE CASE STUDY OF SMM HOLDINGS PRIVATE LIMITED

THE COMPANY AND ACQUISITION

In March 1996, ARL concluded a Sale and Purchase Agreement (“SPA”) with T & N Plc, a company listed in the United Kingdom, for the purchase of the entire shareholding of two of its English registered subsidiary companies, SMM Holdings Limited (“SMMH”) and THZ Holdings Limited (“THZH”).

Pursuant to clauses 2(1) (a) and 3 of the SPA, T & N agreed to sell and ARL agreed to purchase, amongst other things, the SMMH shares and the THZH shares for the consideration of US\$60 million payable in 12 monthly instalments of US\$5 million each. The US\$60 million was to be paid by using the resources of SMMH and THZH’s Zimbabwean subsidiary companies.

SHABANIE MASHABA MINES – THE MINING DIVISION

Through the acquisition of SMMH shares, ARL acquired control, through SMM Private Limited (“SMM”), of two asbestos mines, Shabanie Mine and Gaths

mine located in the towns of Zvishavane and Mashava, respectively, in Zimbabwe (“the Mines”).

SMM was the sole producer of asbestos in Zimbabwe and at its peak accounted for about 10% of the country’s export revenues. About 95% of the Mines’ output was exported with the balance being locally in the production of roofing sheets and pipes.

The mining division that traded as African Associated Mines (“AAM”) was the employer at acquisition of about 8,000 people and the two towns where the mines are located had about 60,000 inhabitants.

PROPERTY AND MANUFACTURING ASSETS

As part of the acquisition, ARL acquired through THZH’s subsidiary company, Endurite Properties (Pty) Limited (“Endurite”), an industrial property portfolio.

SMM was also the sole shareholder of Turnall Fibre Cement Private Limited, a company involved in the manufacturing of roofing sheets and pipes.

ARL through another subsidiary registered in the BVI, African Construction Limited (“ACL”), acquired TAP Building Products (Pty) Limited, a company registered in Zambia, that manufactured roofing sheets and pipes.

THE COMPANY AS AT 6 MAY 2004

Pursuant to the acquisition of SMMH and THZH, ARL assumed the control and management of the subsidiary companies operating in Zimbabwe. The sole beneficiary shareholder of ARL was and has always been Mr. Mawere.

Accordingly, the effect of Mr. Mawere acquiring the citizenship of South Africa was to make South Africa the ultimate beneficiary of his investments and, therefore, the treatment of such investments would inevitably be of substantial interest to the government of South Africa.

The company, SMM Private Limited was renamed SMM Holdings Private Limited to correctly reflect the changed circumstances of the company. The company had grown substantially since acquisition to incorporate new firms.

The offshore ownership structure and its links to the Zimbabwean subsidiary companies are as set out in Annexure ARL1.

The SMMH group structure as at 6 May 2004 is as set out in Annexure ARL2.

The THZ Holdings group structure as at 6 May 2004 is as set out in Annexure ARL3.

The Rayberry International group structure as at 6 May 2004 is as set out in Annexure ARL4.

It will be clear from the attachments that ARL's interests were diversified and extensive making it the largest black-controlled and managed company at the time.

SOUTH AFRICA INTERESTS AS AT 6 MAY 2004

Following the acquisition of SMMH and THZH, Mr. Mawere registered ARL as a branch of the BVI Company in South Africa under registration number: 1996/01289/10. At the time, SMM was also the shareholder of a company, Southern Asbestos Sales (Pty) Limited ("SAS") that had been incorporated in 1965 under registration number 1965/010278/07 registered in terms of the laws of South Africa. SAS was established to market asbestos internationally following the imposition of sanctions against the Rhodesian government by the international community.

However, after the independence of Zimbabwe and the establishment of the Minerals Marketing Corporation of Zimbabwe Limited ("MMCZ") in 1983, the company ceased to operate and, therefore, was dormant at the time ARL acquired SMMH and THZH and consequently through SMM, SAS.

ARPS was established to pursue projects in South Africa on behalf of ARL. The shares of the company were owned directly by Mr. Mawere.

In 1997, ARL concluded an agreement to acquire the assets and business rights of Salister Diesels (Pty) Limited ("Salister"). The acquisition was structured as a leveraged buy-out involving the establishment of a special purpose vehicle whose nominal shares were issued to ARPS and the funding was provided by a local South African bank supported by guarantees issued by ARL and Mr. Mawere.

Salister's registration number is 1997/202467/07. The company was involved in the distribution of diesels engines and alternators as an exclusive channel for UK based original equipment manufacturer ("OEM"), Lister Petter, and other OEMS.

In 1997, the MMCZ appointed SAS as one of three agents appointed to market asbestos. This then necessitated the change of ownership of SAS from SMM to ARPS. This change was effected in 1997.

As SMM grew organically and through acquisitions, it also required a South African base to procure goods and services. In 1998, Zimbabwe embarked on the land reform program and this had the effect of isolating the country from the international community resulting in supply chain and foreign currency problems.

As at 6 May, 2012, Mr. Mawere's direct South African interests were 28 companies of which 17 were in active trading employing about 350 people and with a turnover of about R700 million.

The majority of the companies were linked to the SMM group in terms of trading either as suppliers or customers of the group.

In January 1998, SMM was granted a marketing dispensation by the government of Zimbabwe ("GOZ") to market its asbestos and in turn it then appointed SAS as an agent to handle certain markets.

SAS continued to be SM.M's agent until November 2002 when it assumed the role of a principal. The change was necessary to allow SAS to be able to raise working capital facilities in South Africa using its assets i.e. debtors and stock in South Africa as security. This allowed SAS to play not just the role of agent but also a financing role allowing it to grant inter-company loans to sister companies in the SMM South Africa group.

Mr. Mawere's shareholding was through a company, SMM Holdings SA (Pty) Limited (SMMSA), whose South African registration number is 1998/016863/07, that then operated as an investment holding company as shown in Annexure **ARL5**.

CESSION COURT ORDER

The demise of the SMM group traces its origins to December 2003 when Governor Gono was appointed to the Reserve Bank of Zimbabwe ("RBZ"). Following his appointment, he introduced new monetary measures targeted at the export companies.

SMM's mining division was a large exporter generating about US\$60 million per annum. Prior to the new measures, SMM was entitled to retain 75% of its foreign exchange earnings in a foreign currency account at any Zimbabwean bank and to use such proceeds towards imports of goods and services.

On account of the fact that SMM's foreign exchange needs were higher, the Ministry of Finance & Economic Development of Zimbabwe granted SMM a

dispensation to retain 75% of its earnings in terms of a letter dated 21 February 2003.

The effect of the Monetary measure introduced by the RBZ was to remove the retention dispensation granted to SMM resulting in SMM's foreign exchange earnings being converted at the official exchange rate and forcing the company to apply for foreign exchange to pay its foreign creditors.

SMM's creditors were principally South African companies under the control of Mr. Mawere who was also the ultimate shareholder of SMM.

Petter Trading (Pty) Limited ("Petter"), a South African registered company under the ARPS stable, was established as a procurement company to assist SMM in accessing goods from South Africa and international markets.

During or about the end of 2002, the Credit Guarantee Corporation of South Africa withdrew its credit cover for exporters to Zimbabwe. This created a difficulty for Petter requiring Petter to find alternative financing arrangements. Petter as a South African entity could buy goods locally and onward supply them to SMM in Zimbabwe without such procurement being treated as an export.

The foreign currency exemption allowed Petter to take the risk of shipping the goods to Zimbabwe without requiring any form of security as it was assured of repayment given that SMM was able to use its export earnings to pay for the goods.

SMM, SAS, Petter and all companies under SMMSA were all under common control. Accordingly, the relationship although it involved inter-state commerce was treated as inter-company transactions. In addition, the control and management of SMMSA was vested in the executives of SMM who sat on the boards of SMMSA, ARPS and subsidiary companies.

SMM was under the control of a board comprising executive and non-executive directors. Mr. Mawere did not sit on any of the Zimbabwean boards. However, being a resident of South Africa, he had to seat on the SMMSA board and certain subsidiary boards.

In 2003, the RBZ withdrew the foreign exchange exemption on 30 December. A copy of the letter to SMM is attached hereto as Annexure **ARL6**.

As part of targeting Mr. Mawere who had by then acquired the citizenship of South Africa, the marketing exemption previously granted to SMM by MMCZ

was withdrawn effective from 1 April 2004. A copy of the letter of withdrawal is attached hereto as Annexure **ARL7**.

SMM did make representations to the Ministry of Finance and the RBZ of the implications to the group from the actions of the government. Meetings were also held by SMM executives including Mr. Mawere with the MMCZ during February and March 2004 requesting a review given that SAS as the buyer of asbestos played a dual role of marketing as well as financing SMM's suppliers.

Notwithstanding, the exemption was withdrawn on 1 April resulting in the Buying Contract between SAS and SMM being terminated. The effect of the withdrawal of the exemption was to remove SMM from the export value chain.

Since November 2002, SAS was a direct customer of SMM. However, there was a dispute as to how much SAS owed SMM. Although SAS was a buyer of record, the trading was handled by SMM executives who had direct contacts with the end customers.

The removal of the exemption also had the effect of changing the trading terms and arrangements. MMCZ wanted to appoint its own agents and, therefore, this required a transitional period to ensure that the customers already invoiced and supplied by SAS would pay to SAS before MMCZ started supplying. However, no transition was provided for.

The records that were then provided by SMM were to the effect that as at 31 March 2004, SAS was indebted to SMM in the following amounts: US\$18. Million; Canadian \$630,000 and ZAR4.5 million in the aggregate amounting to approximately ZAR138 million.

Petter Trading was indebted to SAS who in the ordinary course of business played the role of banker to Petter.

SMM under the circumstances could no longer secure goods from Petter as it could not get foreign exchange to pay for the goods. As a result, Petter could not pay back to SAS and, therefore, the model that had worked so well broke down.

In April 2004 meetings were then convened in South Africa between SMM executives, Petter and SAS with the creditors of Petter. One of the meetings was attended by representatives of the Ministry of Mines and MMCZ with a view to exposing them to the SMM business model and why SAS was vital to the chain.

Petter needed assurance that if it supplied to SMM it could get paid and such assurance was not forthcoming. At the time, SMM was indebted to Petter in an amount approximately about R27 million and also Petter was involved in facilitating a transaction involving the purchase and importation of equipment required by Schweppes that had already been ordered costing about R39 million.

Petter then approached the High Court of South Africa with the knowledge and consent of SMM Executives and Chairman for an order on an urgent basis under case Number 04/10496 in terms of which SAS was ordered to make payment to Petter in the sum of ZAR74,872,468.49 plus interest of 15.5%.

SMM was the First Respondent in the matter. The cause of action of Petter was a Cession of Rights and Consent Agreement whose validity and date then became a major issue involving the government of Zimbabwe.

The position of the RBZ was that the cession agreement was void as SMM could never consent to cede to Petter in South Africa its rights and interests to all the payments in respect of exports that it was entitled to receive without the prior consent of the RBZ in terms of the exchange control regulations.

When the existence of the cession court order of 6 May 2004 was made known to the government of Zimbabwe, SMM executives were summoned to the RBZ and ordered to rescind the court order or face arrest. In addition, the board of SMM was instructed to meet and formally repudiate the consent granted by SMM in order to obtain the order.

In addition, the government took an active interest in the matter alleging that the master mind of the cession whose alleged intention was to divert funds due to SMM from SAS to Petter, a company controlled by Mr. Mawere was for his personal gain.

Accordingly, a decision was taken to charge Mr. Mawere in terms of Zimbabwean law for allegedly orchestrating the cession court order and scheme whose intention purported to be fraud.

In support of this allegation, it was determined that the cession agreement was a false document on the basis that it was signed on 28 April although it was dated in March 2003.

The cession agreement was signed by Mr. Obed Manyika Dube on behalf of SMM's mining division, AAM. Mr. Dube was the Managing Director of AAM. It was contended by the government supported by some of the SMM executives

who saw an opportunity to hijack the company that Mr. Dube had no authority to sign the cession.

Mr. Dube under threat of being arrested testified that he signed the cession on the instructions of Mr. Mawere.

Notwithstanding the fact that the cession court order was intended to assure SMM's South African creditors that they would be paid, it was deemed that its true purpose was to unjustly enrich Mr. Mawere in South Africa at the expense of his Zimbabwean companies.

The position taken by the government of Zimbabwe is that the alleged diversion of funds deprived SMM of the needed operational funds and this necessitated the intervention of the government.

EXTRADITION APPLICATION

On 17 May 2004, a Warrant of Apprehension was issued in terms of Section 33(1) of the Criminal Procedure & Evidence Act (CAP) 9:07 on the grounds that during the period commencing January 2000 to June 2003 a crime of fraud and externalization of foreign currency had been committed by Mr. Mawere relying on the facts and circumstances of the cession agreement and the court order obtained not in Zimbabwe but in the jurisdiction of South Africa.

On Saturday, 22 May 2004, an application for obtaining of evidence and securing the arrest of Mr. Mawere in South Africa was made to the Director of Public Prosecutions of South Africa the Chief Law Officer of the Attorney General of Zimbabwe.

In the said application, the intention was to bring Mr. Mawere in the jurisdiction of Zimbabwe for the purposes of:

- Gaining access to the records of South African companies in which Mr. Mawere was a director
- Obtaining affidavit statements from relevant persons in management of the South African companies under Mr. Mawere's control.
- Obtaining and seizing relevant exhibits.
- Obtaining bank statements of account and vouchers including foreign accounts of Mawere and his companies, from the time of their opening to date, relating to all payments in and out of the accounts and also any other South African bank accounts which have done business with Mawere's companies or in his personal capacity.

- Obtaining and seizing documentary exhibits from any other company within South Africa which has directly or indirectly done business with Mawere's South African companies or with him personally.
- Arresting and extraditing Mawere.

It was intended to have Mawere's trial in the High Court of Zimbabwe upon finalisation of the above investigations. Assistant Commissioner Gora of the Zimbabwe Republic Police was assigned the responsibility of investigating the allegations relating to the cession and court order.

This matter was sufficiently high profile to attract the persona attention of the Commissioner of Police, Mr. A. Chihuri. In terms of a letter attached hereto as **Annexure ARL7**, being a request for the immediate arrest and extradition of Mawere by the Zimbabwean office of Interpol there is reference to discussions between Chihuri and former National Commissioner of Police, Mr. J. Selebi, about the matter.

It was pointed out that the subject, Mr. Mawere, was aware of the investigations and pertinent request and was about to abscond to an unknown destination hence the need to act quickly.

A formal extradition request was made on 22 May 2004 in terms of a letter marked Annexure **ARL8** by Mr. Joseph Musakwa on behalf of the DPP to the National Director of Public Prosecutions, South Africa, indicating that Mawere was wanted for prosecution in Zimbabwe on charges of fraud alternatively contravening the Exchange Control. Although it is indicated in the letter that sufficient evidence to warrant prosecution against Mawere existed, the purpose of arresting Mawere was represented as to obtain the very evidence that was purported to exist.

On 24 May 2004, a warrant of arrest in terms of Section 5(1) (b) of the Extradition Act 67 of 1962 was issued in South Africa based on an application made by Captain Nilton Mendes of Interpol a copy of which is marked Annexure **ARL9**.

A copy of the warrant dated 24 May 2004 issued by a magistrate in Pretoria is marked Annexure **ARL10**.

Using this warrant, Mr. Mawere was arrested on 25 May 2004. Mr. Mawere was granted bail on 27 May 2004. On 29 June 2004, the matter was dismissed and Mr. Mawere was dismissed from bail.

SPECIFICATION OF MAWERE

Hon. P. Chinamasa, declared Mr. Mawere to be a specified person in terms of subsection (1) of Section 6 of the Prevention of Corruption Act [Chapter 9:16] published in the Government Gazette of 9 July 2004 a copy of which is marked Annexure **ARL11**.

Mr. Mawere was specified on allegations that his South African companies had failed for a long time to remit to AAM, a division of SMM, its export proceeds thereby prejudicing the mines of the necessary working capital and in addition failing to meet its obligations.

It was alleged that Mr. Mawere had externalized foreign currency from Zimbabwe using SMM and that is the basis that the specification in Zimbabwe for facts and circumstances that could only have taken place in South Africa came about.

The causal link between the cession agreement and the South African cession court order is exposed by paragraph 3-4 of Assistant Commissioner Mangoma in his supporting affidavit in Mawere's application before the High Court of Zimbabwe under case Number 11951/04 to review and set aside the specification order in which he stated as follows:

- “(3) I am the leader of a team investigating a case of externalisation of foreign currency in which the specified person and his former Chairman of SMM Holdings, Mr. William Hamadziripi Mudekunye are being jointly charged.*
- (4) Allegations are that the accused persons acted in connivance and externalised US\$18.5 million, Canadian \$628,071.84 and South African Rand 4,151,367.48, the money realised through the export proceeds of asbestos fibre from Shabani and Gaths Mines. The money was supposed to have been remitted to the Reserve Bank of Zimbabwe.”*

The amounts referred to are exactly the same as the alleged indebtedness of SAS to SMM.

The applicable jurisdiction in respect of all legal proceedings connected with SMM's claims against SAS regarding exports would be South Africa yet in this unusual case, the Zimbabwean government felt that the jurisdiction of Zimbabwe is the appropriate one and, therefore, because Mr. Mawere is Zimbabwean-born, the Zimbabwean courts were competent.

The extra-territorial application of Zimbabwean law in South Africa is evident in this matter. If Mr. Mawere had not chosen to acquire the citizenship of South Africa and more significantly to remain a resident of South Africa, then in all probability he would not have lost his companies.

By acquiring the citizenship of South Africa and choosing to establish South African companies, Mr. Mawere exposed himself to the risk of expropriation.

At the very least, the alleged offences could only have been committed by companies and, therefore, there could be no legal justification for targeting the shareholder in his personal capacity.

Hon. Chinamasa's response was that he had pierced the corporate veil because the alleged criminal offences were done because of Mr. Mawere's unspecified interference with the operations of the Zimbabwean companies.

In general, a company is a separate persona from its shareholders and it should be accountable for its actions through the board of directors.

The law will only regard a company as an association when it is used to defeat public convenience, justify wrong, protect fraud and defend crime.

However, piercing the corporate veil is a legal decision to treat the rights or duties of a corporation as the rights or liabilities of its shareholders.

Common law countries usually uphold this principle of separate persona but in exceptional situations, the Courts may lift the veil.

The facts of this matter show that no judicial proceedings were invoked before the lid was lifted by Hon. Chinamasa.

The specification of Mr. Mawere was revoked in terms of a letter dated 19 May 2010, a copy of which is attached hereto as Annexure **ARL12**.

In terms of section 6 of the Prevention of Corruption Act [Chapter 9:16] by General Notice 345A of 2004, Mr. Mawere, Messrs. Francies Zimuto, James Andrew Kufakunesu Mushore and Julius Bright Tawona Makoni, investigators were appointed by Hon. Chinamasa to investigate the affairs of the specified persons. With respect to Mr. Mawere, Chief Superintendent Mangoma was appointed as Investigator with effect from 13 August 2004. A copy of the Notice is marked **ARL13**.

SPECIFICATION OF SMM

The Minister of Justice, Legal & Parliamentary Affairs declared the following companies deemed to be under the control of Mawere specified persons in terms subsection (1) of section 6 of the Prevention of Corruption Act [Chapter 9:16]:

- Endurite Properties (Private) Limited
- Ukubambana-Kubatana Investments Limited (“UKI”)
- FSI Agricom Private Limited
- SMM Holdings (Private) Limited
- CFI Holdings Limited

The specification was done by General Notice 434B of 2004 a copy of which is marked **ARL14**.

In terms of Section 7 of the Prevention of Corruption Act, Mr. Reggie Francies Saruchera of Camelsa Chartered Accountants (Zimbabwe) was appointed by means of General Notice 434C of 2004 a copy of which is marked **ARL15** as the Investigator of the above-mentioned companies.

RECONSTRUCTION OF SMM

On 3 September 2004, the Minister of Justice, Legal & Parliamentary Affairs of the republic of Zimbabwe, Hon. Chinamasa, published Statutory Instrument 187 of 2004 in the Government Gazette Extraordinary.

A reconstruction order in respect of SMM was published on 6 September in GN 450/2004 a copy of which is marked **ARL16**. The order was issued in terms of Section 4 of the Presidential Powers (Temporary Measures)(Reconstruction of State-Indebted Insolvent Companies) regulations, 2004 in relation to SMM Holdings (Private) Limited.

In terms of the same order, the Minister appointed Mr. Afaras Gwaradzimba to be the administrator of the company under reconstruction assisted by two others.

The Minister and not the Court directed that, from the date of publication of the order:

- The company under reconstruction shall be under the control and management of the Administrator;
- The Board of the company under reconstruction shall be divested of the control and management of the company’s affairs;
- Any person managing or controlling the company’s affairs in any capacity other than simply a member of the board referred to above

shall continue in office subject to the control and direction of, and be, answerable to the Administrator.

The Minister conferred upon the Administrator the power, subject to the rights of directors, to raise money in any way without the authority of shareholders for the purpose of reconstruction of the company.

Some observations that merit highlighting:

- The Minister gave no notice to either SMM or to its shareholder of his decision to specify SMM in terms of the Statutory Instrument;
- The Minister gave no notice to SMM's shareholder of his intention to issue a reconstruction order on 6 September, 2004, barely eleven days after the company's specification and simultaneous appointment of an Investigator. The notice was issued only three days after the Temporary Measures were promulgated by the President. In terms of Section 4(1) of the Temporary Regulations, the Minister is given power to take action in respect of a private company before affording the target company an opportunity to make representations. The facts of the matter are that effective 17 May 2004, a warrant of arrest was already issued in respect of Mawere and moreover he was specified on 9 July 2009 making him legally disabled to intervene.
- The actions of the Minister were premised on a view that the alleged externalisation of foreign currency had forced the company to be state-indebted and, therefore, it was indebted to the state. Accordingly, in terms of the definition of state indebtedness in the Temporary Regulations, a Zimbabwean would have to be indebted to:
 - o The State; and/or
 - o A statutory corporation; and/or
 - o A state-controlled company
- By reason of having received any credit or guarantee in its favour that is disbursed or payable out of public funds, or which imposes any liability upon the state.
- In HC No. 11762/2004 in the High Court of Zimbabwe and Case No. 04/10496 in the Witwatersrand Local Division of the High Court of South Africa, the Administrator of SMM relied on two aspects to indicate that SMM was state-indebted as follows:
 - o That the government of Zimbabwe issued guarantees in favour of SMM; and
 - o The government of Zimbabwe loaned monies to SMM and its related companies in terms of the Productive Sector Finance Facility.

- In so far as the government guarantees are concerned, the Administrator relied upon two guarantees as follows:
 - o A guarantee given by the Government of Zimbabwe to KBC Bank for the equivalent of US\$60 million in local currency on 31 July 1998. This was in respect of a loan by KBC Bank advanced to MMCZ as the borrower. The purpose of the facility was to assist a Zimbabwean company in the restructuring of its existing short-term debt and provide working capital. The guarantee was not provided to SMM.
 - o Another was a guarantee of the equivalent of US\$18 million in Zimbabwean dollars provided to MMCZ to allow it to raise the local currency in the market by way of a bond, the proceeds of which were to assist SMM with working capital in line with the general policy at the time to allow exporters to access concessionary funds in the local market of which SMM was unable to do so because of the conditions pertaining to the US\$60 million facility. It is important to point out that by law the Government of Zimbabwe is precluded from guaranteeing the debts of private persons including private companies incorporated in Zimbabwe.
- In so far as the financing of the Productive Sector Financing Facility is concerned, the legal format of the manner in which the funds were advanced and disbursed results in a position where the beneficiary like SMM would not be indebted to the state but to the commercial bank through which such funds were disbursed and booked. Therefore, contrary to the provisions of the reconstruction decree, the Minister of Justice could not have had any facts before him at the time he issued the order to show that SMM was indebted as a fact to the state.
- In terms of an affidavit filed by Mr. Gwaradzimba in Case No. HC 11762/2004, the Government of Zimbabwe considered the asbestos mines owned by SMMH to be a key national asset. Through the reconstruction order, the government sought to nationalise an asset belonging to a South African citizen.
- Thus the reason for the reconstruction order had nothing to do with the criteria set out in section 4(1) of the Temporary Regulations. Accordingly, the Temporary Regulations were brought into being in order to enable the Government of Zimbabwe to acquire the ownership of SMM without having to comply with the requirements of the law as stipulated in terms of Section 16 of the Old Constitution of Zimbabwe.
- The reconstruction order was preceded by a specification order in terms of the Act. When the reconstruction order was issued, the specification order was still in force. The question is whether a

specification order and a reconstruction order can co-exist in respect of the affairs of one company or person? The purpose of the specification order as set out in section 6 of the Act is quite inconsistent with the purpose of the reconstruction order issued in terms of Section 4 of the Temporary Measures.

A copy of Mr. Abner Botsh, the Chairman of SMM at the material time is marked **ARL17**. He concludes by stating that: “Therefore, the lending under the Productive Sector facility is not between the Government and a private company. It is between the Government and a commercial bank, and thereafter between a commercial bank and a private company, in this case SMM Holdings (Private) Limited. The PSF does not bring about a situation where the company that receives the funds under the PSF facility is indebted to the Government of Zimbabwe.

BACKGROUND INFORMATION ON THE PLACEMENT OF SMM UNDER RECONSTRUCTION

On 2 November 2005, more than a year after the placement of SMM under reconstruction, the Minister of Justice, Legal & Parliamentary Affairs, Hon. Chinamasa, applied for an order in terms Section 8 of the Reconstruction of State Indebted Insolvent Companies Act [Chapter 24:27] that came into force on 4 March 2005 confirming the Reconstruction Order issued in terms of the Presidential decree in relation to SMM.

The matter was set down for a hearing before a Judge in Chambers without notifying the shareholder of SMM other than in form of a Notice in the General Gazette of the Minister’s intention to make the application.

The reconstruction order was issued in relation to SMM in terms of the Presidential Powers (Temporary Measures)(Reconstruction of State-Indebted Insolvent Companies) Regulations, 2004 (published in Statutory Instrument 187 of 2004)(“the Reconstruction Regulations”).

It is significant that at the time the order was issued, there deliberately no provision in the Regulations requiring the Minister to seek any judicial confirmation of the order.

It was only after the fact that the Regulations were amended by yet another Presidential Powers (Temporary Measures) (Reconstruction of State-Indebted Insolvent Companies) (Regulation, 2004 (No.1) published in Statutory Instrument 218 of 2004) (“the Reconstruction Amendment Regulations”).

In terms of Section 7A of Reconstruction Amendment Regulations, the Attorney General was required to seek a confirmation order at any time before the scheme is approved by the Minister by applying to a Judge in Chambers.

In the SMM matter, the Minister instead of the Attorney General applied for the confirmation order. Furthermore, the provision of Section 8 of the Act only came into effect after the Reconstruction order in relation to SMM was issued.

Hon. Chinamasa issued the order in relation to SMM in terms of Section 4 of the Reconstruction regulations, after consulting with the then Acting Minister of Finance and Economic Development; Hon. Dr. H. Murerwa.

In issuing the order, the Minister was of the view that SMM's inability to repay to its commercial and quasi-government creditors arose by reason of fraud and mismanagement on the part of its controlling shareholder, Mr. Mawere.

He contended that SMM was, through the actions of Mr. Mawere, being prevented from becoming a successful concern.

With the involvement of the judiciary, the Minister came to the conclusion that it was just and equitable that SMM be placed under reconstruction.

In addition, he was of the view that: *“Due to the desperate nature of the circumstances of SMM at the time, I found it was necessary to take immediate action to prevent irreparable harm to the Company, its creditors, members and employees and, in this regard, I proceeded to place the Company under reconstruction without affording the Company an opportunity to make representations in this regard.”*

The allegations made against Mr. Mawere by the Minister of Justice are set out below:

SAS did not remit money due to SMM from the export of its asbestos on time or, in some cases, at all. These delays are non-remittances of sales revenues severely affected SMM's cash flows. It would appear that Mr. Mawere diverted these monies (which were due to SMM, and payable by SAS, to other as yet unknown third parties. Indeed, SAS owed to SMM at least US\$18,464,595.27, ZAR4, 515,025.28 and C\$628,071.84. Following legal proceedings instituted under the Administrator's direction in the South African High Court, South Gauteng) under case number 2257/05, SAS was placed under liquidation in a bid to recover these amounts.

In an attempt to legitimize SAS' failure to remit the amounts due to SMM, Mr Mawere even improperly obtained an order on 6 May 2004 ("the Cession Order") from the High Court of South Africa (South Gauteng), under case number 2004/10496, pursuant to the terms of which SAS was required to pay over to Petter Trading (Pty) Limited ("Petter Trading") (another South African company which Mawere controlled) (the sum of ZAR 74,872,468.49. Once the Administrator was appointed he instructed South African lawyers to challenge this order. By order dated 29 November 2004, the High Court of South Africa (South Gauteng) duly rescinded the Cession Order.

As a result of SAS's failure to remit to SMM the proceeds of asbestos fibre sales, SMM's financial position deteriorated rapidly to the extent that in February 2004 and March 2004, SMM failed to pay wages and salaries at AA Mines; banks began to call in their loans and overdraft facilities; and other financial institutions began legal action against the Company.

It is clear from the above that a causal link existed in the mind of the Minister between the alleged cession order that occurred in the jurisdiction of South Africa and the placement of the SMM and related companies under reconstruction.

In response to the alleged fraud that could only have taken place in the jurisdiction of South Africa, the government of Zimbabwe responded by proclaiming a decree whose effect was to convert all loans and claims by state institutions into state assets in relation to SMM.

Accordingly, the Minister unilaterally proceeded to act as follows in relation to SMM:

The loans amounting to Z\$28.8 billion that were provided in the ordinary course of business by Zimbabwe Banking Corporation Limited ("Zimbank") in February 2004 were henceforth treated as state loans. To justify this act, the Minister contended that Zimbank was owned by Zimbabwe Financial Holdings Limited ("Finhold"), which in turn was owned 47% by the National Social Security Authority ("NSSA"), a social security administration company, and 30% by the government and, therefore, the loans provided to SMM by Zimbank qualified in terms of the decree as state loans.

SMM also borrowed under the PSF facility an amount of Z\$30 billion. The company had an outstanding amount with the state-owned electricity

supplier, Zimbabwe Electricity Supply Authority (“ZESA”) of Z\$8.5 billion.

With respect to taxes, the Company was deemed to owe the Zimbabwe Revenue Authority (“Zimra”) an amount of Z\$47.7 billion although this was never independently verified before the placement of the company under reconstruction.

The outstanding amount on a bond issued by the MMCZ was Z\$0.4 billion.

The total amount that was unilaterally converted into state loans was Z\$115 billion.

The schedule of SMM’s indebtedness as per the statement prepared by the Administrator is set out in the annexure marked **ARL18**.

With respect to the Zimbank facilities, a letter marked **ARL19** dated 3 November 2004 addressed to the Zimbank by the RBZ is instructive and it is important to quote its content to properly reflect the context in which the alleged indebtedness of SMM was contrived:

“We refer to the letter from Mr. E.N. Mushayakarara to the Governor dated 20 September 2004 regarding the disbursement of Z\$30 billion through Zimbabwe Banking Corporation Limited (“Zimbank”) for the account of SMM Holdings (Pvt) Limited (African Associated Mines) with the first tranche of Z\$20 billion having been disbursed on 24 May 2004 and the second tranche of Z\$10 billion on 17 August 2004.

We confirm that Zimbank’s role in these transactions was that of facilitation only and that the exposure should not be recorded as a liability in Zimbank’s books.”

SMM was said to be indebted to the RBZ in an amount of Z\$28.8 billion referred to above being funds advanced by the RBZ through commercial banks like Zimbank. No agreement existed between SMM and the RBZ in respect of the amount allegedly borrowed by SMM.

In terms of Zimbabwean law, all the state-owned institutions that were used to takeover SMM as proxies for the state in respect of their commercial claims against SMM are juristic persons in their own rights capable asserting their claims in the court of law without the assistance of the decree yet in the SMM matter such institutions were rendered non-persons notwithstanding the fact that these institutions have their own remedies in the event of default by a client.

THE ACTIONS OF THE ADMINISTRATOR

The Administrator of SMM was appointed by the Minister on 14 September in terms of an appointment letter marked **ARL20** although he started his duties on 6 September 2004 when he dissolved the board of SMM.

There is no doubt that the Reconstruction Act is a penal law. Notwithstanding, its recognition in South Africa to the extent that legal proceedings instituted by an Administrator appointed in terms of the Act raises key and fundamental issues regarding the security and protection the South African legal system provides for foreign-born citizens like Mawere against attack by predatory states like Zimbabwe.

In this matter, the authority and locus standi of the Administrator of SMM was raised in a number of applications and actions before the South African courts including the constitutional court and in all cases, the judiciary held that no constitutional issue arose from the fact that what in effect the rights and interests the Administrator sought to assert in the jurisdiction of South Africa arose directly from the implementation of a class of laws that pose so grave a threat to the constitutional and political morality upon which the Republic of South Africa is founded.

HONOURABLE WILLIS JUDGEMENT AND IMPLICATIONS

SMM instituted action against Messrs. Mawere and Mariemuthu for an order declaring the two jointly and severally liable, the one defendant paying the other to be absolved, to the Plaintiff (SMM) in terms of Section 424(1) of the Companies Act, No. 61 of 1973, as amended ('the old Companies Act'), for a debt owing by Southern Asbestos Sales (Pty) Limited to SMM in the amount of ZAR18,043,374.21.

It is SMM's pleaded case that the monies in question were paid by Southern Asbestos Sales (Pty) Limited ("SAS") (in liquidation) to Petter Trading (Pty) Limited ("Petter") (in liquidation) as a consequence of the implementation of a court order granted on 6 May 2004.

The allegations are that Mr. Mawere and Mr. Mariemuthu acted in concert, as part of a fraudulent scheme, to obtain a cession court order given by Van Oosten J.

At the root of the action instituted by SMM in South Africa against Messrs. Mawere and Mariemuthu is a purported agreement of cession in terms of which debts owed by SAS to SMM were ceded to a South African company, Petter Trading (Pty) Limited ("Petter").

The signing of the cession agreement occurred in April and the application to court in May 2004, respectively.

The cession court order was rescinded on application to this Court in November 2004 on allegations by SMM under the control of a state appointed Administrator that the order was fraudulently obtained.

SMM, SAS and Petter were under one common control when the said order was granted. Mr. Mawere was the ultimate shareholder of the three companies.

On 29 July 2004, Mr. Obed Dube Manyika; the former Managing Director of African Associated Mines (“AAM”); the company that exported asbestos and sold it to SAS, deposed to an affidavit at the Provincial Magistrate in Harare, Zimbabwe.

He made the following allegations on page 69 of the papers attached:

1. Mr. Mawere phoned and asked him to meet him at ARPS House in Rivonia on 28 April 2004.
2. He went to the office and met with one Mr. Lovemore Dube, the General Manager of Petter Trading (Pty) Limited (“Petter”) who showed him a draft agreement which allegedly Mr. Mawere wanted me to sign.
3. What is significant is that he swore as true and fact that Mr. Mawere was at the signing. He stated in the affidavit that: “*Mr. Mawere rejected the idea and again insisted on me signing the agreement for securing creditors.*”
4. He further stated that: “*On the insistence of Mr. Mawere, I signed the back part of the agreement on behalf of the AAM in the presence of Mr. Mawere.*”
5. He also stated that: “*Mr. Cleopus Sanangura, whose signature appears on the part signed for SAS, was not present at the time I was at the House and when I appended my signature.*”

However, when he testified in Court on 12 September 2012 see page 102, he said this about the signing of the cession agreement:

Now what happens on the 28th April 2004.

OBED: On the 28th then I go there, everything was, I think arranged, that the people that were supposed to look at the document are there. Lovemore was with the lawyer and all the people, you see the signatories here.

Yes

OBED: They were all there discussing the document.

It is significant that in the version given to the Court, Mr. Mawere was not at the signing and Mr. Sanangura was at the signing contrary to the version in the affidavit.

The above raises the question as to which of the two versions is true. This is a matter that needs to be investigated.

On the strength of the false statement that Mr. Mawere had insisted that he sign the cession agreement, Mr. Lovemore Dube was a key witness in the trial against Mr. Mawere, knowing full well that Mr. Mawere was not present when the cession agreement was signed, and that the purpose of the agreement was not to divert any funds due to SMM from SAS and more significantly that no funds were diverted as alleged.

Mr. Dube was well aware of the charges against Mr. Mawere and also that at the material time, SMM was indebted to Petter in the sum of a minimum of R19.6 million as set out in his affidavit on page 70 as follows:

*The amount shown on the letter of consent of R74 million was not the amount owed by AA Mines to Petter Trading (Pty) Limited. **The correct amount as at 31st of March 2004 was R19.6 million.***

Mr. Dube was also aware that the amount allegedly diverted to Petter by SAS as a consequence of the cession court order of R18053,374.21 an amount less than what SMM owed to Petter. He knew and must have known that SMM's allegation of fraud was baseless.

It is significant that Hon. Willis J on page 94 of his judgment wrote as follows:

*He (Sanangura) said that SAS had paid Petter the amount of R18 million before the signing of the cession agreement. In the same paragraph the judge then contradicted himself by saying that: "He confirmed the allegations in paragraph 6.7 of the Plaintiff's amended particulars of claim as being correct." Paragraph 6.7 reads as follows: **"Purporting to act in accordance with the cession court order, SAS during or about the period May 2004 to December 2004 paid to Petter an amount of ZAR18,043,373.21."***

No evidence was adduced during trial confirming that any payments were made by SAS to Petter during the period, May through December 2004. In the circumstances, one would have expected the Learned

Judge to have had regard of the fact that there was no intention to defraud anyone as a consequence of the cession court order.