

IN THE CONSTITUTIONAL COURT OF ZIMBABWE

CASE NO: CC234/21

HELD AT HARARE

In the matter between:

TICHAONA MUPASIRI

And

PRESIDENT OF THE REPUBLIC OF ZIMBABWE

EDWIN MANIKAI



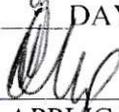
Applicant

First Respondent

Second Respondent

CONSTITUTIONAL COURT APPLICATION

DATED AT HARARE THIS 16th DAY OF DECEMBER 2021


APPLICANT

OFFICE 19, TELONE SHARED OFFICES, 1ST FLOOR, ZOU ENTRANCE,
MAIN POST OFFICE, CNR NELSON MANDELA & JULIUS NYERERE
HARARE. ZIMBABWE

AND TO: **THE REGISTRAR**
Constitutional Court of Zimbabwe
HARARE

AND TO: **THE FIRST RESPONDENT**
MUNHUMUTAPA BUILDING
Cnr. 3RD STREET/SAMORA MACHEL AVENUE
HARARE

AND TO: **THE SECOND RESPONDENT**
C/O DUBE MANIKAI HWACHA
4 FLEETWOOD ROAD, ALEXANDRA PARK
HARARE



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TICHAONA MUPASIRI

And

PRESIDENT OF THE REPUBLIC OF ZIMBABWE

EDWIN MANIKAI



Applicant

First Respondent

Second Respondent

NOTICE OF MOTION
APPLICATION IN TERMS OF S167(2)(D) AND S167(3) OF THE CONSTITUTION
OF ZIMBABWE, 2013

PLEASE TAKE NOTICE that the Applicant intends to apply to the Constitutional Order in terms of the Draft Order annexed to this Notice and that accompanying Affidavits and documents will be used in support of the Application.

PLEASE TAKE NOTICE that if you intend opposing this Application, you will have to file a Notice of Opposition in Form CCZ2 together with one or more opposing affidavits with the Registrar of the Constitutional Court at Harare within 3 days after the date on which this notice is served upon you. You will also have to serve a copy of the Notice of Opposition and affidavits on the Applicant at his address specified below. Your affidavits may be annexed to the documents verifying the facts set out in the affidavits.

PLEASE TAKE NOTICE that there is no need for an order granting direct access of leave to approach this Court.

DATED AT HARARE THIS 16th **DAY OF DECEMBER 2021**



APPLICANT

OFFICE 19, TELONE SHARED OFFICES, 1ST FLOOR, ZOU ENTRANCE,
MAIN POST OFFICE, CNR NELSON MANDELA & JULIUS NYERERE
HARARE. ZIMBABWE

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HARARE

IN THE CONSTITUTIONAL COURT OF ZIMBABWE **CASE NO:**

HELD AT HARARE

In the matter between:

TICHAONA MUPASIRI

Applicant

And

PRESIDENT OF THE REPUBLIC OF ZIMBABWE

First Respondent

EDWIN MANIKAI

Second Respondent



DRAFT ORDER

Before the full court

_____ For the Applicant

_____ For the Respondent

WHEREUPON after reading documents filed of record and hearing Counsel.

IT IS DECLARED THAT

A. The First Respondent's appointment of Chinamasa as Director and Chairman of Air Zimbabwe, a company whose control and management was divested from its directors and shareholders and vested in an Administrator appointed by the Minister of Justice pursuant to the operation of the Reconstruction of State-Indebted Insolvent Act 2005, constitutes conduct that is inconsistent with the Constitution as follows:

- (1) By engaging in a self-help scheme, interposing himself as a shareholder of Air Zimbabwe, the First Respondent failed to fulfil his obligations in terms of s90(1) and s90(2)(c) by clothing himself with right to amend the Reconstruction Act

that specifically vests the control and direction of the company under the Administrator.

- (2) By knowingly and intentionally appointing Chinamasa to be a Chairman of Air Zimbabwe, a juristic entity in its own right, the First Respondent had no title to do and usurped the power and authority of shareholders of the company, to the extent that the then Companies Act could operate concurrently with the Reconstruction of State-Indebted Insolvent Companies Act.
- (3) By unilaterally and arbitrarily involving himself into the affairs of Air Zimbabwe (under reconstruction), the First Respondent knowingly and intentional offended the fundamental rights and freedoms of shareholders and creditors involved in the affairs of the company by appointing a representative of the company who was not accountable to shareholders but to him.
- (4) By failing to take cognisance of the fact that the right to appoint directors falls within the scope of the exercise of fundamental rights, the First Respondent's conduct was inconsistent with the duties imposed upon him by s90(1) and s90(2)(c) of the Constitution rendering his conduct unconstitutional and invalid.
- (5) By allowing and actively participating in the appointment of Chinamasa whose effect was to create an absurdity of a company having two centers of control, the First Respondent acted ultra vires s6 of the Reconstruction of State Indebted Insolvent Companies Act and is so doing failed to uphold, defend, obey and respect the Constitution as set out in s90(1) and to uphold the rule of law as per s(90)(2)(c) of the Constitution.

B. The First Respondent had constructive knowledge that in relation to SMM, s23(1)(a) of the Reconstruction of State-Indebted Insolvent Companies Act (Chapter 24:27), at time he assumed office as President that shares had already been issued to Nicdale Investments Private Limited (Nicdale), a purported proxy for the state as contemplated in

Reconstruction Act, and notwithstanding this knowledge, has failed, refused and neglected to ensure that no agency can exist between an Administrator in respect of a reconstructed company as would have been the case prior to the issuance of any shares to the state as prescribed by the Act. In the premise, the failure to divest the Administrator of the control and management of a reconstructed SMM constitutes a material violation of the Reconstruction Act and the Constitution in terms of s90(1) and s(90)(2)(c) of the Constitution as the role of the Administrator in relation to SMM during the First Respondent's tenure has no legal authority to support it.

- C. It is not in dispute that the Minister of Justice, Legal and Parliamentary Affairs issued a reconstruction order in relation to the affairs of Hwange Colliery Company Limited (Hwange) without the knowledge and consent of the shareholders and directors of the company. The Minister then applied for the Court to confirm the Minister's extrajudicial order. The application for confirmation was dismissed by the Court. The fact that under his tenure, the First Respondent failed to protect the independence and impartiality of the Courts by allowing a law that subordinates the role of the judiciary to that of confirming orders made by the Minister on an ex-parte basis. This conduct has the effect of undermining the doctrines of separation of powers and equality on which the rule of law as set out in s90(2)(c) is premised. Accordingly, the First Respondent failed to fulfil his obligations in terms of s90(1) as well.
- D. Costs of this application shall be borne by the First Respondent and the Second Respondent, is he chooses to oppose it.

BY THE JUDGES

BY THE REGISTRAR

IN THE CONSTITUTIONAL COURT OF ZIMBABWE

CASE NO:

HELD AT HARARE

In the matter between:

TICHAONA MUPASIRI

And

PRESIDENT OF THE REPUBLIC OF ZIMBABWE

EDWIN MANIKAI



Applicant

First Respondent

Second Respondent

FOUNDING AFFIDAVIT

I, the undersigned,

TICHAONA MUPASIRI

do hereby make oath and say:

THE DEPOSITION

1. I am the Applicant in this matter.
2. I am an adult male whose service address is **Office 19**, Telone Shared Offices, 1st Floor, ZOU Entrance, Main Post Office, **Cnr Nelson Mandela & Julius Nyerere**, Harare, Zimbabwe.
3. I wish to state that the facts herein contained are, save where the context otherwise requires or where otherwise expressly indicated, within my own personal knowledge and are to the best of my knowledge and belief both true and correct.

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THE RESPONDENTS

4. The First Respondent is Emmerson Dambudzo Mnangagwa, an adult male, and the current President of the Republic of Zimbabwe. His address of service is: Munhumutapa Building, Causeway, Harare. Zimbabwe.
5. The Second Respondent is an adult male who practices as an attorney with the firm, Dube, Manikai & Hwacha whose address is: 4 Fleetwood Road, Alexandra Park, Harare, Zimbabwe

NATURE OF THE APPLICATION

6. This application is in terms of s167(2)(d) and s167(3) of the Constitution of Zimbabwe, 2013 that provides that subject to this Constitution, only this Court has exclusive jurisdiction to determine whether the First Respondent has failed to fulfil constitutional duties as set out in s(90)(1) and s(90)(2)(c) and whether his conduct in relation to the facts set out in this application, is constitutional.
7. No relief is sought against the Second Respondent who has been cited solely to allow him to assist the Court in determining this matter in the interests of justice.
8. I will in this application place reliance on documents, reports in the public domain, records, and the confirmatory Affidavit of **MUTUMWA MAWERE** which is attached hereto marked **TM1**.
9. The evidence in support of the application will be attached to this affidavit.
10. At the core of this dispute is the First Respondent's actions pursuant to:
 - a. The affairs of SMM Holdings (Private) Limited (SMM), a company duly incorporated and operating in terms of the then Companies Act, that whose control and direction was extra-judicially divested and deprived from its shareholders and directors pursuant to a reconstruction order that was issued by the then Minister of

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Justice, Legal and Parliamentary Affairs in terms of Presidential Powers (Temporary Measures) (Reconstruction of State-Indebted Insolvent Companies) (Regulation of 2004) (as amended) as read with the Reconstruction of State-Indebted Insolvent Act Chapter 24:27 of the laws of Zimbabwe (the Reconstruction laws) in relation to SMM on 6 September 2004 that is currently in force under the First Respondent's administrations since November 2017 to date.

- b. The affairs of Air Zimbabwe Private Limited (Air Zim), a company limited by shares that was duly operating in terms of the Companies Act, as a juristic entity, whose control and direction was divested and deprived on 4th October 2018 in terms of the Reconstruction of State-Indebted Insolvent Companies Act [Chapter 24:27] (No. 27 of 2004).
- c. The affairs of Hwange Colliery Company Limited (HCCL), a company that was duly organized and operating in terms of the laws of Zimbabwe and listed on the Zimbabwe Stock Exchange (ZSE), Johannesburg Stock Exchange, and the London Stock Exchange, whose control and direction was divested and deprived from its shareholders and directors in terms of a Government Gazette (Extraordinary) issued and published on the 26th of October 2018 pursuant to the Reconstruction of State-Indebted Insolvent Companies Act [Chapter 24:27] (No 27 of 2004).

11. Based on the above, the orders sought are as follows:

- A. The First Respondent's appointment of Chinamasa as Director and Chairman of Air Zimbabwe, a company whose control and management was divested from its directors and shareholders and vested in an Administrator appointed by the Minister of Justice pursuant to the operation of the Reconstruction of State-Indebted Insolvent Act 2005, constitutes conduct that is inconsistent with the Constitution as follows:

- (6) By engaging in a self-help scheme, interposing himself as a shareholder of Air Zimbabwe, the First Respondent failed to fulfil his obligations in terms of s90(1)

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and s90(2)(c) by clothing himself with right to amend the Reconstruction Act that specifically vests the control and direction of the company under the Administrator.

- (7) By knowingly and intentionally appointing Chinamasa to be a Chairman of Air Zimbabwe, a juristic entity in its own right, the First Respondent had no title to do and usurped the power and authority of shareholders of the company, to the extent that the then Companies Act could operate concurrently with the Reconstruction of State-Indebted Insolvent Companies Act.
 - (8) By unilaterally and arbitrarily involving himself into the affairs of Air Zimbabwe (under reconstruction), the First Respondent knowingly and intentional offended the fundamental rights and freedoms of shareholders and creditors involved in the affairs of the company by appointing a representative of the company who was not accountable to shareholders but to him.
 - (9) By failing to take cognisance of the fact that the right to appoint directors falls within the scope of the exercise of fundamental rights, the First Respondent's conduct was inconsistent with the duties imposed upon him by s90(1) and s90(2)(c) of the Constitution rendering his conduct unconstitutional and invalid.
 - (10) By allowing and actively participating in the appointment of Chinamasa whose effect was to create an absurdity of a company having two centers of control, the First Respondent acted ultra vires s6 of the Reconstruction of State Indebted Insolvent Companies Act and is so doing failed to uphold, defend, obey and respect the Constitution as set out in s90(1) and to uphold the rule of law as per s(90)(2)(c) of the Constitution.
- B. The First Respondent had constructive knowledge that in relation to SMM, s23(1)(a) of the Reconstruction of State-Indebted Insolvent Companies Act (Chapter 24:27), at time he assumed office as President that shares had already been issued to Nicdale

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Investments Private Limited (Nidale), a purported proxy for the state as contemplated in Reconstruction Act, and notwithstanding this knowledge, has failed, refused and neglected to ensure that no agency can exist between an Administrator in respect of a reconstructed company as would have been the case prior to the issuance of any shares to the state as prescribed by the Act. In the premise, the failure to divest the Administrator of the control and management of a reconstructed SMM constitutes a material violation of the Reconstruction Act and the Constitution in terms of s90(1) and s(90)(2)(c) of the Constitution as the role of the Administrator in relation to SMM during the First Respondent's tenure has no legal authority to support it.

- C. It is not in dispute that the Minister of Justice, Legal and Parliamentary Affairs issued a reconstruction order in relation to the affairs of Hwange Colliery Company Limited (Hwange) without the knowledge and consent of the shareholders and directors of the company. The Minister then applied for the Court to confirm the Minister's extrajudicial order. The application for confirmation was dismissed by the Court. The fact that under his tenure, the First Respondent failed to protect the independence and impartiality of the Courts by allowing a law that subordinates the role of the judiciary to that of confirming orders made by the Minister on an ex-parte basis. This conduct has the effect of undermining the doctrines of separation of powers and equality on which the rule of law as set out in s90(2)(c) is premised. Accordingly, the First Respondent failed to fulfil his obligations in terms of s90(1) as well.
- D. Costs of this application shall be borne by the First Respondent and the Second Respondent, if he chooses to oppose it.
12. Below, I will provide certain background issues that have a material bearing on this application particularly in so far as the conduct of the First Respondent is concerned both before he assumed the position he currently holds and during his tenure.

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13. This background is in support of my contention that the First Respondent at all material times knew that the recognition and enforcement of a law that permits in terms of s4, s6, and s8 the divestment and deprivation of the rights and fundamental freedoms entrenched in the constitution yet he enthusiastically and constructively participated in undermining the public confidence in the rule of law.

LOCUS STANDI

14. I derive my standing to prosecute this application on s(2)(2) of the Constitution of Zimbabwe that reads as follows:

"The obligations imposed by this Constitution are binding on every person, natural or juristic, including the State and all executive, legislative and judicial institutions and agencies of government at every level, and must be fulfilled by them."

15. This application is concerned about holding public office bearers to account for their conduct and ensuring that the First Respondent's conduct is subject to public scrutiny and interrogation.
16. He took an oath to be subject to the constitution and as such the duties set out in s90(1) and s(90)(2)(c) are fulfilled and the supremacy of the constitution is not in dispute.
17. His authority and power is derived from the constitution and as such he is entrusted as the country's (1) chief of state, (2) chief executive, (3) chief administrator, (4) chief diplomat, (5) commander in chief, (6) chief legislator, (7) party chief, and (8) chief citizen his conduct is necessarily subject to public scrutiny and the only vehicle to test his conduct is in terms of s167.
18. In terms of s62(2), it is trite that I as a citizen has a right of access to any information that is held by any person including the Second Respondent in so far as this information is required to test the admissions he openly made that the genesis of the reconstruction

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laws in relation to SMM was as a consequence of a major political fallout between Mr. Mawere and the First Respondent.

19. My locus to prosecute this matter derives from s85(1)(d) that deals with the enforcement of fundamental human rights and freedoms as set out in Chapter 4 of the constitution entitles me to act in the public interest and approach this Court that through the conduct of the First Respondent fundamental rights including those set out in s(85(1) that directors and shareholders who may be alleged to have contravened a law should not bar them from access to courts as is the case in terms of s8 of the Reconstruction Act that permits the courts to confirm an order issued outside the four corners of the Court and in so doing undermine the doctrine of the separation of powers and equality that are fundamental tenets of the rule of law.
20. It is my allegation that based on the statements made by the Second Respondent who refused, neglected and failed to respond as per my request to my letter dated 8 November 2021 attached hereto marked **TM2**, it is in the interests of justice that the veracity of the allegations he makes about the role of the First Respondent played in relation to the extrajudicial and draconian actions used in relation to SMM is tested.
21. In addition, I also wrote the letter attached hereto marked **TM3** on 9 November 2021 in the hope that the First Respondent was going to dissociate himself with the statements made by the Second Respondent about his role in corruptly using public power to undermine the rule of law and helping give life to the Reconstruction Laws that not only offend international law, but also the Constitution of Zimbabwe and the SADC Treaty.
22. I personally attended to the service of my letter to the First Respondent's offices at Munhumutapa Building on the 10th of November 2021, but the security personnel managing the access control refused to accept the letter and consequently, I served via email on the same day. Should the First Respondent have not seen the letter, this

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application will afford him the opportunity to respond to the serious allegations made against him by the Second Respondent.

DIRECT ACCESS

23. This matter falls within the exclusive jurisdiction of this Court and as such there is no need to apply for leave of this Court for the matter to be adjudicated by this Court.

CONSTITUTIONAL BREACHES OF FIRST RESPONDENT

24. There is substantial body of evidence that shows that the First Respondent was involved in giving life to the Reconstruction Laws.
25. Based on the account given by the Second Respondent, the First Respondent was his alter ego in the scheme that involved the introduction of the Reconstruction regulations i.e. SI 187 of 2004 that was issued in relation to the affairs of SMM.
26. It is worth highlighting that the said regulations provided for no court involvement in the prosecution of the matter.
27. The Attorney General (AG) was completely side-lined with the Second Respondent assuming a de facto position of the AG contrary to the Office of the AG Act as follows:
- a) For instance, no papers were furnished to Bharat Patel (April 2003-2005), instead the Second Respondent prepared the court papers for the High Court application of November 2005 by the then Minister of Justice, Legal and Parliamentary Affairs to the High Court seeking an order in retrospect to have the Reconstruction Order of 2004 granted the status of an Act of Parliament. This the Second Respondent constructively did alive to the crime and implications.
 - b) The High Court application mentioned above was not a matter where the AG must have represented then Minister of Justice, Legal and Parliamentary Affairs, but instead where AG should have applied in his capacity as such for the order.

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- c) As a result, the then Minister of Justice, Legal and Parliamentary Affairs applied and appeared to the High Court when he had no locus to do so, locus standi of which is/was expressively vested in the AG who at law took the Oath.
 - d) Further evidence is in the written enquiry communicated from Virginia Mabhiza on 19 December 2005 to Arafas Gwaradzimba, over the Reconstruction Order that took place at end August or early September 2004. This showed that her civil divisional office of the AG was not in the picture hence the belated enquiry with the Administrator of SMM.
 - e) On 26 January 2006, a non-state actor, Arafas Gwaradzimba's response to Virginia Mabhiza copied not the AG but only Dube, Manikai and Hwacha law firm inspite of having mentioned in its contents that her immediate superior the AG would be copied.
 - f) There is every reason to believe the then office of the former President, Cde R. G. Mugabe, which sanctioned the originating Reconstruction Order, may not have been made aware of what was going on, without it knowing or noticing in furtherance of the Reconstruction exercise of SMM nicodemusly.
28. As explained more fully below, the seriousness of the allegations made by the Second Respondent calls for this Court to establish and determine the First Respondent's role and state of knowledge regarding the conceptualization, implementation of the Regulations and the prosecution of the regulation in relation to SMM as a mechanism of determining the conduct of the First Respondent in willingly recognizing and enforcing conduct and the Reconstruction Laws that are inconsistent with the constitution which is the supreme law of the country.
29. The First Respondent has so far failed to provide leadership in rejecting the Reconstruction Laws as laws of general application notwithstanding the premise on which it is founded that divesting a company of its directors and shareholders creates a

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super company deserving of the protection of the Constitution and entitles it to benefit from the protection of the Constitution that he swore to serve and protect. This conduct is inimical to the rule of law and deserves zero judicial, legislative and executive tolerance.

30. The conduct by the First Respondent in fully associating himself with the Reconstruction Laws and prosecuting such laws offended and offends s2(2) of the Constitution that is binding on every person (including the Respondents), natural or juristic including the State and all executive, legislative, judicial institutions and agencies of government at any level.
31. The conduct of the First Respondent in enforcing the Reconstruction Laws, offends Section 3 of the Constitution that provides that Zimbabwe is founded on values and principles that include (1) supremacy of the constitution, (b) the rule of law, and (c) good governance. The rule of law is premised on the separation of powers, respect of the bill of rights that are entrenched in the constitution, certainty of laws, and rejection of the retrospective application of any law.
32. The conduct of the First Respondent in associating and prosecuting the Reconstruction Laws during his tenure, offends Section 44 of the Constitution of Zimbabwe that provides that the state and every person, including juristic persons, and every institution and agency of government at every level must respect, protect, promote and fulfil the rights and freedoms entrenched in the Constitution, violates these fundamental values entrenched in the Constitution.
33. The Second Respondent is the First Respondent's legal advisor, confidante, and the Chairman of his Advisory Council. According to the Second Respondent the Reconstruction Laws were enacted specifically to deal with specific circumstances of SMM and its ultimate shareholder, Mawere, based on a political fallout and as such it can be concluded that this law was never intended to have any general application. The

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Second Respondent, although in private practice, has been the sole legal representative of the government, SMM (under reconstruction), the Administrator's private company, AMG Global Nominees Private Limited (AMG) without any known mandate given by the Attorney General to do so. With the full knowledge and active involvement of the First Respondent, Section 46 of the Constitution of Zimbabwe that provides for this court to give full effect and freedoms enshrined in the Constitution which include: (1) that this Court is compelled to promote the values that underlie a democratic society based on openness, justice, human dignity, equality and freedom, and (2) this Court must take into account international law and all treaties and conventions to which Zimbabwe is a party have been offended in that the rights of shareholders were divested and deprived without no judicial involvement of the judiciary. Accordingly, when the First Respondent had knowledge of the context and content of The Reconstruction laws, proceeded to use the Act in relation to other juristic entities notwithstanding the fact such laws clearly offend public policy, as they are penal in nature and confiscatory to be tolerated as law in terms of international law.

34. The conduct of the First Respondent is openly stated in the article published in the Herald Newspaper under the title: "Chinamasa's board appointment above board," <https://www.herald.co.zw/chinamasa-appointment-above-board-president/> on 17 July 2019 attached hereto marked **TM4** confirming that notwithstanding the limitations imposed by the operation of the Reconstruction Act, that the control and direction of a company placed under reconstruction solely vests in the Administrator, he appointed a board chaired by the author of the Reconstruction Laws, Chinamasa, in defiance and contempt on the limitations imposed by s56(1) of the Constitution that provides that all persons are equal before the law and the right to have the right to equal protection and benefit of the law but the Reconstruction Act is premised on the special and superior status of the state, albeit not defined in the Act, as a creditor that is clothed with self-

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help powers that offend not only the Constitution but international law, and more importantly on the fact that a company is a creature of the Companies Act, a law of general application, and no other law can concurrently apply in relation to its affairs.

35. Under his tenure, two reconstruction orders were issued in relation to Air Zim and Hwange, clearly evidencing the First Respondent's support of the continued existence and operation of the Reconstruction Laws. The audacity of the First Respondent in ignoring the limitations imposed on him by s90(1) and s(90)(2)(c) clearly violated Section 68(1) of the Constitution which provides that every person has a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair. In the case of Air Zim and Hwange, he knowingly and intentionally ignored his duties to the constitution.
36. The First Respondent knows and ought to know that the state is not a contracting party that can assert any creditor to debtor rights in a competent court of law yet in this matter, under his watch reconstruction order were issued and enforced on the premise that the state is a superior creditor and the Courts were only involved in the confirmation of an order issued outside the Court's jurisdiction and control. Accordingly, the First Respondent's conduct violates Section 69(2) and 69(3) that provides as follows: (1) In the determination of civil rights and obligations, every person has a right to a fair, speedy and public hearing within a reasonable time before an independent and impartial court, tribunal or other forum established by law, and 3. Every person has the right of access to the courts, or to some other tribunal or forum established by law for the resolution of any dispute. It is clear that notwithstanding the provisions of the above, the First Respondent constructively and knowingly caused the prosecution of a self-created dispute involving the so-called state without the involvement of the judiciary.
37. The Reconstruction Laws are premised on criminalizing the shareholders and directors as a bridge or nexus to justify government involvement that is not permissible in terms

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of the Constitution that provides in s70(1)(a) that any person accused of an offence has the right to be presumed innocent until proved guilty. By associating with this repugnant law, the First Respondent's conduct is inconsistent with the rule of law.

38. The effect of the Reconstruction laws is to permit the arbitrary and unilateral deprivation of the right to exercise discretion to appoint and remove the directors of a company as well as to permit the Administrator to unilaterally declare targeted shareholders as culpable to permit asset forfeitures. This violates s71(3) that provides that no person may be compulsorily deprived of their property except where the law or regulations used are in terms of a law of general application.
39. It is not in dispute that s86(2)(b) of the Constitution that provides that the fundamental rights and freedoms entrenched in the Constitution may be limited only in terms of a law of general application which the Reconstruction Laws are clearly not.
40. It is common cause that s86(3)(e) of the Constitution that provides for no recognition of law that limits rights without the right to a fair trial being respected yet the conduct of the First Respondent is endorse and implement this in violation of the constitution.

BACKGROUND ISSUES INVOLVING THE FIRST AND SECOND RESPONDENT

41. This application is concerned about public accountability of the First Respondent in relation to the obligations imposed upon him by the constitution in terms of s(90)(1) and s90(2)(c).
42. The onus is, therefore, on me to furnish this Court with evidence that supports my application that at all material time, the Reconstruction Laws were penal and confiscatory.
43. The Second Respondent makes serious admissions, which cite and include the First Respondent, about the existence and operation of an enterprise to use public power to

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divest and deprive shareholders and directors of the control and direction of a company without following any due process of the law.

44. It is not surprising, therefore, that when the First Respondent assumed office, he not only maintained these laws in relation to SMM but also applied the same in relation to Hwange and Air Zimbabwe.
45. The first part of my evidentiary submission deals with the facts and circumstances regarding the introduction and prosecution of the Reconstruction Laws in relation to SMM and related companies based on the Second Respondent's role in the prosecution of these laws on behalf of the government of Zimbabwe (GOZ).

SECOND RESPONDENT'S ROLE IN RELATION TO SMM

TAP BUILDING PRODUCTS LIMITED

46. On 8 November, 2021, I addressed a letter to the Second Respondent attached hereto marked **TM2** requesting him to confirm the version contained in a message on 27 March 2021 also attached hereto marked **TM5** that was addressed to Mr. Fred Mutanda in which the discussion was centred on his role in siphoning about US\$700,000 as a director of TAP Building Products Limited (TAP), a company duly incorporated in terms of the laws of Zambia, in which the Reconstruction Laws was applied extra-territorially in Zambia with the effect of divesting and depriving its shareholder and directors of its control and direction.
47. The Second Respondent, was the legal representative of SMM (under reconstruction) when the following reliefs were granted:
 - 8.1 A declaratory order that by virtue of the Presidential Powers (Temporary Measures) (Reconstruction of State-Indebted Insolvent Companies)

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(Regulations, 2004) (as amended) as read with the Reconstruction of State-Indebted Insolvent Act Chapter 24:27 of the laws of Zimbabwe (the Reconstruction laws), TAP Building Products Limited, a company which is an associate and/or subsidiary of SMM and be deemed to be a company under reconstruction in terms of the Reconstruction Laws, and therefore, under the control and direction of Gwaradzimba.

8.2 An order that the meeting of 16th June 2005, purportedly dissolving the board of TAP appointed by the company's shareholders.

48. It is worth highlighting that the Supreme Court of Zambia ruled as follows:

47.1 There was no justification in the importation of the Zimbabwean Reconstruction laws into Zambia.

47.2 The reference to the Zimbabwean Reconstruction Laws and their application in the jurisdiction of Zambia was not called for.

47.3 Zambian laws did not provide for what is described in the Zimbabwean Reconstruction Laws as "associate company."

47.4 The Administrator as defined in the Zimbabwean Reconstruction Laws could not claim and exercise rights over an asset situated in Zambia, a sovereign country, as this law was inconsistent with the Zambian Companies Act or TAP's Articles of Association.

49. Though the purpose of this application is clearly not to pursue criminal offenses that obtained as a result, it is worthwhile to cite the incriminating evidence/s and breaches that, as a consequence of the purported application of the Reconstruction Laws in relation to Zambia, the Second Respondent and other board members appointed by Gwaradzimba to assume the control and direction of TAP, unlawfully collected US\$700,000 in fees and other income.

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50. To the extent that the attempted hijacking of TAP using the Reconstruction Laws resulted in an unjust enrichment of the Second Respondent, the conduct of the Second Respondent constitutes fraud on TAP.
51. TAP has not been able to recover the stolen funds from the Second Respondent who purportedly acted for and on behalf of SMM whose legal status was altered by an act of state that offends not only Zambian laws but the Zimbabwean constitution, SADC Protocol and Treaty as well as international law.
52. It is also worth noting that the Second Respondent's response to Mr. Mutanda's questions regarding the TAP board fees matter was as follows:

"That is why he (meaning Mr. Mawere, TAP's ultimate beneficial shareholder) ends up trying to claim even Board fees – ashaya poku bata (he has run out of ways to make a living)."

53. The Second Respondent is aware of the facts related to the TAP dispute as he was the briefing attorney for SMM's legal representatives in Zambia.
54. It is not in dispute that the Second Respondent was appointed as a Director of TAP and as a practicing attorney was bound by his oath to preclude himself from benefiting personally from the fraudulent application of a Zimbabwean statute that violates international law.
55. His response to Mr. Mutanda clearly demonstrate that the Second Respondent does not recognize that his conduct undermines the integrity of the legal profession and the mere fact that the Supreme Court of Zambia had to deal with the consequences of a law that is founded on extrajudicial instruments to divest and deprive of rights entrenched in the Zimbabwean constitution, exposes the Zimbabwean government's disrespect of the rule of law to a fellow SADC member state and to the world at a time when Zimbabwe desperately needs foreign direct investment.

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56. The Second Respondent was requested to respond to the Applicant by no later than 12 November 2021. He failed, refused and neglected to respond hence this application.
57. At the core of this dispute is the legality and constitutionality of the reconstruction scheme that the Second Respondent admits led the extrajudicial reconstruction of not only SMM, the targeted company, but all companies that were deemed to be under the control of Mr. Mawere who then at the time was declared a specified person but was despecified since 2010 without recompense of the private property/ies and investments he lost.

SECOND RESPONDENT'S ROLE IN THE AFFAIRS OF SMM UNDER RECONSTRUCTION

58. Attached hereto marked **TM6** is a copy of an affidavit that was deposed to by the then Minister of Justice, Legal and Parliamentary Affairs, Hon Patrick Chinamasa (PC) in support of the application using a Presidential Order, that he had issued in relation to SMM without any judicial involvement at first and more significantly without notifying the directors and shareholders of the company.
59. This was an application for an order by Chinamasa in terms of s8 of the Reconstruction of State Indebted Insolvent Companies Act (Chapter 24:27), confirming the reconstruction order issued by him in relation to SMM, a private company that was duly incorporated and operating in terms of the then Companies Act.
60. Chinamasa's address for service for the purposes of this application was given as care of the Civil Division of the Attorney General's (AG) Office. However, the Second Respondent fraudulently gave his firm's address as that of the AG meaning that the AG was intentionally and knowingly kept in the dark on this application.
61. This begs the question as to who on behalf of the government was briefing the Second Respondent or he simply had hijacked the office and role of the AG to effectively substitute the purported client, the government of Zimbabwe.
62. Chinamasa states on paragraph 5.7 of the affidavit as follows:

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“The new Section 7A of the Reconstruction Regulations provided that the Attorney General was: “*At any time before a scheme of reconstruction is approved (by the Minister)*” to apply to a Judge in Chambers for the confirmation of the reconstruction order,” meaning that the authority to launch the application to confirm Chinamasa’s order in relation to SMM was vested in the AG and not the Second Respondent.

63. It is for this Court to determine in the interest of justice, in what capacity and authority did the Second Respondent assume the authority and incumbency to approach the Court.

64. It cannot be disputed that the Second Respondent in cahoots of Chinamasa constructively misrepresented that the AG was party to the application to confirm the reconstruction when this was not true and fact.

65. Chinamasa on paragraph 5.1 of the affidavit and on the advice of the Second Respondent stated as follows:

“Section 8 of the Reconstruction Act requires that the Minister of Justice, Legal and Parliamentary Affairs should, by application made within thirty (30) days after the issue of the reconstruction order, seek an order confirming the reconstruction.”

66. It is not in dispute that the reconstruction order in relation to SMM was issued on 6 September 2004 in terms of SI 187 and not in terms of the Act that only came to existence after SMM was placed under reconstruction.

67. It follows that the reconstruction order in relation to SMM was supposed to be issued at the latest by October 2004 and not in 2005 when it was issued.

68. The Second Respondent knew and ought to have known that Hon Chinamasa had no power to amend the limitations imposed by the regulations yet the reality is that the Second Respondent and not the AG knowingly and intentionally caused Chinamasa to violate the very regulations that were supposed to regulate the reconstruction of SMM were it being done faithfully or in utmost good faith.

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69. The Reconstruction Act only came into retrospective force on 4th March 2005.
70. In terms of paragraph of 5.4 of Chinamasa's affidavit, it is stated as follows:
"At the time that I issued the Reconstruction Order there was no provision in the Reconstruction Regulations which required me to seek confirmation of a reconstruction order by a Judge or Court."
71. Ordinarily, one would not expect a professional attorney to knowingly and intentionally assist his client, if Chinamasa in his capacity as the Minister of Justice was the Second Respondent's legal representative at all), in openly and wantonly violating the constitution by participating in a scheme or project that offended the doctrine of the separation of powers in relation to the three equal branches of government.
72. It is not in dispute that in relation to SMM's reconstruction, the Second Respondent participated in a scheme whose intent and effect was to exclude the AG and the courts in divesting and depriving the shareholders of SMM and directors appointed by the shareholders of the control and direction of the company outside the four corners of the then Companies Act, a law of general application and more importantly allowing Chinamasa to assume the power of the judiciary to issue limiting and binding orders
73. On paragraph 6 of Chinamasa's affidavit, it stated that he issued the order in relation to SMM on 6th September 2004 in terms of s4 of the Reconstruction Regulations, after consulting with the Acting Minister of Finance and Economic Development.
74. This clearly shows that no judicial proceedings preceded the placement of SMM under reconstruction in clear violation of s18(9) of the then Constitution of Zimbabwe, SADC Treaty and Protocol, and international law. This violates Sections 2, 3, 44, 46, 56(1), 62(2), 68(1), 69(2), 70, 71(3), s86(2)(b), s87(1), s87(3) and s87(4)(b) of the Constitution in that:

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CONSTITUTIONAL BREACHES BY SECOND RESPONDENT

75. The constitution imposes obligations on all persons to ensure that the rule of law is the order of the day and any law that is inconsistent with the constitution is declared by the Constitution to be invalid.
76. It is against this backdrop, that the role of the Second Respondent, a non-state actor, in exclusively prosecuting the reconstruction of SMM be brought to the attention of the this Court as background in determining whether the proximity of the Second Respondent to the First Respondent is free of corruption or is tainted with undermining the rule of law.
77. Section 2 of the Constitution of Zimbabwe Amendment (No.20) Act provides for the supremacy of the Constitution of Zimbabwe and declares any law, practice, custom or conduct that is inconsistent with the constitution as invalid. It is not in dispute that the Regulations used in relation to SMM fall into the category of laws that offend the doctrine of constitutional supremacy.
78. In terms of s6.2(b) and s6.2(c), Chinamasa acting on the advice of the Second Respondent clothed himself with the following powers:
- 77.1 To place SMM under the control and management of an Administrator, a creature of the Reconstruction Laws. To divest the board of directors of SMM of the control and management of SMM's affairs.
- 77.2 The power to unilaterally raise money in any way without the authority of the shareholders for the purported purpose of the Reconstruction. This was prosecuted by the Second Respondent without any regard to the legal and constitutional implications of this.
- 77.3 In the Notice of Motion prepared and processed by the Second Respondent, it is not in dispute that the Second Respondent had constructive knowledge that Chinamasa on his advice had set down the matter pursuant to the

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Reconstruction Laws that allowed for an ex-parte application in Chambers at any time after the expiry of fourteen days (14) days from the date of publication of a Notice in the Government Gazette advising shareholders, creditors, and former members of the board of directors of SMM of the Chinamasa's intention to make the confirmation application, and that such process and procedure violated the audi principle, a fundamental tenet of the rule of law. He proceeded to pander to the unlawful whims of Chinamasa oblivious of his duty to obey, defend, respect, and uphold the rule of law.

77.4 The Second Respondent caused an order from a Court whose terms are as follow:

77.4.1 "The Reconstruction Order issued by the Applicant on 6th September 2004 in relation to SMM in terms of the Presidential Powers (Temporary Measures)(Reconstruction of State-Indebted Insolvent Companies) Regulations (published in Statutory Instrument 187 of 2004) be and is hereby confirmed in terms 8(3)(a) of the Reconstruction of State-Indebted Insolvent Companies Act (Chapter 24:27)."

77.4.2 The Second Respondent knew of the legal and complications of an order whose effect was to subordinate the role of the Court to that of a confirming a limiting an order that was issued by a non-judicial officer. He no doubt did not offer any resistance to the reality of a court being used to rubber stamp a process that has no judicial involvement let alone a construct that conferred enforceable rights to a creature called the state that was not only not defined in the regulations but that has no known existence as a

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contracting entity capable of being a creditor to any debtor in any democratic constitutional order.

79. On 10 February 2006, the Second Respondent filed a Notice of Opposition on behalf of Chinamasa.
80. It is significant that the Second Respondent misled the Court in stating that the address of service for Chinamasa was his firm's address. This confirms that the decision to oppose SMM's shareholder's opposition to the ex parte application to confirm the reconstruction order was not made with the knowledge and consent of the AG or any of the officers in the office of the AG.
81. The AG is appointed by the President in terms of s114(1) of the Constitution.
82. Section 114(2) provides as follows:
- "A person who has been appointed as Attorney General assumes office upon taking before the President, or a person authorised by the President, the oaths of loyalty and office in the forms set out in the Third Schedule."*
83. The functions of the AG are set out in s114(4) of the Constitution as follows:
- 82.1 To act as the principal legal adviser to the Government;
- 82.2 To represent the government in civil and constitutional proceedings;
- 82.3 To draft legislation on behalf of the Government;
- 82.4 To promote, protect, and uphold the rule of law and to defend the public interest; and
- 82.5 To exercise any other functions that be assigned to the Attorney General by an Act of Parliament.
84. It is clear from the above that the Second Respondent lacked title to prosecute the matters related to SMM. There was no evidence placed before the Court that in relation to the critical confirmation application, the AG had knowledge of the matter and let alone was involved in any capacity.

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85. This confirms the allegation that the Second Respondent knew at all material times that he and Chinamasa had unlawfully captured the AG's office to allow him to fraudulently misrepresent to the Court that he possessed title to act on behalf of the Government of Zimbabwe.
86. The application for confirmation was moved on behalf of Chinamasa in his capacity as the Minister of Justice and as such there could be basis for the Second Respondent to take any direct instructions from him.
87. I believe that it is in the public interest, the rule of law and justice, that the Second Respondent brings this Court to his confidence by providing the delegation of authority by the AG for him to act on behalf of Chinamasa and the remuneration his firm was paid for all the matters that he handled on behalf of the government.
88. This specific application was served on Chinamasa's purported legal practitioners on 27th January 2006. There is no suggestion that the AG was privy to the facts and circumstances of this application to confirm an extra-judicial order.
89. It is common cause that the Court was misled and misdirected to grant an order that then was used as a weapon to unilaterally alter the ownership of SMM as set out in the records of the company filed of record with the Registrar of Companies per Annexure **TM7**.
90. Chinamasa with advice of the Second Respondent admits that the Reconstruction Regulations were only amended after catching and capturing SMM by another Presidential decree passed in terms of the Presidential Powers (Temporary Measures) (Reconstruction of State-Indebted Insolvent Companies) Regulations 2004 (published in Statutory Instrument 214 of 2004 ("the Reconstruction Amendment Regulations").
91. With the advice of the Second Respondent, Chinamasa also admits that after the Reconstruction Amendment Regulations was used in relation to SMM, he introduced, by the insertion of s7A, the requirement for the confirmation of a reconstruction order.

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92. With advice of the Second Respondent, Chinamasa that in relation to SMM, there was deliberately no timetable given within which the application for the confirmation (and not for the court to determine anything) of the order that had been issued as a matter of urgency in relation to SMM that divested and deprived directors of their statutory powers to protect and promote the company.
93. With the advice of the Second Respondent, Gwaradzimba, dismissed the board of SMM on the basis of an order issued by Chinamasa in violation of the rule of law.
94. With the active involvement of the Second Respondent, Chinamasa relied on grounds that fell outside his personal knowledge given SMM was a private company to boldly assert as follows:
- 94.1 As at 6th September 2004, SMM was indebted to the:
- 94.1.1 State
 - 94.1.2 State-controlled companies
 - 94.1.3 Statutory Corporations
- With respect to reference to the state as a creditor to SMM, it is worth highlighting that there is no definition of the state within the Reconstruction Act.
- 94.2 It is also worth noting that if the Second Respondent as guided by his duty to justice as an officer of court, he would have known that state controlled and statutory corporations are juristic entities and as such their affairs are governed in terms of specific statutes to allow him to be oblivious of the mala fides and corruption inherent in using public power to advance confiscatory ends.
- 94.3 The Second Respondent was fixed with the knowledge that the government had no legal nexus with SMM to allow Chinamasa who was neither a shareholder nor a director of SMM at the material time to be privy to the indebtedness of SMM to the tune of Z\$115 billion.

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- 94.4 To the extent that the Second Respondent who is compelled by law and the regulations of the Law Society was compelled to reject the use of public power on the false construct of state indebtedness without the authority to act for the respective body corporates like ZESA, NSSA, MMCZ, RBZ etc.
- 94.5 The Second Respondent had constructive knowledge that Chinamasa lacked title to represent SMM's financial affairs.
- 94.6 The Second Respondent who processed the application to confirm the extrajudicial order issued in relation to SMM knew that a confirmatory affidavit would have been required to be placed before the Court to confirm the alleged indebtedness of SMM to them and indicate the basis of the authority of Chinamasa to speak on their behalf.
- 94.7 The Second Respondent who had knowledge of Chinamasa's statement of oath especially where he alleged as true and fact that the cash-flow situation of SMM had become so desperate that the Mines had closed down for two weeks, and there did not seem to be any prospect of SMM obtaining any cash injection either from its shareholder or any other source, allowed this misrepresentation of the reality of SMM to be used as evidence by the Court in confirming the reconstruction order.
- 94.8 The Second Respondent knew that Chinamasa was deliberately misleading the Court in relation to the confirmation application when he stated as true and fact that the cause of SMM's alleged inability to repay the amount of its purported state indebtedness arose by reason of fraud and/or mismanagement on the part of its controlling shareholder, Mr. Mawere.
- 94.9 The Second Respondent knew and ought to have known that Chinamasa's evidence placed before that court that SMM found itself in such a dire financial

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position and this was a result of abuse, by Mawere, of the special dispensations that had been granted to SMM, as a company, and not an agent of Mawere.

- 94.10 The Second Respondent knew that Chinamasa lacked any personal knowledge for him to state as true and fact that: "Mawere through his company, Southern Asbestos Sales Pty Limited (SAS), a company that was duly incorporated in terms of the laws of SA, withheld the foreign currency sales proceeds which were SMM's lifeline.
- 94.11 The Second Respondent knew of the impossibility of Chinamasa in his capacity as the Minister of Justice to have had information about the financial records of SAS, a company incorporated and governed in terms of the laws of South Africa, to permit him to depose to a statement of fact alleging that SAS withheld funds due to SMM resulting in SMM having to borrow from the state.
- 94.12 The Second Respondent knew that Chinamasa deliberately lied to the court when he stated that Mawere was a fugitive from justice and that he was wanted by the authorities in Zimbabwe when the scope of his duties did not include having knowledge of the facts that could only be lawfully in the possession of law enforcement officers in South Africa where the relevant funds would have been unlawfully withheld.
- 94.13 The Second Respondent knew that Chinamasa has no jurisdiction and knowledge to allege in a court deposition that Mawere was wanted in Zimbabwe for questioning on these various matters involving commercial crimes.
- 94.14 The Second Respondent knew that Chinamasa when he stated as true and fact that Mawere was a specified person in terms of the Prevention of Corruption Act (Chapter 9:16) ("the Prevention of Corruption Act pursuant to a declaration that Chinamasa made on 9th July declaring Mawere as a specified person was

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part of scheme orchestrated by Chinamasa with his involvement to create a perception that Mawere was a resident of Zimbabwe and as such Zimbabwean exchange control regulations applied to him when he knew as a matter of fact that Mawere was not a resident of Zimbabwe.

94.15 The Second Respondent knew that Chinamasa who lacked title to act on behalf of SMM lied to the Court when he asserted that SMM could be enabled to pay its debts and meet its obligations and become a successful concern if placed under reconstruction.

THE FIRST RESPONDENT'S CONDUCT IN RELATION TO THE RECONSTRUCTION BEFORE 2017

95. Against the above backdrop, it is self-evident that the Second Respondent effectively hijacked the role and functions of the AG.
96. In order to so, he obviously acted with the knowledge and active support of state actors.
97. The nexus between him and Chinamasa is confirmed in the manner in which the AG was kept in the dark of their activities.
98. In the public domain, allegations have been presented as untested facts that the First Respondent was the driving force behind the decision to use public power to punish Mawere for allegedly being ungrateful for the assistance provided by the First Respondent in getting a government guarantee as collateral for the acquisition of the entire shareholding of SMM's UK parent, SMMH.
99. It is broadly asserted as true and fact that the First Respondent was forced to respond using state power when Mawere allegedly ran away from Zimbabwe and did not honour his promise to reward the First Respondent for his assistance in the acquisition and the usage of public funds in relation to the acquisition.
100. The relationship between the First and Second Respondents is well known in the public.

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101. He is his principal legal advisor, confidant, a member of his Advisory Council and finally a close relative of the First Respondent.
102. This proximity to the First Respondent that makes the version provided to Mr. Mutanda of a major political fallout between the First Respondent and Mawere of public interest to the extent that what followed was an orchestrated plan to divest and deprive Mawere of any of his direct and indirect interests in Zimbabwean companies.
103. The Second Respondent asserted that the late President Mugabe took the side of the First Respondent which led Mawere to flee from Zimbabwe in 2004.
104. The Second Respondent stated that the decision to use public power was made politically and he actively participated in prosecuting it notwithstanding his relationship with SMM prior to the extrajudicial placement of the company under the control of Gwaradzimba.
105. Based on the allegations made by the Second Respondent that the First Respondent was intricately involved in the reconstruction of SMM project, it is important to place the information available in the public domain that may assist in determining this dispute:
106. I attach hereto an article entitled marked **TM8**: Reserve Bank 'gave Zanu-PF \$800m <https://mg.co.za/article/2004-11-26-reserve-bank-gave-zanupf-800m/> published by the South African publication, Mail and Guardian on 26 November 2004 or two just over 2 months after the order in relation to SMM was issued.

106.1. It is worth highlighting the following from the article:

The *Independent* has it on good authority that Gono summoned prominent lawyer Edwin Manikai on Tuesday as part of the probe into the disbursement of the loan. Manikai's legal firm, Dube, Manikai & Hwacha, has allegedly been fingered in the report as being instrumental in the formation of the briefcase

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company, Smoothnest, which allegedly received the \$800-million from the bank.

106.2. The four-member team that prepared the report interviewed the party's secretary for administration, Emmerson Mnangagwa, who made the startling revelation about the loan from the central bank.

106.3. "Zanu-PF wanted to raise \$2,1-billion for the Masvingo conference and requested the money from the party company (M&S Syndicate Pvt Ltd)," the report says.

106.4 "There were 38% shares in Southern Africa Reinsurance Company and the party decided to offer the shares for sale. (The shares were, however, not sold.) A shelf company (Smoothnest) was then formed by Dube, Manikai (sic) & Hwacha. Smoothnest applied to the Reserve Bank and they were given \$800-million," the report said.

106.5 "\$1-billion was also paid to Smoothnest by First Bank as a loan and the money was deposited into the NDH Special Investment Account where it raised \$811-million which was withdrawn by Mr D Pandya [a director of several Zanu PF-linked companies]," it said.

106.6 In another article published by the Zimbabwe Independent in November 2004 under the title: **Mawere speaks on Mnangagwa fallout**
https://www.zimbabwesituation.com/old/may19b_2006.html. It is stated as follows:

106.7 Mawere, who last week accused the so-called Tsholotsho group in Zanu PF of instigating his woes, said the Mnangagwa faction reacted with a fierce backlash against him because Smoothnest was owned by ex-Labour minister and Zanu-PF provincial chairman July Moyo and prominent lawyer Edwin Manikai, seen as Mnangagwa's lieutenants.

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106.8 Although Manikai this week admitted he has an interest in

Smoothnest, he denied any links to Mnangagwa's camp. Manikai said Mawere's allegations were "sour grapes".

106.9 "Mawere is unscrupulous, greedy and vicious. But above all, he

is a loser, a very bad loser and a cry baby," Manikai said. "Mawere has messed himself up and is now blaming everyone for his problems. I have nothing against him but he must have a conscience."

106.10 On the Smoothnest deal, Manikai said it was a tired story

created by Mawere to try and get him into trouble.

106.11 Documents obtained by the Zimbabwe Independent when the

Smoothnest dispute erupted three years ago reveal that the company applied for a loan from FBC in October 2003 to purchase 23 million shares owned by M&S from the then listed Southern Africa Reinsurance Company (Sare). Sare has since been taken over by FBC.

106.12 M&S Investments' stake in Sare was at that time worth about \$500 million but

Smoothnest was offering to buy it at \$875 million. The proceeds from the sale were used to finance the Zanu PF conference.

106.13 The documents show that the loan was fast-tracked because of

Smoothnest's links to Zanu PF. The FBC executive director at the time, Mberikwazvo Chitambo, wrote a strong supporting letter saying Smoothnest's application should be given priority because of its links to Moyo.

106.14 "The names behind Smoothnest are Edwin Manikai and Mr (Patrice)

Dhliwayo recently qualified as an engineer and man of straw," wrote Chitambo.

"Mr Dhliwayo represents the interest of Minister July Moyo and should be accorded that priority."

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THE FIRST RESPONDENT'S CONDUCT AFTER NOVEMBER 2017

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- 107. The First Respondent assumed the office of President of Zimbabwe in November 2017.
- 108. There have been allegations that the Reconstruction Laws were the brainchild of the late President Mugabe.
- 109. However, the letter of 19 May 2009 marked **TM9** from Gwaradzimba to Chinamasa dispels the notion that he was directly or indirectly involved in the SMM matter.
- 110. In this letter, Gwaradzimba stated as follows:

“According to the then Governor of the RBZ, a deal might have been struck between the President and MDM (Mawere) whereby the Government of Zimbabwe (GOZ) would give back the control and ownership of SMM to MDM.

I however advised MC (Mirirai Chiremba) to go back and advise why it was ill-advised to temper with the Reconstruction process at this point in time.

The reason for this was that we have come a long way on the SMM Reconstruction.

An Act of Parliament had to be passed to deal with the special circumstances of SMM – The Reconstruction of State-Indebted Insolvent Companies Act (Chapter 24:27)[“the Act”].

This Act has been tested in the courts, and there are judgments passed in Zimbabwe based on the Act.

Outside, many cases have been brought before various courts to deal with the SMM special circumstances, and the judgments have been passed, which I will deal with later on.”

- 111. It is clear from that above, that Gwaradzimba believes that the Reconstruction Laws are constitutional and in the public interest notwithstanding real and substantive issues they

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- raise on the conduct of the First Respondent to the extent that he was constructively involved in the birth and enforcement of this law.
112. It is alleged that the First Respondent together with Chinamasa persuaded the late President to abandon his decision to reverse the reconstruction process and repeal the law when they argued that the Reconstruction Laws had been endorsed by the courts in Zimbabwe, South Africa, and the UK as constitutional and valid.
113. Against this backdrop, it is only fair that this Court be asked to put this dispute to a finality.
114. The First Respondent after assuming office, visited Mashava as reported in an article published by the Business Times in Zimbabwe under the title: "SMM to inject \$75 million to bring asbestos production to full capacity," that can be found on this link: <https://businesstimes.co.zw/smm-to-inject-75-mln-to-bring-asbestos-production-to-full-capacity/>, in which it was reported that SMM and Gaths Mine in Mashava was shut down in 2004 following Government's problems with owner Mutumwa Mawere.
115. It was also reported that the dispute between the government and Mawere had gone through several litigation cases since as Mawere tried to regain ownership of his empire.
116. What is significant is that the First Respondent said the mines were re-opened after Government won 22 out of 23 litigation cases. Only one case is still pending.
117. To the extent that there is no evidence of the AG having been involved in the reconstruction project, it is not clear where and how the First Respondent obtained the facts relating to the court cases.
118. The Second Respondent who has directly implicated the First Respondent in the project to use public power to punish and destroy Mawere knew when he took his oath that he has a continuing duty of ensuring that his administration is conducted in accordance with an institutional framework that establishes the boundaries within which the government may and should act.

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119. He would have been alive to the promise that his administration is compelled to act within the limitations prescribed by the constitution.
120. To the extent that the constitution's purpose is to protect the people in their God-given unalienable rights, that the reconstruction enterprise was designed to undermine the balance of power between the executive, legislative and judicial branches of government.
121. The existence and operation of the Reconstruction Laws is premised on the executive taking away individual rights and, in the judiciary, playing a subsidiary and subordinate role to the executive.
122. The President is the head of cabinet and no cabinet Minister especially a Minister of Justice would issue a reconstruction order in relation to juristic entities without the knowledge of the President.
123. The Minister of Justice would have known that the authority to issue orders is vested in the courts any executive order would offend the doctrine of separation of powers.

AIR ZIMBABWE

124. Notwithstanding, the constitutional limitations imposed on the executive performing judicial roles, the fact that the orders were issued in relation to Hwange and Air Zim confirms that the First Respondent endorsed the actions and in relation to Air Zim he actually constructively appointed Chinamasa a director of a company under reconstruction and defended it even the Reconstruction Laws do not permit shareholders to be involved at all in the affairs of a company whose sole control and management is vested in the Administrator.
125. In an article dated 17 June 2019, under the title: "Mnangagwa defends appointment of Chinamasa as Chairman of under management Air Zimbabwe Board," the First Respondent stated as follows:
 "Both the administrator and board have their duties clearly spelt in terms of the law."

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“That’s not a problem (Air Zimbabwe being under administration); the board is a board of Air Zimbabwe.”

“The administrator, who is doing reconstruction, has a period which he has been given. I am not ignorant of that. So, I know where we are going, the board must be there.”

“Those who get frightened because we have put people who are going to drive things, it’s their own fault. So, there is no conflict at all. The board has its duties spelt out, the administrator has his duties or her duties spelt out. Let him do his duty and let the board do their duty.”

126. It can be deduced from the able that the First Respondent clearly fully associates himself with a law that divests and deprives shareholders and directors of the control and management of a company.
127. It is also self-evident that he sees no conflict with the reality of the Companies Act operating concurrently with the Reconstruction Laws yet the two laws have a different relationship with the Constitution.
128. The then Companies Act is a law of general application. The control of a company is vested in the directors who are appointed in the main by shareholders. The effect of the Reconstruction Laws is to alienate a company from its shareholders and directors by allowing a third party, the Minister of Justice, to appoint a controller of the company. The authority of a company under reconstruction is vested in the Administrator who is an appointee of the Minister.
129. It is clear that the Reconstruction Laws purports to create a new and unconstitutional class of company solely on account of state-indebtedness when the identity of a company falls within the sole ambit of the Companies Act.
130. The Administrator unlike a judicial manager or liquidator is created outside any legal proceedings in which the precepts of the constitution are followed.

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131. The board of directors cannot co-exist with the Administrator yet the First Respondent is totally ignorant of this cardinal fact.

HWANGE COLLIERY COMPANY LIMITED

132. With respect to the affairs of Hwange Colliery Company Limited (“Hwange”), it is not in dispute that the company was placed under reconstruction pursuant to the Reconstruction Laws during the tenure of the First Respondent.
133. This what Justice Mangota said in relation to the reconstruction order issued in relation to Hwange: <https://www.zimlive.com/2020/02/16/hwange-reconstruction-order-hangs-on-nothing-high-court-says/>
134. Justice Mangota said: “The question which begs an answer is should an order, the existence of which is premised on nothing, be confirmed? Evidence is the hallmark of all court proceedings. Where the same is adduced to the satisfaction of the court, the litigant who produces such is more likely than not to rule the day. Where he fails to do so, he cannot blame the court when, on the basis of lack of evidence, it rules against him.”
135. This is an indictment on the First Respondent who notwithstanding the refusal by Justice's dismissal of an application to confirm the reconstruction order, there was nothing done to Minister Ziyambi and more significantly, Minister Ziyambi refused to remove the Administrator and on the contrary chose to appeal the judgment.
136. It is clearly evident that if the First Respondent respected the constitution, the Reconstruction of Hwange would not have taken place and continued after the stinging Mangota judgment.

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**PUBLIC POLICY CONSIDERATIONS IN TESTING FIRST RESPONDENT'S
CONDUCT IN RELATION TO THE RECONSTRUCTION LAWS**

137. It is generally accepted in any constitutional democracy that it is well settled now that public order is as important as individual freedom.
138. Ordinarily what falls under public policy "is for the legislature to determine," whereas the judiciary would have in the more that 23 litigations in relation to the aftermath of the dispute relating to SMM and other corporate entities been limited to investigating the content of a public policy nature.
139. Had this been done independently and impartially as required by the constitution, the penal provisions that characterise the Reconstruction Laws could have been one obvious red flag for test judicial tolerance on laws that are hopelessly detrimental to public interest.
140. Even absent clear-cut legislative intent, a law that results in the divestment and deprivation of rights without following the due process of the law should a priori be declared unenforceable as contrary to public policy.
141. The duty of the First Respondent includes being a moral gatekeeper to the recognition and enforcement of the Reconstruction Laws because it poses so grave risk to public morality to be considered as law at all.
142. To the extent that the Reconstruction Laws that the confirmation of an order that is issued without the knowledge and consent of the debtor to this created super creditor called state, it follows that no court should acquiesce to this blatant abuse of public power and policy considerations should prevent laws of this nature to exist and operate.
143. The doctrine of equality that is entrenched in the constitution compels that a debtor and creditor must enjoy equal footing at the time of contracting and at the time of dispute resolution. The reality in this case, a creditor in the name of the state was created by

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- law and was clothed with rights to substitute the role of the judiciary in determining and resolving disputes based on the promise of equal protection of the disputing parties.
144. The First President as a guardian of the constitution would have known and ought to know that any law that offends the doctrines of separation of powers and equality does not pass the constitutional muster.
145. To the extent that the First Respondent refused, failed and neglected to take respond to my letter of 9 November 2021 in which I brought to his attention that the admission by the Second Respondent that the Reconstruction Laws was born from the womb of arbitrariness, vindictiveness, and abuse of public power, he was compelled to act in a manner that protects and promotes the rule of law.
146. His failure to act confirms his complicity in the idea behind the law that protecting public order based on constitutionalism is a luxury in Zimbabwe.
147. The Second Respondent has already provided the context and content of how the Reconstruction Laws was conceived and implemented in relation to SMM and that the driving force was a shared stratagem including the First Respondent as the principal to use this law as a weapon to fight Mawere with no regard for any public policy considerations.
148. The fact that more than 20 disputes in relation to the constitutionality and legality of the Reconstruction Laws should have been a reminder to any President whose duty in terms of s90(1) of the Constitution is to uphold, defend, obey and respect the Constitution founded on the respect of the rule of law and fairness to immediately repeal this law that was born during the tenure of his predecessor.
149. The fact that since his assumption of office in November 2017, he has not chosen to fully associate himself with this law confirms his role in giving this repugnant law a life and its use in relation to other entities confirms the real dangers he poses to the constitution that he took an oath to promote and protect.

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150. It was Montesquieu who famously said that a judge is “no more than the mouth that produces the words of law. Judges should not tolerate laws blindly so as to set a bad and unconstitutional precedent of recognizing whose purpose and intent is to undermine the rule of law leaving citizens exposed to tyranny prosecuted on the back of laws that offend constitutionalism.
151. This application is one that is made in the hope that public confidence and trust on the promise and reality of justice can be honoured in the four corners of the Court can be restored.
152. The fact that Hon. Kindness Paradza, Deputy Minister in the First Respondent’s administration can confirm that he was threatened by Hon Chinamasa that he should stay out of the SMM matter must be of concern to this Court.
153. I am a member of the Friends of SMM (FOSMM), a public trust that was established precisely to raise awareness of the risk of deteriorating into anarchy if laws like the Reconstruction Laws are allowed to exist and operate in Zimbabwe.
154. I have followed public figures like Hopewell Chin’ono, an award-winning journalist, Hon. Mliswa, a member of parliament, Rutendo Matinyarare, a political activist, George Charamba, the First Respondent’s spokesperson, and many others openly assert that the Reconstruction Laws was the brainchild of the First Respondent who could not find any private weapon to use to punish Mawere for being ungrateful to him for the role that he allegedly played in the acquisition of SMM’s parent and for a guarantee that was purportedly used to support the acquisition.
155. Against this background, it is important for the First and Second Respondent to bring this court to the confidence by giving evidence on their personal roles in giving life to the demise of SMM.

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156. I believe that it is in the interests of justice and good public morality that the First Respondent helps this process come to a finality so that the truth can characterize the narrative of this important story in the post-colonial era of Zimbabwe.
157. This Court must, therefore, take into consideration the gravity of this matter and must extrapolate the underlying public policy considerations that are inherent in this matter.
158. This Court in the absence of an independent legislature should form the law and not simply follow it.
159. This matter raises fundamental legal and constitutional issues to compel this Court to provoke a national conversation of the legislative principles upon which this law was born and is accordingly called upon to determine in terms of s167(2)(d) and s167(3) whether the First Respondent's conduct in relation to this matter is consistent with the promise of s90(1) of the Constitution.

IRREPARABLE HARM

160. It is not in dispute as set out above that this Court which has inherent jurisdiction has no has no discretion to ignore the grave implications of this dispute in which the First Respondent is publicly accused of being corrupt, vindictive, power hungry and malicious yet remain in the highest office that exists to provide moral leadership.
161. In a fair and just process as provided for in the Constitution, the First Respondent has to openly and transparently give his version on the role that he played in the affairs of SMM to test the allegations made that his relationship with Mawere and/or SMM was generally corrupt.
162. The full protection of the law compels that this matter be treated with the urgency and seriousness it deserves.
163. It is my contention that judicial tolerance to this abuse of public office and corruption has already set a bad precedent allowing the First Respondent to boast that a law of this

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- nature has received judicial tolerance and that no legislative initiative exists seeking to repeal it.
164. Finally, facts of this matter and the abuse of public power has been distorted to confuse and conflate issues resulting in the impression that Mawere stole money from his own companies and ran away when no facts or conviction exists.
165. The harm caused from this case will go unpunished if this Court fails to rise to the occasion.
166. The integrity of the entire judiciary is at stake.
167. It is not in dispute that the Second Respondent led a delegation of non-state and state actors that negotiated and obtained \$2 million from the RBZ to acquire the claims or security held by the former owner of SMMH in the UK in 2004.
168. The attempted theft of the shares using what Hon. Chinamasa informed parliament was a nominee of the government for the purpose of completely alienating Mawere from SMM affairs, was stopped by the UK courts.
169. As a result, AMG Global Nominees Private Limited (AMG) lost the case and the public funds that were used have not been refunded to the government.
170. The Committee chaired by the late Chindori-Chininga exposed the lies by Gwaradzimba and Chinamasa who were openly claiming that AMG had lawful title to the SMMH shares.
171. Chinamasa was ordered to produce the evidence supporting this allegation that ownership of SMMH had passed hands to AMG as a government proxy.
172. Since the Second Respondent is the legal advisor of SMM, it is important that he provides to this court and public details of the refund of the funds used to assert the abortive attempt to use the reconstruction process to benefit AMG, a non-state actor.
173. It will be noted that the attempt to make the Second Respondent account for his role in the extra-territorial application of the Reconstruction Laws was ignored by Hon. Biti,

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attached hereto marked **TM10** is a letter addressed to Hon Biti that explains the nature of the dispute involving the Second Respondent.

174. There are no other avenues to make the Second Respondent to give his own account of his role in exporting a law like the reconstruction act to Zambia.
175. The Court will be aware that the Cross Border Insolvency Act 2000 exists in South Africa that requires representatives of foreign companies to seek the leave of Court.
176. The research so far confirms that no such leave was obtained and it is important to establish the legal basis on which SMM under the control of the Administrator, a creature of a foreign law, was able to invade the SA judiciary.
177. It is common cause that the Willis J judgment of October 2012 in SA was based on a fraudulent claim that SAS paid to Petter Trading Pty Limited (Petter) an amount of +R18 million as a consequence of an alleged fraudulent cession agreement and an order per Van Oosten of 6 May 2004.
178. It is important that the Second Respondent provides the factual and legal basis on which the claim that informed this tainted Willis J judgment was formulated and his precise role in asserting a fraudulent claim to the SA courts that the First Respondent has used to justify the use of public power in the affairs of SMM.

NO ALTERNATIVE REMEDY

179. I have no alternative remedy available to me but to approach this Honourable Court for the relief sought in terms of the Notice of Motion.
180. The relief sought in the Notice of Motion is the only remedy that shall ensure that this Honourable Court dispenses justice in accordance with the constitutional norms and values entrenched in the Constitution of Zimbabwe.
181. In light of the above, there is no alternative relief available to deal with this matter.
182. In the premises, a judicial approach seems to be the best remedy as the First Respondent is portrayed as he is not subject to the law but is the law.

T.M. R.M

183. It is the duty of this Court to protect justice under the law.

THE ISSUE OF COSTS

184. The question of costs incurred in the present application should be decided by this Honourable Court because this is a last-ditch attempt to make the people who caused the demise of SMM accountable for their actions and conduct.

185. In the event of any opposition, I will be seeking for costs to be granted on the higher scale as against the Respondent who opposes this application.

CONCLUSION

186. I believe that I have presented a good and strong case.

187. In the premises and for the reasons set out above, I pray for an Order in terms of the Notice of Motion accompanying this application.

188. I make the above solemn declaration sincerely believing same to be true and correct.



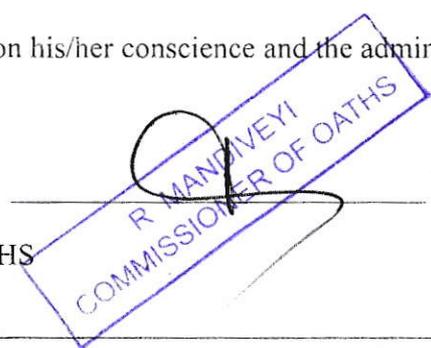
TICHAONA MUPASIRI

DEPONENT

THUS SIGNED AND SWORN TO before me at Harare on this the 14th day of DEC 2021 by the deponent who acknowledges that he/she knows and understands the contents of this affidavit; that it is the truth to the best of his/her knowledge and belief and that he/she has no objection to taking the prescribed oath and regards the same as binding on his/her conscience and the administration of the oath.

COMMISSIONER OF OATHS

EX OFFICIO: _____

T.M. R.M.

FULL NAMES: RAYMOND MANDARYI
PHYSICAL ADDRESS: ZB HOUSE, 48 SPRUCE AVE, HAWAII
DESIGNATION: HAWAII

T.M Rm

ANNEXURES

TM1: MDM CONFIRMATORY AFFIDAVIT

IN THE CONSTITUTIONAL COURT OF ZIMBABWE CASE NO:

HELD AT HARARE

In the matter between:

TICHAONA MUPASIRI

Applicant

And

PRESIDENT OF THE REPUBLIC OF ZIMBABWE

First Respondent

EDWIN MANIKAJ

Second Respondent

SUPPORTING AFFIDAVIT BY MUTUMWA MAWERE

I, **MUTUMWA MAWERE**, do hereby take oath and solemnly state that:

1. I am the Chairman of Africa Resources Limited (BVI), the sole shareholder of Africa Construction Limited (ACL), a company that is the sole shareholder of SMM Holdings Limited, that in turn was the sole shareholder of SMM Holdings Private Limited (SMM), a company that was placed under reconstruction on 6 September 2004 in terms of the Presidential Powers (Temporary Measures) Reconstruction of State Indebted Insolvent Companies, 2004 Regulations.
2. I am a member of the Friends of Shabanie Mashava Mines Trust (FOSMM).
3. I have read the Founding Affidavit by Tichaona Mupasiri as well as the accompanying annexures thereof.

M.P. 

4. I hereby associate myself fully with the contents of the Affidavit as far as it relates to my involvement in the subject matter, being true and correct.
5. I also associate myself with the Applicant's prayer as laid out in the Draft Order.

THUS SWORN TO AT HARARE THIS 6th DAY OF DECEMBER 2021.
Mutumwa Mawere
MUTUMWA MAWERE
DEPONENT

THUS SIGNED AND SWORN TO before me at Sandton on this the 06 day of December 2021 by the deponent who acknowledges that he/she knows and understands the contents of this affidavit: that it is the truth to the best of his/her knowledge and belief and that he/she has no objection to taking the prescribed oath and regards the same as binding on his/her conscience and the administration of the oath.

[Signature]
COMMISSIONER OF OATHS

EX OFFICIO: MP
FULL NAMES: SEBASTHE MP
PHYSICAL ADDRESS: 03 Same Road MorningSide
DESIGNATION: MP

[Faint stamp]
2



52 of 101

J.M. 2 LETTER OF 8 NOVEMBER TO MANIKAI

To: Mr. Manikai

6th Floor Eastgate, Harare

08 November 2021

Dear Mr. Manikai,

My name is Tichaona Mupasiri. I am writing this letter to you in my personal capacity and in a representative capacity on behalf of the Friends of SMM Trust.

I have been following the facts and circumstances surrounding the acquisition and financing of Shabanie and Mashaba Mines Holdings Private Limited (SMM) and the alleged role of the government of Zimbabwe (GOZ) in the provision of public funds by way of a government guarantee in support of the acquisition, which was closed and implemented in March 1996.

Incidentally, I am also the Acting Spokesperson of the Front for Economic Emancipation in Zimbabwe (FEEZ), a political party that was recently launched.

I am sure you will agree that this matter has continued to receive public attention and allegations have been made that Mr. Mutumwa Mawere (MM), the sole shareholder of Africa Resources Limited (ARL), the company that acquired the entire shareholding of SMM Holdings Limited (SMMH), a company duly incorporated in the UK, pursuant to a Sale and Purchase Agreement concluded on 7 March 1996, was a front for His Excellency President Mnangagwa.

It is worth highlighting that you were the legal advisor of ARL in the said acquisition transaction and as such, you are fixed with the correct factual and legal information surrounding the acquisition.

I am sure you are aware that Hon Patrick Chinamasa, the former Minister of Justice who played a key and pivotal role in relation to the issuance of an extrajudicial order whose effect was to divest and deprive SMM's shareholder, SMMH, and the company's Zimbabwean directors of its control and management, was on record in July 2005 in a parliamentary question and answer session alleging that SMM's shareholding was acquired using a government guarantee.

Having examined the information in the public domain and the court records in relation to the litigation between ARL and AMG Global Nominees Private Limited (AMG), a company you represented in negotiating the purchase of bearer share warrants against your former client, ARL, it is abundantly clear that the version of Chinamasa was false and was solely intended to mislead the public into believing that there existed a bona fide nexus between the acquisition of SMM's parent, SMMH, by ARL, of 1996 and the actual use of public funds.

It is common cause that you have always acted for SMM before and the placement of the company under reconstruction notwithstanding the inherent conflict of interest.

Received at Office
DUBEL MANIKAI & HWACHA
LEGAL PRACTITIONERS

FRIENDS OF SMM (Harare Province Chapter)

16 Humba Close, Msasa Park, Harare

Email: tichaona.mupasiri@gmail.com

Tel: +263719231888 | Whatsapp: <http://wa.me/263732231900>

On 3/11/21
4:26
Name Babany

neglected and failed to intervene in determining whether your role in these matters violates the professional promise of a registered and admitted attorney.

What is ironic is that whereas Hon Chinamasa proceeded to act against your client on the basis of erroneous information that SMM was acquired with the support of a government of Zimbabwe guarantee, you knew as a true and fact that the acquisition by ARL involved property or shares situated in the UK and denominated in US\$.

The impossibility of a foreign currency denominated transaction being guaranteed in Zimbabwe would be self-evident but this fallacy and fraud did not deter you and Chinamasa from prosecuting a matter on the basis of this nullity.

It is not in dispute that the acquisition of SMMH was governed in terms of the laws of the UK.

By acting on behalf of AMG in relation to the affairs of SMMH, you were at all material times fixed with the knowledge that the version presented by Chinamasa was a gross misrepresentation of the correct position that SMM could not have been factually indebted to the government of Zimbabwe and certainly insolvent if the sole parent, SMMH, could be attractive enough for \$2 million in public funds could be used to acquire the security interests held by T&N Plc, the previous owner of the UK company.

You are aware that the demise of SMM to the extent that it was caused by political interventions justified on the simple basis that MM did not pay a penny in relation to the acquisition and as such, the decision and actions related to the reconstruction of SMM was in the public interest.

You knew and ought to have known the correct version but you wilfully and intentionally participated in a monumental fraudulent scheme that has resulted in the destruction of so many lives and jobs.

The attention this matter has received in the media, political and financials circles warrants this letter to you in your personal and professional capacities to establish your role in undermining the rule of law in Zimbabwe.

I have been privy as a member of FOSMM to a thread of communication between you and Mr. Fred Mutanda, a fellow member of FOSMM, and between MM and Mr. Mutanda a copy of which is attached hereto marked FOSMM1.

You will note that on 27 March 2021 you wrote to Mr. Mutanda confirming that a major fallout between the President and MM took place that resulted in your taking the side of the President in relation to the succession and factional dispute between the Mujuru and Mnangagwa camps.

I am informed that you were a shareholder and directors of a company, Smoothnest Investments that corruptly benefited from public funds to the tune of Z\$1 billion whose proceeds were used to finance the succession quest by President Mnangagwa in 2004.

It is on record in the public spaces that the funds were raised using First Bank Corporation of Zimbabwe using public funds as cash collateral that were provided by the Ministry of Labour whose Minister at the time was Hon July Moyo.

It is not in dispute that Smoothnest, a shelf company, through the direct involvement of Hon Moyo, secured a loan of Z\$1 billion from FBC and used the proceeds to acquire shares in SARE, a reinsurance company.

The seller of the shares was a company called M&S Investments Private Limited that was beneficially owned and controlled by the President.

It is my understanding that Z\$800 million was paid to the order of President Mnangagwa at an account held at NDH.

I am raising the issue of Smoothnest because in your communication to Mr. Mutanda you allege that your fallout with Mawere was purely on political grounds

I have no knowledge of your personal involvement in the political affairs of Zimbabwe that would support the version you gave to Mr. Mutanda that MM went political and you with unnamed accomplices had to fight back after MM ran away.

You knew that MM was not residing in Zimbabwe yet you persisted in the false representation that he ran away.

You also stated as true and fact that you fought back. Could your fighting back have included the use of public power and funds including prosecuting the reconstruction enterprise under the guise of state indebtedness when as a lawyer and officer of court you were fixed with the knowledge that you had participated in a grand corrupt misrepresentation that SMM, your former client, was indebted to a non-existent entity called the state.

You would have known that for SMM to be legitimately indebted to the state, the state would have needed to exist as a contracting party capable of advancing credit.

In any event, you would have known that the doctrines of separation of powers and equality prevented the state from engaging in any self-help scheme exercise. Acquisition of SMM continue to be scrutinized based on what journalist, politicians, chinamasa and ED said. I do not even know why.

If someone wants to understand, why not just confine himself to the Sale and Purchase Agreement which is available in black and white.

Politicians want to fit where they cannot fit. That is why Mr. Chinamasa at some point in time officiated the opening of bins in Rusape. This is the reason why ED also officiated the opening of a mortuary in Kwekwe. Politicians want people to believe that nothing good can be done without their hand and help that is inimical to the rule of law.

The facts in my possession confirm that you knowingly and intentionally led the persecution and prosecution of Mawere and related entities as part of an unprofessional and criminal syndicate involving the President in a repugnant manner as part of the so-called fight back.

You stated boldly that Mawere went with Mujuru against ED. When properly construed the import of this statement is that you chose to go with ED hence the link between the reconstruction of SMM and the fight back that you stated as fact.

You stated that the late President RGM took ED's side and ordered the investigation of SMM and found a rot.

As a citizen, I believe I am entitled to the alleged report that established the rot.

Who investigated SMM and for whose benefit? These are some of the questions that arise from your version.

I attach herewith a copy of thread between you and Mr. Chitambo of FOSMM whose contents is self-explanatory.

Based on the above, this serves to inform you that given the gravity of this matter and alive to the real evidence that you have confirmed the role of the sitting President in participating in an unlawful and unconstitutional scheme called reconstruction, it is important that I get your side of the story on whether the contents in the screenshot referred to above is a correct record of what you said to Mr. Mutanda on 27 March 2021.

If it is, we intent to take further steps to ensure that this unacceptable precedent is exposed and should never happen again.

If I do not get a response from you by no later than Friday, 12 November, 2021, I will instruct our FOSMM' s attorneys to compel you to provide the details of the fight back scheme, the Smoothnest transaction, and details of all the fees that have been paid to you and your firm in relation to SMM matters.

I have taken notice of your proximity to President Mnangagwa as both his legal advisor and a member of his Presidential Advisory Council.

In the premises, I am copying this letter to him as well.

I hope you will find the above in order.

Yours Sincerely,



Tichaona Mupasiri

DIRECTOR OF PUBLIC POLICY

TM2: LETTER OF 9 November 2021 to President Mnangagwa

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HIS EXCELLENCY, CDE ED MNANGAGWA: REQUEST FOR CLARITY WITH REGARDS TO SHABANIE & MASHABA MINE ACQUISITION

f message

Tichaona Mupasiri <tichaona.mupasiri@gmail.com>

Wed, 10 Nov 2021 at 16:16

To: info@opc.gov.zw

Bcc: mmawere1@gmail.com, Tichaona Mupasiri <tichaona.mupasiri@gmail.com>

His Excellency, Cde. Mnangagwa
President and Commander-in-Chief of The Zimbabwe Defence Forces Munhumutapa Building
Harare.

10 November 2021

Your Excellency,

Please note that I visited your offices yesterday, the 9th of November 2021 with a sole intention to serve you with a letter in which as an active citizen was demanding clarity from your person with regards to the acquisition of Shabanie and Mashaba Mine as it is a matter of public interest.

However, I was intercepted by the security details manning your Munhumutapa offices after they had read the contents of the letter which they indicated to me were provocative to a sitting president hence my resorting to this mode: email. The security personnel in question rather suggested that I should request for an appointment and knowing the wheels of justice to be slow, I had to take the convenience that comes with technology.

It must be noted that your name has been thrown around in this case revealing that you resorted to a political fight after your alleged fallout with Mr. Mutumwa Mawere.

I have attached a letter which I had intended to serve you at your offices together with the one that I served Mr. Manikai on the 8th of November 2021, which to the best of my knowledge is your legal advisor, member of your Advisory Council, and a legal representative of SMM Holdings Private Limited (SMM).

I look forward to hearing from you.

Your Sincerely,

Tichaona Mupasiri

Mobile: +263 771231888 | +263 771231900

FRIENDS OF SMM (Harare Province Chapter)

16 Humba Close, Msasa Park, Harare

Email: tichaona.mupasiri@gmail.com

Tel: +263719231888 | Whatsapp: <http://wa.me/263732231900>

His Excellency, Cde. Mnangagwa
President and Commander-in-Chief of The Zimbabwe Defence Forces
Munhumutapa Building
Harare.

09 November 2021

Your Excellency, Cde. E.D. Mnangagwa

Please find herewith a copy of a letter addressed to your legal advisor, member of your Advisory Council, and a legal representative of SMM Holdings Private Limited (SMM).

It is common cause that SMM was placed under the control of a state-appointed Administrator pursuant to decree promulgated by the late President Mugabe in September 2004.

This decree was relied upon by the Minister of Justice, Legal and Parliamentary Affairs, Hon. Patrick Chinamasa, to divest and deprive the shareholders and directors of the control of SMM.

Since 6 September 2004, SMM has been under the control and management of Mr. Gwaradzimba.

Various litigations have been launched and instituted in Zimbabwe, Zambia, RSA and the UK that you are personally aware of.

At the core of this matter, is whether jurisdictional factors existed in 2004 to warrant the draconian measures employed under the first dispensation.

You will be aware that allegations have been made and continue to be made that the decision to place SMM under reconstruction was premised on a fallout between you and Mr. M. Mawere based on your alleged involvement as his God Father in relation to the support that he received in acquiring the company.

Your colleague, Hon Chinamasa represented to Parliament in July 2005 that the acquisition of SMM was supported by a government guarantee and Mawere did not pay any single penny in relation this controversial acquisition.

The question that arises is your involvement in this matter and your state of knowledge regarding the serious allegations made by your lawyer and close confidant Mr. Manikai.

Mr. Manikai has openly stated as true and fact that you personally orchestrated the demise of SMM using public power by manufacturing damaging facts solely intended to create in the public mind that SMM was indebted to the state and that the insolvency test had been met without following the prescripts of the Companies Act and the Insolvency Act.

No facts existed that the state notwithstanding the fact that this presumed creditor was to date not been defined was a creditor to SMM and how debtor to creditor relationship could factually and legally exist between the state and SMM.

I say this because I am not aware of any transaction involving the state as a contracting party let alone a beneficiary of any funds allocated by the parliament of Zimbabwe to permit it to be a legitimate and lawful creditor.

It has come to our attention that Mr. Manikai whose closeness to you gives him legitimacy and credibility that citizens can rely upon.

He has admitted that the reconstruction of SMM was part of a well-orchestrated scheme that you personally led in fighting back against Mawere who at the material time was also alleged to be close to you.

Manikai has boldly stated that the origins of the alleged feud between you and Mawere was Mawere's alleged to have gone political and sided with your alleged political nemesis, Ms. Mujuru, who was a Vice President of the party, ZANU-PF, and government.

It is alleged that the late President took your side and he personally ordered that an investigation be done into Mawere's corporate affairs resulting in certain findings being made that SMM's affairs were being conducted in a fraudulent and reckless manner.

Mr. Manikai has effectively implicated you in a corruption scheme and I believe it is in the public interest for you to come out publicly to tell the nation in less than 7 days from receipt of this letter on your personal knowledge about the serious allegations that Manikai has levelled against you.

Should you fail to respond to this within the time indicated, we will proceed to approach the Court for appropriate remedies.

We trust that you will find the above in order.

Yours Sincerely,



Tichaona Mupasiri

DIRECTOR OF PUBLIC POLICY

TM4: CHINAMASA APPOINTED AIR ZIMBABWE CHAIRMAN

/ NATIONAL

Chinamasa appointment above board: President

SHARE EDIT PAGE COMMENTS



President Mnangagwa

Africa Moyo Deputy News Editor

President Mnangagwa has said the appointment of Cde Patrick Chinamasa as Air Zimbabwe board chairman is above board.

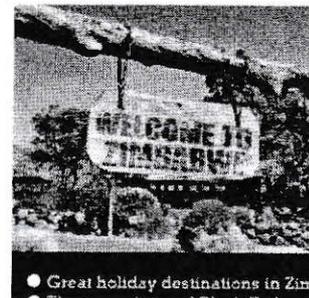
In an interview with Capital K 100.ZFM last Friday, President Mnangagwa said he was alive to the fact that Air Zimbabwe was under administration.

Mr Reggie Saruchera of Grant Thornton is the administrator since October last year, after Government issued General Notice 75/8/2018, which placed Air Zimbabwe under



SWITCH TO VIDEO

Homestyle Newsletter



Great holiday destinations in Zim

administration.

Some legal practitioners have been insinuating that the appointment of Cde Chinamasa as Air Zimbabwe board chairman last week, was offside since management of the national flag carrier was "thrust in the hands" of Mr Saruchera.

But President Mnangagwa said both the administrator and board have their duties clearly spelt in terms of the law.

"That's not a problem (Air Zimbabwe being under administration); the board is a board of Air Zimbabwe," said President Mnangagwa. "The administrator, who is doing reconstruction, has a period which he has been given. I am not ignorant of that. So, I know where we are going, the board must be there.

"Those who get frightened because we have put people who are going to drive things, it's their own fault. So, there is no conflict at all. The board has its duties spelt out, the administrator has his duties or her duties spelt out. Let him do his duty and let the board do their duty."

Air Zimbabwe has already recorded a number of milestones in its bid to get back to yesteryear glory, with the recent acquisition of an Embraer ERJ 145 sparking hopes of recovery.



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The Embraer is set to be deployed on domestic and regional routes, while two long haul aircraft, the Boeing 777-200ERs acquired from Malaysia, are expected anytime

from now.

Government has already paid for two B777s which should be delivered in the next few weeks.

Training programmes for pilots and engineers earmarked to operate the planes have started.

Payments for two other B777s have begun, with US\$5 million having been paid recently.

Air Zimbabwe is also working on acquiring some narrow-bodied aircraft, Boeing 737s.

The revival of Air Zimbabwe is also expected to help the country's bid to widen trade with other countries, and also boost tourism.

Tourism is on an upward trajectory, with arrivals hitting almost 2,6 million last year, representing a 6 percent jump from the year earlier.

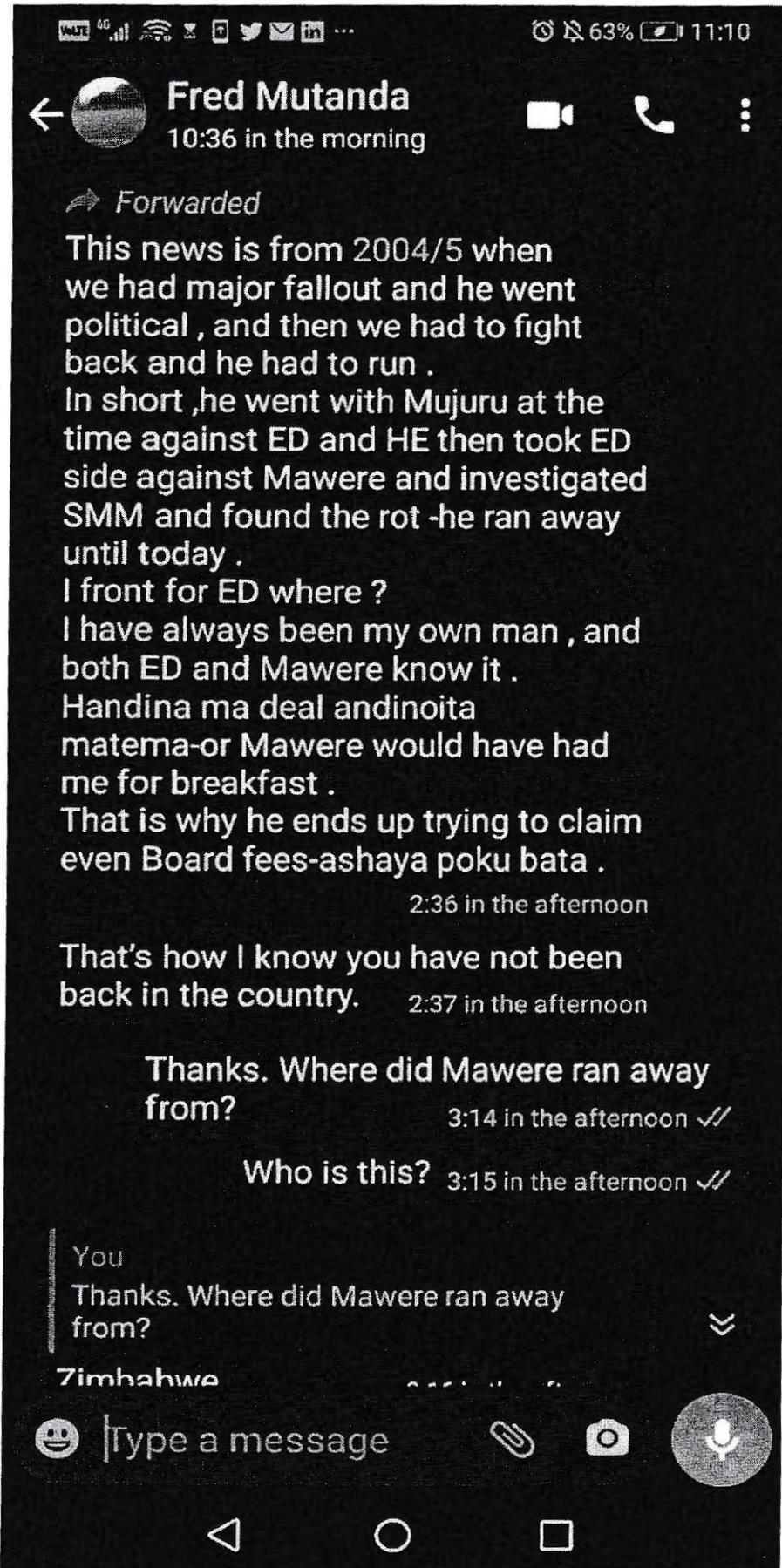
The tourism sector is a low-hanging fruit that is expected to help Zimbabwe in its quest to attain an upper middle income status under Vision 2030.

Air Zimbabwe officials say once the two B777s have been delivered, they will be deployed to service critical routes such as Harare-London and Harare-Beijing, which have a larger concentration of Zimbabweans.

The airline used to service these routes at its peak.

The move is expected to give them as a "sense of pride".

TM5: MANIKAI MUTANDA WHATSAPP SCREENSHOT



TM6: CHINAMASA ORDER CONFIRMATION

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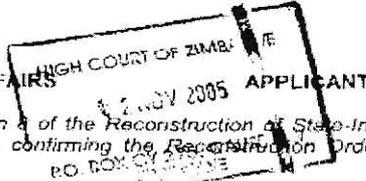
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**IN THE HIGH COURT OF ZIMBABWE
HELD AT HARARE**

CASE NO. HC _____/05

In the Application of:

**THE MINISTER OF JUSTICE,
LEGAL & PARLIAMANTARY AFFAIRS**



For an Order, in terms of Section 4 of the Reconstruction of State-Indebted Insolvent Companies Act (Chapter 24:27), confirming the Reconstruction Order issued by the Applicant in relation to:

SMM HOLDINGS (PRIVATE) LIMITED

CHAMBER APPLICATION

TAKE NOTICE that the Applicant intends to apply to a Judge of the High Court in Harare in Chambers for an Order in terms of the Draft Order annexed to this Notice and that the accompanying affidavit(s) and documents will be used in support of the Application.

FURTHER TAKE NOTICE that the Applicant shall set this Application down for hearing before a Judge in Chambers at any time after the expiration of fourteen (14) days from the date of publication of a Notice in the Government Gazette advising shareholders, creditors and former members of the board of directors of SMM Holdings (Private) Limited of the Applicant's intention to make this Application.

FURTHER TAKE NOTICE that the Applicant's address for service for the purposes of this Application is care of the Civil Division of the Attorney General's Office at its address as set out below.

DATED AT HARARE THIS 2nd **DAY OF** November **2005.** 

DUBE, MANIKAI & HWACHA
Applicant's Legal Practitioners
DMH Commercial Law Chambers
6th Floor, Goldbridge
Eastgate Complex
Sam Nujoma Street/Robert Mugabe Road
Harare (EIM/GRB/PM/dj)

TO: THE REGISTRAR
High Court of Zimbabwe
Harare

AND

**TO: SHAREHOLDERS, CREDITORS,
AND FORMER MEMBERS OF THE
BOARD OF DIRECTORS OF
SMM HOLDINGS (PRIVATE) LIMITED**

IN THE HIGH COURT OF ZIMBABWE
HELD AT HARARE

CASE NO. HC _____/05

In the Application of:

**THE MINISTER OF JUSTICE,
LEGAL & PARLIAMENTARY AFFAIRS**

APPLICANT

For an Order, in terms of Section 8 of the Reconstruction of State-Indebted Insolvent Companies Act (Chapter 24:27), confirming the Reconstruction Order issued by the Applicant in relation to:

SMM HOLDINGS (PRIVATE) LIMITED

DRAFT ORDER

At Harare, on this the _____ day of _____ 2005

Before the Honourable Mr/Mrs Justice _____ in Chambers

For the Applicant

WHEREUPON having read documents filed of record and heard Counsel

IT IS ORDERED THAT:

The Reconstruction Order issued by the Applicant on 6th September 2004 in relation to SMM Holdings (Private) Limited in terms of the Presidential Powers (Temporary Measures) (Reconstruction of State-Indebted Insolvent Companies) Regulations, 2004 (published in Statutory Instrument 187 of 2004) be and is hereby confirmed in terms of Section 8(3)(a) of the Reconstruction of State-Indebted Insolvent Companies Act (Chapter 24:27).

BY THE JUDGE /REGISTRAR

DATE: _____

IN THE HIGH COURT OF ZIMBABWE
HELD AT HARARE

CASE NO. HC 498/06

In the matter between

PARMANATHAN MARIEMUTHU

FIRST APPLICANT

AND

AFRICA RESOURCES LIMITED

SECOND APPLICANT

AND

SMM HOLDINGS LIMITED

THIRD APPLICANT

AND

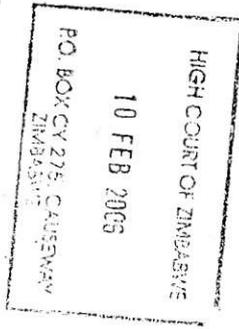
THZ HOLDINGS LIMITED

FOURTH APPLICANT

AND

MINISTER OF JUSTICE,
LEGAL AND PARLIAMENTARY AFFAIRS

RESPONDENT



NOTICE OF OPPOSITION

TAKE NOTICE THAT Respondent, intends to oppose the Court Application on the grounds set out in the Affidavit(s) and documents annexed to this notice.

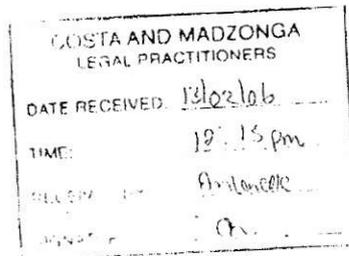
FURTHER TAKE NOTICE that the address for service for the Respondent is care of his undersigned Legal Practitioners, Dube, Manikai & Hwacha.

The Court Application was served on the Respondent's Legal Practitioners on Friday 27th January 2006.

DATED at Harare this 10th day of February 2006.

[Signature]
DUBE, MANIKAI & HWACHA
Respondent's Legal Practitioners
DMH Commercial Law Chambers
6th Floor, Goldbridge
Eastgate Complex
Sam Nujoma St/ Robert Mugabe Rd
Harare (EIM/GRB/PM/dj)

TO: THE REGISTRAR
High Court of Zimbabwe
Harare



AND

TO: COSTA & MADZONGA
Applicants' Legal Practitioners
4th Floor, Three-Anchor House
54 Jason Moyo Avenue
Harare (RIC/cm)

**IN THE HIGH COURT OF ZIMBABWE
HELD AT HARARE**

CASE NO. HC _____/05

In the Application of:

**THE MINISTER OF JUSTICE,
LEGAL & PARLIAMENTARY AFFAIRS**

APPLICANT

For an Order, in terms of Section 8 of the Reconstruction of State-Indebted Insolvent Companies Act (Chapter 24:27), confirming the Reconstruction Order issued by the Applicant in relation to:

SMM HOLDINGS (PRIVATE) LIMITED

CHAMBER APPLICATION

TAKE NOTICE that the Applicant intends to apply to a Judge of the High Court in Harare in Chambers for an Order in terms of the Draft Order annexed to this Notice and that the accompanying affidavit(s) and documents will be used in support of the Application.

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FURTHER TAKE NOTICE that the Applicant's address for service for the purposes of this Application is care of the Civil Division of the Attorney General's Office at its address as set out below.

DATED AT HARARE THIS 2nd November **DAY OF** 2005.

DUBE, MANIKAI & HWACHA
Applicant's Legal Practitioners
DMH Commercial Law Chambers
6th Floor, Goldbridge
Eastgate Complex
Sam Nujoma Street/Robert Mugabe Road
Harare (EIM/GRB/PM/dj)

TO: THE REGISTRAR
High Court of Zimbabwe
Harare

AND

**TO: SHAREHOLDERS, CREDITORS,
AND FORMER MEMBERS OF THE
BOARD OF DIRECTORS OF
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IN THE HIGH COURT OF ZIMBABWE
HELD AT HARARE

CASE NO. HC _____/05

In the Application of:

THE MINISTER OF JUSTICE,
LEGAL & PARLIAMENTARY AFFAIRS

APPLICANT

For an Order, in terms of Section 8 of the Reconstruction of State-Indebted Insolvent Companies Act (Chapter 24:27), confirming the Reconstruction Order issued by the Applicant in relation to:

SMM HOLDINGS (PRIVATE) LIMITED

FOUNDING AFFIDAVIT

I, the undersigned, **PATRICK ANTHONY CHINAMASA**, do hereby make oath and swear that:

Section A: Introductory Matters

1. I am the Minister of Justice, Legal & Parliamentary Affairs in the Government of the Republic of Zimbabwe.
2. I am, in my official capacity, the Applicant in this matter.
3. Save where I indicate otherwise or where the context indicates otherwise, the facts that I depose to are within my personal knowledge, and are, to the best of my information and belief, true and correct. Where I do not have personal knowledge relating to any facts contained in this Affidavit, I confirm that I have verified, by due and diligent inquiry, the accuracy of such facts and that I believe them to be true and correct.

Section B: Summary of Relief Sought

4. This Application is made in terms of Section 8 of the Reconstruction of State-Indebted Insolvent Companies Act (Chapter 24:27) (*"the Reconstruction Act"*) for an Order confirming the Reconstruction Order (*"the Reconstruction Order"*) that I issued on 6th September 2004 in relation to SMM Holdings (Private) Limited (*"SMM"* or *"the Company"*).
5. I wish to deal with a preliminary procedural issue before turning to the substantive aspects of this Application.
 - 5.1 Section 8 of the Reconstruction Act requires that the Minister of Justice, Legal & Parliamentary Affairs should, by application made within thirty (30) days after the issue of the reconstruction order, seek an order confirming the reconstruction order.

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- 5.2 The Reconstruction Act came into force on 4th March 2005.
- 5.3 The Reconstruction Order that I issued in relation to SMM was issued 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"*).
- 5.4 At the time that I issued the Reconstruction Order there was no provision in the Reconstruction Regulations which required me to seek confirmation of a reconstruction order by a Judge or Court.
- 5.5 The Reconstruction Regulations were amended by the Presidential Powers (Temporary Measures) (Reconstruction of State-Indebted Insolvent Companies) (Amendment) Regulations, 2004 (No. 1) (published in Statutory Instrument 218 of 2004) (*"the Reconstruction Amendment Regulations"*).
- 5.6 The Reconstruction Amendment Regulations introduced, by the insertion of a section 7A, the requirement for the confirmation of a reconstruction order.
- 5.7 The new Section 7A of the Reconstruction Regulations provided that the Attorney General was "*At any time before a scheme of reconstruction is approved (by the Minister)*" to apply to a Judge in Chambers for the confirmation of the reconstruction order.
- 5.8 The amendment to the Reconstruction Regulations, accordingly, only required that the application for confirmation be made at any time before the approval of the Scheme of Reconstruction.
- 5.9 In view of the foregoing, I would, therefore, submit, and I verily believe, that there is no time limit within which an application for the confirmation of the Reconstruction Order issued in relation to SMM is to be made as the provisions of Section 8 of the Reconstruction Act only came into effect after the Reconstruction Order relating to SMM had been issued.

Section C: Reconstruction Order

6. I set out below, the details of the Reconstruction Order that I issued in relation to SMM on 6th September 2004.
 - 6.1 I issued the Reconstruction Order in terms of Section 4 of the Reconstruction Regulations, after consultation with the Acting Minister of Finance and Economic Development.
 - 6.2 The Reconstruction Order was issued in relation to SMM and, in terms of the Reconstruction Order, I:
 - (a) appointed Mr. Afaras Mtausi Gwaradzimba to be the Administrator of SMM, together with the following Assistant Administrators who were to be under the Administrator's control and direction:

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- (i) Mr. Forbes Mugumabati, whom I appointed to be the Assistant Administrator at Shabanie Mine; and
 - (ii) Mr. Robert Kaisi, whom I appointed to be the Assistant Administrator at Gaths Mines; and
- (b) directed that, from the date of publication of the Reconstruction Order-
- (i) SMM was to be under the control and management of the Administrator; and
 - (ii) the board of directors of SMM was to be divested of the control and management of the Company's affairs; and
 - (iii) any person managing or controlling the Company's affairs in any capacity, other than as simply a member of the board referred to above, was to continue in office subject to the control and direction of, and be answerable to, the Administrator; and
- (c) conferred upon the Administrator the power, subject to the rights of the creditors of the Company, to raise money in any way without the authority of the shareholders for the purpose of the Reconstruction of SMM.
7. At the time that I issued the Reconstruction Order in relation to SMM, it appeared to me that:
- 7.1 SMM was "State-indebted" in that it was, as at 6th September 2004, indebted to the State, statutory corporations and State-controlled companies by reason of having received credit, in its favour, disbursed or payable out of public funds;
 - 7.2 SMM was unlikely to be able to make any repayment of the credits or loans made to it from public funds on a date when the repayment of such funds was due;
 - 7.3 SMM's inability to repay arose by reason of fraud and mismanagement on the part of its controlling shareholder;
 - 7.4 SMM was, through the actions of its controlling shareholder, being prevented from becoming a successful concern;
 - 7.5 There was a reasonable probability that if the Company was placed under reconstruction, it would be enabled to pay its debts and meet its obligations and become a successful concern; and
 - 7.6 It would be just and equitable that SMM be placed under reconstruction.



8. Due to the desperate nature of the circumstances of SMM at the time, I found that 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.
9. The Reconstruction Order issued in relation to SMM was published in an Extraordinary Government Gazette issued on 6th September 2004, a copy of which is annexed hereto marked **Annexure "PAC1"**.
10. I also proceeded to issue the Administrator of SMM, Mr. Gwaradzimba, with a certificate of his appointment as Administrator. A copy of this certificate is annexed hereto marked **Annexure "PAC2"**.

Section D: Background information on the placing of SMM under reconstruction

11. I believe that it is necessary, in order to be able to put this Application in its proper perspective, for me to furnish the Honourable Judge with certain background information on SMM.
12. SMM is a company duly incorporated in the Republic of Zimbabwe in terms of the Companies Act.
13. SMM carries on business:
 - (a) as a miner of asbestos, under the name and style of African Associated Mines ("AA Mines" or "AAM"); and also
 - (b) as an investment holding company for a number of subsidiary companies and associates.
14. AA Mines is a division of SMM and operates two asbestos mines, namely, Shabanie and Gaths Mines ("the Mines"), which are situated in Zvishavane and Mashava, respectively.
15. The Mines that are operated by SMM through its division, AA Mines, constitute the entire operating asbestos mining and processing capacity of Zimbabwe. Approximately 95% of the asbestos that AA Mines produce is exported. At its peak, AA Mines contributed approximately 10% of Zimbabwe's foreign exchange earnings.
16. The AA Mines division of SMM currently employs approximately 5,600 people, and the two towns of Zvishavane and Mashava are entirely dependent for their existence on the mining activities of AA Mines. More than 60,000 people in and around these two towns are directly and indirectly sustained by the activities of AA Mines.
17. The Mines, as operated by AA Mines, are therefore, significant national assets.



18. SMM is the holding company for a number of subsidiaries, three of which subsidiaries are listed on the Zimbabwe Stock Exchange (*"the ZSE"*), namely, General Beltings Limited, Turnall Holdings Limited and Steelnet (Zimbabwe) Limited.
19. SMM is also, in terms of the Law of Reconstruction, associated with TAP Building Products Limited (*"TAP"*), a company incorporated in Zambia.
20. The registered shareholder in SMM is SMM Holdings Limited (*"SMMH"*), a private company limited by shares and registered in England.
21. At all material times until 1996, SMMH had been owned by T&N Plc (*"T & N"*), a company registered in England and Wales.
22. On or about 7th March 1996, Zimbabwean born Mr. Mutumwa Dziva Mawere (*"Mr. Mawere"*), through his company, Africa Resources Limited (*"ARL"*), a company registered in the British Virgin Islands, concluded an agreement with T & N for the purchase of the entire issued share capital of SMMH, THZ Holdings Limited (*"THZH"*), a private company limited by shares and registered in England, and TAP through a Sale and Purchase Agreement (*"the SPA"*).
23. In terms of the SPA, the shares in SMMH and THZH (*"the SMMH and THZH Shares"*) were purchased by ARL for US\$60 million payable over a period of twelve (12) months in monthly instalments of US\$5 million each, commencing April 1996 through a leveraged buy-out. The shares in TAP (*"the TAP Shares"*) were purchased as part of the same transaction for US\$1. The purchase price for the SMMH and THZH Shares was to be financed from the operations of SMM. Similarly, and by virtue of the same indivisible transaction, the TAP Shares were to be financed from the same source.
24. Simultaneously with the signing of the SPA, the parties entered into a Memorandum of Deposit & Charge in terms of which ARL pledged the SMMH and THZH Shares to T & N as security, giving T & N certain rights as mortgagees in the event of ARL defaulting on any of its payments.
25. ARL defaulted on its payment obligations to T & N and T & N exercised its rights as mortgagee and, in November 2004, it became the member in SMMH and THZH.
26. Subsequently, in November 2004, T & N sold its rights and interests in the SMMH and THZH Shares to AMG Global Nominees (Private) Limited.
27. The effective acquisition of the Mines in 1996 by Mr. Mawere (through his purchase of the SMMH Shares) was particularly important. It marked the first major transaction that effected an indigenisation of previously foreign-owned Zimbabwean assets of national importance.
28. It was for this reason that ARL's purchase of the SMMH and THZH Shares received the special blessing of the Government of Zimbabwe (*"the Government"* or *"the GOZ"*) as explained below.

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29. A special dispensation was granted to SMM in relation to the marketing and export of the asbestos that AA Mines produced.
30. In terms of Section 42 of the Minerals Marketing Corporation of Zimbabwe Act (Chapter 21:04) (*"the MMCZ Act"*), the sale and export of all minerals has to take place through the Minerals Marketing Corporation of Zimbabwe (*"the MMCZ"*) – a statutory corporation created by the GOZ for this purpose.
31. Section 43 of the MMCZ Act empowers the MMCZ, on application, to grant authority to particular producers or exporters of minerals to allow them to undertake their own sales and exports. Furthermore, whilst pursuant to Section 47 of the MMCZ Act, the proceeds of sales of minerals outside Zimbabwe have to be received by the MMCZ (and not by the exporters themselves), the MMCZ may, in exceptional circumstances, authorise direct receipt of such proceeds by exporters.
32. On 1 December 1997, MMCZ (with the consent of the Government) granted SMM authority to market and export its own products (*"the Export Exemption"*).
33. A further special dispensation granted to SMM related to the retention of its foreign exchange earnings.
34. Pursuant to the Exchange Control Regulations, issued under the Exchange Control Act (Chapter 22:05), Zimbabwean exporters have to comply with certain formalities to ensure that their exports are properly recorded. In particular, an exporter is obliged to remit any foreign exchange earned from the exports, to Zimbabwe via an "authorised dealer". "Authorised dealers" are the registered commercial banks in Zimbabwe. Until early 2003, exporters were allowed to retain approximately 50% of their foreign exchange earnings in foreign currency, in bank accounts with the authorised dealers. In early 2003, that percentage was reduced to just 25%. The remaining 50% (prior to 2003) or 75% (post 2003) of the exporters' foreign exchange earnings was sold to the Reserve Bank of Zimbabwe (*"the RBZ"*) at the operative exchange rate and converted into Zimbabwean dollars.
35. However, the Minister of Finance and Economic Development granted to SMM, a dispensation in this regard to the effect that SMM was allowed to retain 75% of its foreign exchange earnings (*"the Forex Exemption"*).
36. SMM's insolvency ultimately resulted from Mr. Mawere's abuse of the above dispensations.
37. Pursuant to the special dispensation to market and export, Mr. Mawere procured that SMM enter into a buying agreement (*"the Buying Agreement"*) with Southern Asbestos Sales (Proprietary) Limited (*"SAS"*). SAS is a company incorporated in South Africa and beneficially owned by Mr. Mawere.
38. The Buying Agreement gave SAS the exclusive right to act as SMM's agent for the sale of all asbestos fibre exported by SMM from the Mines. The Buying Agreement operated on the basis that SMM would export its asbestos fibre to SAS, which would, in turn, supply the asbestos fibre to the external customers.

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The external customers would then pay SAS the sale price of the asbestos fibre, and SAS would become obliged to remit the sale proceeds to SMM (net of the commission that SAS was entitled to for handling the sales).

39. SAS did not remit money due to SMM from the export of its asbestos on time or, in some cases, at all. These delays and 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 as at 6th September 2004, SAS owed to SMM at least US\$18,464,595.27, ZAR4,513,025.28 and C\$628,071.84. Following legal proceedings instituted under the Administrator's direction in the South African High Court (Witwatersrand Local Division) under case number 2257/05, SAS was placed under liquidation in a bid to recover these amounts.
40. In an attempt to legitimise SAS's failure to remit the amounts due to SMM, Mr. Mawere even improperly obtained an order on 6th May 2004 (*"the Cession Order"*) from the High Court of South Africa (Witwatersrand Local Division), under case number 2004/10496, pursuant to the terms of which SAS was required to pay over to Petter Trading (Proprietary) Limited (*"Petter Trading"*) (another South African company which Mr 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 29th November 2004, the High Court of South Africa (Witwatersrand Local Division) duly rescinded the Cession Order.
41. 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 to threaten legal action against the Company.
42. The Company obtained a loan under the Productive Sector Funding (*"PSF"*), facility, amounting \$28.8 billion, through Zimbabwe Banking Corporation Limited (*"Zimbank"*) in February 2004. Zimbank is owned by Zimbabwe Financial Holdings Limited (*"Finhold"*), which is in turn owned 47% by the National Social Security Authority (*"NSSA"*) and 30% by the Government.

The PSF loan of \$28.8 billion was used at the Mines as follows:

	Z\$bn
- AA Mines wages and salaries for February and March 2004	6.4
- ZESA	2.0
- Banks and trade creditors	20.4
	28.8

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43. After realising that the above amount was still not enough, the Company made a special appeal on 16th April 2004 to Government through its bank, Zimbank, for further government assistance, following which Government advanced the Company an amount of Z\$20.0 billion through RBZ on 24th May 2004. This amount was fully utilised and the Company made a further request for \$25 billion on 16th July 2004, of which Government provided only Z\$10 billion on 14th August 2004. This brought the total amount directly advanced by Government to the Company, prior to the appointment of the Administrator, to Z\$30 billion, excluding the PSF funding.
44. By August 2004, the situation was so desperate that the Mines closed down for two weeks. SMM could not pay for raw materials, spares and wages as its money was tied up in the export sales that were being withheld by SAS; the suppliers of inputs to the Mines were no longer accepting orders from AA Mines because of the state of the Mines' overdue accounts; the Zimbabwe Electricity Supply Authority ("ZESA") was threatening to cut-off electricity supplies to the Mines; the banks were no longer prepared to give any loan or overdraft facilities to the Mines; and SMM could not pay back to Government the Z\$30 billion which Government had advanced to the Mines.
45. A final appeal was made to the Government by AA Mines and members of the Zvishavane and Mashava communities to intervene and save the Mines from closing – a closure which would have had a devastating effect on Zvishavane and Mashava towns and the communities that relied on the Mines for their livelihood.
46. Prior to the issue of the Reconstruction Order relating to SMM, on 6th September 2004, SMM was indebted to the State for an amount of \$115 billion, broken down as follows:

Government	Z\$bn
- Direct advances	30.0
- Zimbabwe Revenue Authority ("ZIMRA")	47.7
State-controlled companies	
- Zimbabwe Electricity Supply Authority ("ZESA")	8.5
Statutory corporations	
- Reserve Bank of Zimbabwe, "RBZ"	28.4
- Mineral Marketing Corporation of Zimbabwe "MMCZ"	0.4
	115

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Section E: Reasons why it appeared to the Applicant that the circumstances referred to in Section 4(1) (a) of the Reconstruction Act were present in relation to SMM

47. I set out below, in the following paragraphs, a statement of the reasons why it appeared to me that the circumstances referred to in Section 4(1) (a) of the Reconstruction Act were present in relation to SMM.
48. As at 6th September 2004, and as detailed above, SMM was indebted to the State, State-controlled companies and statutory corporations for a total amount of \$115 billion.
49. It was apparent to me that SMM would not be able to pay back to the State, the State-controlled companies and statutory corporations, the \$115 billion owed to them as at the time (in or about August 2004). The cash-flow situation at SMM had become so desperate that the Mines had closed down for two weeks, and there did not seem to be any prospect of SMM obtaining any cash injection, either from its shareholder or from any other source.
50. It further appeared to me, at the time that I issued the Reconstruction Order, that SMM's apparent inability to repay the amount of its State-indebtedness essentially arose by reason of fraud and/or mismanagement on the part of its controlling shareholder, Mr. Mawere.
- 50.1 The main reason why SMM found itself in such a dire financial position was as a result of the abuse, by Mr. Mawere, of the special dispensations which had been granted to SMM. In particular, Mr. Mawere through his company, SAS withheld the foreign currency sales proceeds which were SMM's lifeline. Mr. Mawere is presently a fugitive from justice. He is wanted by the authorities here in Zimbabwe for questioning on these various matters involving commercial crimes. Further, Mr. Mawere is a specified person in terms of the Prevention of Corruption Act (Chapter 9:16) ("the Prevention of Corruption Act") pursuant to a declaration that I made on 9th July 2004 declaring him as a specified person to allow for investigations into the matters involving the commercial crimes.
- 50.2 It further appeared to me, at the time that I issued the Reconstruction Order, that SMM could be enabled to pay its debts or meet its obligations and become a successful concern if placed under reconstruction. It was apparent to me that if SMM were allowed to have access to its export proceeds in the normal course it would be able to trade viably and meet its debts and other obligations.
51. Having regard to all these circumstances of the case, I believed that it was just and equitable that SMM be placed under Reconstruction:
- 51.1 Its dire position arose from the actions of an errant shareholder;

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51.2 The livelihood of over 5,000 employees and 60,000 people in the communities of Zvishavane and Mashava were at risk if the Company were to be closed down;

51.3 The Mines were a significant national asset which deserved to be secured and protected.

Section F: Administration of SMM and Scheme of Reconstruction

52. The Administrator of SMM has undertaken the administration of SMM in accordance with the Reconstruction Regulations and the Reconstruction Act.

53. The Administrator has formulated a Scheme of Reconstruction which he has now submitted to me in terms of Section 24(3) of the Reconstruction Act. Copies of the Scheme Document and its annexures are annexed hereto marked **Annexure "PAC3"**.

54. The Scheme is subject to the following conditions precedent:

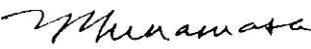
54.1 The confirmation of the Reconstruction Order by the Honourable Judge;

54.2 The approval of the Scheme by me.

55. Should the Honourable Judge grant the Order sought in this Application, then this shall pave the way for the consideration by me of the Scheme and, if I deem it appropriate, its approval.

WHEREFORE I pray for an Order in terms of the Draft Order annexed hereto.

SWORN TO AT HARARE ON THIS 27th **DAY OF** October, **2005**



PATRICK ANTHONY CHINAMASA

BEFORE ME



J.W.B. NANGOMBE
COMMISSIONER OF OATHS

**IN THE HIGH COURT OF ZIMBABWE
HELD AT HARARE**

CASE NO. HC _____/05

In the Application of:

**THE MINISTER OF JUSTICE,
LEGAL & PARLIAMENTARY AFFAIRS**

APPLICANT

For an Order, in terms of Section 8 of the Reconstruction of State-Indebted Insolvent Companies Act (Chapter 24:27), confirming the Reconstruction Order issued by the Applicant in relation to:

SMM HOLDINGS (PRIVATE) LIMITED

DRAFT ORDER

At Harare, on this the _____ day of _____ 2005

Before the Honourable Mr/Mrs Justice _____ in Chambers

For the Applicant

WHEREUPON having read documents filed of record and heard Counsel

IT IS ORDERED THAT:

The Reconstruction Order issued by the Applicant on 6th September 2004 in relation to SMM Holdings (Private) Limited in terms of the Presidential Powers (Temporary Measures) (Reconstruction of State-Indebted Insolvent Companies) Regulations, 2004 (published in Statutory Instrument 187 of 2004) be and is hereby confirmed in terms of Section 8(3)(a) of the Reconstruction of State-Indebted Insolvent Companies Act (Chapter 24:27).

BY THE JUDGE /REGISTRAR

DATE: _____

Annex A / B
2005



ZIMBABWEAN

GOVERNMENT GAZETTE

EXTRAORDINARY

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General Notice 450A of 2004.

**PRESIDENTIAL POWERS (TEMPORARY MEASURES)
(RECONSTRUCTION OF STATE-INDEBTED INSOLVENT
COMPANIES) REGULATIONS, 2004**

Reconstruction Order

THE Minister of Justice, Legal and Parliamentary Affairs hereby, in terms of section 4 of the Presidential Powers (Temporary Measures) (Reconstruction of State-Indebted Insolvent Companies) Regulations, 2004, and after consultation with the Acting Minister of Finance and Economic Development—

- (a) issues a reconstruction order in relation to—
SMM Holdings (Private) Limited;
and
- (b) appoints Mr. A. Gwaradzimba to be the administrator of the company under reconstruction, together with the following assistant administrators under his control and direction—
 - (i) Mr. Forbes Mugumbati, who shall be the assistant administrator at Shabani Mine; and
 - (ii) Mr. Robert Kaisi, who shall be the assistant administrator at Gathis Mine;
 and
- (c) directs that, from the date of publication of this order—
 - (i) the company under reconstruction shall be under the control and management of the administrator; and

Mugumbati

- (ii) the board of the company under reconstruction shall be divested of the control and management of the company's affairs; and
 - (iii) any person managing or controlling the company's affairs in any capacity other than as 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;
- and
- (d) confers upon the administrator the power, subject to the rights of the creditors of the company, to raise money in any way without the authority of shareholders for the purpose of the reconstruction of the company.

P. A. CHINAMASA,
Minister of Justice, Legal and
Parliamentary Affairs.

6-9-2004.

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Presidential Powers (Temporary Measures)
(Reconstruction of State Indebted Insolvent Companies)
Regulations, 2004

14
2236

GOVERNMENT OF ZIMBABWE

Certificate of Appointment of
Administrator

THESE ARE TO CERTIFY that AFARAS MTAUSI GWARADZIMBA has been appointed as the administrator of SMM HOLDINGS (PRIVATE) LIMITED in accordance with the provisions of the Presidential Powers (Temporary Measures)(Reconstruction of State Indebted Insolvent Companies) Regulations, 2004, as published in Statutory Instrument 187 of 2004.

Given under my hand at Harare, this 14th day of September, 2004.

Whinamata

THE HON. P.A. CHINAMASA
MINISTER OF JUSTICE,
LEGAL AND PARLIAMENTARY AFFAIRS

TM7: REGISTRAR OF COMPANIES SHARE ALLOTMENT

Names and addresses of allottees and date of allotment:

1. Date of allotment	2. Name of allottee	3. Address (not post office numbers)	4. Number of shares allotted
12.11.2009	NICDALE INVESTMENTS (PRIVATE) LIMITED	RESERVE BANK OF ZIMBABWE, 80 SAMORA MACHEL AVENUE, HARARE	25 270 ORDINARY
12.11.2009	SMM HOLDINGS LIMITED (UK)	C/O SMM HOLDINGS (PRIVATE) LIMITED, BLOCK 2 TENDESEKA PARK, SAMORA MACHEL AVENUE EAST, HARARE	7 980 ORDINARY
TOTAL			33 250

TM8: RESERVE BANK GAVE ZANU PF 800m -MAIL & GUARDIAN (S.A)

BUSINESS

Reserve Bank 'gave Zanu-PF \$800m'

Staff Reporter 26 Nov 2004



Reserve Bank of Zimbabwe governor Gideon Gono is probing the disbursement of \$800-million (about R\$21.5 billion) to a Zanu-PF shelf company by the bank last year.

In an interview this week, Gono said he was not aware of the transaction until the *Zimbabwe Independent* brought it to his attention. The transaction did not take place during his tenure as governor. However, he said the reserve bank (RBZ) was not washing its hands of the matter, as he takes responsibility for "all transactions" done by his predecessors.

The *Independent* has it on good authority that Gono summoned prominent lawyer Edwin Manikai on Tuesday as part of the probe into the disbursement of the loan. Manikai's legal firm, Dube, Manikai & Hwacha, has allegedly been fingered in the report as being instrumental in the formation of the briefcase company, Smoothnest, which allegedly received the \$800-million from the bank.

The RBZ has been disbursing loans under the productive sector facility (PSF) to distressed companies to boost productivity. A Zanu-PF politburo report on the party's enterprises cites Smoothnest as the recipient of a loan from the Reserve Bank. There is no RBZ facility catering for such a disbursement.

It is not clear whether the party, through Smoothnest, has repaid the RBZ loan.

The report, compiled by a team probing the party's decaying business empire, alleges that Smoothnest, described in the document as a "shelf company", applied for and got the money when Zanu-PF was preparing to raise funds for its conference held in Masvingo in December last year.

The four-member team that prepared the report interviewed the party's secretary for administration, Emmerson Mnangagwa, who made the startling revelation about the loan from the central bank

"Zanu-PF wanted to raise \$2,1-billion for the Masvingo conference and requested the money from the party company (M&S Syndicate Pvt Ltd)," the report says.

"There were 38% shares in Southern Africa Reinsurance Company and the party decided to offer the shares for sale. (The shares were, however, not sold.) A shelf company (Smoothnest) was then formed by Dube, Manikayi (sic) & Hwacha. Smoothnest applied to the Reserve Bank and they were given \$800-million," the report said.

Gono said this week that under normal circumstances the RBZ "does not advance loans to individuals but transactions were made through financial institutions".

"The central bank also advances loans to (the) government of Zimbabwe. Based on this observation, a transaction such as this one would be an anomaly," he said.

The curious loan from the central bank is one of numerous murky deals highlighted in the report, which has caused serious ructions in the ruling party.

Party sources this week said there were also concerns that the money raised from the RBZ might not have been used to finance the staging of the conference. The report, in a rather intricate way, explains how the party also raised money from other sources over and above the \$800-million.

"\$1-billion was also paid to Smoothnest by First Bank as a loan and the money was deposited into the NDH Special Investment Account where it raised \$811-million which was withdrawn by Mr D Pandya [a director of several Zanu PF-linked companies]," it said.

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"Cde (David) Karimanzira (secretary for finance) managed to raise \$1,2-billion from donations, so the \$811-million which was withdrawn was re-invested (in) NDH and raised \$38-million."

This arrangement is also curious as Smoothnest also warehouses Zanu-PF shares in both First Bank and NDH. This means a bank in which Zanu-PF has major influence extended a loan to a Zanu-PF company, Smoothnest. The money was deposited into NDH, where Zanu-PF also holds sway and yielded \$811-million. The interest was reinvested to produce an additional \$38-million interest. Thus the party raised \$849-million in interest from a loan provided by First Bank in which Zanu-PF held a 27% stake.

Meanwhile, the RBZ is expected to name and shame companies which accessed PSF funds and converted part of the loans into dividends to shareholders. Gono this week confirmed a number of companies cutting across all sectors of the economy had diverted RBZ loans to pay dividends.

"An example of this development is the payment of dividends where PSF loans have been called back in full and are due for payment by 30 November 2004," said Gono.

"Both the Reserve Bank and issuing commercial banks have the joint responsibility of ensuring that borrowed funds are used for their intended purposes." – Zimbabwe Independent

TM9: GWARDZIMBA (AMG) LETTER

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AMG/fm

19 May 2009

Honourable PA Chinamasa
Minister of Justice, Legal and Parliamentary Affairs
New Government Complex
Cnr 4th Street/ Samora Machel Avenue
HARARE

Dear Honourable Minister

SMM HOLDINGS (PRIVATE) LIMITED (UNDER RECONSTRUCTION) ("SMM"/"THE COMPANY")
Activities update report Number 16

I called Your Honourable Minister, on your cellphone yesterday, Monday, 18 May 2009, to advise Your Honourable Minister of the telephone call I had received from the Governor of the Reserve Bank of Zimbabwe ("RBZ"), Dr Gideon Gono ("GG"). Previously, I had advised Your Honourable Minister of the telephone conversation I had had with Mirirai Chiremba ("MC") of the RBZ, on the SMM issue. On Saturday, 16 May 2009, I had met MC to further our discussions on SMM on the basis of the previous telephone conversation on same. This update report is meant to put all issues discussed, as stated above, into perspective, and highlight the straight rope we have walked along in dealing with the SMM Reconstruction ("the Reconstruction").

First, I put it on record that the telephone conversation I had with MC was meant for MC to advise me to postpone litigation against Mr Mutumwa Dziva Mawere ("MDM"), particularly the judgement set down date on the Culpability case. My response to this was that this was inadvisable, and I was not going to do so. MC argued that this was a directive from the highest office in the land, coming through the office of the Governor of the RBZ. According to him, a deal might have been struck between the President and MDM, whereby the Government of Zimbabwe ("GOZ") would give back the control and ownership of SMM to MDM.

I however advised MC to go back and advise why it was ill-advised to temper with the Reconstruction process at this point in time. The reason for this was that we have come a long way on the SMM Reconstruction. An Act of Parliament had to be passed to deal with the special circumstances of SMM – The Reconstruction of State-Indebted Insolvent Companies Act (Chapter 24:27) ["the Act"]. This Act has been tested in the courts, and there are judgements passed in Zimbabwe based on the Act. Outside Zimbabwe, many cases have been brought before various courts to deal with the SMM special circumstances, and judgements have been passed, which I will deal with later on.



I refer to "SMM Special Circumstances" for various reasons, which are:

- SMM, before reconstruction, was not state-controlled, and GOZ did not own any shares in the Company;
- Though SMM, before reconstruction, was not state-controlled as stated above, the Company had secured significant state loans;
- Previously, SMM had secured loans from KBC in the magnitude of US\$60 million, which had been state-guaranteed;
- SMM was one of the country's largest single employers, with close to Ten thousand (10 000) employees, when one looks at the whole group, including subsidiaries and associates;
- The Company's export earnings, at some point, are said to have come to around 10% of the country's total export earnings;
- SMM, literally, owns two large communities which have developed into towns, being Zvishavane and Mashaba;
- The Company was acquired in 1995 from T&N of the UK (now Federal Mogul Limited, "FML"), by Africa Resources Limited of the British Virgin Islands ("ARL BVI"), which Company is said to be owned and controlled by MDM. Payments for this acquisition have been done using the Company's export proceeds, without having first declared dividends. This is illegal in terms of Zimbabwe law, as those payments contributed to the Company becoming insolvent, leading GOZ to issue the Reconstruction Order against the Company, through the Zimbabwe legal process;
- MDM had created a company in South Africa, called Southern Asbestos Sales (Pty) Limited ("SAS"), which company he used for the export of SMM's product, and then retaining the proceeds, thus denying SMM the much needed cash flow required for its operations. Worse, this was against the Zimbabwe Exchange Control Laws. This, as well, contributed to SMM's insolvency referred to above; and
- MDM used SMM's resources, including cash flows, to acquire non-core and peripheral businesses, including Best Practices (Private) Limited, Fortress Travel (Private) Limited, Cernol Chemicals (Private) Limited, Midsec (Private) Limited, Firstel Cellular (Private) Limited, FSI Trading (Private) Limited, Schweppes Zimbabwe Limited, Regatta Financial Services (Private) Limited, Textbook Sales (Private) Limited, Ngezi Mining Company (Private) Limited, FSI Agricom Holdings (Private) Limited, Shipping Consolidated Holdings (Private) Limited, and many other investments, which only worsened SMM's financial standing, leading into its insolvency.



The issues above are what cause me, Honourable Minister, to refer to "SMM Special Circumstances", because there are:

- Issues of fraud, through the payments to T&N/FML and the externalisation of SMM's earnings;
- Issues of political favours, with SMM, a private company, obtaining GOZ guarantees for significant external borrowings;
- Issues of abuse of the Company's resources by MDM buying anything coming to his ears and/or eyes, with no regard to values being added to SMM's assets; and
- Unusual processes where the Company borrowed from the GOZ Treasury as opposed to commercial banks.

When on Monday, 18 May 2009, GG called me, he asked for all minutes of the Cabinet Committee ("CC") on SMM, to which I responded by advising that those minutes were for the CC and could only be obtained from the CC Chairman. I had also advised MC that, in terms of the Reconstruction laws, the Administrator reports only to Your Honourable Minister, in Your Honourable Minister's capacity as the Minister of Justice, Legal and Parliamentary Affairs, a point I had emphasised and put on record at the beginning of the SMM Reconstruction process. Unfortunately, my letter to Your Honourable Minister, emphasising this point was stolen, with many other documents, when people suspected to be connected to MDM have been sent by MDM, broke into the AMG Global offices in 2004. To cut the long story short, in order not to appear unreasonable and controversial, and to be cooperative, I advised GG that I could explain to him anything else about the SMM Reconstruction, at which point he asked me to urgently go to his office for a meeting with him. Unfortunately, the meeting never took place for reasons only the heavens and GG know.

Above, I have stated that we have walked the straight rope as far as the SMM Reconstruction is concerned. I now provide details of this Reconstruction, from start to where we are now, in order to put Your Honourable Minister, and those Your Honourable Minister deal with on the matter, in the correct perspective. MDM was specified in Mid 2004 by Your Honourable Minister, and Your Honourable Minister declared him, MDM, a Specified Person in terms of Section 6 of the Prevention of Corruption Act (Chapter 9:16), by notice in the Zimbabwean Government Gazette Extraordinary, on 9 July 2004. MDM appealed against the specification order, but in 2008, the Zimbabwe Supreme Court ruled against MDM and ordered that MDM's specification was proper. The Supreme Court ruling is attached hereto marked *Annexure I*.

Given the above background, Your Honourable Minister, I now deal with what Your Honourable Minister already knows, through my activities update reports, SMM Schemes of Reconstruction and their revisions and updates, discussions at meetings and court judgements, but only for completeness of record, and for Your Honourable Minister to use in persuading colleagues in GOZ that, for good or for worse, the best that can be done with the Reconstruction Act in the first instance of its implementation, is to let the whole legal process of the SMM Reconstruction be followed to the letter, and to its final conclusion. After that, if GOZ see it fit, they can give back to MDM, the control and ownership of SMM, for whatever reason.



As far as the Administrator can see, the criminality involved in the SMM case is beyond anyone's imagination, and MDM knows he cannot escape the guilt verdict, hence his run away from the law to political machinations and connections. I have already discussed with Your Honourable Minister, MDM's alleged approaches to people in GOZ, lying that he had the liquidators in South Africa on his side, and they were wondering why his companies had been put under liquidation. Now, there is the request to stop/postpone litigation! Is the SMM story, the story we would want repeated in Zimbabwe, one which we can be proud of as leaders passing on to our children and those beyond, one wonders!

Your Honourable Minister will recall that SMM was put under reconstruction on 6 September 2004, after apparent revelations of insolvency, approaches to GOZ for funding, which funding was partly provided by GOZ, and investigations of the SMM Group and of MDM by Mr Regis Saruchera of CAMELSA Chartered Accountants ("CAMELSA"). I, Afaras Mtausi Gwaradzimba ("AMG") of AMG Global Chartered Accountants ("AMG Global") was appointed the Administrator ("the Administrator"). I attach hereto as *Annexures II and III*, respectively, the Certificate of appointment of AMG as the Administrator, and the Court Order confirming the Reconstruction of SMM.

The major tasks that the Administrator had to do on appointment, were as follows:

- to save SMM from collapsing by securing funding;
- to investigate the causes of SMM's ills, and so establish culpability;
- to recover SMM's resources from any and all culpable persons convicted by the courts; and
- Once the three tasks above are complete, to hand over SMM to an interim board of directors, which the Administrator would appoint in consultation with Your Honourable Minister.

The four tasks above have not been easy. I hereunder discuss each one of them to show why, until now, five years later, SMM is still under reconstruction.

A SAVING SMM FROM COLLAPSE

1 Dealing with creditors

1.1 The Administrator's first and most immediate task was that of dealing with creditors, which included:

- Banks;
- Suppliers, both local and foreign;



- GOZ in the form of RBZ, Treasury, Zimbabwe Revenue Authority ("ZIMRA"), Zimbabwe Electricity Supply Authority ("ZESA"), et al.

1.2 With respect to all local creditors, the Administrator held meetings with them, at which the Administrator promised to secure funding for the Company, and to restructure it in a way that would ensure the creditors were paid their money, and SMM remained in sustainable business, going forward. The creditors agreed to this approach and held fire, as most of them were on the verge of putting the Company under liquidation, or realising any security they might have held against their loans to SMM.

2 Securing funding

2.1 It was not easy to secure funding from any of the local banks or investors, given the Company's status at the time of the Reconstruction Order. Therefore, the only resolve the Administrator had to make was to ask GOZ to provide the required funding. GOZ provided a total of Z\$799 billion, which was enough mainly to pay out local creditors and provide a little bit of working capital.

2.2 The Administrator then went on to dispose of all the non-core/peripheral businesses referred to above, realising very little in cash flows as those businesses were near to being valueless.

2.3 When the Administrator approached GOZ, through the RBZ, for further funding, particularly for capital expenditure, the answer was an emphatic "no". The Administrator was advised by the RBZ to look elsewhere for the funding.

3 Changing of the Administrator's roles in the SMM Reconstruction and the implementation of the SMM Scheme of Reconstruction

3.1 After the above activities had been completed with Your Honourable Minister's approval, and SMM's two mines of Shabani and Gaths ("the Mines") had gone back into full production, the CC decided that the Administrator should appoint interim boards for all SMM Companies, and stay away from SMM's management, but remain dealing only with legal issues pertaining to the Reconstruction, which decision was implemented. This was in January 2006. By then, SMM still needed significant funding for its capital expenditure and for working capital.

3.2 However, by January 2006, the Mines were performing above average, under the management of one Grenville H Hampshire ("GHH"), whom the Administrator had hired from England. On appointment of the board of directors for SMM, GHH resigned, being replaced by a local in his place. It was soon after that, that the Administrator agreed with Nickdale Enterprises (Private) Limited ("Nickdale"), the Company through which GOZ had loaned money to SMM, that the whole outstanding loan, plus interest thereon, be converted into equity, which then gave Nickdale a 76% equity interest in SMM, with the



remaining 24% being held by SMM Holdings Limited (UK) ("SMMH"). This was through the Administrator's Scheme of Reconstruction. This Scheme of Reconstruction has been updated a number of times with Your Honourable Minister's approval, and the last update was in 2008, attached hereto as *Annexure IV*.

- 3.3 The major reasons for the updates/revisions of the SMM Scheme of Reconstruction have been the difficulties faced by the Administrator in raising the required funding. Funding of the Company's capital expenditure was (and is still) required for major plant and equipment replacements and (in some cases) refurbishments, as well as for mining development expenditure. No programmes for these critical capital expenditures had/have not been carried out since the take-over by ARL BVI, of the control and ownership of SMM. This was mainly due to the externalisation of SMM resources through payments to T&N (over US\$40 million), retention of SMM export proceeds by SAS (over US\$18 million) and acquisition of dead wood businesses by MDM/ARL BVI in Zimbabwe, the list of which is already provided above. As it stands right now, it is extremely dangerous to carry out mining activities at the Mines because of the sorry and sad state of the Mines plant and equipment.
- 3.4 The main reason for the conversion of the SMM GOZ debt to equity, referred to in 3.2 above, was that it was not feasible for SMM to repay that debt and be able to continue operations, as over US\$40 million had been paid to T&N in fulfilling ARL BVI's SMM acquisition obligations, and over US\$18 million had been retained by SAS in South Africa, and partly used for investments in Zimbabwe, notably the acquisition of a controlling shareholding in CFI Holdings Limited ("CFI"). Significant amounts had also been used in non-core/peripheral business acquisitions already referred to above.
- 3.5 As far as the Administrator was concerned, given SMM's performance under reconstruction, to January 2006, the appointment of a board of directors for the Company, and the Administrator's new role of only dealing with the various legal cases, the SMM Reconstruction had been substantively completed, except for the legal form therefor. However, in mid 2007 SMM distress signals started to come to the Administrator's office. On further probings, the Administrator discovered that the Company was back to its pre-Reconstruction status, with significant problems, and needed urgent assistance. On this realisation, the Administrator wrote to Your Honourable Minister (*Annexure V*) advising of the need for the Administrator to go back and be more involved in the resuscitation of the Company. As well, the board of directors had to be relieved of its duties. The Administrator's requests were fully approved by Your Honourable Minister (*Annexure V*). The distress was due to the unfulfilled funding requirements referred to above.
- 3.6 Above, the Administrator has already referred to the latest update to the SMM Scheme of Reconstruction. This came after the Administrator's requests attached as *Annexure V* as referred to above. It is this latest update to the SMM Scheme of Reconstruction that the Administrator is working hard to implement. Working hard, because it is extremely



difficult in Zimbabwe's circumstances to find investors willing to be exposed to the perceived high Zimbabwe economic country risks.

- 3.7 The above said, the Administrator is really pleased that quite some milestones have been reached, which promise to solve SMM's financial problems. There are:
- The Administrator has approached the Development Bank of South Africa ("DBSA") for a loan amount of US\$60 million, and the prospects of securing this loan are high. One issue with DBSA is that they have asked the Administrator to unequivocally state that MDM is no longer the controller and shareholder of SMM. They also want an undertaking that MDM will never be involved with SMM as long as SMM is still indebted to DBSA (should the loan be approved). This says a lot about how financial institutions in South Africa view MDM. The Administrator trusts that the issues of litigation postponement and the possibilities of handing back to MDM, the control and ownership of SMM, as referred to earlier in this document, will not be pursued to the detriment of the Company.
 - The Administrator has prepared a private placement document ("the PPD") for purposes of inviting possible investors to take up equity in SMM, and the response has been positive and encouraging. The processes of due diligence and evaluation by the possible investors should start any time now.
 - Within SMM's resources, there are mining claims and dumps. There is significant interest in these, and the Administrator might be forced to sell some of them to inject some cash flow into the Company. The major problem is that the potential equity investors have asked the Administrator not to dispose of these claims and dumps during this period of private placement.
 - Recently, the Administrator secured a US\$2 million working capital loan from CJ Petrow ("CJP"). One of the terms of this loan is a GOZ guarantee, which the Administrator is still waiting for from Your Honourable Minister, as recently discussed. In addition to the CJP loan, Ramatex, another of SMM's customers, has offered SMM a working capital loan of US\$3 million, but the terms of this loan are still being discussed.

4 Concluding the SMM financial reconstruction

- 4.1 Given all that is said above, the Administrator considers it that the SMM financial reconstruction is close to its conclusion.
- 4.2 The implementation of the SMM Scheme of Reconstruction in its latest (hopefully final) form, as discussed in 3 above, is what should seal the Company's financial



reconstruction. The Administrator is hopeful that this is about to happen, barring any unforeseen eventualities.

B INVESTIGATING SMM'S ILLS, AND SO ESTABLISHING CULPABILITY

1 The investigator's (CAMELSA's) reports

These reports have been provided to Your Honourable Minister and are clear as to MDM's culpability.

2 The Administrator's Investigations

2.1 On 18 September 2006, after the Administrator's investigations, the Administrator submitted to Your Honourable Minister, the Culpability Statement, which is a detailed account on culpability and identifying the following persons as culpable in relation to SMM:

- Mr Mutumwa Dziva Mawere;
- Dr William Hamadziripi Mudékunye ("WHM");
- Africa Resources Limited BVI;
- AR Project Services (Pty) Limited ("ARPS");
- Petter Trading (Pty) Limited ("Petter Trading"); and
- Southern Asbestos Sales (Pty) Limited.

2.2 The Administrator has since made an application to the High Court (20 October 2006) for the confirmation of the above persons as culpable. The hearing for this application was in 2007 and the set down date is 21 May 2009. This is the set down date that the RBZ Governor's office was asking the Administrator that it be postponed. The prerogative, however, for determining whether or not to pursue MDM and his associates in courts, is with Your Honourable Minister, in terms of the law.

2.3 Though Your Honourable Minister already have the Culpability Statement, which the Administrator submitted to Your Honourable Minister on 18 September 2006, for completeness of this document, however, the Administrator is attaching hereto as *Annexure VI*, the Administrator's sworn affidavit as presented to the High Court in the Court application referred to above.

2.4 Establishment of culpability will be finalised once the court process has been concluded, and the Administrator would have fulfilled his responsibilities in relation to this matter.



C RECOVERY OF SMM RESOURCES FROM CULPABLE PERSONS AND OTHERS

1 Generally

- 1.1 The effort to recover SMM resources that have been removed from the Company, one way or the other, started with the Administrator's appointment, as the Administrator had to quickly move to MDM's base in South Africa to stop further hemorrhaging of the Company through various vehicles MDM had established in that country. All that the Administrator had to do in South Africa, had to be through the courts. For expedient purposes the details will not be provided here, but a summary of all the court cases relating to SMM since the Reconstruction Order was issued, their verdicts and status, is attached hereto marked *Annexure VII*, in a report prepared by the Administrator's lawyers.
- 1.2 Significantly, in relation to recoveries in South Africa, the Administrator has managed to have SAS and ARPS put under liquidation. SAS owes SMM at least US\$13 million dollars.
- 1.3 Also, the Administrator recovered the cotton ginnery and delinter from South Africa, which equipment the Administrator has been trying to dispose of locally to raise cash for SMM.
- 1.4 There is still one significant court case in South Africa, for which the hearing is scheduled for October 2009. In that case, the Administrator is suing MDM for ZAR18 million.

2 Recovery of resources from culpable persons

- 2.1 This process can/will only start once the court process on culpability has been concluded.
- 2.2 The resources to be recovered from culpable persons are extremely significant in value, should the courts find in favour of the Administrator (*see Annexure VI*).
- 2.3 There is, however, no guarantee that even if the courts find in favour of the Administrator, the resources listed in the Culpability Statement will all be recovered. Also, the recoveries would have to be pursued through court processes wherever the culpable persons might be having their domiciles. Your Honourable Minister, this is not going to be easy. However, the comforting aspect is that SMM would be operating normally should the financial reconstruction have been successfully concluded. Also comforting is the fact that the recoveries would be mainly from South Africa, Zambia and BVI. In South Africa, MDM is already negatively viewed and it should be easier to have the courts against him.



- 2.4 At some point, the Administrator will have to recommend to Your Honourable Minister (assuming the courts have found culpability) a cut-off point, where the pursuit against the culpable persons would have to be stopped, as it is apparently impossible that all the resources in the Culpability Statement can be recovered.

D HANDING OVER OF SMM TO AN INTERIM BOARD OF DIRECTORS, AND OTHER ISSUES

1 Subsidiaries and associates

- 1.1 With effect from January 2006, all SMM subsidiaries and associates were handed over to interim boards of directors, which meant that those subsidiaries and associates were removed from reconstruction. The exceptions were FSI Agricom Holdings Limited ("FSI Agricom"), Endurite Properties (Private) Limited ("Endurite") (now dormant) and Ukubambana-Kubatana Investments Limited ("UKI"), which was mainly an investment company with shares in ZHL Limited and in FSI Agricom, for which the only assets remaining are the cotton ginnery and delinter. Through the SMM Scheme of Reconstruction, FSI Agricom has come to be owned and controlled by SMM, with UKI being a minority shareholder.

- 1.2 Endurite, UKI and FSI Agricom will be handed over to interim boards of directors (if necessary) once the issue of the cotton ginnery and delinter has been resolved and the Supreme Court judgement on the issue of the Reconstruction Order has been handed down. Also, there are issues of UKI which is owned by third parties that have to be resolved.

2 SMM hand over to an interim board of directors

- 2.1 This will come after the financial reconstruction has been successfully concluded. More important, the Supreme Court judgement on MDM's appeal against the Reconstruction Order should have been out. The case was heard in 2007 and the set down date is 1 June 2009.
- 2.2 The issue of pursuing recoveries, dealt with above, would have to continue even long after SMM has been removed from reconstruction. This is because it would be SMM following its debtors as determined by the courts, and that does not require SMM to be under reconstruction.

3 Other pertinent issues

- 3.1 On the periphery of the SMM Reconstruction, is the ownership of SMMH in the UK. This is disputed between ARL BVI and AMG Global Nominees (Private) Limited ("AMG Global Nominees").



- 3.2 In November 2004, AMG Global Nominees successfully negotiated to buy the entire shareholding in SMMH from T&N, and paid US\$2 million for that acquisition. T&N had the right to sell that shareholding on the basis of the terms of their agreement with ARL BVI. In terms of that agreement, T&N held the shares in SMMH as security against possible default in payment of the SMMH acquisition price by ARL BVI. By November 2004, ARL BVI had defaulted in its payment of the acquisition price of SMMH, and T&N exercised their right by selling the shares in SMMH to AMG Global Nominees.
- 3.3 When ARL BVI went to court in the UK, to challenge T&N's sale of the SMMH shares to AMG Global Nominees, the judges were unkind to AMG Global Nominees' case as they perceived it that GOZ were expropriating individuals' assets. However, their verdict was that the SMMH shares should go back to T&N until ARL BVI completed their payment of their SMMH acquisition price, the balance of which stands at US\$23 million before interest. FML have put it on record to AMG Global Nominees' lawyers that their sale of the shareholding in SMMH to AMG Global Nominees was above board, legal, and in accordance with their agreement with ARL BVI. The Administrator now waits for the outcome of the argument between FML and ARL BVI, before taking action, one way or the other.

E CONCLUSION

There is nothing more to add. The request of the court cases' set down dates to be postponed should be directed to Your Honourable Minister, and the Administrator will comply with any instructions Your Honourable Minister will issue out, provided those instructions are in accordance with the law and do not impinge on the Administrator's professional reputation. The case is rested for Your Honourable Minister to make the necessary moves to go forward.

Yours faithfully

A M GWARADZIMBA

ADMINISTRATOR - SMM HOLDINGS (PRIVATE) LIMITED (UNDER RECONSTRUCTION)

TM10: LETTER TO BITI

TAP (Zambia) Limited

Plot 100, Industrial Estate, Lusaka
P.O. Box 21022, Lusaka, Zambia

Website: www.tapzambia.com.zm

State of Zambia, Plot 100, Industrial Estate, Lusaka
State of Zambia, Plot 100, Industrial Estate, Lusaka

Lusaka, 25th June 2008

Honourable T. Mutshemba
Minister of Finance
New Development Office, Copper
belt Avenue, Harare, Zimbabwe

Dear Hon Minister,

**RE: RECOVERY OF FUNDS EXTRACTED FROM TAP (ZAMBIA) LIMITED
US\$698,688.75 BY MR AFARAS MTAUSI GWARADZIMBA ACTING AS AN
AGENT OF THE GOVERNMENT OF ZIMBABWE BEING ADMINISTRATOR OF
SMM HOLDINGS (PRIVATE) LIMITED.**

Mr A M Gwaradzimba was appointed Administrator of SMM Holdings (Private) Limited 'By virtue of the Presidential Powers (Temporal measures) [Reconstruction of State-Indebted Insolvent Companies], Regulation, 2004'

Arrived with this appointment, Mr A M Gwaradzimba, the Administrator of SMM Holdings (Private) Limited on 30th January 2006 came to Zambia, assumed control, management and all problem solvers of shareholders, directors and officials of TAP Building Products Limited with effect from 30th January 2006.

This action was instigated by the restructuring administrator of the company, TAP Zambia Limited in the Courts of Law in Zambia.

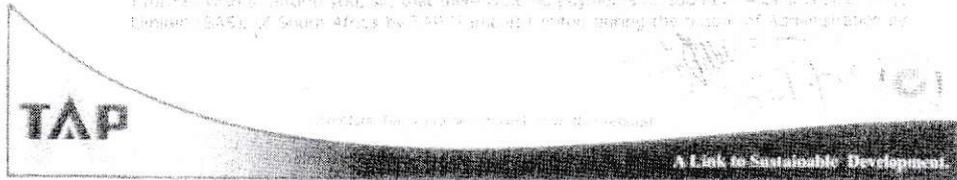
The Zambia Supreme Court ruled on 11th June 2008 nullified the appointment of Mr A M Gwaradzimba as an Administrator of TAP Zambia Limited and ordered the reversal of the company to operating at Zambia's 100% ownership structure.

The Administrator, Mr A M Gwaradzimba of APN (Zimbabwe), acting as an agent of the Zimbabwe Government by virtue of the Reconstruction Order in Zimbabwe, extracted from TAP (Zambia) Limited the sum of **US\$698,688.75**.

TAP (Zambia) Limited's operations have been adversely affected by the extraction of funds by the Administrator.

We humbly seek your assistance and advice in the recovery of the above funds, guaranteed by Mr A M Gwaradzimba acting as an agent of the Zimbabwe Government.

I further wish to inform you that there were no payments received from the TAP (Zambia) Limited (SAS) of South Africa by TAP (Zambia) Limited during the period of Administration by



TAP

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I am however ...

... you may ...

Your ...

Yours ...

TAP (ZAMBIA) LTD

[Handwritten signature and date]

**ZULU KALEB ROBINSON
CHAIRMAN**

CC: Honorable Professor W. Ncube, M.P.
Minister of Commerce and Industry
Ministry of Commerce and Industry
13, Floor, The World Bank Building
4, Samuel Moyo, Zimbabwe

CC: Honorable P. Mwanakatwe-Mushumba, M.P.
Minister of Regional Integration and International Trade
Ministry of Regional Integration and International Trade
12, Second Floor, Trade House
4, Street, Harare, Zimbabwe