IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NUMBER: 2023-133335

In the matter between:

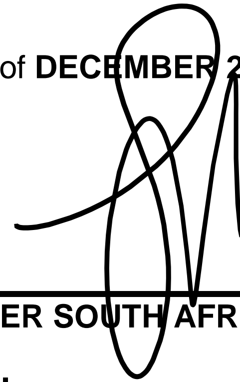
DANIEL K. SHUMBA	Applicant
And	
MASTER OF THE HIGH COURT: JOHANNESBURG	Respondent
SMM HOLDINGS (PRIVATE) LIMITED	Intervening Party
In *re:*	
SMM HOLDINGS (PRIVATE) LIMITED	Applicant
And	
MUTUMWA DZIVA MAWERE	Respondent

FILING SHEET

PRESENTED FOR SERVICE AND FILING:

The Intervening Party's answering affidavit and annexures thereto.

SIGNED and **DATED** at **JOHANNESBURG** on this the **20th** day of **DECEMBER 2023.**



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

AND TO: **DANIEL K. SHUMBA**
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Sandton
Email: shumba327@gmail.com

SERVICE PER EMAIL

AND TO: **MASTER OF THE HIGH COURT OF SOUTH AFRICA**
Respondent
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gchaba@justice.gov.za

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And	
MUTUMWA DZIVA MAWERE	Respondent

INTERVENING PARTY'S ANSWERING AFFIDAVIT

I, the undersigned,

RUMBIDZAI MATAMBO

do hereby make oath and state that:

1. I am a major female practicing attorney and partner practicing under the name and style of "*Dube Manikai Hwacha Attorneys*" (**DMH**) at its principal place of business situated at DMH House, 4 Fleetwood, Road, Alexandra Park, Harare.

2. I depose to this answering affidavit on behalf of the Intervening Party, SMM Holdings (Private) Limited (**SMM**). SMM is a company under reconstruction pursuant to a reconstruction order and decree dated 6 September 2004 and promulgated under General Notice 45A of 2004, which is attached hereto as annexure "**AA1**".

3. DMH are the Zimbabwean attorneys of record of SMM and in that role, they have been involved in the affairs of SMM, since 2004 including in various litigation in South Africa. I have been involved in the various litigation since about 2007.

4. Save where the contrary is stated or appears from the context, the facts contained herein fall within my personal knowledge and are, to the best of my knowledge and belief, both true and correct.

5. On 18 December 2023, I became aware that Daniel Kuzozvirava Shumba (**Applicant**) had instituted an urgent application under the above case number and set the application down for 11h00 on Thursday, 21 December 2023.

6. Because SMM was not notified of the application timeously, SMM was not able to comply with the time periods for opposition set out in the notice of motion.

7. Be that as it may, SMM acted immediately and served and filed a notice of opposition, at about 16h00 on 18 December 2023.

8. This affidavit has therefore been prepared under extremely urgent circumstances in order to place the necessary facts before this honourable Court before the hearing of

the matter on 21 December 2023. SMM reserves the right to request this honoruable Court for leave to supplement this affidavit in the event that it is necessary or desirable to do so.

9. I have read the founding affidavit deposed to by the Applicant. All allegations in the founding affidavit deposed to by the Applicant are denied unless expressly admitted herein.

10. The Applicant makes out no case whatsoever for the relief sought in the notice of motion. I address this more fully below, but there is not sufficient time available for SMM to reply to the allegations contained therein *ad seriatim*.

11. I deal with the content of the founding papers as follows:

11.1 I address the Applicant's failure to join SMM and certain individuals at D&t Trust as parties in this application and the intervention of SMM in terms of Rule 12 of the Uniform Rules of Court;

11.2 I deal with the Applicant's failure to set out how he is an interested party in the proceedings being intervened against;

11.3 I then deal with the lack of urgency of the application in terms of Rule 6(12)(b) of the Uniform Rules of Court;

11.4 For context, I set out a brief chronology of the lengthy history of this matter spanning almost 20 years and leading up to the institution of this urgent application;

11.5 I deal with the Applicant's failure to make out any case in this matter;

11.6 Lastly, I deal with costs.

NON-JOINDER AND INTERVENTION OF SMM IN THE URGENT APPLICATION

12. The Applicant cites only the Master of the High Court (**Master**) as a respondent in the urgent application. He has failed to cite SMM or the Trustees as parties.

13. SMM has a direct and substantial interest in the urgent application. This appears from the following:

13.1 On 15 November 2016, SMM brought an application for the sequestration of one Mutumwa Dziva Mawere (**Mawere**) under case number 40602/2016;

13.2 While the notice of motion is vague, it is clear that the relief sought in paragraphs 2.1 to 2.5 of the notice of motion is directed at undermining the court orders secured by SMM against Mawere and his associates over almost 20 years;

13.3 This includes (i) an order in terms of section 424 of the Companies Act, 1973 directing, *inter alia*, Mawere to pay SMM some R18 million plus interest and costs and (ii) the sequestration order granted in favour of SMM against Mawere after he failed to make payment thereof;

13.4 The Applicant, in fact, refers to SMM by name over 70 times in the founding affidavit;

13.5 He states in paragraph 6 that this application pertains to the status of SMM as a juristic person, and more specifically under paragraph 6 (b) (1), that:

> "… *I aim to prevent SMM Holdings (SMM) from continuing debt collection activities.*"

13.6 As such, SMM has a direct and substantial interest in the relief sought and ought to have been joined as a party in the urgent application;

13.7 The Applicant failed to join SMM as a party, which constitutes a material non-joinder and a procedural irregularity; and

13.8 The Applicant's motives in this regard are questionable, given the long history of litigation between the parties and the aforesaid facts.

14. In addition, the Trustees have a direct and substantial interest in the urgent application. This appears from the following:

14.1 Theodore van den Heever (**Van den Heever**) and Coralie Bickmore (**Bickmore**), the Trustees, were appointed by the Master as co-trustees in the insolvent estate of Mawere. A copy of the notice of appointment is annexed as "**AA2**";

14.2 The Applicant refers to Van den Heever by name in paragraphs 18, 19 and 39 of the founding affidavit;

14.3 Given the aforesaid, both the Trustees have a direct and substantial interest in the relief sought and ought to have been joined as a party in the urgent application;

14.4 The Applicant failed to join the Trustees as parties in the application, which constitutes a material non-joinder.

15. In the circumstances:

15.1 the relief sought cannot be granted in the absence of joining both SMM, Trustees and the other proven creditors, the IDC and ABSA;

15.2 application will be made by SMM at the hearing of this application in terms of Rule 12 of the Uniform Rules of Court for SMM to be permitted to intervene as a party in this application. A notice of motion in this regard will be filed with this affidavit.

THE APPLICANT IS NOT AN INTERESTED PARTY

16. The Applicant sets out in the founding affidavit that he is a "*distinguished businessman and politician*". He then goes on in the remainder of his affidavit in an endeavour to make out a case for the relief he seeks.

17. Firstly, as stated above, the interdict sought under paragraph 2.1 of the notice of motion relates to the execution of an Order that was granted against Mawere, and in favour of SMM. The Applicant makes no submissions whatsoever regarding his interest in what he has termed “debt collection proceedings” against Mawere or how the continuance of the debt collection proceedings against him would cause irreparable and sufficient harm to the Applicant.

18. Secondly, I submit that the Applicant has no interest in SMM either.

19. Moreover, the submissions made by the Applicant in his founding affidavit are hearsay evidence, as he is effectively purporting to be a mouthpiece of Mawere.

Interestingly, whilst this is the norm in affidavits, I note that the Applicant does not state that the contents of his founding affidavit fall within his personal knowledge. Instead, he simply asserts at paragraph 3 of his affidavit that the contents of his affidavit are true and correct. I submit that this wording must have been intentional, because the contents of the Applicant's application do not fall within his personal knowledge, nor does he rely on any confirmatory affidavits deposed to by others. I submit that on this basis, the Applicant cannot assert that the contents of his founding affidavit are true and correct, when they relate to information that does not fall within his personal knowledge.

20. In the circumstances, I submit that the Applicant has no interest in these proceedings, and the application falls to be dismissed on this basis alone.

LACK OF URGENCY

21. The Applicant served his notice of motion on SMM's legal representatives by electronic mail at 11h29 on Monday, 18 December 2023. The notice of motion called upon SMM to file a notice of intention to oppose by 12h00 on that day (18 December 2023), followed by an answering affidavit by 16h00 on Tuesday, 19 December 2023. I have already explained the extremely urgent circumstances under which this affidavit was prepared, and SMM's inability to comply with the extremely truncated time periods.

22. The Applicant makes out no case whatsoever for the granting of urgent relief.

23. He also does not make out any case for the extremely urgent basis upon which the Applicant has approached this honourable Court and without any justification as to why the urgent application is brought on a date other than what I am advised is the

usual urgent court day, a Tuesday, and furthermore, why the application is being brought while the Court is in recess.

24. The Applicant purports to make out a case for urgency, or refers to urgency, under the following paragraphs of his founding affidavit:

    24.1 Paragraph 18;

    24.2 Paragraph 19 (o);

    24.3 Paragraphs 61 to 68;

    24.4 Paragraphs 69 to 89.

25. Paragraph 61 highlights the absurdity in the Applicant's pursuit of urgent relief. Therein he states that the urgency he contends for relates to the *"irreversible harm posed to the constitution and the rule of law."* Not only is this incorrect, but this does not justify the launching of this urgent application.

26. There are specific bald references to the harm that the Applicant contends may befall Mawere himself. As stated under the relevant section above, the Applicant has not made out a case for his interest in the affairs of Mawere.

27. Even if the honourable Court was to be persuaded that the Applicant may somehow be a mouthpiece for Mawere's alleged harm (which I dispute), at the heart of the Applicant's case is the sequestration order that was granted against Mawere and in favour of SMM.

28. The provisional sequestration order was granted more than 8 months ago, on 15 March 2023, by her Ladyship Madam Justice Fisher (**Fisher J**), with a return date of 8 May 2023. A copy is attached hereto as annexure "**AA3**".

29. The provisional order was served on Mawere on 20 and 22 March 2023, and 4 May 2023, as appears from annexure "**AA4**" hereto.

30. After service of the provisional sequestration order, and on Saturday, 6 May 2023, shortly before the return date of 8 May 2023, Mawere served an application for leave to appeal the provisional sequestration order. The application for leave was dismissed with costs on 15 May 2023.

31. In the meantime, on 8 May 2023, his Lordship Mr Justice Strydom granted a final order sequestrating Mawere. A copy of that order is attached as annexure "**AA5**".

32. The final sequestration order was served on Mawere on 11 May 2023, as appears from annexure "**AA6**" hereto.

33. In addition, on 8 May 2023, Mawere brought an application to stay the sequestration proceedings, pending the outcome of an application instituted under case number 2022-045016. No case number was reflected on this application. SMM nevertheless delivered an answering affidavit on 19 May 2023 but Mawere has failed to prosecute the matter since such date.

34. Mawere then applied for the rescission of the sequestration order on 16 May 2023 under the above case number. Again, he has taken no action to advance that application since SMM filed opposing papers. In fact, SMM has demanded that Mawere deliver his heads of argument so that the rescission application can be set down and dismissed but he has failed to do so. A copy of SMM's demand is annexed

as "**AA7**". Still, Mawere has not delivered heads of argument so that the rescission application can be heard.

35. A first creditors meeting in the sequestration proceedings was held on 7 August 2023 and the second creditors meeting was held on 11 September 2023. SMM is a proven creditor in the estate based on a judgment debt.

36. Despite the aforesaid, Mawere chose not to bring this application and waited until November 2023, in the last week of court term for 2023, to institute an application on an extremely urgent basis under case number 2023-123899. He has also failed to prosecute the rescission application expeditiously and is intentionally delaying the hearing thereof.

37. The upshot of the above submissions is that not only has Mawere himself failed to timeously pursue any legal remedies that he may have had (which I do not admit), but even if it is argued that the Applicant has legal standing to bring this application (which I dispute as stated above):

    37.1 He has made out no case for this matter to be heard urgently; and

    37.2 Any urgency that may be found to exist (which I do not admit) is self-created.

38. Last but not least, in addition to lack of urgency, with reference to paragraph 21 above, I am advised and accordingly submit that the Applicant's conduct is contrary to the directive issued by the office of the Deputy Judge President on 4 October 2021 regarding the urgent motion Court, including but not limited to the following:

    38.1 The Applicant has not set down the matter on a Tuesday, nor did he explain why the matter warrants such extreme urgency such that he could not do so;

38.2 The Applicant prescribed unrealistic time frames for answering affidavits and having regard to the facts of the matter, there was no justification for this; and

38.3 The Applicant's founding affidavit was not prepared in a manner suitable to be adjudicated urgently. It is unnecessarily lengthy, and the submissions made are not succinct. This is the typical "waffling affidavit" that the Deputy Judge President referred to under paragraph 12 of his directive.

39. I submit that this honourable Court should not come to the Applicant's aid on an urgent basis in this application, and that the matter should accordingly be struck off the Court roll, with punitive costs.

BRIEF CHRONOLOGY

40. I do not want to burden this honourable Court with the detailed facts relating to the history of this matter. However, it is necessary for me to set out a brief chronology of events in South Africa from 2004 in order for the context of this application to be understood.

41. On 3 May 2004, Mawere caused an urgent application to be brought by Petter Trading (Pty) Ltd (**Petter**) against SMM and Southern Asbestos Sales (Pty) Ltd (**SAS**) in this honourable Court under case number 04/01496, for payment of R74,872,468.49 plus interest. The application was based on a cession agreement purportedly dated in 2003.

42. The cession agreement was a fraudulent document as it was not legitimately concluded between the parties and although it purported to having been signed in 2003, it was actually signed on 28 April 2004, a week before the urgent application was brought. The application was not opposed by SMM as the founding papers were

not served on it. An order was issued against SAS in terms of the application on 6 May 2004 by his Lordship Mr Justice van Oosten.

43. It subsequently came to SMM's attention that these (fraudulent) proceedings had been instituted. On 7 October 2004, SMM launched an urgent rescission application against Petter under case number 04/10496. SMM sought the rescission and setting aside of the order granted by his Lordship Mr Justice van Oosten in urgent court.

44. The basis of the rescission application was, *inter alia*, that the urgent application papers were never served on SMM and that the reason for the procurement of the court order was merely to complete the fraudulent scheme in terms of which SMM's foreign exchange earnings were channelled to Petter on the basis of the fraudulent cession agreement. The rescission application was initially opposed. The application was argued on 29 November 2004 before his Lordship Mr Acting Justice Joubert. He granted the rescission and ordered costs to be costs in the cause.

45. After obtaining the rescission order on 29 November 2004, SMM delivered an answering affidavit to the main application under case number 2004/10496. Neither SAS, nor Petter (both then under the control of Mawere), ever filed a replying affidavit and the matter was not pursued.

46. On 2 February 2004 and under case number 2005/20057, SMM launched an application for the final winding-up of SAS. The application was based on SAS' indebtedness to SMM arising from asbestos products which had been delivered to SAS and sold through it to customers.

47. SAS opposed the winding-up application. SAS' main grounds of opposition were that the legislation underpinning SMM's authority to prosecute the application was

unconstitutional and therefore unenforceable in the Republic of South Africa and that the application for winding-up constituted an abuse of process.

48. It was alleged by SAS and confirmed by Mawere in a confirmatory affidavit to the answering affidavit that:

48.1 the application was an attempt by the Zimbabwean government to victimise and ostracise Mawere;

48.2 the reconstruction order and reconstruction legislation was nothing more than the unlawful expropriation of assets by the Zimbabwean government, without compensation;

48.3 no other company in Zimbabwe had been placed under and "*the measures adopted by the Zimbabwean executor were designed to unlawfully assume control of SMM's interests*".

49. The application was argued in full before his Lordship Mr Acting Justice Epstein (**Epstein AJ**) on 1 June 2005 and a final winding-up order was granted. In his judgment, Epstein AJ dismissed all the defences raised by SAS. He specifically dealt with and dismissed the alleged defence that SMM was not authorised to bring the application. The judgment has been reported as *SMM Holdings (Private) Limited v Southern Asbestos Sales (Pty) Limited* 2005 (4) All SA 584 (W).

50. On 7 April 2006, almost a year after the final winding-up order was granted, Mawere and another Parmanathan Mariemuthu (**Mariemuthu**) caused a rescission action to be issued under case number 2006/7836 on behalf of SAS. They sought the rescission and setting aside of the order placing SAS under final liquidation, as well as the setting aside of the appointment of the liquidators and costs against the

Administrator and SMM. The defendants cited included SMM, the Administrator and the liquidators of SAS. SMM defended the action which was set down for hearing on 4 October 2007. After two days of trial and Mariemuthu giving evidence, the action was withdrawn and Mariemuthu tendered payment of costs personally.

51. On 9 June 2006, Mr Norman Klein, Ms Y Seckle-Marupeng, Mr T Motsepe and Ms D Lindup were appointed as final liquidators in the estate of SAS. The first meeting of creditors in the estate of SAS was held on 4 November 2005 and no claims were proved at the first meeting.

52. On 14 September 2006, a second meeting of creditors was held. Mawere and Mariemuthu proved claims in the estate on behalf of various companies.

53. The following day, SMM brought an urgent application under case number 2006/20467 for an order reviewing and setting aside the decision of the Master to admit claims brought by Mawere and Mariemuthu.

54. The review application was argued fully and on 14 November 2005, his Lordship Mr Acting Justice Wepener (as he then was) (**Wepener AJ**) rejected the argument regarding a lack of the Administrator's authority and reviewed and set aside the admission of the claims and granted costs including the costs of two counsel against the companies on whose behalf Mawere acted. A copy of this judgment in this application will be made available to the Court at the hearing of this application. Mawere and Mariemuthu then caused an application for leave to appeal to be brought in respect of the judgment by Wepener AJ. This application for leave to appeal was fully argued and dismissed by Wepener AJ.

55. On 18 September 2006, SMM brought an action against SAS for the proving of its claim. On 17 July 2007, SMM obtained a default judgment against SAS for rectification of the agreement and payment of the amount of US $13,308,150.27, South African R4,515,367.48 and Canadian $628,071.84, which constituted SMM's main claim against SAS. The default judgment was granted after the liquidators of SAS withdrew the bare denial plea that they had entered in defence of the claim.

56. Mawere also brought a constitutional challenge under case number 9367/07, which was dismissed with costs. Mawere's application for leave to appeal was also dismissed with costs. A copy of the judgment in the constitutional challenge will be made available to the Court at the hearing of this application.

57. On 13 September 2006, SMM issued summons against Mawere in this honourable Court under case number 20235/06 for payment of R18,043,374.21. SMM's claim against Mawere was based on section 424 of the Companies Act, 1973. The facts in the action related to facts which arose during April and May 2004, when the purported cession agreement was signed, and urgent application proceedings were instituted at the instance of Mawere. Various trial dates were requested but Mawere, on a number of occasions, had the trial postponed. Mawere tried everything possible to engineer postponements and on Monday, 10 September 2012, when the matter was placed on the roll again for trial before his Lordship Mr Justice Willis (as he then was) (**Willis J**), Mawere again attempted to have the matter postponed.

58. One of the strategies that Mawere attempted to employ to have the matter postponed was to, on the day prior to the set down of the trial on 6 September 2012, deliver a supplementary discovery affidavit enclosing 110 pages of newly discovered documents.

59. The trial commenced before Willis J on Monday, 10 September 2012. Mawere pursued numerous further underhanded tactics in an attempt to have the trial postponed but all his attempts to derail the proceedings failed. The trial ultimately proceeded and after hearing evidence, was argued on 18 September 2012.

60. Willis J gave judgment in favour of SMM at the end of September 2012. The judgment is annexed hereto as annexure "**AA8**". The judgment has been reported as *SMM Holdings (Private) Limited v Mawere 2012 SACLR 480 (GSP)* and is damning of Mawere and his conduct.

61. Mawere applied for leave to appeal the judgment of Willis J, which was unsuccessful. He thereafter applied for further leave to appeal to the Supreme Court of Appeal and to the Constitutional Court. Both of these applications for leave to appeal were unsuccessful.

62. Mawere then brought an application for rescission of the order granted by his Willis J. This application was also unsuccessful. I annex the judgment by his Lordship Mr Justice Makume dismissing his application for rescission as annexure "**AA9**".

63. Still, Mawere failed to comply with the order of Willis J.

64. In 2016, SMM brought an application for the sequestration of Mawere's estate under the above case number. In its founding affidavit in the sequestration application, SMM makes out a clear case for the sequestration of Mawere's estate based upon the unpaid judgment debt in the 424 action of R18,043,374.21 plus interest and costs.

65. Mawere filed a lengthy answering affidavit. In the answering affidavit, he does not deal at all with the merits of the sequestration application. The facts in that regard therefore stand uncontroverted.

66. SMM proceeded with the application for the sequestration of Mawere's estate. SMM filed heads of argument and a practice note but despite numerous requests, Mawere refused to file heads of argument.

67. On 30 January 2023, his Lordship Mr Justice Vally granted an order compelling the Mawere to file heads of argument, failing which his defence in the sequestration application would be struck out. Mawere refused to file heads and his defence was consequently struck.

68. On 15 March 2023, Fisher J then granted a provisional order sequestrating Mawere's estate. The final order was granted on 8 May 2023.

FAILURE TO MAKE OUT ANY CASE

69. The misleading and sometimes nonsensical allegations made in the founding affidavit are broad-sweeping and suffer from a lack of particularity that renders the affidavit entirely deficient and incapable of making out any case in support of the relief sought in the notice of motion.

70. With particular reference to the Order sought under paragraph 2.1 of the notice of motion for an interdict, the Applicant has neither addressed nor satisfied the requirements for the grant of an interdict.

71. The same goes for the remainder of the relief sought: the Applicant's bald statements simply do not support the relief sought by him.

72. The Applicant should accordingly fail.

COSTS

73. I submit that a punitive costs order is warranted.

74. The Applicant has brought the application without citing crucial respondents as parties.

75. He has brought the application on an extremely urgent basis, during Court recess, without any justification in respect thereof.

76. The Applicant's bald allegations are misleading and nonsensical. No case whatsoever is made out for the relief sought. He seeks costs of two counsel in the matter but there is no evidence in the affidavit of him having taken legal advice. The application is entirely unmeritorious.

77. The urgent application is an abuse of court process, similar to Mawere's previous conduct in this honourable Court (as appears from the brief chronology set out above).

78. This is an application that should never have been instituted, let alone on an urgent basis. The conduct of the Applicant warrants censure and a punitive costs order. Argument will be addressed to the honourable Court on this issue at the hearing of this matter.

79. I submit that in these circumstances, a punitive costs order on an attorney-client scale is warranted.

WHEREFORE the Intervening Party prays for an order in terms of the notice of motion attached hereto for the intervention application, and an order dismissing the urgent application with costs on an attorney-client scale, alternatively, party and party scale.

____

RUMBIDZAI MATAMBO

Sworn and signed before me by the deponent who indicated that she has read this affidavit, understands the contents thereof and that it is true and correct; that she has no objection to taking the prescribed oath and deems it binding on her conscience. This affidavit was signed and sworn to before me at ________________ on this the _____day of **DECEMBER 2023** and the Regulations contained in Government Notice R1258 of 21 July 1972, as amended, have been complied with.

____

COMMISSIONER OF OATHS
Full names:
Occupation:
Address:
Tel:

"A21"

ZIMBABWEAN

GOVERNMENT GAZETTE

EXTRAORDINARY

Published by Authority

Vol. LXXXII, No. 72B — 6th SEPTEMBER, 2004 — Price $4 200,00

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. Afras Gwaradzimba to be the administrator of the company under reconstruction, together with the following assistant administrators under his control and direction—

(i) Mr. Forbes Mugwambati, who shall be the assistant administrator at Shabani Mine; and

(ii) Mr. Robert Kaisi, who shall be the assistant administrator at Gaths 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

(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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Mugumbati.

J 327

«Boedelno»-G.P.-S 003-0160

DEPARTEMENT VAN JUSTISIE

DEPARTMENT OF JUSTICE

Insolvensiewet, No. 24 van 1936
(soos gewysig) [Artikel 18(1) en 56 (2)] /

Insolvency Act, No. 24 of 1936
(as amended) [Section 18 (1) and 56 (2)]

SERTIFIKAAT VAN AANSTELLING VAN *~~VOORLOPIGE KURATOR(S)~~ / KURATOR(S)
CERTIFICATE OF APPOINTMENT OF *~~PROVISIONAL TRUSTEE(S)~~ / TRUSTEE(S)

No: **G291/2023**

Hierby word gesertifiseer dat/
This is to certify that **THEODOR WILHELM VAN DEN HEEVER & CARALIE BICKMORE**

D & D TRUST

PO BOX 904

FLORIDA HILLS

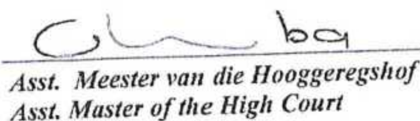
1716

aangestel word as *~~Voorlopige Kurator(s)~~ / Kurator(s) van die insolvente boedel van:
is / are appointed *~~Provisional Trustee(s)~~ / Trustee(s) of the insolvent estate of

MUTUMWA DZIVA MAWERE: ID NO : 600111 1602 5083

wat op Bevel van die Hooggeregshof van Suid-Afrika (**«Afdeling_1» Afdeling**), gedateer die **«Dag1»** dag van **«Maand» «Jaar»** *~~voorlopig gesekwestreer~~ / gesekwestreer is, met die magte en bevoegdhede soos uiteengesit in die Insolvensiewet, 1936 (Wet 24 van 1936).

Which was placed under *~~provisional sequestration~~ / sequestration by Order of the High Court of South Africa **(GAUTENG DIVISION, JOHANNESBURG)**, dated the **08TH** **day of MAY 2023 with the powers and authority as set out in the insolvency Act , 1936 (Act 24 of 1936)**



Asst. Meester van die Hooggeregshof
Asst. Master of the High Court

Date Stamp/Datumstempel

(SOUTH GAUTENG * Afdeling / Division)

DEPARTMENT OF JUSTICE AND

CONSTITUTIONAL DEVELOPMENT

Tel No. : (011) 429 8025
Fax No. :
E – Mail : PTjebane@justice.gov.za
Enquiries : Mr Peter Tjebane
My Ref : G291/2023
Your Ref : TW VD HEEVER

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Johannesburg
2000

D & T TRUST (PTY) LTD
PO BOX 904
FLORIDA HILLS
1716

Sirs/Madam

RE: ~~CLOSE CORPORATION /COMPANY IN LIQUIDATION~~/INSOLVENT ESTATE

MUTUMWA DZIVA MAWERE

1. The certificate of ~~provisional~~ appointment attached.

2. The *second/general meeting will be held before the Master JHB unless it is shown to my satisfaction that it can be more conveniently held elsewhere. The date and hour of the meeting must be arranged with the presiding officer and be held within tree months from the date of appointment, unless extension of time has been granted.

3. A ~~Provisional~~ *Trustee/Liquidator must investigate the assets of the *Estate/Company and report the value thereof within one month of appointment.

4. The attention of the Liquidator is drawn to the provisions of section 400 (1) and (2); 402 (d) and (g); 421 (1) (a)-(d), (2) and (8) of Act 61 of 1973.

~~Close Corporations:~~

~~Your attention is drawn to the provisions of Section 78 (1) and 79 of Act 69 of 1984 in respect of the convening of the First and Second meetings.~~
~~Your attention is also drawn to the provisions of Section 400 (1) (a) and 400 (2) of Act 61 of 1973.~~

Yours Faithfully

Asst. Master of the South Gauteng High Court
Johannesburg
Insolvency Groups

"AA3"

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

CASE NO. 40602/16

JOHANNESBURG: WEDNESDAY, 15 MARCH 2023

BEFORE THE HONOURABLE JUDGE FISHER

In the matter between:

SMM HOLDINGS (PRIVATE) LIMITED Applicant

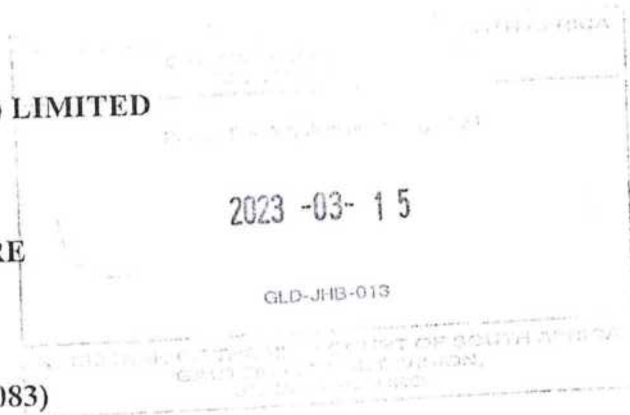
and

MUTUMWA DZIVA MAWERE Respondent

(DOB: 11 January 1960)

(Identity number: 6001116025083)

(Marital Status: Single)



ORDER

Having considered the papers filed of record, having heard counsel, and having considered the matter, the following order is made:

1. The Respondent's estate is placed under provisional sequestration.

2. The Respondent is called upon to advance the reasons, if any, why the court should not order final sequestration of the said estate on the 8TH day of MAY 2023 at 10H00 or so soon thereafter as the matter may be heard.

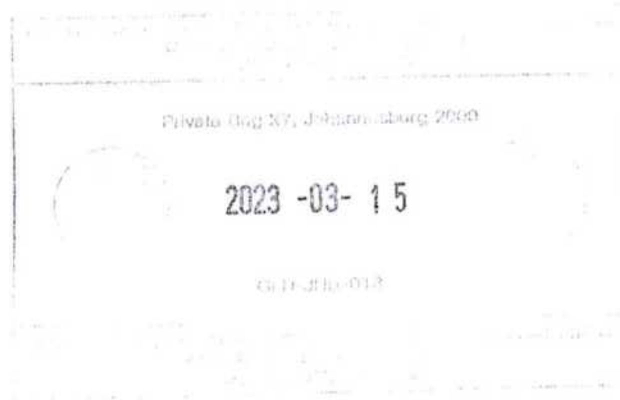
3. The costs of the application shall be costs in the administration of the Respondent's insolvent estate.

BY ORDER OF THE COURT

REGISTRAR

Counsel for the applicant: H. C. Bothma, SC: bothma@law.co.za; 083 284 7267

Attorneys for the applicant: DLA Piper South Africa (RF) Inc., Kirsty Simpson: Kirsty.Simpson@dlapiper.com; 084 504 3919.



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

CASE NO: 40602/16

In the matter between:

SMM HOLDINGS (PRIVATE) LIMITED	Applicant
and,	
MUTUMWA DZIVA MAWERE	Respondent
(DOB: 11 JANUARY 1960)	
(Identity number: 6001116025083)	
(Marital Status: Single)	

COMPLIANCE AFFIDAVIT

I, the undersigned,

NICOLE SENTOO

do hereby state under oath that:

1 I am an adult female candidate attorney at DLA Piper South Africa (RF) Inc (**DLA**), situated at 6th Floor, 61 Katherine Street, Sandown, Sandton, Johannesburg. DLA are the attorneys of record for the Applicant in this matter.

2 The facts contained in this affidavit are within my personal knowledge unless otherwise indicated and are to the best of my knowledge and belief both true and correct.

Service on the Respondent

3 On 22 March 2023, the Sheriff attempted to serve a copy of the provisional sequestration order under the above case number (**Order**), on the Respondent at his last known place of employment, 325 Rivonia Boulevard, Sandown, Sandton. The Sheriff served a copy of the Order on the Receptionist, Andrew Beta after the nature and contents of the document was explained to him. The Sheriff was informed that Andrew Beta was charged at the Respondent's place of employment in lieu of the temporary absence of the Respondent. A copy of the return of service in this regard is attached hereto marked "**CA1**".

4 On 20 and 22 March 2023, the Sheriff attended at the Respondent's residential address, 62 Cambridge Road, Bryanston, Johannesburg (**Residence**), to serve a copy of the Order on the Respondent. The Residence was found vacant on both dates. A copy of the return of service in this regard is attached hereto marked "**CA2**".

5 On 4 May 2023, the Sheriff again attended at the Respondent's place of employment to serve a copy of the Order on the Respondent. The Order was again served on the receptionist, Andrew Beta. A copy of the return of service is attached hereto marked "**CA3**".

6 During my telephone call with the Sheriff on the same day, I was informed that the Respondent does not attend at his place of employment on a daily basis

RM
TM

and sometimes, is away for over a month. The Sheriff informed me further that he was informed that any documentation received for the Respondent is immediately scanned in and emailed to the Respondent.

7 On 4 May 2023, the Sheriff also attended at the Respondent's Residence. The Respondent was not present at the Residence at the time. The Sheriff affixed a copy of the Order to the main entrance to the premises. A copy of the return of service is attached hereto marked "**CA4**".

8 In any event, the Respondent is aware of the Order. In the Respondent's letter dated 30 March 2023, the Respondent refers to the "*sequestration judgment*" at paragraph 5 of the letter. The letter is attached hereto, marked "**CA5**".

9 The Applicant and the Respondent have been involved in litigation against each other for the past 19 years, since about September 2004. The Respondent has, in the last year, instituted applications against the Applicant and when doing so has served the applications by way of email using the email address mdmawere1@gmail.com. On 4 May 2023 at 12H00, I sent the Order to the Respondent using this same email address. I annex a copy of the email with the Order attached hereto, as annexure "**CA6**".

10 I submit that the Respondent has received proper notice of the return date for the hearing of the sequestration.

Service on the Respondent's employees

11 On 20 and 22 March 2023, the Sheriff attended at the Residence to serve a copy of the Order on the Respondent's employee's, namely Rhoda Khumalo (**Khumalo**) and Precious, whose surname is unknown (**Precious**). The

Residence was found vacant on both dates. Upon conducting a diligent search, the Sheriff was unable to locate the two employees to serve on them personally. A copy of the returns of service are attached hereto marked "**CA7**" and "**CA8**".

12 On 4 May 2023, the Sheriff again attended at the Residence to serve a copy of the Order on the Respondent's employees. The Residence was vacant and locked. The Sheriff could not gain access thereto and therefore he affixed the Order to the main entrance to the Residence. Copies of the returns of service are attached hereto marked "**CA9**" and "**CA10**".

Service on the South African Revenue Service (SARS)

13 On 23 March 2023, the Sheriff served the Order on SARS, at its head office situated at 299 Bronkhorst Street, Nieuw Muckleneuk, Pretoria.

14 The Sheriff found the premises locked and affixed a copy of the Order to the door. The return of service is attached hereto marked "**CA11**".

Lodgement with the Master

15 On 20 and 22 March 2023, the Sheriff lodged a copy of the Order and with the Master of the High Court, Johannesburg, situated at the Hollard Building, 66 Marshall Street, Johannesburg. A copy of the return of service in this regard is attached hereto marked "**CA12**".

16 In light of the aforegoing, I respectfully submit that the Applicant has duly complied with the provisions of section 11(2A) of the Insolvency Act, No. 24 of 1936.

NICOLE MESHAIL SENTOO

The deponent has acknowledged that she knows and understands the contents of this affidavit, which was signed and sworn before me at Strand on this the 04 day of May 2023, the regulations contained in the Government Notice no. R1258 of 21 July 1972, as amended, and Government Notice no. R1648 of 19 August 1997, as amended having been complied with.

A. JONES CST 7235496-8

COMMISSIONER OF OATHS

Full Names: Aadam Jones

Capacity: Cst / 7235496-8

Address: 6 Altena Road, Strand.

SOUTH AFRICAN POLICE SERVICE
COMMUNITY SERVICE
04 MAY 2023
STRAND
AMAPOLISA OMZANTSHI AFRICA

"CA1"
004-17

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

Case No. 40602/16

In the matter between:

SMM HOLDINGS (PRIVATE) LIMITED

Applicant

and

MUTUMWA DZIVA MAWERE

Respondent

and

RETURN: SERVICE OF ORDER

IT IS HEREBY CERTIFIED:

That on 22 March 2023 at 14h21 at 1ST FLOOR, AHS BUILDING, 32 RIVONIA BOULEVARD, SANDOWN, SANDTON being the place of employment of the Respondent a copy of the ORDER was served to ANDREW BETA- RECEPTIONIST after the original document was displayed and the nature and contents thereof was explained to him. ANDREW BETA apparently not less than sixteen years of age and apparently in charge at the Respondent's place of employment, accepted service in the temporary absence of the Respondent. Rule 4(1)(a)(iii).

Court Date: 08 May 2023

SHERIFF CHARGES/EXPENSES: (You may require that this account be taxed and vouched before payment)

Description	Tariff	QTY	Amount	Description	Tariff	QTY	Amount
COLLECTION AT OFFICE	6.00	1	6.00				
Service	71.00	1	71.00				
Faxemail	20.00	1	20.00				
Registration & Return	65.00	1	65.00				
Travelling.	6.00	50	300.00				
Urgent Service	670.68	1	670.68				

TO: THE REGISTRAR OF THE HIGH COURT, JOHANNESBURG

Zero rated items	0.00
Sub-total	1,132.68
VAT	169.90
Total	1,302.58

Account No.: D12941

TO: DLA PIPER SOUTH AFRICA (RF) INC. (C

6TH FLOOR

61 KATHERINE STREET

SANDTON

2196

Your Reference: N VAN ONSELEN

MR C RYNEVELDT - DEPUTY SHERIFF

(Properly appointed in terms of Section 6(1) of the Sheriff's Act No. 90/1986)

Signed at Sandton on 23/03/23

My Reference: 2023/00/03028.00 / OPR1

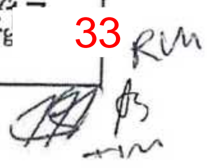
Sheriff Sandton South - F R Moeletsi

P O BOX 67 HALFWAYHOUSE 1685

Tel: 087 330 0969 Email: accounts@sheriffsand[...]

Standard Bank Acc No.: 012 801 747 DX-127 Randburg

VAT No./BTW Nr.: 4390216432



004-18

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

CASE NO. 40602/16

JOHANNESBURG: WEDNESDAY, 15 MARCH 2023

BEFORE THE HONOURABLE JUDGE FISHER

In the matter between:

SMM HOLDINGS (PRIVATE) LIMITED — Applicant

and

MUTUMWA DZIVA MAWERE — Respondent

(DOB: 11 January 1960)

(Identity number: 6001116025083)

(Marital Status: Single)

Private Bag X7, Johannesburg
2023 -03- 15
GLD-JHB-013

ORDER

Having considered the papers filed of record, having heard counsel, and having considered the matter, the following order is made:

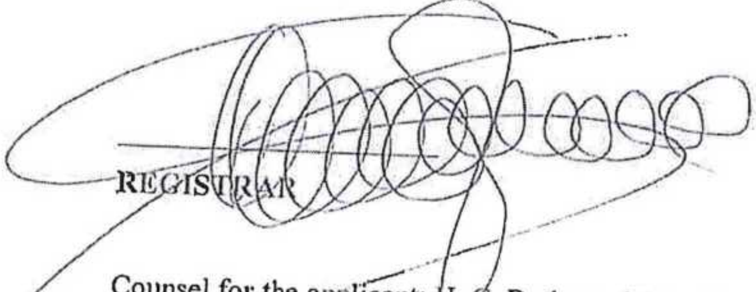
1. The Respondent's estate is placed under provisional sequestration.

2. The Respondent is called upon to advance the reasons, if any, why the court should not order final sequestration of the said estate on the 8TH day of MAY 2023 at 10H00 or so soon thereafter as the matter may be heard.

Sheriff Sandton South
2023 -03- 20
RECEIVED

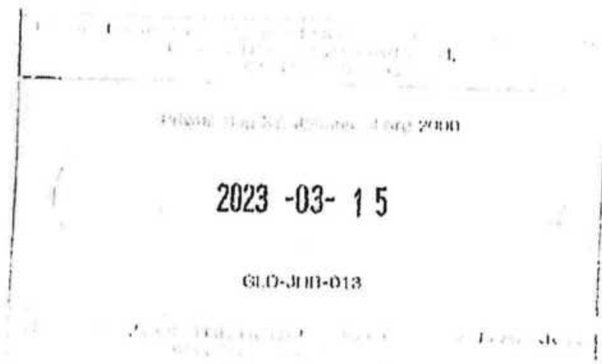
3. The costs of the application shall be costs in the administration of the Respondent's insolvent estate.

BY ORDER OF THE COURT



REGISTRAR

Counsel for the applicant: H.C. Bothma, SC: bothma@law.co.za; 083 284 7267
Attorneys for the applicant: DLA Piper South Africa (RF) Inc., Kirsty Simpson: Kirsty.Simpson@dlapiper.com; 084 504 3919.



004-20 A2

In the High Court of South Africa
(Gauteng Local Division)

Case No. 40602/16

In the matter between:

SMM HOLDINGS (PRIVATE) LIMITED

Plaintiff

and

MUTUMWA DZIVA MAWERI

Respondent

RETURN: NON-SERVICE OF COURT ORDER DATED 15 MARCH 2023

IT IS HEREBY CERTIFIED:

That on 23 March 2023after various attempts as listed below, at 62 CAMBRIIDGE ROAD BRYANSTON the COURT ORDER DATED 15 MARCH 2023 could not be served as the Respondent could not be found. The premises are constantly locked and it could not be ascertained whether the Respondent still resides there. The occupier does not react to any written messages left for him to contact our office. Due to the mounting costs the COURT ORDER DATED 15 MARCH 2023 is returned herewith, for your further instructions.

ATTEMPT(S):

20 March 2023 at 10h50 - Attempt - No answer.

22 March 2023 at 07h30 - Attempt - No answer.

REMARK(S):

Kindly note that I could not determine who or if anybody is staying here.

SHERIFF CHARGES/EXPENSES: (You may require that this account be taxed and vouched before payment)

Description	Tariff	QTY	Amount	Description	Tariff	QTY	Amount
Attempted Service	63.50	3	190.50				
Photo Copies / E-mail printed	6.50	3	19.50				
Registration & Return	65.00	1	65.00				
Collection	12.50	1	12.50				
Data	16.50	1	16.50				
Document returned	12.00	1	12.00				
Travelling.	6.00	16	96.00				

TO: Registrar Johannesburg

Zero rated items	0.00
Sub-total	412.00
VAT	61.80
Total	473.80

Account No.: MDLA PIPER

TO: DLA PIPER SOUTH AFRICA INCORPORA
PRIVATE BAG X1'
BENMORE

2010

Your Reference: VAN ONSELEN

Mr R Gie - Deputy Sheriff
(Properly appointed in terms of Section 6(1) of the Sheriff's Act No. 90/1986)
Signed at Sandton on 24/03/23
My Reference: 2022/00/18188.00 / JH

Sheriff Sandton North - K I Mphahlele
P.O. Box 1572 Randburg 2125
Tel: 011 326 3170 Fax: 086 613 0853
Standard Bank Acc No: 002965984
VAT No./BTW Nr. 4760264160

004-2

In the High Court of South Africa
(Gauteng Local Division)

Case No. 40602/16

In the matter between:

SMM HOLDINGS (PRIVATE) LIMITED

Plaintiff

and

MUTUMWA DZIVA MAWERI

Respondent

RETURN: NON-SERVICE OF COURT ORDER DATED 15 MARCH 2023

IT IS HEREBY CERTIFIED:

That on 23 March 2023after various attempts as listed below, at 62 CAMBRIIDGE ROAD BRYANSTON the COURT ORDER DATED 15 MARCH 2023 could not be served as the Respondent could not be found. The premises are constantly locked and it could not be ascertained whether the Respondent still resides there. The occupier does not react to any written messages left for him to contact our office. Due to the mounting costs the COURT ORDER DATED 15 MARCH 2023 is returned herewith, for your further instructions.

ATTEMPT(S):

20 March 2023 at 10h50 - Attempt - No answer.

22 March 2023 at 07h30 - Attempt - No answer.

REMARK(S):

Kindly note that I could not determine who or if anybody is staying here.

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Attempted Service	63.50	3	190.50				
Photo Copies / E-mail printed	6.50	3	19.50				
Registration & Return	65.00	1	65.00				
Collection	12.50	1	12.50				
Data	16.50	1	16.50				
Document returned	12.00	1	12.00				
Travelling.	6.00	16	96.00				

TO: Registrar Johannesburg

Zero rated items	0.00
Sub-total	412.00
VAT	61.80
Total	**473.80**

Account No.: MDLA PIPER

TO: DLA PIPER SOUTH AFRICA INCORPORA
PRIVATE BAG X17
BENMORE

2010

Your Reference: VAN ONSELEN

Mr R Gie - Deputy Sheriff
(Properly appointed in terms of Section 6(1) of the Sheriff's Act No. 90/1986)
Signed at Sandton on 24/03/23
My Reference: 2022/00/18188.00 / JH

Sheriff Sandton North - K I Mphahlele
P.O. Box 1572 Randburg 2125
Tel: 011 326 3170 Fax: 086 613 0853
Standard Bank Acc No: 002965984
VAT No./BTW Nr. 4760264160

RM

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

38 CA3

Case No. 40602/16 004-22

In the matter between:

SMM HOLDINGS (PRIVATE) LIMITEI

Applicant

and

MUTUMWA DZIVA MAWERI

Respondent

and

RETURN: SERVICE OF COURT ORDER DATED 15 MARCH 2023

IT IS HEREBY CERTIFIED:

That on 04 May 2023 at 10h01 at AFRICAN HERITAGE SOCIETY,, 1ST FLOOR, AHS BUILDING,, 325 RIVONIA BOULEVARD,, SANDTON being the principal place of business of MUTUMWA DZIVA MAWERE, a copy of the COURT ORDER DATED 15 MARCH 2023 was served to ANDREW BETA-RECEPTION after the original document was displayed and the nature and contents thereof explained to him. ANDREW BETA a person apparently not less than sixteen years of age accepted service. Rule 4[1](a)(v).

NB: THE DEFENDANT HAVE AN OFFICE HERE BUT HE DOES NOT COME TO THE OFFICE EVERYDAY. HE SOMETIMES TAKE MONTHS NOT COMING TO THE OFFICE.

SHERIFF CHARGES/EXPENSES: (You may require that this account be taxed and vouched before payment)

Description	Tariff	QTY	Amount	Description	Tariff	QTY	Amount
COLLECTION AT OFFICE	6.00	1	6.00				
Service	71.00	1	71.00				
Faxemail	20.00	1	20.00				
Registration & Return	65.00	1	65.00				
Travelling.	6.00	50	300.00				
Urgent Service	670.68	1	670.68				

TO: THE REGISTRAR OF THE HIGH COURT, JOHANNESBURC

Zero rated items	0.00
Sub-total	1 132.68
VAT	169.90
Total	**1 302.58**

Account No.: D12941

TO: DLA PIPER SOUTH AFRICA (RF) INC. (C(
6TH FLOOR
61 KATHERINE STREET
SANDTON
2196

Your Reference: EFT/K Simpson/N Van Onselen/N Se

MR C RYNEVELDT - DEPUTY SHERIFF
(Properly appointed in terms of Section 6(1) of the Sheriff's Act No. 90/1986)
Signed at Sandton on 04-05-23
My Reference: 2023/00/04629.00 / OPR1

Sheriff Sandton South - F R Moeletsi
P O BOX 67 HALFWAYHOUSE 1685
Tel: 087 330 0969 Email: accounts@sheriffsandton.co.za
Standard Bank Acc No.: 012 801 747 DX-127 R 004-22
VAT No./BTW Nr. 4390216432

38

004-23 "A4"

In the High Court of South Africa
(Gauteng Local Division)

Case No. 40602/16

In the matter between:

SMM HOLDINGS (PRIVATE) LIMITEI

Applicant

and

MUTUMWA DZIVA MAWERI

Respondent

RETURN: SERVICE OF COURT ORDER

IT IS HEREBY CERTIFIED:

That on the 04 May 2023 at 09h40 at 62 CAMBRIDGE ROAD BRYANSTON being the place of residence of MUTUMWA DZIVA MAWERE a copy of the Court Order was served by affixing it to the main entrance, as requested. After a diligent search and enquiry, no other manner of service was possible at the given address.

REMARK(S):

Kindly note that the premises is vacated & locked. None of the member or employees available.

SHERIFF CHARGES/EXPENSES: (You may require that this account be taxed and vouched before payment)

Description	Tarifl	QTY	Amount	Description	Tarifl	QTY	Amount
Service	84.50	1	84.50	Urgent Service	950.00	1	950.00
E-mail Sent / Received	16.00	1	16.00				
Photo Copies / E-mail printed	6.50	3	19.50				
Registration & Return	65.00	1	65.00				
Collection	12.50	1	12.50				
Document returned	12.00	1	12.00				
Travelling.	6.00	16	96.00				

TO: Registrar Johannesburg

Zero rated items	0.00
Sub-total	1 255.50
VAT	188.32
Total	**1 443.82**

Account No.: MDLA PIPER

TO: DLA PIPER SOUTH AFRICA INCORPORA
PRIVATE BAG X1
BENMORE

2010

Your Reference: K SIMPSON/N VAN ONSELEN

Mr N A Mafodi - Urgent - Deputy Sheriff
(Properly appointed in terms of Section 6(1) of the Sheriffs Act No. 90/1986)
Signed at Sandton on 04/05/23
My Reference: 2022/00/20250.00 / JH

Sheriff Sandton North - K I Mphahlele
P.O. Box 1572 Randburg 2125
Tel: 011 326 3170 Fax: 086 613 0853
Standard Bank Acc No: 002965984
VAT No./BTW Nr. 4760264160

004-23

In the High Court of South Africa
(Gauteng Local Division)

Case No. 40602/16

In the matter between:

SMM HOLDINGS (PRIVATE) LIMITEL

Applicant

and

MUTUMWA DZIVA MAWERI

Respondent

RETURN: SERVICE OF COURT ORDER

IT IS HEREBY CERTIFIED:

That on the 04 May 2023 at 09h40 at 62 CAMBRIDGE ROAD BRYANSTON being the place of residence of MUTUMWA DZIVA MAWERE a copy of the Court Order was served by affixing it to the main entrance, as requested. After a diligent search and enquiry, no other manner of service was possible at the given address.

REMARK(S):

Kindly note that the premises is vacated & locked. None of the member or employees available.

SHERIFF CHARGES/EXPENSES: (You may require that this account be taxed and vouched before payment)

Description	Tarifl	QTY	Amount	Description	Tarifl	QTY	Amount
Service	84.50	1	84.50	Urgent Service	950.00	1	950.00
E-mail Sent / Received	16.00	1	16.00				
Photo Copies / E-mail printed	6.50	3	19.50				
Registration & Return	65.00	1	65.00				
Collection	12.50	1	12.50				
Document returned	12.00	1	12.00				
Travelling.	6.00	16	96.00				

TO: Registrar Johannesburg

Zero rated items	0.00
Sub-total	1 255.50
VAT	188.32
Total	**1 443.82**

Account No.: MDLA PIPER

TO: DLA PIPER SOUTH AFRICA INCORPORA
PRIVATE BAG X1?
BENMORE

2010

Your Reference: K SIMPSON/N VAN ONSELEN

Mr N A Mafodi - Urgent - Deputy Sheriff
(Properly appointed in terms of Section 6(1) of the Sheriff's Act No. 90/1986)
Signed at Sandton on 04/05/23
My Reference: 2022/00/20250.00 / JH

Sheriff Sandton North - K I Mphahlele
P.O. Box 1572 Randburg 2125
Tel: 011 326 3170 Fax: 086 613 0853
Standard Bank Acc No: 002965984
VAT No./BTW Nr. 4760264160

In the High Court of South Africa
(Gauteng Local Division)

Case No. 40602/16

In the matter between:

SMM HOLDINGS (PRIVATE) LIMITED

Applicant

and

MUTUMWA DZIVA MAWERE

Respondent

RETURN: SERVICE OF COURT ORDER

IT IS HEREBY CERTIFIED:

That on the 04 May 2023 at 09h40 at 62 CAMBRIDGE ROAD BRYANSTON being the place of residence of MUTUMWA DZIVA MAWERE a copy of the Court Order was served by affixing it to the main entrance, as requested. After a diligent search and enquiry, no other manner of service was possible at the given address.

REMARK(S):

Kindly note that the premises is vacated & locked. None of the member or employees available.

SHERIFF CHARGES/EXPENSES: (You may require that this account be taxed and vouched before payment)

Description	Tariff	QTY	Amount	Description	Tariff	QTY	Amount
Service	84.50	1	84.50	Urgent Service	950.00	1	950.00
E-mail Sent / Received	16.00	1	16.00				
Photo Copies / E-mail printed	6.50	3	19.50				
Registration & Return	65.00	1	65.00				
Collection	12.50	1	12.50				
Document returned	12.00	1	12.00				
Travelling.	6.00	16	96.00				

TO: Registrar Johannesburg

Zero rated items	0.00
Sub-total	1 255.50
VAT	188.32
Total	**1 443.82**

Account No.: MDLA PIPER

TO: DLA PIPER SOUTH AFRICA INCORPORA
PRIVATE BAG X17
BENMORE

2010

Your Reference: K SIMPSON/N VAN ONSELEN

Mr N A Mafodi - Urgent - Deputy Sheriff
(Properly appointed in terms of Section 6(1) of the Sheriff's Act No. 90/1986)
Signed at Sandton on 04/05/23
My Reference: 2022/00/20250.00 / JH

Sheriff Sandton North - K I Mphahlele
P.O. Box 1572 Randburg 2125
Tel: 011 326 3170 Fax: 086 613 0853
Standard Bank Acc No: 002965984
VAT No./BTW Nr. 4760264160

Nicole Sentoo

Subject: FW: TAP Zambia Limited // DLA Piper (RAF) Inc [DLAP-UKMATTERS.FID6166878]
Attachments: Judgment_TAP Zambia_June 2008 (5).pdf; SMM order.PDF

From: Mutumwa Mawere <mdmawere1@gmail.com>
Sent: Thursday, March 30, 2023 10:27:02 AM
To: jurol@boaf10000pol.co.za <jurol@boaf10000pol.co.za>
Cc: Nnetshitahame@justice.gov.za <Nnetshitahame@justice.gov.za>; malebo@presidency.gov.za <malebo@presidency.gov.za>; nyamadzieddy2020@gmail.com <nyamadzieddy2020@gmail.com>; janicegreaver@gmail.com <janicegreaver@gmail.com>; stanleymumbula@yahoo.com <stanleymumbula@yahoo.com>; mudekunyejo@gmail.com <mudekunyejo@gmail.com>; consult@jfgmatiza.com <consult@jfgmatiza.com>; theo@dttrust.co.za <theo@dttrust.co.za>; Kirsty Simpson <Kirsty.Simpson@dlapiper.com>
Subject: Re: TAP Zambia Limited // DLA Piper (RAF) Inc

EXTERNAL

Dear Ms. Simpson,

This serves to inform you that I have read the contents in the email addressed to me personally among others.

I attach hereto a copy of the Supreme Court Judgment in relation to the legality and validity of the asserting rights and claims pursuant to the Zimbabwean reconstruction laws.

I believe that the facts of the Zambian dispute intersect with the facts of the SMM under reconstruction that you and your firm prosecuted in relation to SA juristic and natural persons.

I am writing in my capacity as a natural person as defined in s8(2) of the Constitution as read with s2 of the Constitution regarding the supremacy of the Constitution that regulates the conduct and laws in relation to their consistency of the constitution.

It is trite that the sequestration judgment was prosecuted in the name of SMM Holdings Private Limited (SMM) when you are fixed with the knowledge that a reconstruction order that was issued by the then Minister of Justice, Legal & Parliamentary Affairs in terms of the Reconstruction of State-Indebted Insolvent Companies Act, a law that is inconsistent with the Constitution of South Africa as well as the laws of Zambia per the Supreme Court judgment of June 2008, created no company and as such a Company under the control of a creature of a foreign law that is inconsistent of the SA constitution has no locus to assert claims or rights against SA persons - natural and juristic.

Notwithstanding the bill of rights that all persons including state organs that impose binding obligations to all to promote and protect, it is clearly evident that you and your firm are above the constitution to permit you to audaciously assert rights and freedoms that were acquired by force of a foreign law.

It is trite that SA is a sovereign nation and no law of a foreign state that is inconsitent with the SA constitution can be recognized and enforced in SA.

I am writing this email in order that the urgency of the matter under case number 22/054016 that is pending in which the President of South Africa is a respondent, my recognize the contempt in his decision to refuse, fail and neglect to be involved in this important constitutional matter regarding his constitutional duty to obey, respect, uphold and defend the supremacy of the constitution as the law he is obligated in terms of his oath of office to adhere to.

It is clearly evident that you may have refused to apply your mind to the facts contained in the correspondence to you dealing with the facts of TAP, a company that was a customer of SMM prior to the state capture or more specifically as at 31 March 2004 when the alleged claim established via fraudulent court proceedings on the basis that the commercial relationship between SMM and SAS, a South African registered company, was that of a buyer and seller when in truth and fact no asbestos was sold by SMM and delivered to SAS.

It is instructive that the reality known to Gwaradzimba and the Minister he reported to was that SMM delivered asbestos not to SAS but directly to TAP.

It was SMM that invoiced TAP with instructions by SMM to pay through SMM's agent, SAS. Accordingly, Messrs. Gwaradzimba and Manikai who were the driving forces in your firm's agency were fixed with the knowledge of TAP's indebtedness to SMM yet your firm proceeded to commit fraud on the SA courts claiming that SAS had received goods that were never supplied.

As a consequence, TAP sought legal and commercial counsel on what to do with the payments that should have been made to SAS for onward remittance to SMM.

It is chilling that inspite of this fraud, your firm has not taken its serious constitutional obligations to protect the SA constitution against the fraud in the Epstein AJ judgment.

It is against this background, that I am writing this letter to remind you personally and your firm of the binding obligations to ensure that the rule of law is promoted and protected with no exceptions using the following grounds:

1. Your conduct in prosecuting a matter and obtaining Court judgments in the name of SMM Holdings Private Limited when your client is de facto the government of Zimbabwe falls within the ambit of the s2 of the Constitution.
2. Your conduct in misrepresenting to various SA courts that SMM sold and delivered asbestos in the territory of South Africa permitting you to prosecute fraudulent claim in foreign currencies against SAS when no facts existed that SAS had any clients and that it was not an agent in relation to commercial dealings with SMM constitutes conduct that falls within the ambit of s2 of the constitution.

Regards

On Fri, Mar 24, 2023 at 3:56 PM <jurol@boaf10000pol.co.za> wrote:

Good day sirs,

Kindly see attached letter for your attention.

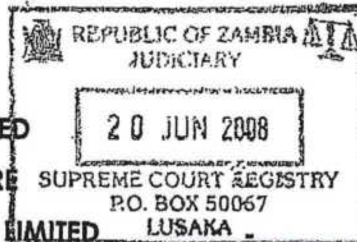
I trust that you find this in order.

Regards,

43

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT KABWE AND LUSAKA
(CIVIL JURISDICTION)

SCZ APPEAL NO.89 OF 2006



BETWEEN:

AFRICA RESOURCES LIMITED		1ST APPELLANT
MUTUMWA DZIVA MAWERE		2ND APPELLANT
TAP BUILDING PRODUCTS LIMITED	-	3RD APPELLANT
MEANWOOD HOLDINGS LIMITED	-	4TH APPELLANT
AND		
AFARAS MTAUSI GWARADZIMBA (Suing in his capacity as Administrator of SMM Holding Private Company)	-	1ST RESPONDENT
SMM HOLDINGS PRIVATE LIMITED	-	2ND RESPONDENT

CORAM : Chitengi, Silomba and Mushabati, JJS.
On 6th November, 2007 and 13th June, 2008
For the 1st and 2nd Appellant : Mrs I.M. Kunda of George Kunda and Company
For the 3rd Appellant: Mr N. Nchito of MNB
For the 4th Appellant: Mr C. Mabutwe of Mabutwe and Company
For the Respondents: Mr M.M. Mundashi of Mulenga Mundashi and Company

JUDGMENT

Mushabati, JS., delivered the judgment of the Court.

Cases referred to:

1. Salomon and Salomon Company Ltd[1895-1899] ALL E.R.33

Legislation referred to:

Companies Act, Cap. 388 of Laws of Zambia – SS.10,11, 22(1) and 211
Reconstruction of State- Indebted Insolvent Companies Act Cap. 24:27 of the Laws of Zimbabwe
Residential Powers(Temporary Measures)(Reconstruction of State Indebted Insolvent Companies) Regulations, 2004 – S.I.187 of 2004 of the Laws of Zimbabwe

This is an appeal against the High Court judgment of 30th January, 2006. In this judgment we refer to the appellants as the defendants and the respondents as the plaintiffs the designations they held in the court below.

The plaintiffs, by originating summons, commenced an action against the defendants for the following reliefs, which are the subject of this appeal.

1. ***A declaratory order that by virtue of the presidential powers (Temporary measures) (Reconstruction of State-Indebted Insolvent Companies) Regulations, 2004 (published in Statutory Instrument 187 of 2004 of the Laws of Zimbabwe) (as amended) as read with the Reconstruction of State-Indebted Insolvent Companies Act Chapter 24 ; 27 of the Laws of Zimbabwe (the Reconstruction laws), TAP Building Products Limited a Company (the 3rd Defendant) which is an associate and or subsidiary of the 2nd Plaintiff and be deemed to be a Company under reconstruction in terms of the Reconstruction laws and therefore under the control and direction of the 1st Plaintiff.***
2. ***An order that the meeting of 16th June 2005 purportedly dissolving the existing Board of the 3rd Defendant and replacing it with a new one be declared null and void.***

The trial court granted the above reliefs hence this appeal before this court. This case was disposed of on affidavit evidence.

The plaintiffs' evidence can be summarized as follows. The second plaintiff is a Company incorporated in Zimbabwe and the first plaintiff is Administrator of the second plaintiff Company. The first plaintiff's appointment was through a certificate signed by the Minister of Justice, Legal and Parliamentary Affairs of the Republic of Zimbabwe. This document is document No. 73 in the record of appeal. The 2nd plaintiff Company is a Holding Company of a number of Companies incorporated in Zimbabwe. It was also a holding Company for the only two Zimbabwe asbestos mines.

The 1st defendant is Company incorporated in the British Virgin Islands but at the same time operating or carrying business in the Republic of South of Africa, where it is controlled by the 2nd defendant. On 6th March, 1996 the 1st defendant concluded a sale and purchase agreement, as a shareholder, of the outstanding shares in the following companies, SMM Holdings U.K Limited (SMM U.K), THZ Holdings U.K. Limited (THZ U.K) and TAP Building Products Limited, the 3rd defendant Company, which is incorporated under the Zambian Laws. SMM U.K. has controlling share-holding in the 2nd plaintiff Company. SMM U.K, THZ U.K and the 3rd defendant were, before the acquisition agreement, owned by subsidiary Companies of T and N International Limited. After the acquisition of the three companies, the shares in the 3rd defendant Company were held by the 1st defendant. As a result of the Acquisition Agreement the following arrangement existed; SMM UK and THZ UK were controlled by the 1st defendant.

The second plaintiff was controlled by SMM UK which, itself, was controlled by the 1st defendant. The third defendant was controlled by the 1st defendant.

In the final analysis it became obvious that 2nd plaintiff and 3rd defendant were under the control of 1st defendant which also controlled the 2nd defendant, a South African National born in Zimbabwe. In its operations, the 2nd plaintiff

obtained various loans and became indebted to the Government of Zimbabwe and had difficulties in repaying back the loans. The 2nd plaintiff was as a result of its indebtedness placed under "Administration" pursuant to the **Presidential Powers (Temporary Measures)(Reconstruction of State Indebted Insolvent Companies) Regulations of 2004 of The Reconstruction of State Indebted Insolvent Companies Act Cap.24.27 of Laws of Zimbabwe.**

The affairs or the running of the 2nd plaintiff was placed under an Administrator appointed in accordance with the Laws of Zimbabwe. The 3rd defendant, being an Associate Company of the 2nd plaintiff, was intended to be put under Administratorship of the first plaintiff because only then could the 2nd plaintiff, through the 1st plaintiff, have been able to dispose or deal with the assets in the 3rd defendant Company, in accordance with the Zimbabwe an Laws. The first plaintiff later informed the Chairman of the third defendant of his desire to work with the 3rd defendant's Board. The 3rd defendant's reaction to the said correspondence was to convene a Board Meeting, through KPMG Corporate Secretaries, and came out with a resolution to remove the then existing Directors despite being advised by Messrs Mulenga Mundashi and Company that the notice concerning the meeting was defective. KPMG responded to Messrs Mulenga Mundashi's letter saying that the 2nd plaintiff had no association with the 3rd defendant and consequently a Board resolution, removing the 3rd defendant's existing Board and replaced it with new Directors who intended to declare dividend to benefit the 1st and 2nd defendants, was passed on 16th June, 2005.

This is the brief summary of the evidence in support of the plaintiff's claims.

In opposing the application, the 2nd defendant informed the third defendant Company's Board Chairman of the acquisition of 60% shareholding by

Meanwood Holding Limited, the 4th defendant, in the third defendant Company. The third defendant Company is a Company registered under the Zambian Law which requires that its shareholders and equity holder be registered with the Registrar of Companies. This being the case, the allegation that the 1st and 2nd defendants intended to externalize funds from the 3rd defendant's declared dividends was not true. There existed no resolution which was passed to declare interim dividend to shareholders. The Board that was chaired by one David Phiri was dissolved by resolution and this aggrieved him (the Chairman) as he depended, for his livelihood, on his continued membership of the third defendant's Board. The 1st defendant directed KPMG, the Corporate Secretary, to convene an extra ordinary meeting by issuing a notice but failed to comply with the directive. The second defendant who personally perused the third defendant's statutory accounts, observed that there was an exaggeration that it was going through some financial difficulties. The source of this exaggerated information was the 1st plaintiff. The 2nd defendant further deposed that the allegation that the 3rd defendant depended on the 2nd plaintiff for its raw materials and that the changes made at the 3rd defendant (by the appointment of new Board of Directors) would cause strained relationship with the suppliers was a pure malicious smear because this was not true. No strain of relationships could be caused because the 2nd plaintiff needed to have hard currency from Zambia. He went on to say that externalization of dividends is authorized by the Zambia Revenue Authority was allowed in Zambia because Zambia is liberalized democratic economy. At the time the new Board was accused of conniving with the 1st and 3rd defendants to declare dividends it (the New Board) had not yet held its inaugural meeting; so the allegations were a mere fabrication by the 1st plaintiff and the former Board Chairman of the 3rd defendant Company.

On the 1st defendant Company, a Company incorporated in the British Virgin Island, the 2nd defendant admits of having incorporated it and that he was its founding Chairman. The 1st defendant later acquired the entire share capital in the 3rd defendant Company through its wholly owned subsidiary Company called African Construction Limited, also incorporated in the British Virgin Island. The transaction was basically a commercial deal or venture between two private companies. When the Government of Zimbabwe realized that the 1st defendant had acquired the 2nd plaintiff Company, it passed a special Law in 2004 which provided for extra-judicial expropriation of Companies which the Government deemed to be state indebted. As a result of this Law, the 1st plaintiff has taken over assets of the Companies deemed to be under the 2nd defendant's control. The off-shore line credit that was acquired by the 2nd plaintiff was paid off in November, 2002. This was done without the Government of Zimbabwe's intervention, though it was the guarantor.

Companies, like the 3rd defendant, which had operations outside Zimbabwe, had their Board of Directors controlled by the 2nd plaintiff and their executive staff appointed by it (2nd plaintiff). The Zimbabwean Reconstruction Law had no application outside Zimbabwe as to give rise to these proceedings now under review. The 3rd defendant being a Zambian Registered Company under the Laws of this country and the 2nd plaintiff being a Zimbabwean Registered Company, the Zimbabwean Laws are not applicable to operations of the third defendant. An Administrator appointed under Zimbabwean Law has no jurisdiction over a Zambian Company or Companies.

The affidavit of Parmanattan Mariemunthu, a director in the 1st defendant Company, showed that the relief sought by the plaintiffs was based on unconstitutional draconian legislation.

One Robinson Kaleb Zulu, a director appointed by former Board Chairman of the 3rd defendant Company, said though he was appointed as such in January, 2005 dividends for the shareholders were never discussed. The Company's financial statements showed good financial performance. Meetings were held between the 3rd defendant and Meanwood Property Development Corporation and it was noted that both Companies would benefit through his participation on the Board of the combined efforts of the two Companies. The 3rd defendant's shareholders accepted his 60% offer of shareholding in the 3rd defendant on behalf of the 4th defendant.

The above are the brief relevant evidence in this case.

At the time of the trial, the lower court heard that the 3rd defendant Company was an associate Company of the 2nd plaintiff and was deemed to be under reconstruction as per **Presidential Powers (Temporary Measures) (Reconstruction of State Indebted Insolvent Companies) Regulations, 2004 Statutory Instrument No. 187 of 2004 as read with the State Indebted Insolvent Companies Act, Cap. 24;27 of the Laws of Zimbabwe.**

The defendants, being unhappy with decision appealed to this court and has filed five grounds of appeal. These are;

1. **The learned trial Court erred in law and fact when it subjected the 3rd Defendant, a company incorporated in Zambia to Zimbabwean legislation, a foreign law, which is not applicable to it.**
2. **The learned trial Court erred in law and fact when it held that the extraordinary meeting of the majority shareholders which was held to remove the Board of Director of the 3rd Appellant was void for want of twenty eight (28) days notice.**

3. **The learned trial Court erred in law and fact when it held that the agreement for the sale of 60% shares of 3rd Appellant to the 4th Appellant not having been sanctioned by the Respondent was null and void.**
4. **The learned trial Court erred in law and fact when it admitted in evidence documents which were not separately authenticated just because they were exhibited to an affidavit which was sworn before a notary public.**
5. **Or in the alternative, the learned trial Court erred in law and fact when it dealt with the Respondent's application which was commenced by way of Originating Summons which depended on evidence being called by both sides as regards, inter alia, the question of insolvency of the 3rd Appellant, relationship between the 3rd Appellant and 2nd Respondent, shareholding of the 3rd Appellant and so forth.**
6. **Such further grounds as may be submitted at the hearing of the Appeal.**

The defendants, excepting the 3rd defendant, filed in written heads of arguments on which they entirely relied. The 3rd defendant indicated that he was not filing any written arguments.

The learned Counsel for the 1st and 2nd defendant's argued the first and fifth grounds of appeal, beginning with the last one. In arguing the 5th ground of appeal Mrs Kunda stated that the 1st prayer that TAP Building Products be declared a Company under reconstruction in terms of **Reconstruction Laws of Zimbabwe** and that the meeting held on 16th June, 2005 be declared null and void, were of declaratory nature. The court below therefore, misdirected itself when proceeding with this case through an Originating Summons. The issues raised in the summons and affidavits, together with the accompanying documents, could only be resolved through viva voce evidence so that the deponents could have been subjected to cross-examination. In short the proceedings were wrongly commenced.

It was further argued that the court below, not having conducted a trial, failed to consider the evidence contained in the 2nd defendant's affidavit as it related to the relationship between the 2nd plaintiff and the 3rd defendant which was based on trade relationship. The court below also failed to take into account the evidence that the 2nd plaintiff was not registered shareholder, in the third defendant Company, at the Companies' Registry in Zambia.

On the first ground the learned Counsel basically argued that the court below erred in law and fact when it held that TAP Building Products Limited, a Company incorporated in Zambia, can be subjected to foreign law of Zimbabwe. The law applicable ought to have been the Zambian Law because the agreement signed in this case, dated 7th March, 1996 at pages 74-97 of the record of appeal volume, clearly stated under clause 22 (1) (c) it was t he applicable Law.

The fourth appellant argued the appeal on two grounds only namely the 1st and 4th grounds. It was argued on the 1st ground that the **Zimbabwean Presidential Power (Temporary Measures) (Reconstruction of State Indebted Insolvent Companies) Regulation 2004 (Statutory Instrument No. 87 of 2004)** was not applicable to Zambia. The written law which is applicable in Zambia is defined under ***Section 3 of the Interpretation and General Provisions Act, Cap.2 of the Laws of Zambia.***

Further **Section 51** of the said **Act** states as follows:

51(1) No written law shall in any manner whatsoever affect the rights of the Republic unless it is therein expressly provided or unless it appears by necessary implication that the Republic is bound thereby.

The Zimbabwean Law could therefore, not be applied in Zambia without a validating Act for its application in Zambia. It was further argued that our own Constitution, under **Article 16**, forbids compulsory acquisition of a person's property unless it is done under an Act of Parliament.

Lastly on the fourth ground Mr Mabutwe argued that the certificate of Appointment of the Administrator was executed in Zimbabwe by a third party and it was not separately authenticated. This document could be equated to an appointment of a receiver in Zambia. The Authentification of the said certificate was mandatory under ***Section 2 of the Authentication of Documents Act, Cap. 75 of the Laws of Zambia.*** The said document having not been authenticated could not be used and relied upon in the courts of Zambia.

In response to the arguments by the 1st and 2nd appellant, Mr Mundashi's submission was that the proceedings were properly commenced in that the issue before the court below was in fact the interpretation of Law i.e. whether the **Presidential Powers (Temporary Measures) (Reconstruction of State Indebted Companies) Regulations 2004** were applicable in Zambia or not. This matter could therefore, be disposed of in chambers as per ***Order VI rule 2 of the High Court Rules, Cap. 27 as authorized under Rule 11 of order 30.***

The legal issues for consideration are:

(i) Whether an administrator appointed under the Zimbabwean laws could claim and exercise rights over an asset situated in Zambia but associated with a Company in Zambia.

(ii) Secondly whether Board of Directors could be dismissed in a manner that was inconsistent with the Companies Act or Articles of Association.

On the prayers being declaratory orders, Mr Mundashi argued that this issue was not raised in the court below and so it cannot be raised here. Mr Mundashi argued the second ground which neither the Counsel for the 1st and 2nd defendant nor the Counsel for 4th defendant argued. We take it that this was abandoned and so we do not wish to comment on it.

In response to the 4th appellant's argument Mr Mundashi stated that the Zimbabwean law was cited as a fact and not in respect to its binding nature in Zambia, because it (fourth defendant) joined the proceedings as an intervenor which had acquired 60% of the controlling equity share in the 3rd defendant. The acquisition of the 60% shares in Tap was done without following the provisions in the 3rd defendant's own Articles of Association. The meeting itself was not convened by the Directors of the 3rd defendant Company but by the Company Secretaries, KPMG for the sole purpose of removing the previous directors. Such a resolution to have a binding effect, a notice of 28 days was required to be given in accordance with ***Section 211of the Companies Act, Cap. 388.***

The fourth defendant, like the others, did not argue the second ground of appeal, so even if the respondents have argued it we do not intend to consider it because we deem it to have been abandoned.

We have carefully considered the evidence, the law and the judgment appealed against. We find that there was no dispute that the 3rd defendant Company was a registered Company in Zambia with some connections to some shareholders based in Zimbabwe.

In fact one of the shareholders is a Zimbabwean registered Company namely SMM Holdings Private Company, the 2nd plaintiff. The third defendant was termed as an "Associate Company" of the 2nd plaintiff which was put under

reconstruction pursuant to the **Presidential Powers (Temporary Measures) (Reconstruction of State Indebted Insolvent Companies) Regulations 2004. This law was under Zimbabwean Law.**

The plaintiff's argument was that since the 2nd plaintiff Company was subject to reconstruction under Zimbabwean Laws of Reconstruction, the 3rd defendant was also affected by the fact that it was an associate Company to the 2nd plaintiff. The proceedings against the 3rd defendant in this case were founded on the Zimbabwean Laws called the Presidential Powers (Temporary Measures) (Reconstruction of State Indebted, Insolvent Companies) Regulations, 2004 (Statutory Instrument No. 187 of 2004).

The real question before us is whether the 3rd defendant Company was subject to Zimbabwean Laws. This Company was incorporated under Zambian Law i.e the ***Companies Act, Cap.388.*** Zambia and Zimbabwe are two separate and distinct sovereign states each with its own laws. Admittedly the 3rd defendant's shareholders may have been based in Zimbabwe but then its registration was done in Zambia under ***Section 10 (1)*** as read with ***Section 11*** all of ***the Companies Act, Cap. 388.*** These sections read as follows:

10 (1) Where an application for incorporation and the documents referred to in section six have been duly lodged, the Registrar shall, subject to this Act, issue a certificate in the prescribed form stating that the company is, on and from the date specified in the certificate, incorporated and that the company is the type of company specified in the application for incorporation.

11. On and from the date of incorporation specified in the certificate of incorporation, but subject to this Act, there shall be constituted an incorporated company by the name set out in the certificate.

Once a Company is formed it becomes a legal entity independent of its shareholders as per ***Salomon Vs Salomon Company Ltd (1).*** This is buttressed by our own Law in **Section 22(1) of the Companies Act Cap. 388** which reads:

(1) A Company shall have, subject to this Act and to such limitations as are inherent in its corporate nature, the capacity, rights, powers and privileges of an individual.

(2) A Company shall have a capacity to carry on its business and exercise its powers in any jurisdiction outside Zambia to the extent that the laws of Zambia and of that jurisdiction permit.

In view of what we have said above the 3rd defendant company is a legal entity with powers, rights, capacity and privileges which a natural person has. It can sue and be sued in its own name. The shareholders do not own the Company but merely own the shares allocated to them.

We have said elsewhere above that this action was founded on the **Zimbabwean Law.** The reason for this was that the third defendant Company was called an associate Company of the company which was subject to reconstruction pursuant to the **Reconstruction of State Indebted Insolvent Companies Act chapter 24:27 of the Laws of Zimbabwe as read with Presidential Powers (Temporary Measures)(Reconstruction of State Indebted Insolvent Companies) Regulations 2004 (S.I. 187 of 2004).**

The effect of Reconstruction of Company is provided for under **Regulation 6.** In a nutshell a company under a **Reconstruction Order** is placed under the control and management of an Administrator. The equivalent of Reconstruction in our own laws is Receivership. A Company placed under Receivership is placed

under the control and management of a Receiver/Manager. This is done when a company is insolvent.

If the 3rd defendant company was insolvent, surely necessary action could be taken within the ambit and spirit of our Zambian Law. Our Laws do not provide for what is described as "Associate Company" under the Zimbabwean Laws. The intended reconstruction of the 3rd defendant company was to be done in accordance with the Zimbabwean Laws. We have already said that Zambia is a sovereign state with its own laws. Zimbabwean laws do not apply in Zambia. The only foreign laws that may be applied in Zambia are those provided for under the ***British Acts Extension Act, Cap. 10 of the Laws of Zambia.*** As clearly stated under **Section 51**of the **Interpretation and General Provisions Act, Cap. 2 of the Laws of Zambia** no written Law shall affect the rights of the Republic unless it is so provided or it is bound thereof by implication. The Zimbabwean Reconstruction Laws are not provided for under our Laws. Neither can they be implied. **Section 3 of Interpretation and General Provisions Act Cap.2** of the Laws of Zambia categorically defines the written Law, applicable in Zambia, as an **Act of Parliament, an Applied Act, and Ordinance and a Statutory Instrument. Applied Acts** are those that were made by the then Legislature of the Federation of Rhodesia and Nyasaland and Ordinances are Laws which were enacted by the Legislature of Northern Rhodesia.

The other Acts that are applicable in Zambia, as already stated above, are those prescribed under the **British Acts Extension Act, Cap.10 of our Laws.**

Admittedly the 3rd defendant company's shareholders or holding Company may be based in Zimbabwe but that does not make the 3rd defendant answerable to Zimbabwean laws. The learned trial Judge did say in his judgment **"There is no doubt that shareholders, as owners of a company can do anything**

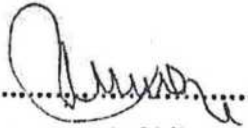
that they deem fit but they must comply with the law....." It is clear from this that shareholders in dealing with a company must do so in compliance with the law. This being the case we find no justification in the importation of the Zimbabwean Laws into this country when we have in place our own Laws under which the 3rd defendant Company was incorporated. The 3rd defendant, being a body corporate, had its own rights under our Laws like an individual natural person. It cannot be subjected to the Laws of its foreign based shareholders. The reference to the Zimbabwean Laws was uncalled for and there was no need for their application beyond Zimbabwe's borders in a foreign sovereign state.

We agree with the appellants advocates that the lower court erred when it up-held the claim based on foreign law, namely Zimbabwean Law, which is not applicable in Zambia. We therefore allow the first ground of appeal.

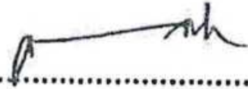
The next question we were asked to consider is whether the Board meeting that was held to have new Board members appointed was null and void. All we can say here is that this was supposed to be challenged using our own provisions of the Law. Reference was, of course, made to ***Section 211 of the Companies Act Cap. 388*** regarding the removal of directors. It will be noted that this issue was brought in for the purpose of justifying the main claim seeking the 3rd defendant company to be deemed as an Associate company of the 2nd plaintiff, which was subject to reconstruction pursuant to the **Reconstruction Laws of Zimbabwe.** The issue was therefore, not properly brought before the court. It ought to have been challenged on its own merit and not with an extraneous motive to give effect or legitimacy to a foreign statute.

All in all we are satisfied that the **Zimbabwean laws on Reconstruction** were not applicable in Zambia.

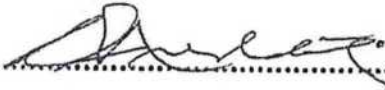
The defendants' appeals are allowed with costs, in default of agreement, to be taxed.



P.Chitengi
SUPREME COURT JUDGE



S.S. Silomba
SUPREME COURT JUDGE



C.S.Musahabati
SUPREME COURT JUDGE

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

CASE NO. 40602/16

JOHANNESBURG: WEDNESDAY, 15 MARCH 2023

BEFORE THE HONOURABLE JUDGE FISHER

In the matter between:

SMM HOLDINGS (PRIVATE) LIMITED — Applicant

and

MUTUMWA DZIVA MAWERE — Respondent

(DOB: 11 January 1960)

(Identity number: 6001116025083)

(Marital Status: Single)

2023 -03- 15
GLD-JHB-013

ORDER

Having considered the papers filed of record, having heard counsel, and having considered the matter, the following order is made:

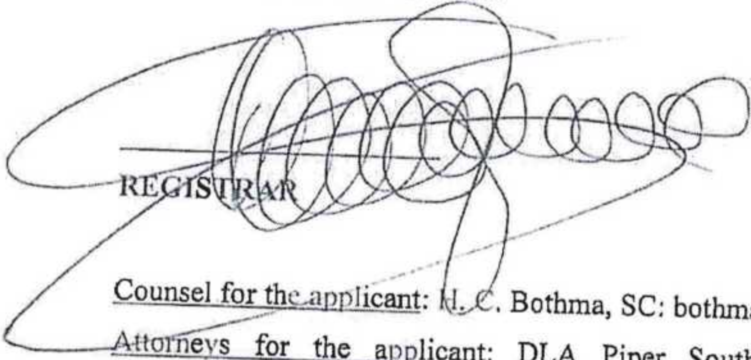
1. The Respondent's estate is placed under provisional sequestration.

2. The Respondent is called upon to advance the reasons, if any, why the court should not order final sequestration of the said estate on the 8TH day of MAY 2023 at 10H00 or so soon thereafter as the matter may be heard.

Sheriff Sandton South
2023 -03- 20
RECEIVED

3. The costs of the application shall be costs in the administration of the Respondent's insolvent estate.

BY ORDER OF THE COURT



REGISTRAR

Counsel for the applicant: H. C. Bothma, SC: bothma@law.co.za; 083 284 7267
Attorneys for the applicant: DLA Piper South Africa (RF) Inc., Kirsty Simpson: Kirsty.Simpson@dlapiper.com; 084 504 3919.

2023 -03- 15

GLD-JHB-013

Nicole Sentoo

From:	Nicole Sentoo
Sent:	Thursday, May 4, 2023 12:04 PM
To:	mdmawere1@gmail.com; mdmawere!@gmail.com
Cc:	Kirsty Simpson; bothma@law.co.za
Subject:	Electronic Service: Provisional Sequestration Court Order - SMM Holdings (Private) Limited v Mutumwa Dziva Mawere (Case number: 40602/16) [DLAP-UKMATTERS.FID6166878]
Attachments:	SMM HOLDINGS V MAWERE_Court Order (Provisional Sequestration).pdf
Importance:	High

Dear Mr Mawere,

Kindly find attached a copy of the provisional sequestration court order dated 15 March 2023.

Kind regards,

Nicole Sentoo
Candidate Attorney

T: +27113020841
nicole.sentoo@dlapiper.com

DLA Piper South Africa (RF) Incorporated
www.dlapiper.com

In the High Court of South Africa
(Gauteng Local Division)

Case No. 40602/16

In the matter between:

SMM HOLDINGS (PRIVATE) LIMITED

Applicant

and

RHODA KHUMALO

Respondent

RETURN: NON-SERVICE OF COURT ORDER

IT IS HEREBY CERTIFIED:

That on 23 March 2023after various attempts as listed below, at 62 CAMBRIIDGE ROAD BRYANSTON the COURT ORDER DATED 15 MARCH 2023 could not be served as the Respondent could not be found. The premises are constantly locked and it could not be ascertained whether the Respondent still resides there. The occupier does not react to any written messages left for him to contact our office. Due to the mounting costs the COURT ORDER DATED 15 MARCH 2023 is returned herewith, for your further instructions.

ATTEMPT(S):

20 March 2023 at 10h50 - Attempt - No answer.

22 March 2023 at 07h30 - Attempt - No answer.

SHERIFF CHARGES/EXPENSES: (You may require that this account be taxed and vouched before payment)

Description	Tariff	QTY	Amount	Description	Tariff	QTY	Amount
Photo Copies / E-mail printed	6.50	3	19.50				
Registration & Return	65.00	1	65.00				
Document returned	10.00	1	10.00				

TO: Registrar Johannesburg

Zero rated items	0.00
Sub-total	94.50
VAT	14.18
Total	108.68

Mr R Gie - Deputy Sheriff
(Properly appointed in terms of Section 6(1) of the Sheriff's Act No. 90/1986)
Signed at Sandton on 28/04/23
My Reference: 2022/00/20122.00 / JH

Account No.: MDLA PIPER

TO: DLA PIPER SOUTH AFRICA INCORPORA
PRIVATE BAG X1?
BENMORE

2010

Your Reference: K SIMPSON/N VAN ONSELEN

Sheriff Sandton North - K I Mphahlele
P.O. Box 1572 Randburg 2125
Tel: 011 326 3170 Fax: 086 613 0853
Standard Bank Acc No: 002965984
VAT No./BTW Nr. 4760264160

In the High Court of South Africa
(Gauteng Local Division)

Case No. 40602/16

In the matter between:

SMM HOLDINGS (PRIVATE) LIMITED

Applicant

and

RHODA KHUMALO

Respondent

RETURN: NON-SERVICE OF COURT ORDER

IT IS HEREBY CERTIFIED:

That on 23 March 2023after various attempts as listed below, at 62 CAMBRIIDGE ROAD BRYANSTON the COURT ORDER DATED 15 MARCH 2023 could not be served as the Respondent could not be found. The premises are constantly locked and it could not be ascertained whether the Respondent still resides there. The occupier does not react to any written messages left for him to contact our office. Due to the mounting costs the COURT ORDER DATED 15 MARCH 2023 is returned herewith, for your further instructions.

ATTEMPT(S):

20 March 2023 at 10h50 - Attempt - No answer.

22 March 2023 at 07h30 - Attempt - No answer.

SHERIFF CHARGES/EXPENSES: (You may require that this account be taxed and vouched before payment)

Description	Tariff	QTY	Amount	Description	Tariff	QTY	Amount
Photo Copies / E-mail printed	6.50	3	19.50				
Registration & Return	65.00	1	65.00				
Document returned	10.00	1	10.00				

TO: Registrar Johannesburg

Zero rated items	0.00
Sub-total	94.50
VAT	14.18
Total	**108.68**

Account No.: MDLA PIPER

TO: DLA PIPER SOUTH AFRICA INCORPORA
PRIVATE BAG X1?
BENMORE

2010

Your Reference: K SIMPSON/N VAN ONSELEN

Mr R Gie - Deputy Sheriff
(Properly appointed in terms of Section 6(1) of the Sheriff's Act No. 90/1986)
Signed at Sandton on 28/04/23
My Reference: 2022/00/20122.00 / JH

Sheriff Sandton North - K I Mphahlele
P.O. Box 1572 Randburg 2125
Tel: 011 326 3170 Fax: 086 613 0853
Standard Bank Acc No: 002965984
VAT No./BTW Nr. 4760264160

004-49 "CA8"

In the High Court of South Africa
(Gauteng Local Division)

Case No. 40602/16

In the matter between:

SMM HOLDINGS (PRIVATE) LIMITEI

Applicant

and

PRECIOUS

Respondent

RETURN: NON-SERVICE OF COURT ORDER

IT IS HEREBY CERTIFIED:

That on 23 March 2023after various attempts as listed below, at 62 CAMBRIIDGE ROAD BRYANSTON the COURT ORDER DATED 15 MARCH 2023 could not be served as the Respondent could not be found. The premises are constantly locked and it could not be ascertained whether the Respondent still resides there. The occupier does not react to any written messages left for her to contact our office. Due to the mounting costs the COURT ORDER DATED 15 MARCH 2023 is returned herewith, for your further instructions.

ATTEMPT(S):

20 March 2023 at 10h50 - Attempt - No answer.

22 March 2023 at 07h30 - Attempt - No answer.

SHERIFF CHARGES/EXPENSES: (You may require that this account be taxed and vouched before payment)

Description	Tariff	QTY	Amount	Description	Tariff	QTY	Amount
Photo Copies / E-mail printed	6.50	3	19.50				
Registration & Return	65.00	1	65.00				
Document returned	10.00	1	10.00				

TO: Registrar Johannesburg

Zero rated items	0.00
Sub-total	94.50
VAT	14.18
Total	108.68

Account No.: MDLA PIPER

TO: DLA PIPER SOUTH AFRICA INCORPORA
PRIVATE BAG X17
BENMORE

2010

Your Reference: K SIMPSON/ N VAN ONSELEN

Mr R Gie - Deputy Sheriff
(Properly appointed in terms of Section 6(1) of the Sheriff's Act No. 90/1986)
Signed at Sandton on 28/04/23
My Reference: 2022/00/20121.00 / JH

Sheriff Sandton North - K I Mphahlele
P.O. Box 1572 Randburg 2125
Tel: 011 326 3170 Fax: 086 613 0853
Standard Bank Acc No: 002965984
VAT No./BTW Nr. 4760264160

004-49

In the High Court of South Africa
(Gauteng Local Division)

Case No. 40602/16

In the matter between:

SMM HOLDINGS (PRIVATE) LIMITEL

Applicant

and

PRECIOUS

Respondent

RETURN: NON-SERVICE OF COURT ORDER

IT IS HEREBY CERTIFIED:

That on 23 March 2023after various attempts as listed below, at 62 CAMBRIIDGE ROAD BRYANSTON the COURT ORDER DATED 15 MARCH 2023 could not be served as the Respondent could not be found. The premises are constantly locked and it could not be ascertained whether the Respondent still resides there. The occupier does not react to any written messages left for her to contact our office. Due to the mounting costs the COURT ORDER DATED 15 MARCH 2023 is returned herewith, for your further instructions.

ATTEMPT(S):

20 March 2023 at 10h50 - Attempt - No answer.

22 March 2023 at 07h30 - Attempt - No answer.

SHERIFF CHARGES/EXPENSES: (You may require that this account be taxed and vouched before payment)

Description	Tariff	QTY	Amount	Description	Tariff	QTY	Amount
Photo Copies / E-mail printed	6.50	3	19.50				
Registration & Return	65.00	1	65.00				
Document returned	10.00	1	10.00				

TO: Registrar Johannesburg

Zero rated Items	0.00
Sub-total	94.50
VAT	14.18
Total	108.68

Account No.: MDLA PIPER

TO: DLA PIPER SOUTH AFRICA INCORPORA
PRIVATE BAG X1?
BENMORE

2010

Your Reference: K SIMPSON/ N VAN ONSELEN

Mr R Gie - Deputy Sheriff
(Properly appointed in terms of Section 6(1) of the Sheriff's Act No. 90/1986)
Signed at Sandton on 28/04/23
My Reference: 2022/00/20121.00 / JH

Sheriff Sandton North - K I Mphahlele
P.O. Box 1572 Randburg 2125
Tel: 011 326 3170 Fax: 086 613 0853
Standard Bank Acc No: 002965984
VAT No./BTW Nr. 4760264160

"CA9"

004-51

In the High Court of South Africa
(Gauteng Local Division)

Case No. 40602/16

In the matter between:

SMM HOLDINGS (PRIVATE) LIMITED

Applicant

and

RHODA KHUMALO (EMPLOYEE OF THE RESPONDENT)

Respondent

RETURN: SERVICE OF COURT ORDER

IT IS HEREBY CERTIFIED:

That on the 04 May 2023 at 09h40 at 62 CAMBRIDGE ROAD BRYANSTON being the place of employment of RHODA KHUMALO (EMPLOYEE OF THE RESPONDENT) a copy of the Court Order was served by affixing it to the main entrance, as requested. After a diligent search and enquiry, no other manner of service was possible at the given address.

SHERIFF CHARGES/EXPENSES: (You may require that this account be taxed and vouched before payment)

Description	Tarifl	QTY	Amount	Description	Tarifl	QTY	Amount
Service	84.50	1	84.50				
Photo Copies / E-mail printed	6.50	3	19.50				
Registration & Return	65.00	1	65.00				

TO: Registrar Johannesburg

Zero rated items	0.00
Sub-total	169.00
VAT	25.35
Total	**194.35**

Account No.: MDLA PIPER

TO: DLA PIPER SOUTH AFRICA INCORPORA
PRIVATE BAG X1?
BENMORE

2010

Your Reference: K SIMPSON/ N VAN ONSELEN

Mr N A Mafodi - Urgent - Deputy Sheriff
(Properly appointed in terms of Section 6(1) of the Sheriff's Act No. 90/1986)
Signed at Sandton on 04/05/23
My Reference: 2022/00/20252.00 / JH

Sheriff Sandton North - K I Mphahlele
P.O. Box 1572 Randburg 2125
Tel: 011 326 3170 Fax: 086 613 0853
Standard Bank Acc No: 002965984
VAT No./BTW Nr. 4760264160

004-5

In the High Court of South Africa
(Gauteng Local Division)

Case No. 40602/16

In the matter between:

SMM HOLDINGS (PRIVATE) LIMITEI

Applicant

and

RHODA KHUMALO (EMPLOYEE OF THE RESPONDENT)

Respondent

RETURN: SERVICE OF COURT ORDER

IT IS HEREBY CERTIFIED:

That on the 04 May 2023 at 09h40 at 62 CAMBRIDGE ROAD BRYANSTON being the place of employment of RHODA KHUMALO (EMPLOYEE OF THE RESPONDENT) a copy of the Court Order was served by affixing it to the main entrance, as requested. After a diligent search and enquiry, no other manner of service was possible at the given address.

SHERIFF CHARGES/EXPENSES: (You may require that this account be taxed and vouched before payment)

Description	Tarifl	QTY	Amount	Description	Tarifl	QTY	Amount
Service	84.50	1	84.50				
Photo Copies / E-mail printed	6.50	3	19.50				
Registration & Return	65.00	1	65.00				

TO: Registrar Johannesburg

Zero rated items	0.00
Sub-total	169.00
VAT	25.35
Total	194.35

Account No.: MDLA PIPER

TO: DLA PIPER SOUTH AFRICA INCORPORA
PRIVATE BAG X1'
BENMORE

2010

Your Reference: K SIMPSON/ N VAN ONSELEN

Mr N A Mafodi - Urgent - Deputy Sheriff
(Properly appointed in terms of Section 6(1) of the Sheriff's Act No. 90/1986)
Signed at Sandton on 04/05/23
My Reference: 2022/00/20252.00 / JH

Sheriff Sandton North - K I Mphahlele
P.O. Box 1572 Randburg 2125
Tel: 011 326 3170 Fax: 086 613 0853
Standard Bank Acc No: 002965984
VAT No./BTW Nr. 4760264160

In the High Court of South Africa
(Gauteng Local Division)

Case No. 40602/16 004-53

In the matter between:

SMM HOLDINGS (PRIVATE) LIMITEI

Applicant

and

RHODA KHUMALO (EMPLOYEE OF THE RESPONDENT)

Respondent

RETURN: SERVICE OF COURT ORDER

IT IS HEREBY CERTIFIED:

That on the 04 May 2023 at 09h40 at 62 CAMBRIDGE ROAD BRYANSTON being the place of employment of RHODA KHUMALO (EMPLOYEE OF THE RESPONDENT) a copy of the Court Order was served by affixing it to the main entrance, as requested. After a diligent search and enquiry, no other manner of service was possible at the given address.

SHERIFF CHARGES/EXPENSES: (You may require that this account be taxed and vouched before payment)

Description	Tariff	QTY	Amount	Description	Tariff	QTY	Amount
Service	84.50	1	84.50				
Photo Copies / E-mail printed	6.50	3	19.50				
Registration & Return	65.00	1	65.00				

TO: Registrar Johannesburg

Zero rated items	0.00
Sub-total	169.00
VAT	25.35
Total	194.35

Account No.: MDLA PIPER

TO: DLA PIPER SOUTH AFRICA INCORPORA
PRIVATE BAG X1?
BENMORE

2010

Your Reference: K SIMPSON/ N VAN ONSELEN

Mr N A Mafodi - Urgent - Deputy Sheriff
(Properly appointed in terms of Section 6(1) of the Sheriff's Act No. 90/1986)
Signed at Sandton on 04/05/23
My Reference: 2022/00/20252.00 / JH

Sheriff Sandton North - K I Mphahlele
P.O. Box 1572 Randburg 2125
Tel: 011 326 3170 Fax: 086 613 0853
Standard Bank Acc No: 002965984
VAT No./BTW Nr. 4760264160

RM

004-5

TM

"CA10"
004-54

In the High Court of South Africa
(Gauteng Local Division)

Case No. 40602/16

In the matter between:
SMM HOLDINGS (PRIVATE) LIMITED

Applicant

and
PRECIOUS (SURNAME UNKNOWN) EMPLOYEE OF THE RESPONDENT

Respondent

RETURN: SERVICE OF COURT ORDER

IT IS HEREBY CERTIFIED:

That on the 04 May 2023 at 09h40 at 62 CAMBRIDGE ROAD BRYANSTON being the place of employment of PRECIOUS (SURNAME UNKNOWN) EMPLOYEE OF THE RESPONDENT a copy of the Court Order was served by affixing it to the main entrance, as requested. After a diligent search and enquiry, no other manner of service was possible at the given address.

SHERIFF CHARGES/EXPENSES: (You may require that this account be taxed and vouched before payment)

Description	Tarifl	QTY	Amount	Description	Tarifl	QTY	Amount
Service	84.50	1	84.50				
Photo Copies / E-mail printed	6.50	3	19.50				
Registration & Return	65.00	1	65.00				

TO: Registrar Johannesburg

Zero rated items	0.00
Sub-total	169.00
VAT	25.35
Total	194.35

Account No.: MDLA PIPER
TO: DLA PIPER SOUTH AFRICA INCORPORA
PRIVATE BAG X1?
BENMORE

2010
Your Reference: K SIMPSON/ N VAN ONSELEN

Mr N A Mafodi - Urgent - Deputy Sheriff
(Properly appointed in terms of Section 6(1) of the Sheriff's Act No. 90/1986)
Signed at Sandton on 04/05/23
My Reference: 2022/00/20251.00 / JH

Sheriff Sandton North - K I Mphahlele
P.O. Box 1572 Randburg 2125
Tel: 011 326 3170 Fax: 086 613 0853
Standard Bank Acc No: 002965984
VAT No./BTW Nr. 4760264160

004-54

In the High Court of South Africa
(Gauteng Local Division)

004-55

Case No. 40602/16

In the matter between:

SMM HOLDINGS (PRIVATE) LIMITEI

Applicant

and

PRECIOUS (SURNAME UNKNOWN) EMPLOYEE OF THE RESPONDENT

Respondent

RETURN: SERVICE OF COURT ORDER

IT IS HEREBY CERTIFIED:

That on the 04 May 2023 at 09h40 at 62 CAMBRIDGE ROAD BRYANSTON being the place of employment of PRECIOUS (SURNAME UNKNOWN) EMPLOYEE OF THE RESPONDENT a copy of the Court Order was served by affixing it to the main entrance, as requested. After a diligent search and enquiry, no other manner of service was possible at the given address.

SHERIFF CHARGES/EXPENSES: (You may require that this account be taxed and vouched before payment)

Description	Tarifl	QTY	Amount	Description	Tarifl	QTY	Amount
Service	84.50	1	84.50				
Photo Copies / E-mail printed	6.50	3	19.50				
Registration & Return	65.00	1	65.00				

TO: Registrar Johannesburg

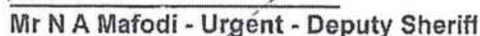
Zero rated items	0.00
Sub-total	169.00
VAT	25.35
Total	**194.35**

Account No.: MDLA PIPER

TO: DLA PIPER SOUTH AFRICA INCORPORA
PRIVATE BAG X1?
BENMORE

2010

Your Reference: K SIMPSON/ N VAN ONSELEN



Mr N A Mafodi - Urgent - Deputy Sheriff
(Properly appointed in terms of Section 6(1) of the Sheriff's Act No. 90/1986)
Signed at Sandton on 04/05/23
My Reference: 2022/00/20251.00 / JH

Sheriff Sandton North - K I Mphahlele
P.O. Box 1572 Randburg 2125
Tel: 011 326 3170 Fax: 086 613 0853
Standard Bank Acc No: 002965984
VAT No./BTW Nr. 4760264160

004-55

In the High Court of South Africa
(Gauteng Local Division)

004-56

Case No. 40602/16

In the matter between:

SMM HOLDINGS (PRIVATE) LIMITEE

Applicant

and

PRECIOUS (SURNAME UNKNOWN) EMPLOYEE OF THE RESPONDENT

Respondent

RETURN: SERVICE OF COURT ORDER

IT IS HEREBY CERTIFIED:

That on the 04 May 2023 at 09h40 at 62 CAMBRIDGE ROAD BRYANSTON being the place of employment of PRECIOUS (SURNAME UNKNOWN) EMPLOYEE OF THE RESPONDENT a copy of the Court Order was served by affixing it to the main entrance, as requested. After a diligent search and enquiry, no other manner of service was possible at the given address.

SHERIFF CHARGES/EXPENSES: (You may require that this account be taxed and vouched before payment)

Description	Tarifl	QTY	Amount	Description	Tarifl	QTY	Amount
Service	84.50	1	84.50				
Photo Copies / E-mail printed	6.50	3	19.50				
Registration & Return	65.00	1	65.00				

TO: Registrar Johannesburg

Zero rated items	0.00
Sub-total	169.00
VAT	25.35
Total	194.35

Account No.: MDLA PIPER

TO: DLA PIPER SOUTH AFRICA INCORPORA
PRIVATE BAG X17
BENMORE

2010

Your Reference: K SIMPSON/ N VAN ONSELEN

Mr N A Mafodi - Urgent - Deputy Sheriff
(Properly appointed in terms of Section 6(1) of the Sheriff's Act No. 90/1986)
Signed at Sandton on 04/05/23
My Reference: 2022/00/20251.00 / JH

Sheriff Sandton North - K I Mphahlele
P.O. Box 1572 Randburg 2125
Tel: 011 326 3170 Fax: 086 613 0853
Standard Bank Acc No: 002965984
VAT No./BTW Nr. 4760264160

004-56

TM

"CA11"

004-57

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case No. 40602/2016

In the matter between:

SMM HOLDIMGS (PRIVATE) LIMITED

Applicant

and

MUTUMWA DZIVA MAWERE

Respondent

RETURN: SERVICE OF COURT ORDER

IT IS HEREBY CERTIFIED:

That on the 23 March 2023 at 13h49 at THE SOUTH AFRICAN REVENUE SERVICE, 299 BRONKHORST STREET, NIEUW MUCKLENEUK, PRETORIA being the principal place of business of THE SOUTH AFRICAN REVENUE SERVICE a copy of the Court Order was served by affixing it to the principal door at principal place of business, as the premises was found locked. After a diligent search and enquiry, no other manner of service was possible at the given address. Rule 4(1)(a)(v).

Remark SARS has chosen not to avail an employee to receive document in cases were SARS is not sighted directly.

SHERIFF CHARGES/EXPENSES: (You may require that this account be taxed and vouched before payment)

Description	Tariff	QTY	Amount	Description	Tariff	QTY	Amount
Service	84.50	1	84.50				
Registration & Return	65.00	1	65.00				
Travelling	6.00	20	120.00				
Urgent Service	1 000.00	1	1000.00				

TO: THE REGISTRAR OF THE HIGH COURT, PRETORIA

Zero rated items	0.00
Sub-total	1 269.50
VAT	190.43
Total	**1 459.93**

Account No.: KONTAN2023
TO: KONTANT 2023

Your Reference: K SIMPSON/N VAN ONSELEN

Mr Taariq Gasant - Deputy Sheriff

(Properly appointed in terms of Section 6(1) of the Sheriff's Act No. 90/1986)
Signed at Pretoria on 24/03/23

My Reference: 2023/00/03875.00 / TSE

Sheriff Pretoria South East - MN Gasant
P.O. Box 27611 Sunnyside 0132 Dx 40 Hatfield
TEL: +27(12) 342 0706 FAX: +27(12) 342 7138
ABSA - Acc No. 4055623663 B/Code 632005
VAT No./BTW Nr.: 4310201837

004-57

TM

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

In the matter between: Case No – Saak No 40602/16

SMM HOLDINGS (PRIVATE) LIMITED — Applicant

and:

MUTUMWA DZIVA MAWERE — Respondent

and:

MASTER OF THE HIGH COURT — THIRD PARTY

Return in accordance with the provisions of the Supreme Court Act 59 of 1959, as amended

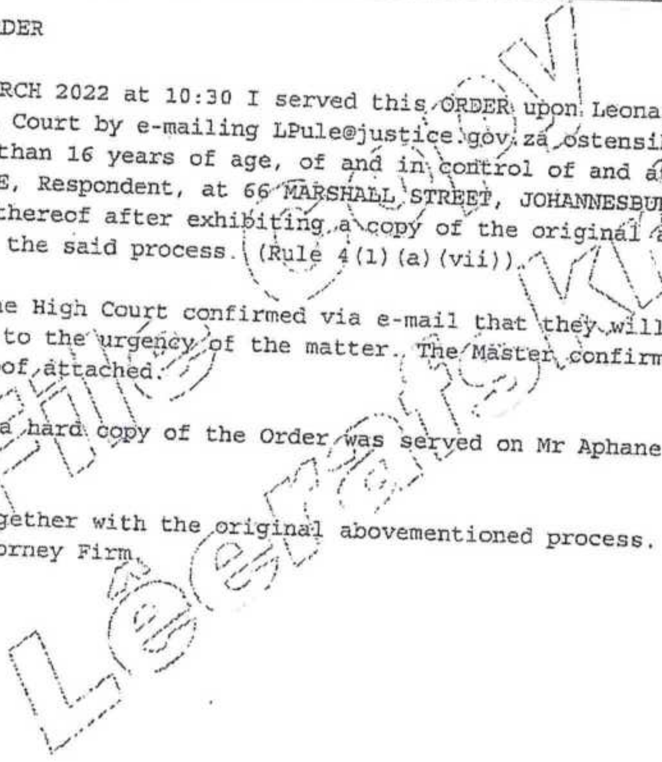
RETURN OF SERVICE - ORDER

On this 20th day of MARCH 2022 at 10:30 I served this ORDER upon Leonard Pule the Master of the South Gauteng High Court by e-mailing LPule@justice.gov.za ostensibly a responsible employee and not less than 16 years of age, of and in control of and at the place of business of MUTUMWA DZIVA MAWERE, Respondent, at 66 MARSHALL STREET, JOHANNESBURG by handing abovementioned a copy thereof after exhibiting a copy of the original and explaining the nature and exigency of the said process. (Rule 4(1)(a)(vii)).

Note: The Master of the High Court confirmed via e-mail that they will be willing to accept service via e-mail due to the urgency of the matter. The Master confirmed receipt of my e-mail service, see proof attached.

On 22.03.2023 at 08:22 a hard copy of the Order was served on Mr Aphane the Assistant Master at the Master's Office.

The original return together with the original abovementioned process. will be collected by Applicant/Plaintiff/Attorney Firm.



Sheriff Fees / Baljugelde	Date / Datum	Tax Invoice Number / Belastingfaktuur Nr.
	22.03.2023	I 391765

Description	Qty	Vat	Amount
Service	2	21.15	141.00
Registration	1	1.65	11.00
Return	1	5.03	33.50
Copies	1	0.75	5.00
e-mail	3	3.38	22.50
Urgency fee	1	35.25	235.00
Travelling	1	6.30	42.00
Copies	12	9.00	60.00
VAT / BTW			82.50

Richards
M Richards
~~Deputy Sheriff~~

Sheriff – Balju
Johannesburg Central
Tel 011 492 2660
011 492 2655
011 492 2860
Fax 011 492 0059
P O Box 42864
Johannesburg
2000
MT Mangaba
nthabiseng@sheriffjc.co.za
melany@sheriffjc.co.za
Bank: FNB Centurion
BrCode: 261550
Name: Sheriff Johannesburg Central Business
AccNo: 624 198 108 42

Form Design © Sheriffnet Information Gateway (Pty) Ltd

VAT Reg No. / BTW Reg Nr. 4020158368

You may require this account to be taxed and vouched before payment. U kan vereis dat hierdie rekening getakseer en gestaaf word voor betaling

Total / Totaal 632.50

DLA PIPER SOUTH AFRICA (RF) IN
WILL COLLECT

Account No. ◆ Rekening Nr.
Your Reference ◆ U Verwysing
My Reference ◆ My Verwysing
Ret: 1199936/Melany/4

20075 VatReg
K SIMPSON / N VAN ON

Registrar: GAUTENG LOCAL DIVISION,

Nicole Sentoo

From:	Pule Leonard <LPule@justice.gov.za>
Sent:	Monday, March 20, 2023 10:14 AM
To:	Melany Richards; Masina Nthabiseng
Subject:	RE: SERVICE OF AN URGENT COURT ORDER
Follow Up Flag:	Follow up
Flag Status:	Flagged

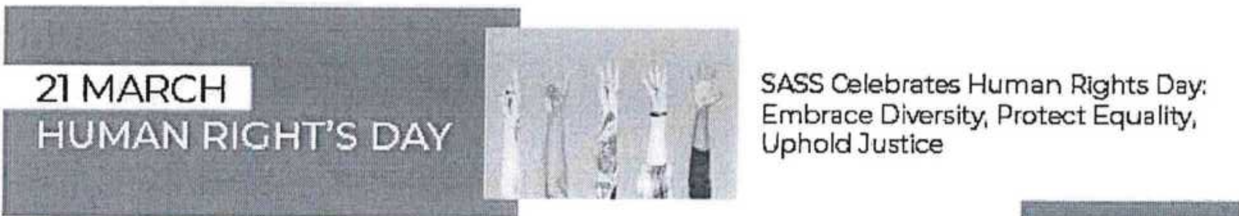
Dear Ms Richards

Yes please do.

Regards

Leonard Pule
Master of the South Gauteng High Court,
Johannesburg
Tel: (011) 429 8005

From: Melany Richards <melany@sheriffjc.co.za>
Sent: Monday, 20 March 2023 08:07
To: Pule Leonard <LPule@justice.gov.za>; Masina Nthabiseng <NMasina@justice.gov.za>
Subject: SERVICE OF AN URGENT COURT ORDER
Importance: High



Good morning

Hope you are well and keeping safe!

My office will not be opening today due to the unprotected strike.

I herewith wish to request if your office will be willing to accept service of a Court Order via e-mail?

I can arrange for the hard copy to be delivered to your office on Wednesday, 22 March 2023.

I await your urgent response!

Your assistance would be greatly appreciated!

Thanking you in advance!

Regards

Melany Richards
PA to the Sheriff, Immovable & Bank Attachments
Sheriff Johannesburg Central

South African Sheriff Society

T: (011) 492 2660 | F: (011) 492 0059
E: melany@sheriffjc.co.za
21 Hubert St, Westgate Johannesburg
www.sheriffjc.co.za
VAT no: 4810262172 | PO Box 42864, Fordsburg, 2033

DISCLAIMER

www.sassoc.co.za

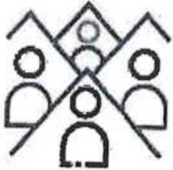
Disclaimer

Privileged/Confidential information may be contained in this message. If you are not the addressee indicated in this message (or responsible for delivery of the message to such person) you may not copy or deliver this message to anyone. In such case, you should destroy this message and kindly notify the sender by reply E-Mail. Please advise immediately if you or your employer do not consent to e-mail messages of this kind. Opinions, conclusions and other information in this message that do not relate to the official business of the Department of Justice and Constitutional Development shall be understood as neither given nor endorsed by it. All views expressed herein are the views of the author and do not reflect the views of the Department of Justice unless specifically stated otherwise.

Nicole Sentoo

From: Melany Richards <melany@sheriffjc.co.za>
Sent: Thursday, May 4, 2023 1:30 PM
To: Nicole Sentoo
Subject: FW: SMM HOLDINGS (PRIVATE) LIMITED / MUTUMWA DZIVA MAWERE

EXTERNAL



IT TAKES A COMMUNITY TO PROTECT A COMMUNITY
SASS PROUDLY REPRESENTS THE LARGEST BODY OF SHERIFFS IN SOUTH AFRICA.

BECOME A SASS MEMBER

Regards

Melany Richards
PA to the Sheriff, Immovable & Bank Attachments
Sheriff Johannesburg Central

South African Sheriff Society

T: (011) 492 2660 | F: (011) 492 0059
E: melany@sheriffjc.co.za
21 Hubert St, Westgate Johannesburg
www.sheriffjc.co.za
VAT no: 4810262172 | **PO Box 42864, Fordsburg, 2033**

www.sassoc.co.za

From: Melany Richards
Sent: Monday, 20 March 2023 11:12
To: Pule Leonard <LPule@justice.gov.za>
Subject: RE: SMM HOLDINGS (PRIVATE) LIMITED / MUTUMWA DZIVA MAWERE

Thank you!

Enjoy your day and stay safe!

Regards

From: Pule Leonard <LPule@justice.gov.za>
Sent: Monday, 20 March 2023 10:33
To: Melany Richards <melany@sheriffjc.co.za>; Masina Nthabiseng <NMasina@justice.gov.za>
Subject: RE: SMM HOLDINGS (PRIVATE) LIMITED / MUTUMWA DZIVA MAWERE

Dear Ms Richards

Service of the Court Order acknowledged and received.

Regards

Leonard Pule
Master of the South Gauteng High Court,

RM
TM

Johannesburg
Tel: (011) 429 8005

From: Melany Richards <melany@sheriffjc.co.za>
Sent: Monday, 20 March 2023 10:30
To: Pule Leonard <LPule@justice.gov.za>; Masina Nthabiseng <NMasina@justice.gov.za>
Subject: SMM HOLDINGS (PRIVATE) LIMITED / MUTUMWA DZIVA MAWERE
Importance: High

Good morning

Hope you are well and keeping safe!

Attached hereto please find a Court Order for your urgent attention.

Thanking you in advance!

Regards

Melany Richards
PA to the Sheriff, Immovable & Bank Attachments
Sheriff Johannesburg Central

South African Sheriff Society

T: (011) 492 2660 | F: (011) 492 0059
E: melany@sheriffjc.co.za
21 Hubert St, Westgate Johannesburg
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"AA5"

"024-1"

8/05/2023

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 40602/16

On this the 8th day of May 2023

Before the Honourable Justice Mr Strydom

In the matter between:

SMM HOLDINGS (PRIVATE) LIMITED — Applicant

and

MUTUMWA DZIVA MAWERE — Respondent
(DATE OF BIRTH: 11 JANUARY 1960)
(IDENTITY NO: 600111 1602 5083)
(MARITAL STATUS: SINGLE)

2023 -05- 08

DRAFT ORDER

Having considered the court papers filed of record and having heard counsel for the Applicant, an order is made in the following terms:

1. The estate of the Respondent is placed under final sequestration.

BY ORDER OF THE COURT

024-1

Nicole Sentoo

From:	Nicole Sentoo
Sent:	Thursday, May 11, 2023 3:40 PM
To:	mdmawere1@gmail.com
Cc:	Kirsty Simpson
Subject:	Electronic Service: SMM Holdings // Mawere (Case Number: 40602/16) [DLAP-UKMATTERS.FID6166878]
Attachments:	COURT ORDER DATED 8 MAY 2023 SMM HOLDING (PRIVATE) LTD VS M.D MAWERE CN 40602-2016.pdf
Importance:	High

Tracking:

Recipient	**Read**
mdmawere1@gmail.com	
Kirsty Simpson	Read: 5/11/2023 3:41 PM
447586_1 MD Mawere _ Others Emails	

Dear Mr Mawere,

Kindly find attached a copy of the final sequestration court order.

Kindly treat this as service of same.

Kind regards,

Nicole Sentoo
Candidate Attorney

T: +27113020841
nicole.sentoo@dlapiper.com

DLA Piper South Africa (RF) Incorporated
www.dlapiper.com

Nicole Sentoo

From:	Nicole Sentoo
Sent:	Thursday, August 31, 2023 4:37 PM
To:	mdmawere1@gmail.com
Cc:	Kirsty Simpson; Alpha Zungu
Subject:	MUTUMWA DZIVA MAWERE AND ANOTHER V SMM HOLDINGS (PRIVATE) LIMITED: RESCISSION APPLICATION [DLAP-UKMATTERS.FID6692777]
Attachments:	Letter to Mawere to file HOA dated 29-08-23(128318743.1)(128356115.1).pdf
Importance:	High
Tracking:	

Recipient	Delivery	Read
mdmawere1@gmail.com		
Kirsty Simpson	Delivered: 8/31/2023 4:38 PM	Read: 8/31/2023 5:01 PM
Alpha Zungu	Delivered: 8/31/2023 4:38 PM	
447586_1 MD Mawere _ Others Application to Stay		

Good day,

Kindly find attached correspondence for your attention.

Kind regards,

Nicole Sentoo
Candidate Attorney

T: +27761041714
F: +27113020801
nicole.sentoo@dlapiper.com

DLA Piper South Africa (RF) Incorporated
www.dlapiper.com

DLA PIPER

DLA Piper South Africa (RF) Incorporated
Private Bag X17, Benmore 2010
6th Floor, 61 Katherine Street
Sandton 2196
South Africa
T: +27113020800
dlapiper.com

Attn: Mr Mawere
Mutumwa Dziva Mawere
1st Floor
AHS Building
325 Rivonia Boulevard
Sandton
Per Email: mdmawere1@gmail.com

Your reference

Our reference
KS/KS/447586/1K Simpson
UKM/128356115.1

31 August 2023

Dear Sir,

MUTUMWA DZIVA MAWERE AND ANOTHER V SMM HOLDINGS (PRIVATE) LIMITED: RESCISSION APPLICATION

1 We refer to the above matter.

2 The time period for filing your replying affidavit in the rescission application has expired. Pleadings have closed.

3 We hereby call upon you to file the index, your heads of argument and practice note by no later than close of business on 7 September 2023.

4 All our client's rights remain strictly reserved.

Yours sincerely

Kirsty Simpson
Partner

T: +27113020802
kirsty.simpson@dlapiper.com

DLA Piper South Africa (RF) Incorporated

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+27113020800

"AA8"

Part 7 (2012)

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SMM HOLDINGS (PVT) LIMITED v MAWERE

A person considered to be liable for the debts of a company as referred to in section 424 (1) of the Companies Act (no 61 of 1973) in circumstances where that person has diverted funds due to that company for his personal gain

Judgment given in the South Gauteng High Court on 11 October 2012 by Willis J

Southern Asbestos Sales (Pty) Limited (SAS) owed SMM Holdings (Pvt) Ltd R18 043 374, 21. Under a cession purportedly entered into by SMM, Petter Trading (Pty) Limited took cession of the debt. Petter was controlled by Mawere, the same person who controlled SAS. Mawere also exercised some control over SMM, the decisions taken by its board of directors having historically, been influenced by Mawere.

The cession was executed in writing, but was a fraudulent document because it contravened the Zimbabwean laws in regard to the remittal of foreign exchange. In terms of those laws, one could not cede the entitlement to foreign exchange without the prior approval of the Reserve Bank of Zimbabwe. Furthermore, the cession agreement had not been approved by the board of directors of SMM and the date upon which the agreement had been signed was not the date reflected on the agreement itself.

Petter obtained a court order based on the purported cession agreement which affirmed its rights in the cession, and ensured that money owing from the debt owing by SAS was not remitted to SMM in Zimbabwe but to Petter.

SMM obtained an order rescinding that court order, and then brought an action against Mawere claiming an order that he was personally liable to SMM in terms of section 424 (1) of the Companies Act (no 61 of 1973).

Held—

Mawere's failure to contest the evidence presented by SMM in regard to the cession and his failure to testify, the question arose: why was a cession agreement fraudulently created and thereafter relied upon to obtain a court order, if not for the purpose of diverting funds which were due to SMM by SAS to Petter? Further, if the funds were not, in fact paid from SAS to Petter, why was the money not found in the accounts of SAS?

The probabilities led to the conclusion, beyond reasonable doubt that (i) the cession agreement was devised for the purpose of diverting funds which were due to SMM by SAS, out of the accounts to SAS to Petter and that (ii) this diversion of funds took place consequent upon the court order. In the result, the diversion of funds caused SMM to suffer loss.

This meant that section 424(1) was directly applicable, and an order

declaring Mawere personally liable to pay SMM's claim against SAS was appropriate.

Advocate HC Bothma instructed by Brink Cohen Le Roux Inc, Johannesburg, appeared for the plaintiff
The first defendant appeared in person

Willis J:

[1] The plaintiff, a Zimbabwean company, claims the following in an action:

1. An order declaring that the first and second defendants are jointly and severally liable, the one defendant paying the other to be absolved, to the plaintiff in terms of section 424 (1) of the Companies Act, No.61 of 1973, as amended ('the old Companies Act'), for a debt owing by Southern Asbestos Sales (Pty) Limited ('SAS') to the plaintiff in the sum of ZAR (South African Rands) 18 043 374, 21 (eighteen million and forty-three thousand, three hundred and seventy–four rand and twenty-one cents);

2. An order that the first and second defendants are jointly and severally liable, the one paying the other to be absolved, to pay the plaintiff the sum of ZAR 18 043 374, 21;

3. An order that the defendants pay interest on the aforesaid sum *a tempore morae* and costs.

[2] At the root of the action is a purported agreement of cession in terms of which debts owed by SAS to the plaintiff were ceded to a South African company, Petter Trading (Pty) Limited ('Petter'). This alleged cession gave rise to an application in this court resulting in order being granted (per Van Oosten J).[1] In order to avoid an appearance of being pedantic, I shall refer to this purported cession agreement simply as the 'cession agreement'. The signing of the cession agreement occurred in April and the application to court in May of 2004, respectively. That court order was rescinded on application to this court in November 2004 on the basis that it was fraudulently

[1] Under Case No. 04/10496

obtained.

[3] The plaintiff alleges that as a result of the court order that was granted by Van Oosten J, SAS paid the sum claimed above to Petter when this money should have been paid to the plaintiff. The plaintiff alleges that the first and second defendants acted in concert, as part of a fraudulent scheme, to obtain this purported cession and the consequent court order given by Van Oosten J. Both SAS and Petter were liquidated in 2005. SAS and Petter will not be able to repay the plaintiff the money that was diverted from the plaintiff as a result of this fraudulent scheme. The first and second defendants were at all material times directors of the plaintiff. Accordingly, the plaintiff claims from the first and second defendants personally in terms of section 424 (1) of the old Companies Act (no 61 of 1973), as amended.

[4] This has been none of the most unpleasant civil cases in which I have presided in my fourteen years on the bench. The case reeks of contempt not only for those who have lost employment as a result of the alleged fraud but also the court, including the individual persons who have been judges in this saga, and the court's rules and processes. In order to do justice to this matter, it will be necessary to set out its history in some detail.

[5] I shall first deal with an outline of the chronology which relates to the procedural aspects in bringing this matter to trial. Thereafter, I shall refer to substantive merits of the case. The summons in this matter was issued on 13 September 2006. The first application for a trial date was made on 16 October 2006. The matter was set down for hearing on 21 November 2007. The first and second defendants then requested the postponement of the matter on the basis that an application had been instituted by the first defendant in the Constitutional Court, allegedly relating to the issues raised in the pleadings under the above case number. Although the plaintiff did not agree to the postponement of the matter, a postponement was, in the end, forced upon it.

[6] A further trial date was then applied for on 8 April 2008 and the matter was set down for hearing on 12 October 2009. The trial was, however, postponed as a result of pending liquidation proceedings instituted by Investec Bank Limited in relation to other companies managed by the first and second Defendants, which may have had a material effect on the trial. The trial was then postponed by agreement

between the parties.

[7] A further application for a trial date was delivered on 23 July 2010. The matter was set down for a third time for 13 October 2011. The first and second defendants requested a postponement on various grounds including:

(i) that they intended delivering a Rule 35(3) Notice, requesting the plaintiff to make further discovery of documentation;

(ii) the defendants intended delivering a request for security for costs;

(iii) the alleged disallowance of the plaintiff's claim in the insolvent estate of Southern Asbestos Sales (Pty) Ltd (in liquidation);

(iv) possible expert testimony that the defendants may wish to lead; and

(v) the defendants estimated that a long duration of trial of five to ten days would be required for the hearing of the matter.

[9] These issues were raised on 27 September 2011 during the pre-trial meeting, shortly before the trial was due to begin. The pre-trial minute was filed on 6 October 2011, after the defendants' attorneys of record had refused to sign the pre-trial minute. The matter set down for 13 October 2011 was, however, postponed, the defendants agreeing to pay the wasted costs of the plaintiff.

[10] An application for a fourth trial date was then made. The trial was set down for hearing on 7 September 2012. Prior thereto, on 6 October 2011, the defendants filed a notice requesting that the plaintiff pay security for costs, in terms of Rule 47(1). They also filed a Rule 35(3) Notice. They also filed a Rule 7(1) Notice on 3 August 2012. The plaintiff refused to provide the security for costs, as requested, but no application for security for costs was forthcoming from the defendants. The plaintiff responded to the Rule 35(3) Notice on 29 June 2012 and filed a power of attorney in response to the Rule 7(1) notice on 17 August 2012.

[11] In the light of the previous indication given by the defendants' attorneys of record that they were of view that the trial would run for five to ten days, the plaintiff applied for a special allocation for a trial of estimated long duration on 7 August 2012. Confirmation from the office of the Deputy Judge President that such an allocation had been given was forthcoming later in that month. The first day of trial had

been allocated on 7 September 2012. No judge was available on that date. Boruchowitz J, who was calling the civil trial roll on that day, indicated to the parties that I would be available on Monday 10 September 2012 and that he had allocated the trial to me. On Friday 7 September 2012 I was the senior judge on duty in Motion Court. I nevertheless met the representatives of the parties in my chambers that afternoon to discuss matters relating to the 'housekeeping' of the trial that would commence before me. Both defendants were jointly represented by an attorney Mr Kyle.

[12] On 6 September 2012, the day before the trial had been set down, the defendants delivered a supplementary discovery affidavit, enclosing 110 pages of newly discovered documentation. They also filed a notice of intention to amend their special pleas, in terms of Rule 28 of the Uniform Rules of Court. Further still, the Defendants instituted an application in terms of Rule 30 of the Uniform Rules of Court.

[13] On Monday, 10 September 2012, when the matter was formally called before me, the hearing opened with an application brought in terms of Rule 30 in terms of which the defendants claimed that the power of attorney delivered by the plaintiff pursuant to a Rule 7(1) notice was defective in that it was not retrospective. Mr Kyle argued the matter. The defendants sought that the application for trial date be set aside and that the matter be struck from the roll. I dismissed the application, holding that the power of attorney, by necessary implication, ratified all the proceedings that had been brought by the plaintiff thus far.

[14] Mr Kyle then proceeded to request that the issue of whether the plaintiff was still subject to a 'reconstruction order' in terms of Zimbabwean law be dealt with in a separation of issues in terms of Rule 33(4). In particular, the defendants claimed that the reconstruction order had been cancelled, even though they admitted that there had been no publication of the alleged cancellation thereof in the Zimbabwean *Government Gazette*. The court found that it would not convenient to order a separation of issues on the grounds which had been claimed to justify it.

[15] Mr Kyle then proceeded to apply for my recusal. He claimed that the issues in the special plea had been pre-determined and that there was clear bias in favour of the plaintiff. After argument, the application

for recusal was dismissed with costs. At that stage, I had not even read any of documents in the nine Leverarch files before me. I had not even heard an opening address. I had no idea of the history of the matter and had merely read the practice notes and annexures which had been filed. There appeared to me to be no legitimate grounds for my recusal. At that stage I had no sense of the basketfuls of mambas with which I would be presented during this case. The application for my recusal was the mere beginning of a strategy of intimidation of the bench.

[16] Mr Kyle then proceeded to bring another application for a separation of issues in terms of Rule 33(4). He argued in that he wanted the separate determination of the issue as to 'whether a foreign law of a penal nature where State obtains a preferential right as a creditor is permissible'. The plaintiff argued that this is not necessarily an issue on the pleadings and referred to the judgment in constitutional litigation that had taken place between the parties. Essentially, the defendants argued that the first defendant's shares in the plaintiff had been seized by the Zimbabwean government in terms of the Zimbabwean Reconstruction of State-Indebted Insolvent Companies Act, CAP 24:27 and that in South African this seizure would be regarded as unconstitutional.

[17] Later evidence by Mr Moyo, who had been company secretary of the plaintiff at the relevant time, was that the shareholder in the plaintiff had been SMM Holdings Limited, a British Company. Be that as it may, before I had even heard this evidence, I dismissed that application with costs. I did so on the basis that even if it were the case that the first defendant's shares had been appropriated in terms of this Zimbabwean legislation, I was far from confident that, in our law, such a 'socialist' measure by a foreign state would not be recognised by the courts exercising authority over the High Court. I indicated that while I might be personally sympathetic if such an expropriation had indeed taken place, I seriously doubted that courts higher than the High Court would intervene to set aside the proceedings on the ground that because the majority of shares in the plaintiff had been obtained by state expropriation. I referred, *inter alia*, to my personal experience of both the Constitutional Court and the Judicial Service Commission when I had been a candidate for appointment as a judge in the Constitutional Court. I had, as such a candidate, publicly criticised the Constitutional

Court for being insufficiently aware of the seriously unfortunate consequences for economic growth and job-creation by handing down rulings that were unfriendly to business and investor interests. I was also mindful of a judgment given by Campbell AJ relating to the same point between the same parties in September 2008. Campbell AJ had found there was no merit in the point. Campbell AJ dismissed the application for leave to appeal. The petition to the SCA was unsuccessful.

[18] Mr Kyle then requested leave to appeal my decision in respect of the separation of issues on the point relating to the Zimbabwe 'Reconstruction Act'. He argued that the defendants had been prejudiced by the refusal to hear these issues first. The plaintiff argued that the order was not definitive of the rights between the parties, nor final, and that there was no basis for the application for leave to appeal. I dismissed the application for leave to appeal with costs. I placed on record that the fact that it was undesirable for appeals to be heard piece-meal in actions and my lack of confidence that the courts above the High Court would consider there to be merit in the point informed my decision. I also pointed out that the setting aside of action done in terms of legislation in Zimbabwe could have major diplomatic implications. This would necessitate the joinder of at least one South African cabinet minister. No member of the South African cabinet had received any notice of such an argument to treat as pro non scripto in a South African court actions done in terms of the laws of a foreign state.

[19] Mr Kyle then requested that the matter stand down so that he could draft a petition for leave to appeal to the Supreme Court of Appeal ('SCA'). The plaintiff objected. They decided that the trial would proceed but pointed out that the petition could be drafted in the meantime.

[20] Mr Kyle then informed the court that he withdrew as attorney of record in the matter. He did not seek the leave of the court to withdraw. The first and second defendants thereafter represented themselves. The first defendant decided to proceed with the trial and to defend the matter personally.

[21] During the lunch adjournment I received a telephone call from an advocate to say that he had been instructed to report me to the Bar Council for saying that I had 'no confidence' in the SCA and the

Constitutional Court. This is a twisting of what I had said. Both courts give me reason to sleep soundly at night. During the process of negotiations leading to the establishment of a democratic State in South Africa, I was a keen supporter of the concept of a Constitutional Court having extensive testing powers. Whenever I had an opportunity to exert influence in favour of such an idea, I did not hesitate to do so.

[22] In dismissing the application in question, I said (and I remain convinced that I am correct in this regard), that I was far from confident that these courts would act in the manner that the defendants had argued that they should with regard to the alleged expropriation of the first defendant's shares in the plaintiff by the government of Zimbabwe. That afternoon I also received a letter from attorneys claiming to have been appointed to act on behalf of the second defendant and demanding that I deliver transcripts of my rulings earlier in the day. My clerk was instructed to reply to these attorneys to advise them that 'iafrica transcriptions' were responsible for preparing transcripts of rulings given *ex tempore* by the court. I made sure that my clerk did, indeed, reply accordingly via email. I referred to the matter in open court. The letter from the attorney, as well as my clerk's reply thereto, have been filed of record.

[23] After the lunch adjournment, the second defendant requested a postponement of the matter so that he could instruct new attorneys. He claimed that Mr Kyle had withdrawn 'on his own account'. I dismissed, with costs, the application for a postponement. I gave, as my main reason, that it would be prejudicial to the plaintiff to grant a postponement in all the circumstances of the case. The second defendant then indicated that he wished to apply for leave to appeal against that decision. The application for leave to appeal was also dismissed with costs. I did so on the basis that rulings disallowing postponements were exceptionally appealable, if at all, because to allow an appeal on such an issue would, in effect be to grant a postponement. The second defendant thereupon withdrew from the proceedings. He sat in the gallery for a while thereafter and then left the court room, not to return again during the proceedings before me.

[24] The plaintiff then moved for default judgment to be granted against the second defendant, without the leading of any evidence. I decided to exercise my judicial discretion so as to defer this decision

until the end of the trial. The plaintiff then called its first witness, Mr Peter Moyo.

[25] Any misgivings that one may have had about the first defendant, a Zimbabwean who has become a South African citizen through naturalisation, and who now lives in Sandton, being disadvantaged by not having legal representation were soon dispelled. Legal jargon trilled from his lips as though he had been born in a courthouse and had well-known legal text books and law reports read to him as lullabies. He is clearly no stranger to litigation, demonstrating familiarity with court procedures. He cross-examined witnesses with poise and confidence which many a 'baby, blue-bag' junior at the Bar would envy. He even had the temerity to suggest, at one stage, that I was treating him 'like a nigger, like a kaffir'. When, in South Africa in 2012, a person uses the 'race-card', one's curiosity is aroused.

[26] On Friday, 5 October 2012, before I had delivered judgment in this matter, the first defendant lodged a complaint with the Chief Justice, as head of the Judicial Service Commission, about my conduct in this trial. I annex a copy of the complaint to this judgment as 'Annexure 'A'.*

[27] In his written heads of argument, submitted at the end of the case, the first defendant submitted that the following were the issues which the court had to consider in deciding the matter:

(i) whether the plaintiff was properly authorised to bring these proceedings against the defendants;

(ii) whether the plaintiff was entitled to bring the claim for relief against the defendants;

(iii) whether SAS was indebted to the plaintiff as alleged in its amended particulars of claim;

(iv) whether the agency agreement between SAS and the plaintiff was valid and enforceable;

(v) whether the order of the court obtained in consequence of the purported cession agreement was used to divert funds that were due to the plaintiff;

* This annexure has been omitted in this report as it does not contribute to legal precedent - Ed.

(vi) whether the sum of ZAR 18 043 374, 21 paid to Petter represented funds collected by SAS pursuant to a valid agreement in existence and, therefore whether such funds were available solely for the purpose of discharging an obligation to the plaintiff;

(vii) whether SAS had in its possession the aforesaid amount of ZAR 18 043 374, 21 at the time when the order *per* Van Oosten J was granted;

(viii) the status of an amount of United States $4 646 445 paid by SAS;

(ix) whether the first defendant was a director of SAS at the material time and was knowingly a party to the business of SAS being carried on recklessly or with intent to defraud its creditors or for any fraudulent purpose;

(x) if the first defendant had knowingly been a party to the fraud, the extent of his liability under section 424 of the old Companies Act.

[28] In his written heads of argument presented at the end of the case, the first defendant further submitted that 'it is common cause that the real driving force behind this litigation is the government of Zimbabwe'. This is not correct. He also submitted that 'There is no dispute on the fact that the Reconstruction Act (of Zimbabwe) is a penal law and allows the government to superimpose itself as a party on commercial transactions'. This, too, is incorrect.

[29] Mr Moyo, the first witness called by the plaintiff, is presently employed as the managing director of Tetrad Holdings Limited. He has been employed by this company for just over a year. Prior to his current employment, he worked for the plaintiff from June 1998 to June 2011. He had been employed at the plaintiff as a company secretary and administration manager. In this position, he looked after the statutory records and attended to the legal work of the company and its subsidiaries. He was also secretary to the board of the plaintiff and all its subsidiary companies. In addition, he dealt with pension fund issues, medical aid issues and related matters.

[30] Mr Moyo said that the plaintiff has been in existence since 1923. The business of the plaintiff is the mining of white chrysolite asbestos. It is also an investor in certain subsidiary companies. The plaintiff

conducted the operations of asbestos mines since the early 1900's. There are two asbestos mines owned by the plaintiff, known as Shabanie and Gaths Mines. Long fibre asbestos is mined at Shabanie Mine and short fibre asbestos is mined at Gaths Mine. In 2004 the plaintiff had employed over 5 000 people.

[31] SAS owed the plaintiff an amount of United States $18 000 000, Canadian dollars 600 000 and South African Rand 4 000 000 as at 29 April 2004. At that time the Zimbabwean government was facing foreign currency problems. As a result, it began to control the use of foreign exchange acquired by exporters. 50% of foreign exchange acquired by exporters was required to be surrendered to the Government but the plaintiff had received an exemption in terms of which it was permitted to use up to 75% of its foreign exchange generated from its operations. The exemption was cancelled by the Reserve Bank of Zimbabwe.

[32] On 3 May 2004, Petter brought an urgent application against the plaintiff and SAS in the High Court here in Johannesburg[2] for payment of R74 872 468,49 plus interest. The application was premised upon on a cession agreement purportedly entered into in 2003 in terms of which the plaintiff appeared to have ceded its claims against SAS to Petter. The cession agreement is a fraudulent document for reasons which Mr Moyo went on to explain. Although it purports to have been signed in 2003, it was actually signed on 28 April 2004, a week before the urgent application was brought.

[33] The application was not opposed by the plaintiff, as the founding papers were not served on it. An order was issued against SAS in terms of this application on 6 May 2004 by Van Oosten J.

[34] Mr Moyo first became aware of the court order in the main application dated 6 May 2004, after the date upon which it was granted. When he received a copy of the court order, he began to investigate the reasons for the court order being granted. He noticed certain anomalies in regard to the cession agreement upon which the court order was based. He sought legal opinion from external legal advisors. He also facilitated the investigation of the matter internally at the plaintiff.

[2] As noted under footnote 1 (*supra*), the case number was 04/10496

[35] Mr Moyo testified that the cession agreement was a fraudulent document because it contravened the Zimbabwean laws in regard to the remittal of foreign exchange. In particular, he understood that one cannot cede the entitlement to foreign exchange without the prior approval of the Reserve Bank. In addition, the cession agreement had not been approved by the board of directors of the plaintiff and the date upon which the agreement had been signed was not the date reflected on the agreement itself. He stated that if the agreement had been signed in 2003, it would have been in his records and he would have known about it. Furthermore, Mr Obed Dube (who was later called as a witness) had informed Mr Moyo that the cession agreement was signed on 28 April 2004. Mr Moyo confirmed that he had been the author of the minutes of the meeting of the board of directors of the plaintiff, during which meeting the fraudulent character of the cession agreement and the reasons therefore had been recorded.

[36] The court order obtained *per* Van Oosten J had been used to justify Petter receiving payment from the plaintiff's debtor, SAS. Mr Moyo confirmed that the affidavit in support of the application to rescind Van Oosten J's order had deposed to by him and that an order granted rescission of Van Oosten J's earlier order was made by Joubert AJ on 29 November 2004.

[37] Mr Moyo said that the first defendant had controlled the South African companies, Petter and SAS and to some extent, the plaintiff and another Zimbabwean company, Minerals Marketing Corporation of Zimbabwe ('MMCZ'). Mr Moyo said that although 'on paper', the first defendant appeared to be non-executive, but he actually controlled these South African companies and gave instructions to the chairman of the plaintiff in Zimbabwe. He went on to say that, at all material times, the first defendant had played an active role in the affairs of these companies. The decisions taken by the board of directors of the plaintiff had, historically, been influenced by the first defendant. The first defendant dictated what needed to be done. For example, in regard to relocating the group of companies from Zimbabwe to South Africa, the first defendant called a meeting at the Sheridan Hotel in Harare. This was a major strategic decision initiated by the first defendant. The idea was that a mining division to be called 'Pan African Mining' would be established in South Africa, with a financial division to be

known as 'Pan African Financial Services'. The directors of the plaintiff had queried the structure and sought clarity on the funding of the structure from the first defendant.

[38] When it came to the attention of the plaintiff that the order of Van Oosten J had been obtained, the plaintiff launched proceedings for rescission of that order on 7 October 2004. The basis of the application for rescission was that the urgent application papers had never been served on the plaintiff that the reason for the procurement of the court order was merely to provide a cloak by which further to disguise complete the fraudulent scheme in terms of which the plaintiff's foreign exchange earnings were channelled to Petter on the basis of the fraudulent cession agreement. The rescission application was opposed. The issue of the administrator's authority to bring the rescission application was raised as a defence in the answering affidavit The second defendant, who deposed to the answering affidavit on behalf of Petter, denied that the administrator had authority to bring the rescission application.

[39] Consequent to its having obtained the rescission order on 29 November 2004, the plaintiff delivered an answering affidavit to the application brought by Petter against it and SAS in May 2004. Neither SAS, nor Petter, ever filed any further affidavits.

[40] The effect of the court order obtained *per* Van Oosten J by reason of this so-called cession agreement was that funds were not remitted by SAS to the plaintiff in Zimbabwe. The non-remittance of funds by SAS forced the plaintiff to borrow funds from banks and from the Ministry of Mines. The Governor of the Reserve Bank in Zimbabwe had issued what was described as a 'monetary statement' on 18 December 2003. As a result of this, all outstanding 'CD1 forms' relating to export documentation had to be 'acquitted'. The plaintiff had many outstanding CD1 forms. From 2003, the Reserve Bank had taken an active role in following up the outstanding CD1 forms. The CD1 forms needed to be discharged within 180 days. The Reserve Bank enquired why so many of these forms were outstanding and summoned senior executives of the plaintiff to a meeting at its offices. In addition, dispensations granted to mining companies as exporters in regard to the retention of foreign currency were withdrawn. The amounts that had not been acquitted in terms of the outstanding CD1 forms were United

States $18 000 000 Canadian dollars 600,000 and South African Rands 4 000 000. The amounts that had not been acquitted were unusually high.

[41] Mr Moyo testified that when he reviewed the cession agreement, he had concluded that it was a fraudulent document. He then made recommendations to the Chief Executive Officer ('CEO') and sought legal advice. The CEO convened a meeting of the board of directors of the plaintiff on 1 July 2004. Mr Moyo confirmed that the signature on the minutes of the meeting held on 1 July 2004 is that of the chairman of the meeting, and the non-executive chairman of the plaintiff, Dr Mudukunye. Dr Mudukunye is the first defendant's cousin. Mr Moyo asked Dr Mudukunye to sign the minutes, which he did. The minutes are a true reflection of what took place at the meeting of 1 July 2004. Dr Mudukunye went through the minutes and would have objected if there was any item in the minute with which he did not agree.

[42] Mr Moyo also testified that AA Mines (Pvt) Ltd was a dormant company and that it was an operating division of the plaintiff. He did not know why AA Mines (Pvt) Ltd was referred to in the 'Marketing and Sales Agreement' which had been concluded between AA Mines (Pvt) Ltd and SAS in 1998. That agreement was signed prior to Mr Moyo having been employed by the plaintiff. Operationally, the agreement was between SAS and the plaintiff. He said that any reference to 'AA Mines (Pvt) Ltd' in that agreement must have been a mistake. When the plaintiff had instituted its claim in court for judgment in the amount of United States $18 million, six hundred thousand Canadian dollars 600 000 and four million South African Rand, the plaintiff had also applied for rectification of the agreement and obtained an order to this effect.

[43] According to Mr Moyo, SAS had marketed asbestos for the plaintiff. It was a relationship as between principal and agent. The plaintiff would have had various claims against SAS including for non-payment of the amounts owed, interest and return of goods. The plaintiff invoiced the ultimate purchaser of the asbestos fibre. The funds paid by the ultimate purchaser flowed through SAS and were remitted to the plaintiff by SAS. SAS had no title in respect of the asbestos fibre.

[44] Mr Moyo was adamant that there were certain amounts received

by SAS and that were not remitted to the plaintiff. The plaintiff's claim arises from funds which SAS received from the customers but did not remit to the plaintiff. The plaintiff had verified and confirmed the payments that were made by the customers to SAS in respect of the claim of United States $18 million, six hundred thousand Canadian dollars and four million South African Rand. These facts were confirmed with the customers themselves. There were other amounts that were not remitted to SAS by the customers. The amounts claimed by the plaintiff against SAS are the amounts that were paid by the customers to SAS. The agent, SAS had indeed received payment as agent for the sum of approximately United States $18 million, six hundred thousand Canadian dollars 600 000 and four million South African Rand. All amounts that were received by SAS as a result of the asbestos fibre exported were required to be remitted to the plaintiff. SAS was the agent responsible for collection of such funds. Mr Moyo emphasized on several occasions that Zimbabwean exchange control regulations forbid the withholding of export proceeds from Zimbabwe.

[45] With regard to the amount of 18 million South African Rand, which, it is common cause had flowed from SAS to Petter (and which is not to be confused with the amount of 18 million United States dollars or the amount of four million South African Rand referred to above), Mr Moyo stated that the details of how this amount was made up came from the finance department. He said that he saw the vouchers in the books of the plaintiff in support thereof and that he personally had gone through such books in order to see the financial transactions, along with the finance department. He stated that the finance department liaised with SAS and obtained documents from SAS that showed that Petter had been paid the amount of 18 million South African Rand by SAS during the period May 2004 to December 2004. Mr Moyo said that if SAS paid Petter using funds that were required to be remitted to Zimbabwe, the payment to Petter was unlawful. In order to make this for the remittances to have been lawful, the plaintiff would have had to have applied for permission to make payment directly by SAS to Petter. The plaintiff had not done so. He said that it was not acceptable to merely use the funds due to the plaintiff to pay a creditor of the plaintiff without prior exchange control approval from the Zimbabwean Reserve Bank.

[46] The plaintiff also called, as a witness, Mr Obed Dube who had been appointed managing director of the plaintiff's mining division, AA Mines in July 2002 and held that position at the times material to this case. He studied mining engineering at a college in Zambia. He joined Mangura Copper Mines as a general manager. The mine was taken over by a parastatal organisation Zimbabwe. In 1997, he joined AA Mines in the position of Manager: Mining of Shabanie Mine. Mr Dube was promoted to Mine Manager and then to General Manager. He is a mining engineer with 40 years' experience. He described himself as ambitious and always wanting to achieve. He said that his mission had been to resuscitate AA Mines. They had succeeded and it was sad to see the mines deteriorating later on. He had sleepless nights over this, as they had mined, processed and sold asbestos but had not received any money back from SAS, as agent.

[47] Mr Dube said that the plaintiff operated two asbestos mines, situated in the midlands to the east of Zimbabwe. They were the biggest in Zimbabwe. At the time, the plaintiff was the fifth largest producer of asbestos worldwide. Like Mr Moyo, Mr Dube said that the plaintiff employed approximately 5,500 people.

[48] Mr Dube said that he has known the first defendant since 1997. He knew the first defendant to be a shareholder of the plaintiff. He had not interacted with the first defendant while he, Mr Dube, was in the lower ranks of the plaintiff but began interacting with the first defendant when he became its managing director in 2002. Mr Dube described the first defendant as an "executive shareholder" in the plaintiff. The first defendant had dealings with the management of the plaintiff that went beyond his being a person who merely owns shares. When there were financial issues, the first defendant became involved because he had a rich fund of ideas when it came to raising money.

[49] Mr Dube described how the plaintiff had made record production and record sales during 2002 and 2003. He outlined how the plaintiff operated mechanised mines and therefore had to import spares and equipment to operate the mines. The plaintiff therefore owed funds to foreign entities who sold the spares and equipment. While the plaintiff had been selling asbestos through SAS, it had not received the proceeds of such sales. SAS had sold the asbestos fibre and received funds but had failed to remit those funds to the plaintiff. He said that the plaintiff

had always sold asbestos through agents, the biggest of which was SAS. The plaintiff had also sold asbestos through an agent known as CJ Petrow. Mr Dube said that Petter had purchased equipment and consumables on behalf of the plaintiff. Mr Dube had an independent recollection of the amounts owed by SAS to the plaintiff as at the end of March 2004 being approximately United States $18 000 000, Canadian dollars 600 000 to 650 000 and three to four South African rand. In total, SAS had owed the plaintiff approximately twenty million US dollars. Mr Dube said that he had asked Mr Washington Samanga, the plaintiff's director of finance to confirm the amounts owed by SAS to the plaintiff.

[50] Mr Dube confirmed his signature and initials on the cession agreement that has been the vital subject matter of this trial. He said that the cession agreement had been signed on 28 April 2004 and not on 1 March 2003 as appears *ex facie* the document. It was signed at the South African office in Rivonia, South Africa. He said that, at the time of the signature of the cession agreement, all dispensations had been cancelled by the government of Zimbabwe. The plaintiff had been selling its asbestos in the market through SAS.

[51] Mr Dube had been in Florida, in the United States of America, at a producer's meeting, when the first defendant contacted him telephonically and asked him to stop in South Africa on his way home to Zimbabwe in order to finalise a query with MMCZ. Mr Dube's wife, who was accompanying him, continued to Zimbabwe but he made a detour to South Africa. He attended a meeting in Rivonia on 26 April 2004 at which various discussions were held as to how to deal with the outstanding amounts, as all parties were suffering as a result of the funds outstanding by SAS to the plaintiff and funds outstanding from various parties worldwide to MMCZ. The plaintiff authenticated the amounts owed to it at this time. By reason of the fact that the plaintiff was the end user of the products procured by Petter, a meeting was held in his presence with the creditors of Petter.

[52] Mr Dube described how, later that evening, the first defendant had called him to indicate that there was a document that had to be signed in order to procure that the amounts outstanding were paid. The first defendant knew the problems that had been encountered by the operations. As the first defendant was the owner of SAS, Mr Dube

assumed that the first defendant knew how the funds would be paid by SAS to the plaintiff. The first defendant informed Mr Dube that he must meet at the offices in Rivonia the following day.

[53] Mr Dube said that the next day, while he was travelling to Rivonia, he contacted the first defendant telephonically. The first defendant said that Mr Dube would meet with Mr Lovemore Dube at the office. I intend no disrespect to Mr Lovemore Dube when I refer to him as 'the other Mr Dube' in order to avoid confusion between Mr Obed Dube, on the one hand and Mr Lovemore Dube , on the other. When Mr Dube arrived, the other Mr Dube was present with the lawyer of SAS, Mr John Ooosthuizen, as well as the other signatories to the cession agreement. Mr John Oosthuizen was a relatively young man, who Mr Dube was meeting for the first time. It seemed that Mr Oosthuizen had been dealing with the people at the office a short while previously. Mr Dube was in a hurry as he needed to reach the airport that day to catch a flight to Zimbabwe.

[54] Mr Dube was told why they were signing the cession agreement. As the first defendant was so successful at raising money, Mr Dube was certain that the first defendant would take steps to ensure that AA Mines runs and that the creditors are paid. Mr Dube asked who the author of the cession agreement was. The other Mr Dube indicated to Mr Dube that the agreement had been drafted by the lawyer, Mr Oosthuizen and the first defendant. The first defendant did not arrive while Mr Dube was at the office that day. Those present discussed the cession agreement and it seemed that it was purely an inter-company transaction so that one company could pay what was due and the other company could continue operating. Mr Dube thought that this was in order and he signed the cession agreement. He left the office while the other signatories were finishing signing the agreement.

[55] The cession agreement was later sent to Zimbabwe to Mr Dube's offices. He did not take a copy of the cession agreement with him when leaving South Africa. Once he arrived in Zimbabwe, Mr Dube received legal advice from Mr Peter Moyo. In response to a question as to who the author of the cession agreement was, he replied that all financial engineering had always, in his experience, been undertaken by the first defendant and given that the cession agreement was meant to deal with getting the mines out of the financial doldrums, it was the first

defendant, who was the author of the cession agreement. When back in Zimbabwe, Mr Dube also consulted with MMCZ. He checked whether the cession agreement was feasible in terms of Zimbabwean exchange control regulations. He consulted with Mr Moyo, who referred to the Reserve Bank regulations regarding exports. Mr Dube sought legal advice from Mr Moyo. He informed Mr Moyo that a lawyer was present when the cession agreement was crafted. Mr Moyo said that the agreement should have been approved by the plaintiff's board. The cession agreement had not been authorised by the board of the plaintiff. Mr Dube said that he had signed the document as managing director, subject to ratification by the plaintiff's board.

[56] Mr Dube said that he had addressed a letter dated 11 May 2004 to the first defendant in which he had raised concerns with the first defendant about the cession agreement and had sought clarity from him . Mr Dube said that he had received no answer from the first defendant to that letter. It seems that the cession agreement had, in the meantime, received the adverse attention of the Reserve Bank in Zimbabwe. Mr Dube emphasised that he had signed the cession agreement in good faith because the first defendant advised him to do so as part of a plan to re-engineer the finances of the mines.

[57] Mr Dube spoke of how he and the first defendant had spoken on the telephone on numerous occasions about the need to deal with the financial problems of the plaintiff. This was important for the survival of the mines. Mr Dube would not have signed the cession agreement unless the first defendant had instructed him to do so.

[58] Mr Dube confirmed that he had attended the board meeting of the plaintiff on 1 July 2004. He also confirmed that those referred to in the minute as having been present at the meeting were indeed so present and that Mr Moyo had taken the minutes. Mr Dube confirmed that the content of the minutes accords with the events at the meeting. At the meeting of 1 July 2004, Mr Dube had expressed his concerns about corporate governance in the plaintiff because the first defendant made him do things that he would never otherwise have done. After the meeting of 1 July 2004, Mr Dube was called to give evidence by the police, the state security and the Reserve Bank of Zimbabwe.

[59] Under cross-examination Mr Dube described how the first defendant had been passionately involved with AA Mines. The board

had interfaced with the first defendant and had received brilliant ideas from him. Unfortunately, things went astray. Mr Dube described how the dealings of SAS were predominantly run by the first defendant. Mr Dube said that his interaction with the first defendant had arisen primarily as a result of SAS' failure to pay the plaintiff. Prior to that, the plaintiff had been receiving funds and there was no cause to interact with SAS at managerial or director level. It was abundantly clear to Mr Dube that the first defendant was the person who would assist because he had been so very involved in SAS.

[60] Mr Dube said that the agreement between SAS and the plaintiff was in place when he, Mr Dube took over as the managing director of the plaintiff. Mr Dube said that SAS was the agent for the plaintiff and that the asbestos had been sold on a commission basis. Customers were situated in various countries such as Brazil and India. The plaintiff was meant to have been paid by SAS but SAS did not do so at this critical period. There was a policy to support the companies in the group. Mr Dube said that but if SAS had not had an inter-company relationship with the plaintiff he would not have engaged SAS. Under cross-examination he confirmed that the plaintiff had supplied SAS with asbestos to the value of twenty million United States dollars. The customers owed AA Mines through SAS. He described how in 2004 the plaintiff had a turnover of between forty-five and sixty million United States dollars. The plaintiff had improved production but the money was not coming in. Mr Dube said that the first defendant had formed SAS in order to take over the marketing and selling of the asbestos.

[61] Mr Dube said that while he had been in South Africa in April 2004, he had attended a meeting with creditors of the plaintiff. A representative of MMCZ had also attended that meeting, along with the first defendant. The first defendant had assured the creditors that they would be paid, as an arrangement was being reached between Petter, SAS and AA Mines. The first defendant informed the creditors that SAS owed the plaintiff money and that the creditors would be paid.

[62] The plaintiff called the second Mr Dube as a witness. He had been subpoenaed to give evidence at the end of 2011. Last year, he worked in Boksburg, South Africa. He currently lives in Harare, Zimbabwe where he works for Riozim as their Group Supply Chain Manager. In this position, he manages the procurement and supplies for the gro

of companies, which consist of a gold mine, a coal mine and a refinery. Prior thereto, he worked for Shemax CC in Brakpan, South Africa.

[63] The second Mr Dube described how, he began working for a subsidiary of the plaintiff, Turner Asbestos, in 1991. He worked there until 1998, when he began working for the plaintiff in Bulawayo. In 2001, he was seconded to Petter Trading in South Africa to set up a buying house to buy for the plaintiff's group of companies. Even before 2001, he had travelled to and from South Africa for the purpose of setting up Petter. He had been recruited by the first defendant. At Petter, he was at first the Projects Purchasing Manager. Later, he became the Operations Manager or the Purchasing Manager. Essentially, he was doing the same job with all these titles, which was managing purchases for the group of company. The second Mr Dube said that had been retrenched from Petter in September 2004 and has not been paid the agreed severance package. The second Mr Dube said that the first defendant had managed the business of Petter what was, effectively, a full-time basis.

[64] The second Mr Dube confirmed that his initials and signature appear on the cession agreement. He confirmed that the cession agreement was signed in 2004 and that the date in the agreement of 1 March 2003 was not the date upon which it was signed.

[65] The second Mr Dube said that they had reached a point where all companies in the plaintiff's group were being supplied (for example Turnall, General Beltings, AA Mines) but Petter was not receiving funds in respect of those supplies. A discussion was held in order to find a way for Petter to receive payment from Zimbabwe. At the time, the management of the plaintiff was the same as the management of Petter. Petter needed the money so that it could pay its creditors. The second Mr Dube confirmed that he had attended a meeting with creditors in late 2004. The creditors wanted payment of the outstanding amounts, otherwise they were threatening to sue Petter. Petter was under pressure to get the suppliers paid. There were times, during this crisis, when the creditors wanted the first defendant, to sign surety.

[66] The second Mr Dube said that the other Mr Dube (Mr Obed Dube) was present at the meeting of creditors of Petter. AA Mines had therefore participated in the meetings with the creditors. It was in this context that the first defendant came up with the idea of drafting the

cession agreement. The first defendant had an office near Mr Dube's office, in the same building. The first defendant wanted to put the cession agreement together so that SAS, Petter and the plaintiff agreed that SAS would cede its debtors or money to Petter, so that Petter could pay its creditors. The first defendant explained to all the relevant parties the purpose of the document, including SAS, Petter and the plaintiff. The second Mr Dube said that AA Mines was a division of the plaintiff. He confirmed that there were funds outstanding by SAS to the plaintiff as SAS sold asbestos on behalf of AA Mines.

[67] The second Mr Dube said that when he signed the cession agreement, he asked why he was required to sign and the first defendant responded that it was because he was the General Manager of Petter, the affected company, and that as General Manager, he must represent Petter. He described how, on 28 April 2004, the first defendant had come to his office. Those present included the Group Financial Director, the Accountant for SAS and the second Mr Dube's secretary. The first defendant initiated the idea of the cession agreement. At first, he, the second Mr Dube had typed the cession agreement, while the first defendant dictated the details. The first defendant then took over but later abandoned typing the cession agreement and stated that they needed a lawyer to draft the cession agreement. This was a few weeks or a month before 28 April 2004.

[68] The first defendant then engaged a lawyer whom the first defendant had described to the second Mr Dube as 'green behind the ears'. The second Mr Dube stated that it must have been the first defendant who gave instructions to the lawyer to draft the cession agreement because the first defendant told him that he had engaged a company lawyer to draft the cession agreement. This was during the same week of the meeting of 28 April 2004. On 28 April 2004, Mr John Oosthuizen, a lawyer, had came to the offices of Petter.

[69] A meeting was held on that day, 28 April 2008 at which both Mr Oosthuizen and the first defendant were present. In the presence of Mr Oosthuizen and the first defendant, the second Mr Dube had queried why he was required to sign the document and the issue of backdating the document. When he asked whether it was legal to put the incorrect date on the cession agreement, Mr Oosthuizen replied in the affirmative. The first defendant had even asked the second Mr Dube,

'Are you now a lawyer?' The second Mr Dube said believed that if the lawyer said it was fine to backdate the agreement, he must be correct. The second Mr Dube said that he had trusted the first defendant and there was no reason for him to think that the cession agreement and affidavit were not in order.

[70] The second Mr Dube said that the offices of Mr Oosthuizen, the lawyer were across the road from ARPS House, the offices of Petter and SAS. The lawyer went and worked on the document and made certain changes but eventually the second Mr Dube was called to go and sign the document. The second Mr Dube cannot remember whether the document was signed at Petter's offices or at the lawyer's offices. He said there were lots of people present to sign. The second Mr Dube said that he had seen the other Mr Dube (Mr Obed Dube) at the signing of the cession agreement and that Mr Obed Dube had come to the offices specifically to sign the cession agreement.

[71] The second Mr Dube confirmed his signature to the affidavit that was used in support of the application heard by Van Oosten J. The second Mr Dube said that the affidavit had been drafted by Mr Oosthuizen. The second Mr Dube said that he had been called by Mr Oosthuizen to go to Mr Oosthuizen's offices to sign the affidavit. Mr Oosthuizen had then transported the second Mr Dube in Mr Oosthuizen's car to the police station to have the affidavit commissioned. Mr Oosthuizen has read the affidavit out to him. The affidavit was already complete when he arrived. He did not consult with Mr Oosthuizen about the content of the affidavit. Mr Oosthuizen was already briefed by somebody else.

[72] Mr Oosthuizen must have received the information to put into the affidavit from the first defendant. According to the second Mr Dube there could not have been any other person who could have provided the information. The second Mr Dube said that the entire idea of the cession agreement and the purpose thereof had originated with the first defendant. No other person would have an interest in or could come up with necessary background information for Mr Oosthuizen to draft the agreement, other than the first defendant.

[73] The second Mr Dube confirmed that he has signed a letter on behalf of Petter to the plaintiff dated 26 April 2004 in which Petter had demanded payment from the plaintiff 'regarding long overdue

outstanding payments amounting to R74 872 468, 49'. The second Mr Dube said that the letter had been typed by his secretary and dictated in his presence by the first defendant. The source of the detail contained therein is the first defendant. The content of the letter was not in written by the second Mr Dube in his own words. The same applies to a letter which the second Mr Dube had signed on the same date on behalf of Petter, addressed to SAS which referred to the cession agreement and demanded payment of this amount of R74 872 468, 49.

[74] The second Mr Dube also described how the first defendant was also the author of a letter dated 29 April 2004 which was addressed by the plaintiff to SAS in terms of which the plaintiff recognised and accepted the cession agreement. The second Mr Dube said that the letter had been drafted at the offices of Petter and sent by telefax to Zimbabwe so that Dr Mudukunye, the chairman could sign the letter and send it back. The same stratagem applied in respect of a letter dated 30 April 2004 addressed by the plaintiff to Petter and signed by Dr Mudukunye, the chairman which alluded to and recognised the cession agreement.

[76] The plaintiff called Mr Norman Klein, one of the joint liquidators of SAS to give evidence. He is a Chartered Accountant by profession and conducted business as an insolvency practitioner under the name and style of 'Westrust' at 41 Central Street, Houghton, Johannesburg. He has been an insolvency practitioner for approximately 45 years. He concentrated his business in Gauteng but was on the panels of various other Masters' offices such as Bloemfontein and Cape Town. He said that of the four other joint liquidators of SAS, Ms Daphne Lindup is deceased and has been replaced by Ms Karen Keevy of the same office. As far as he is aware, the other parties are all still liquidators of SAS. He confirmed that the summons, together with the particulars of claim in the action instituted by the plaintiff against SAS[3] had been served on him. Mr Klein had been subpoenaed in about November/December 2011 and he had also been subpoenaed to appear at the last set-down of the trial for October 2011.

[77] Upon receiving the summons, the liquidators consulted with their attorneys and sought advice from counsel. They took steps to file a

[3] Under case number 06/2007

notice of intention to defend. The matter was then dealt with by Mr Vincent Matsepe, a joint liquidator. They received a formal opinion from Advocate Johan Smit but Norman Klein did not attend the consultation with him. They filed a plea that was a bare denial because there were not sufficient facts and documents to give full details of a defence. The bare denial plea was submitted because the liquidators did not want default judgment to be issued against them. After the plea had been delivered, a consultation was held on 3 November 2006 between Mr Matsepe, representing the joint liquidators, Advocate Johan Smit, the first defendant and the second defendant, along with the instructing attorney, Mr Gewer.

[78] Mr Klein confirmed that Advocate Smit had given them a formal written opinion which has never been seen by the plaintiff. In that opinion Advocate Smit advised the liquidators that there was no basis upon which the liquidators could proceed to defend. He recommended that the liquidators withdraw their defence of the matter. Advocate Smit stated that there were not sufficient documents but that there may be a counterclaim. He stated that if there is a counterclaim, the liquidators could proceed with the counterclaim or allow the first defendant to proceed with the counterclaim.

[79] Mr Klein said that he had dealt mainly with the second defendant and to a lesser extent, with the first defendant. He confirmed that the second defendant had been a director of the company in liquidation from about a year before the liquidation of the company.

[80] Mr Klein said that, between filing the notice of intention to defend and withdrawing the defence, there had been interactions involving the liquidators and both the first defendant and the second defendant.

[81] Mr Klein confirmed that SAS was finally liquidated in June 2005. He was then appointed as a provisional liquidator on 13 October 2005. After the first meeting of creditors, all five liquidators were appointed as final liquidators on 11 April 2006. He has since been involved in the usual liquidator's task of collecting assets and reducing the assets to cash. He said that approximately R4,6 million has been recovered into the SAS estate. A little more had been recovered, as this amount was nett of costs. This amount has been recovered since April 2006.

[82] Mr Klein said that besides the plaintiff's claim, a claim has been submitted in the SAS estate by the South African Revenue Service

(SARS), but not yet proved. The claim of SARS is in the amount of approximately R8,6 million. He pointed out that the plaintiff is not a secured creditor and therefore does not rank first in the distribution of the estate. SARS, however, is a preferent creditor in the free residue of the estate. Mr Klein said that a small portion of its claim (approximately R80,000) is not preferent, as it is for penalties and interest.

[83] If SARS' claim is proven, the other creditors will receive nothing. SARS' claim is not yet proven because the second meeting of creditors was held on 22 October 2006 and SARS' claim was not received in time for such meeting. The second meeting has not yet been closed by the Master and another meeting cannot be convened while the meeting is still open. The SARS claim has therefore not been submitted for proof as yet. Mr Matsepe, Ms Keevy and Mr Klein have been meeting to discuss ways to bring the matter to finality but no conclusion has been reached as yet.

[84] Mr Klein testified that the plaintiff had tried to prove a claim in the SAS estate before the Master at the second meeting of creditors. The claim was withdrawn, an action was instituted and judgment granted in favour of the plaintiff.

[85] Mr Klein said that he had received no CM100 form from the second defendant, as the director of SAS. He also did not know whether the second defendant had been excused from producing a CM100 in terms of section 363 of the old Companies Act.

[86] He confirmed that, to the best of his knowledge, AA Mines was a division of the plaintiff even though on certain documentation it appeared as if it was a separate company. He also confirmed that he had received a list of debtors to the value of many millions. The list of debtors was handed to the liquidators by the attorneys for the plaintiff. He sent the debtors statements and letters of demand. He said that, in general, the debtors responded that they had already paid SAS or they put the liquidators to the proof of the allegations in the letters of demand. The liquidators could not compile the documentation substantiating the claim. He confirmed that had been received from Brazil and Nigeria.

[87] Mr Klein also confirmed further that, to the best of his knowledge, with regard to the relationship between SAS and the plaintiff, that the

plaintiff had supplied asbestos to SAS, which sent customers invoices in its own name. There is a dispute as to whether it was an agent-principal relationship. SAS was responsible for non-collection and was entitled to a commission of 4,25%. The plaintiff was aware of the customers and provided the list of debtors.

[88] Mr Klein said that the notice of withdrawal of the defence to the plaintiff's action had been filed for two reasons. First, the liquidators received a letter from the attorneys Brink Cohen Le Roux Incorporated, the plaintiff's attorneys, advising that they considered the funds in the estate to belong to the plaintiff and that if the funds were used, the liquidators did so at their peril. Secondly, Advocate Smit had also advised them that they were unlikely to succeed. Advocate Smit had also advised that the liquidators would be at risk in their personal capacity to pay costs and recommended that the liquidators not defend the action. Advocate Smit had gone on to advise that if a counterclaim were to be instituted, the first and second defendants could be allowed to pursue the counterclaim so long as they furnished an indemnification or provided security. Mr Klein confirmed that a letter was sent to the first and the second defendants stating that if they wanted to defend the claim action, the liquidators could not take on the personal risk but they, the first defendant and the second defendant could do so on behalf of the estate, if they so wished.

[89] Ms Kirsty Simpson, a practising attorney employed by Brink Cohen Le Roux Incorporated, the plaintiff's attorneys, also testified. She said she is a practising attorney and that since the second half of 2005 she has been working on various matters relating to matters in which the first and second defendants had been parties. She confirmed that she had attended the rescission action proceedings on 4 and 5 October 2007. She said that she took detailed notes during such proceedings, at which both the first and the second defendant were present. Ms Simpson also confirmed that she had perused the transcription of the proceedings relating to the hearing in application to rescind the order of Van Oosten J and that they contained an accurate record of what had been said by the second defendant in those proceedings. The transcript was handed in as an exhibit.

[90] Ms Simpson said that, during the rescission proceedings, the second defendant had given evidence as set out in the affidavit in

support of the joinder application. She confirmed, in particular that the second defendant had stated that he was the sole director of SAS and a director of Petter at the material time and as such, he knew of and sanctioned the application proceedings in respect of which Van Oosten J had given the order. He had confirmed that he knew that this application had been predicated upon the cession agreement in question as well as consent by SAS and the plaintiff to judgment being taken by Petter. The second defendant had also confirmed that he had discussed the judgment being sought in the application that went before Van Oosten J with the first defendant. The second defendant had been clear that the first defendant agreed with the course of action that had been taken. The second defendant had also admitted that, as a result of the court order secured in the application heard by Van Oosten J, approximately R18 million flowed from SAS to Petter.

[91] In paragraphs 6.6 and 6.7 of the plaintiff's particulars of claim, it alleges as follows:

6.6 On 6 May 2004 Petter obtained judgment against SAS for payment of the amount of ZAR 74 872 468, 49, together with interest and costs)'the cession court order'(.

6.7 Purporting to act in accordance with the cession court order, SAs during or about the period May 2004 to December 20-04 paid to Petter an amount of ZAR18 043 373, 21.

In response to these allegations the first defendant expressly admitted not only that Petter had obtained the judgment but also that 'an amount of R18 043 373,21 was paid to Petter'.

[92] After the close of the plaintiff's case, the first defendant applied for absolution from the instance. I dismissed the application with costs on the basis that I could not conclude that there was no case for either of the defendants to answer.

[93] The first defendant declined to give evidence. He called one witness only, Mr Cleopas Sanangura. Mr Sanagura confirmed that he had been the financial manager of SAS from 2001 to October 2004 and that his signature appears on the cession agreement which he had signed on behalf of SAS. He agreed that John Oosthuizen, the attorney had drawn up the cession agreement. Mr Sanangura said that SAS was at risk at the time. AA Mines owed Petter money. He said that the cession agreement had been devised to enable SAS to divert the funds

which SAS owed to the plaintiff to pay to Petter directly. He said that the cession agreement had served as 'as security'.

[94] He said that SAS had paid Petter the amount of R18 million before the signing of the cession agreement. He agreed that the date reflected on the agreement was not the actual date the agreement was signed. The attorney had given advice that the agreement must be back-dated to before the payments were made by Petter. He confirmed the allegations in paragraph 6.7 of the plaintiff's amended particulars of claim as being correct. He accepted that it was correct that the first defendant had, at all material times, been a director of SAS.

[95] During cross-examination, Mr Sanangura admitted that he had recorded in letters during August 2004 that SAS owed the plaintiff approximately US $18 million, Canadin dollars 600 000 and R4,5 million. He said, however, that that those amounts had been reduced since 31 March 2004 by US $4,2 million.

[96] At the end of the trial the following facts were common cause:

(i) That at all material times, the plaintiff had carried on business as a miner of asbestos fibre in Zimbabwe, *inter alia* under the name and style of African Associated Mines;

(ii) That SAS was a company with limited liability duly incorporated in accordance with the laws of the Republic of South Africa with its registered office at AHI House, 325 Rivonia Boulevard, Rivonia, Johannesburg;

(iii) That Petter was a company with limited liability duly incorporated in accordance with the laws of the Republic of South Africa with its registered office at AHI House, 325 Rivonia Boulevard, Rivonia, Johannesburg;

(iv) That SAS and Petter shared a common principal place of business at AHI House, 325 Rivonia Boulevard, Rivonia, Johannesburg;

(v) That the first defendant had been a director of SAS, more particularly during the period 1 April 1996 to 1 March 2004;

(vi) That the first defendant had been a director of Petter, more particularly from 1 July 1998 to 1 March 2004;

(vii) That the second defendant had been a director of SAS, more particularly from at least 6 May 2004 until date of liquidation

of SAS on 14 July 2005;

(viii) That the second defendant had been a director of Petter, more particularly from at least 6 May 2004 until date of liquidation of Petter on 20 September 2004;

(ix) That on or about 4 January 1998, the plaintiff and SAS concluded an agreement;

(x) That pursuant to that agreement, the plaintiff had, from time to time, delivered asbestos fibre to SAS;

(xi) That a document styled a 'cession agreement' and dated 31 March 2003 was signed on 28 April 2004, (the date when this document was created is not in dispute any more), in terms whereof the plaintiff had purported to cede to Petter a part of its claim against SAS in the amount of R74 872 468,49;

(xii) That on or about 3 May 2004, Petter caused an application to be issued out of the Witwatersrand Local Division of the High Court in terms whereof Petter, relying on the cession agreement, sought judgment against SAS for payment of the amount of South African R74 872 468,49;

(xiii) On 6 May 2004, Petter obtained judgment against SAS for payment of the amount of South African R74 872 468,49 together with interest and costs;

(xiv) That SAS paid to Petter an amount of South African R18 043 373,21;

(xv) That the cession order was rescinded at the instance of the plaintiff in what was then known as the Witwatersrand Local Division of the High Court on 29 November 2004;

(xvi) That SAS was finally wound up in the Witwatersrand Local Division of the High Court on 14 June 2005.

(xvii) That a final order for the liquidation of Petter was made in the Witwatersrand Local Division of the High Court on 20 September 2004.

[97] There is no reason to doubt the evidence of Mr Klein and Ms Simpson, both of whom are professional persons. Messrs Moyo and the two Dubes were excellent witnesses. If I could waive a magic wand, in the manner of a fairy godmother, I would appoint each of them to prominent positions in the administration of the courts in this

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country. They were intelligent, well-educated, motivated, disciplined, hard working and idealistic. Their evidence was convincing.

[98] Messrs Moyo and the two Dubes were cross-examined up hill and down dale by the first defendant. At no stage was it put to them that the first defendant disagreed with them as to his rŏle in the events relating to the cession agreement.

[99] The following additional information, involving other court proceedings in which the plaintiff was a litigant, may assist in obtaining perspective in this matter:

99.1.1 SAS brought an attachment application against the plaintiff in order to attach the assets of the plaintiff in South Africa to found, alternatively, confirm jurisdiction in an action, which allegedly would be instituted by SAS against the plaintiff for the payment of US $6,966,666.00, as an alleged damages claim[4], which claim has been pursued;

99.1.2 Thisapplication for attachment was argued before Fevrier AJ at the end of January 2005. The attachment was later set aside and SAS was ordered to pay the plaintiff's costs.

99.2.1 The plaintiff launched an application for the final winding-up of SAS on 2 February 2005.[5]

99.2.2 This application was based on SAS' indebtedness to the plaintiff arising from asbestos product which had been delivered to SAS and sold through it, to customers.

99.2.3 SAS opposed the winding-up application. SAS' main grounds of opposition were that the legislation underpinning the plaintiff's authority to prosecute the application was unconstitutional and, therefore, unenforceable in the South Africa, and that the application for winding-up constituted an abuse .

99.2.4. It was alleged on behalf of SAS in opposing the application that the application was an attempt at victimisation by the Zimbabwean Government and that the Zimbabwean reconstruction order and reconstruction legislation was nothing more than the unlawful expropriation of assets by the Zimbabwean Government, including the

[4] Under case number 2004/26770

[5] Under case number 2005/20057

plaintiff without compensation.

99.2.5. This application was argued before Epstein AJ on 1 June 2005 and resulted in the granting of a final winding-up order. In his judgment, Epstein AJ he dismissed the defences raised by SAS. He specifically dealt with and dismissed the alleged defence that the plaintiff was not authorised to bring the application.[6] An application for leave to appeal against this judgment has been lodged but has not been argued.

99.3.1. On 7 April 2006, almost a year after the final winding-up order had been granted, the first and the second defendants instituted a rescission action to on behalf of SAS,[7] in which they sought the rescission and setting aside of the order placing SAS under final liquidation, as well as the setting aside of the appointment of the liquidators and costs against the plaintiff's administrator and the plaintiff. The defendants cited included not only the plaintiff but also the liquidators of SAS. The plaintiff defended the action, which was set down for hearing on 4 October 2007.

99.3.2. After two days of trial during which the second defendant gave evidence, the action was withdrawn, the second defendant tendering payment of costs personally.

99.4.1. On 9 June 2006, Mr Norman Klein and various others were appointed as liquidators in the estate of SAS. The first meeting of creditors in the estate of SAS was held on 4 November 2005. No claims were proved at the first meeting.

99.4.2. A second meeting of creditors was held on 14 September 2006. Both the first the second defendants proved claims in the estate of SAS on behalf of various companies, namely ECC Properties (Pty) Limited ('EEC'), Africa Heritage Management Services (Pty) Limited ('AHMS') and Africa Resources Limited ('ARL').

99.4.3. On the following day, the plaintiff brought an urgent application[8] for an order reviewing and setting aside of the decision of a representative of the Master of the High Court to admit, as proved,

[6] The judgment has been reported as *SMM Holdings (Pvt) Ltd v Southern Asbestos Sales (Pty) Ltd*]2005[4 All SA 584)W(.

[7] Under case no. 2006/7836

[8] Under case number 2006/20467.

claims submitted by the first and the second defendant on behalf of ECC, AHMS and ARL; as well as an order that these aforesaid claims be submitted to interrogation by the Master of the High Court, as set out in section 44(7) of the Insolvency Act, 24 of 1936 and directing the Master of the High Court to reconsider the claims in accordance with section 44 of the Insolvency Act, after completion of the interrogation.

99.4.4. The review application was argued before Wepener AJ (as he then was). On 14 November 2005, Wepener AJ rejected the argument regarding a lack of authority and reviewed and set aside the admission of the claims and granted costs, including the costs of two counsel, against the companies on which behalf the first defendant acted.

99.4.5. Both the first and the second defendant then made an application for leave to appeal to be brought in respect of the judgment of Wepener AJ. This application for leave to appeal was dismissed by Wepener AJ.

[100] Sight must also not be lost of the fact that on 18 September 2006, the plaintiff brought an action against SAS for the proving of its claim as well as the fact that the plaintiff obtained default judgment against SAS on 17 July 2007 for rectification of an agreement and payment of the amount of United States $13 308 150,27; South African R4 515367,48 and Canadian dollars 628 071,84, (which constituted the aggregate of the plaintiff's claim against SAS). The default judgment was granted after the liquidators of SAS withdrew the bare denial plea that they had entered in defence of the claim.

[101] Section 424 (3) of the old Companies Act provides as follows:

> Without prejudice to any other criminal liability incurred, where any business of a company is carried on recklessly or with such intent or for such purpose as is mentioned in subsection (1), every person who was knowingly a party to the carrying on of the business in the manner aforesaid, shall be guilty of an offence.

This is plainly a penal provision. Section 425 of the same Act makes the criminal provisions of the law relating to insolvency applicable to the directors or officers of a company, under certain circumstances.

[102] Throughout this trial I have been mindful of the common law wariness of treating admissions of criminal activity by one person as

admissible against another.[9] Extra-curial statements made by one accused person are not evidence against another accused person.[10] It is not, however, an absolute rule of law that admissions made by one person are inadmissible in evidence against another.[11] In *S v Miller*,[12] Watermeyer JA, delivering the judgment of the court held that the acts and declarations of one conspirator are admissible in evidence against another provided they are acts performed and declarations made in the furtherance of a common purpose.[13] In this connection, he relied on *R v Levy and Others*[14] and *R v Cilliers*.[15]

[103] A useful discussion of the whole question of the admissibility of statements made by one person as evidence against another is to be found in the judgment of Friedman J (as he then was) in *S v Banda and Others*.[16] In considering the issue, he draws attention to the distinction between narrative statements (which are not admissible against another accused person) and executive statements (which are). Good illustrations of the difference between the two types of statements is to be found in R v *Blake and Tye*[17] which was considered by the court in the *R v Miller* case (*supra*).[18] Another useful discussion on the question of 'narrative' v 'executive' statements is to be found in Zeffert and Paizes' *The South African Law of Evidence*.[19] Sight must also not be

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[9] See, for example, *R v Miller and Another* 1939 AD 106; R v Mayet 1957 (1) SA 492 (A); *R v Matthews and Others* 1960 (1) SA 752 (A); *R v Baartman and Others* 1960 (3) SA 535 (A); *S v ffrench-Beytagh* 1972 (3) SA 430 (A); *R v Heyne and Others* 1955 (2) SA 539 (W); *S v Cooper and Others* 1976 (2) SA 875 (T).

[10] See, for example, *R v Matsitwane and Another* 1942 AD 213 at 218-20; *R v Serobe and Another* 1968 (4) SA 420 (A) at 425F-H; *Makhathini v Road Accident Fund* 2002 (1) SA 511 (SCA) at 519-520; *R v Kefasi* 1966 (1) SA 364 (SRA) at 365-66B.

[11] See, for example, *S v Ndhlovu and Others* 2002 (2) SACR 325 (SCA); *S v Ralukukwe* 2006 (2) SACR 394 (SCA); *S v Shaik and Others* 2007 (1) SACR 247 (SCA); *S v Mokoena and Others* 2006 (1) SACR 29 (W).

[12] 1939 AD 106

[13] At 115.

[14] 1929 AD 312

[15] 1937 AD 285

[16] 1990 (3) SA 466 (BG) at 502E-507G

[17] (1844) 6 QB 126

[18] 1939 AD 106 (*supra*, footnote 12) at 116-7

[19] 2009, D T Zeffert and AP Paizes, Second Edition (formerly Hoffmann and Zeffertt), LexisNexis: Durban, at p495-6.

lost of the provisions of section 219 the Criminal Procedure Act, No.51 of 1977, which provides that '(n)o confession made by any person shall be admissible as evidence against another person'.

[104] The trial has been replete with damning admissions made by the second defendant. The question arose as to whether these admissions may be admissible against the first defendant. As mentioned above in this judgment, in paragraphs 6.6 and 6.7 of the plaintiff's particulars of claim, it alleges as follows:

6.6 On 6 May 2004 Petter obtained judgment against SAS for payment of the amount of ZAR 74 872 468, 49, together with interest and costs)'the cession court order'(.

6.7 Purporting to act in accordance with the cession court order, SAs during or about the period May 2004 to December 20-04 paid to Petter an amount of ZAR18 043 373, 21.

In response to these allegations the first defendant expressly admitted not only that Petter had obtained the judgment but also that 'an amount of R18 043 373,21 was paid to Petter'.

[105] The first defendant did not plead that the payment of the amount of approximately R18 million was made before the judgment was obtained on 6 May 2004. Taken in context, the first defendant's plea contains a clear admission that the payment of some R18 million by SAS to Petter was effected consequent upon the judgment obtained *per* Van Oosten J on 6 May 2004. This clear admission makes it unnecessary to make a pertinent finding of the admissibility of the second defendant's admissions as against the first defendant. It also makes irrelevant the question of whether SAS did or did not make a payment on behalf of the plaintiff in an amount of US $4 646 445. So too, if such a payment was made the question of when it was paid becomes a red herring in the context of this case.

[106] The court has had regard to the vexed question, related to the to questions considered in the case of *Hollington v F. Hewthorn & Company Limited,*[20] of the extent to which admissions made by the second defendant as a person in other civil proceedings may be used

[20] [1943] KB 587 (CA); [1943] 2 All ER 35 (CA); See, also, *Prophet v National Director of Public Prosecutions* 2007 (6) SA 169 (CC) at paragraph [42].

against him in this particular trial. Useful discussions about the admissibility of these admissions, which may perhaps be considered as informal admissions in this particular trial, are to be found in Zeffert and Paizes' *The South African Law of Evidence*[21] and Schwikkard and Van der Merwe's *Principles of Evidence*.[22]

[107] In the absence of any viva voce evidence from the second defendant in this trial, there seems no good reason not to have regard to the admissions which the second defendant has made in other related matters which have a bearing on this issues in this trial. Even if this conclusion relating to the admissibility of the second defendants admissions in other matters is wrong, he faces the much same difficulties, mutatis mutandis, as the first defendant in regard to his formal admissions in pleadings in this trail action. He has admitted that he was a director of both SAS and Petter from at least 6 May 2004 until 14 June 2005 (the date of liquidation of SAS) and 20 September 2005 (the date of liquidation of Petter) respectively. The second defendant has also admitted that Petter obtained the judgment against Petter on 6 May 2004 and that an amount of R18 043 373, 21 was paid to Petter. Again, taken in context, the second defendant's plea contains a clear admission that the payment of some R18 million by SAS to Petter was effected consequent upon the judgment obtained *per* Van Oosten J on 6 May 2004.

[108] In evaluating the evidence, the court has held in focus the 'purple passage'[23] set out in the case of *Stellenbosch Farmers' Winery Group Limited & Another v Martell et Cie & Others*[24] as follows:-

On the central issue as to what the parties actually decided, there are two reconcilable versions. So, too, on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes may

[21] 2009: Zeffertt, D.T. and Paizes, A.P. Second Edition; LexisNexis: Durban at Chapter 10, pp340-44 and Chapter 16, pp475-570.

[22] 2010: Schwikkard, P.J. and Van der Merwe, S.E. in collaboration with Collier, D.W.; De Vos, W.L. and Van der Berg, E. Third Edition; Juta's: Cape Town at Chapter 16, pp305-332.

[23] William Shakespeare's account of Cleopatra sailing down the Nile to meet Mark Antony is another example of what the court has in mind as a 'purple passage'.

[24] 2003 (1) SA 11 (SCA) at paragraph [5]

conveniently be summarised as follows:

To come to a conclusion on the disputed issues, a court must make findings on:

a) the credibility of the various witnesses;
b) their reliability; and
c) the probabilities.

As to (a) the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a number of subsidiary factors not necessarily in order of importance such as:

(i) the witness' candour and demeanour in the witness box;
(ii) his bias, latent or blatant;
(iii) internal contradictions in his evidence;
(iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions;
(v) the probability or improbability of particular aspects of his version;
(vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incidents or events.

As to (b), a witness' reliability will depend, apart from the factors mentioned under (a) (ii), (iv), (v) above, on

(i) the opportunities he had to experience or observe the events in question and
(ii) the quality, integrity and independence of his recall thereof.

As to (c), this necessitates an analysis and evaluation of a probability or improbability that each partiy's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the *onus* of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be latter. But when all factors equipoised the probabilities prevail.

[109] Mindful of the penal nature of section 424 of the old Companies

Act, the court considers it appropriate to apply a criminal standard of proof insofar as inferential reasoning is concerned. The standard is that found in *R v Blom*:[25] the inference to be drawn must not only be consistent with all the proved facts but must also exclude every other reasonable inference that may be drawn. The court has also had regard to the Constitutional Court's imprimatur in *S v Boesak*[26] and *Osman and Another v Attorney-General, Transvaal*[27] of the inference of guilt that may be drawn when, during a trial, an accused person fails to testify in his defence in the face of there being evidence which calls for an answer.

[110] Having regard to the tests set out in *SFW v Martell* and *R v Blom* against the evidence outlined above, the failure of the first defendant to put it to Messrs Moyo and the two Dubes that he disputed their evidence with regard to the cession and the first defendant's failure to testify (despite the free advice from the bench that he had a case to answer when he applied for absolution from the instance), one question looms large: why would there have been this rigmarole to concoct a cession agreement and thereafter, relying upon it, would there have been the application before Van Oosten J if not for the very purpose of diverting funds which were due to the plaintiff by SAS, out of the accounts to SAS to Petter? This leads to another question: if the funds were not, in fact paid from SAS to Petter, how come, when SAS was liquidated those funds were not in its accounts? The probabilities mount to the extent that it may be concluded, beyond reasonable doubt, not only that (i) the cession agreement was devised for the purpose of diverting funds which were due to the plaintiff by SAS, out of the accounts to SAS to Petter but also that (ii) the aforesaid diversion of funds took place consequent upon the order of Van Oosten J. In the result, the diversion of funds caused the plaintiff to suffer the loss in question.

[111] Section 424(1) of the old Companies Act reads as follows:

(1) When it appears, whether it be in a winding-up, judicial management or otherwise, that any business of the company was or

[25] 1939 AD 188 at 202-3
[26] 2001 (1) SA 912 (CC) at paragraph [24]
[27] 1998 (4) SA 1224 (CC) at paragraph [22]

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is being carried on recklessly or with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the Court may, on the application of the Master, the liquidator, the judicial manager, any creditor or member or contributory of the company, declare that any person who was knowingly a party to the carrying on of the business in the manner aforesaid, shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court may direct.

[112] If one has regard to the cases of *Cooper & Others NNO v SA Mutual Life Assurance Society and Others*[28] and *Ozinsky NO v Lloyd and Others*,[29] it is clear that, in addition to the plaintiff having to show that it is a creditor of SAS, in order to hold someone liable under s 424(1), the following has to be established:

(1) the business of the company was carried on

(a) recklessly,

(b) with intent to defraud creditors (of the company or of any other person), or

(c) for any fraudulent purpose; and

(2) the person concerned must:

(a) have been a party to the carrying on of the business, and

(b) have had knowledge of the facts from which the conclusion is properly to be drawn that the business of the company was or is being carried on:

(i) recklessly;

(ii) with intent to defraud creditors (of the company or of any other person); or

(iii)for any fraudulent purpose.

[113] Insofar as the interpretation and applicability of the provisions of section 424 of the old Companies Act are concerned, the Supreme Court of Appeal ('SCA') has delivered a judgment which is 'hot off the

[28] 2001 (1) SA 967 (SCA)
[29] 1995 (2) SA 915 (A) at 917G - I

press': *Fourie v Firstrand Bank Limited*.[30] That case dealt with the cases to which the plaintiff and the first defendant had previously referred me: *Howard v Herrigel and Another NNO*[31] *Philotex (Pty) Limited and Others v Snyman; Braitex (Pty) Limited v Snyman and Others*,[32] *L & P Plant Hire Beperk en Andere v Bosch en Andere*[33] and *Saincic and Others v Industro-Clean (Pty) Limited and Another*.[34] In paragraph [30] of *Fourie v Firstrand Bank*, the general principle that section 424 of the old Companies Act does not require proof of a causal link between the relevant conduct and the company's inability to pay the debt in question is affirmed. In *Fourie v Firstrand Bank*, the SCA also reaffirmed the exception to this general principle where the converse had been positively established inasmuch as there plainly was no causal connection between the relevant conduct and the debt.[35]

[114] The factual finding, in this court, that the probabilities are, beyond reasonable doubt:-

(i) that the cession agreement was devised for the purpose of diverting funds which were due to the plaintiff by SAS, out of the accounts to SAS to Petter; and

(ii) that a diversion of funds took place consequent upon the order of Van Oosten J; and

(iii) that this diversion of funds resulted in the plaintiff suffering a loss of R18 043 374, 21

makes it unnecessary to deal with the finer points of causality raised in the respective cases of *Saincic* and *Fourie v Firstrand Bank*. While the first and second defendants were directors of SAS, it business was, with their knowledge and active participation being conducted for fraudulent purposes. As a result of this fraudulent conduct of the business of SAS, SAS has not been able to pay a debt due by it to the plaintiff.

[115] The plaintiff has asked for the costs of two counsel, where two

[30] (578/2012) [2012 ZASCA 119 (18 September 2012).
[This judgment is reported above at page 461 - Ed.]
[31] 1991 (2) SA 660 (A) at 672C-E
[32] 1998 (2) SA 138 (SCA) at 142G-I
[33] 2002 (2) SA 662 (SCA) at paragraphs [39] and [40]
[34] 2009 (1) SA 538 (SCA)
[35] Paragraph [31] of *Fourie v Firstrand Bank Limited*; paragraph [29] of *Saincic*.

counsel were, in fact engaged in the matter. In view of the nature of this matter, such an order is justified. The plaintiff has asked that interest be order to run from 6 May 2004 (the date of the order given by Van Oosten J), alternatively from 14 September 2006 (the date of service of the summons). It will be wiser if the court errs on the side of being conservative on this issue. The date of service of the summons shall apply.

[116] Judgment is given in favour of the plaintiff against the first and second defendants jointly and severally, the one defendant paying the other to be absolved. It is declared that the first and second defendants are jointly and severally liable to the plaintiff, the one defendant paying the other to be absolved, in terms of section 424 (1) of the old Companies Act (No.61 of 1973, as amended) for a debt owing by Southern Asbestos Sales (Pty) Limited ('SAS') to the plaintiff in the sum of ZAR (South African Rand) 18 043 374, 21 (eighteen million and forty-three thousand, three hundred and seventy–four rand and twenty-one cents).

[117] The first and second defendants are jointly and severally liable to pay the plaintiff, the one defendant paying the other to be absolved, as follows:

(i) The sum of R18 043 374, 21;

(ii) Interest on the aforesaid sum calculated at the rate of 15.5% per annum from 14th September, 2006 to date of payment;

(iii) Costs of suit, which costs are to include all costs previously reserved and the costs of two counsel for the times when two counsel were actually employed by the plaintiff.

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 20235/2006

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

02/05/2014
DATE

SIGNATURE

In the matter between:

MUTHUMWA DZIVA MAWERE	Applicant
and	
S M M HOLDINGS (PRIVATE) LTD	Respondent

In re:

S M M HOLDINGS (PRIVATE) LTD	Plaintiff
and	
MUTHUMWA DZIVA MAWERE	First Defendant
PARMANATHAN MARIEMUTHU	Second Defendant

JUDGMENT

MAKUME, J:

[1] The applicant in this matter seeks the following orders against the respondent:

1.1 That the judgment granted against the applicant by His Lordship Willis J as he then was on the 11th October 2012 be rescinded and set aside.

1.2 Directing that a trial be held for the consideration of new evidence.

1.3 Alternatively that the trial between the parties be commenced *de novo*.

1.4 Granting the request for a submission and hearing of new evidence at a trial between the parties.

1.5 Staying any execution of a warrant of execution against the applicant's property pending the finalisation of this application.

1.6 To the extent necessary condoning the late filing of the rescission application.

1.7 That any party who opposes the granting of the relief sought be ordered to pay the costs.

1.8 That such further and/or alternative relief as the court may deem appropriate be granted.

[2] The application was argued over three days. The notice of motion, answering and replying affidavits besides annexures stretches over 300 pages. The applicant generated a mass of paper in this application in an effort to show that he has a case worthy of reconsideration. I have no hesitation to say right at the beginning that the applicant's case was misconceived right from the outset and was doomed for failure.

[3] A reading of the papers indicates that this matter has gone a full circle. It commenced in this Court with a full hearing in the presence of the applicant during October 2012 before Willis J as he then was. It proceeded to the Supreme Court of Appeal wherein that court refused application for leave to appeal. Then it next stopped at the Constitutional Court where once more leave to appeal directly to that court was refused. It is now back where it started.

[4] Besides the route covered in this matter there was a number of interlocutory applications leading up to the date of hearing in October 2012. These interlocutory applications brought at the instance of the applicant all cumulatively sought to exonerate the applicant from liability. Some of the applications were in the Zimbabwean High Court and others in South Africa. I mention hereunder such applications as they appear from the document titled "*Chronology of relevant events in regard to the rescission application*".

[5] It is common knowledge that during September 2004 the respondent's company was placed under reconstruction in terms of Zimbabwe Government Gazette General Notice 450A of 2004. This resulted in an administrator being appointed by the Zimbabwean Government to oversee the companies activities in Zimbabwe.

[6] The reconstruction order was confirmed by the High Court of Zimbabwe on the 15th December 2004. On the 1st February 2011 the applicant failed in his application to the Supreme Court of Zimbabwe where he attacked the constitutionality of the reconstruction order. In February 2008 he launched a similar attack in South Africa. Judge Campbell dismissed that application.

[7] The action instituted against the applicant and a certain Marimuthu is in terms of section 424 of the Companies Act No 61 of 1973. The Honourable Willis J found in favour of the respondent and ordered the applicant and the

said Marimuthu to pay to the respondent an amount of R18 million. It is that judgment granted on 12 October 2012 which he seeks that it be rescinded.

[8] The record establishes that prior to the final date of hearing the action had been postponed on at least four occasions all at the instance of the applicant. On the day of the hearing itself there was no less than three applications all by the applicant directed at an attempt that the trial should not proceed. This included an application that Willis J recuse himself.

[9] His Lordship Willis in his judgment at paragraph [15] says the following in relation to the strategies adopted by the applicant then:

> *"Mr Kyle then proceeded to apply for my recusal. He claimed that the issues in the special plea had been predetermined and that there was a clear bias in favour of the plaintiff. After argument the application for recusal was dismissed with costs. At that stage I had not even read any of the documents in the nine lever arch files before me, I had not even heard an opening address. I had no idea of the history of the matter and had merely read the practice notes and annexures which had been filed. There appeared to me to be no legitimate grounds for my recusal. At that stage I had no sense of the basket full of mambas with which I would be presented during this case. The application for my recusal was the mere beginning of a strategy of intimidation of the bench."*

[10] It is against this background that I now turn to the merits of the application itself.

CONDONATION

[11] It is a fact that this application was launched on the 13th August 2013 a period of ten months since the judgment was granted. That judgment was neither by default nor was it in error. The application can accordingly not be in terms of Rule 42. It can only be dealt with under the common law. Such application should be brought timeously and proceed expeditiously. See the matter of *Firestone SA (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) at 306, *First National Bank of South Africa Ltd v Van Rensburg NO* 1994 (1) SA 677 at 681.

[12] However, I will accept that the applicant did not just sit and do nothing. He spent the time with attempts to appeal the judgment which decision was a right one and only when this was unsuccessful he returned to base. It is because of that only that I have decided to grant condonation.

AD PRAYERS 1.1, 1.2, 1.3 AND 1.5

[13] In his notice of motion the applicant seeks rescission of judgment to enable him to lead new evidence at a trial that will ensue should I set aside the judgment as applied for.

[14] In terms of the common law and in principle it has been a long-standing practice of our courts that two essential elements must exist to enable a court to set aside its own judgment namely:

14.1 that the party seeking relief must present a reasonable explanation;

14.2 that on the merits that party has a *bona fide* defence which *prima facie* carries some prospect or probability of success.

[15] In the matter of *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 764J the learned Miller JA said the following:

> *"The appellant's claim for rescission of the judgment confirming the rule nisi cannot be brought under Rule 31(2)(b) or Rule 42(1) but must be considered in terms of the common law which empowers the court to rescind a judgment obtained on default of appearance provided sufficient cause therefor has been shown."*

[16] The main reason the applicant says constitutes sufficient cause appears on paragraph 6 of his founding affidavit which reads as follows:

> *"6. This application for rescission of a judgment is brought in terms of the common law on the following grounds:*
>
> *6.1 The applicant has since obtained material evidence which was not available before the trial court, which evidence would have shed light on the matter and consequent decision thereto by the honourable court.*
>
> *6.2 There is also a good and just cause as well as to why such material evidence was not available before the court a quo nor was it available to the applicant at the time in order to allow the applicant to fully and appropriate vindicate its defence in the action against it in the trial court.*
>
> *6.3 Further to the abovementioned grounds there is a causal link between the circumstances that gave rise to the*

original judgment and the material evidence now sought to be introduced to the court and the consequent relief sought in this application."

[17] Of significance is paragraph 6.2 of the applicant's founding affidavit. The applicant having said that he is expected to set out in detail when such new material or evidence came to his knowledge, in what manner and the reason why he could not have access to it earlier than now.

[18] The applicant says his concerted efforts and attempts to secure the records of payments between SAS and PETTER was unsuccessful prior to the conclusion of the trial. What the applicant does not tell us is why he did not issue a subpoena or proceed in terms of Rule 35 to compel discovery and the production of that information which seems crucial for his defence.

[19] At paragraph 23 he says that he eventually was provided with record of transactions by the liquidator on the 25th May 2013. Once more he does not tell the court what method he used to get the record which he had been trying to get since 2011. In the absence of any explanation I have to accept that the liquidators readily made the information available to him without any difficulty.

[20] The next question that arises out of the applicant's information that he received the record the new evidence on the 23rd May 2013 is why he did not bring this to the attention of the Supreme Court of Appeal and/or the Constitutional Court.

[21] The Supreme Court of Appeal dismissed his application for leave to appeal on the 18th May 2013. He has given no reason why he did not bring this to the attention of the court (SCA) before judgment was passed.

[22] In a recent decision by the Supreme Court of Appeal the matter of *AllPay Consolidated Investments v CEO SASSA* 2013 (4) SA 557 Nugent JA writing for the majority states the following at page 559 paragraph [7]:

> *"[7] It is the practice of this court that parties may not file new material after the hearing of an appeal without the leave of the court. There must be finality in litigation and finality comes for the litigants once the appeal has been heard. That was conveyed to the attorneys of all the parties and they were directed to refrain from doing so. The response from AllPay's attorneys was to ask our leave to file the application formally. After reading the application we refused the request because even on its face, without hearing the other parties, there is no possibility that the application could succeed."*

[23] Further in the same judgment the learned judge continued as follows at page 560 paragraphs [13] and [14]:

> *"[13] It has been said many times that new evidence will be admitted on appeal only where the circumstances are exceptional. There would need at least to be an acceptable explanation for why the evidence was not placed before the court below ...*
>
> *[14] ... It is also trite that the evidence would need to be 'weighty and material'. (See Dormell Properties 282 CC v Renasa Insurance Co Ltd and Others NNO 2011 (1) SA 70 (SCA). In S v N 1988 (3) SA 450 (A) at 458I-459A Corbett JA pointed out that in the vast majority of cases new evidence has not been allowed, and where it has been allowed the evidence has related to a single critical issue. In this case, if the evidence were to be admitted, the parties might just as well start the case over again. What is now sought to be introduced is a new case entirely at odds with the case that was presented. What is more, far*

from being weighty, the evidence carries no weight at all, and would not be admissible."

[24] The principle expounded in the cases referred to above establish that new evidence is allowed not only before an appeal is heard but thereafter but before judgment as long as that evidence is exceptional and there is an acceptable reason given why such evidence was not made available at the court *a quo*.

[25] The litigation involving all the companies wherein the applicant has a direct or indirect interest was placed before me and were dealt with by other judges. Amongst them is the application brought by the respondent for the liquidation of Southern Asbestos Sales (Pty) Ltd ("*SAS*"). This application was heard in this Division during the year 2005. The cause of the liquidation was the failure by SAS to pay to the respondent the amount of US $18 464 595,27 the same amount which is the basis of the cause of action against the applicant. In the liquidation application which was opposed by Mr Mawere the applicant SAS raised all such defences including the constitutionality of the order placing SMM under reconstruction by the Zimbabwean Government.

[27] The learned Epstein AJ referred to the two companies SAS and PETTER as the Mawera companies. The applicant clearly controls both companies directly and indirectly. In dismissing the defence that SAS was not indebted to the respondent in the liquidation application the judge said the following at paragraph [31] of the matter *SMM Holding (Pvt) (Pty) Ltd v*

Southern Asbestos Sales (Pty) Ltd 2005 (4) All SA 584 (W) at page 594 paragraph [31]:

> *"There is, however, telling evidence against SAS in regard to the indebtedness. I have already referred to the judgment obtained by PETTER pursuant to the alleged cession. The facts are that on 6 May 2004 PETTER obtained an Order against SAS for payment of the amount R74 872 468,49. The cause of action relied on by PETTER was based upon an allegation that SMM had ceded this part of its claim against SAS to PETTER. The Order was rescinded on 29 November 2004. PETTER has, I was informed, not pursued its case against SAS. There is however no explanation by SAS as to why it was prepared to consent to a judgment in favour of PETTER in the amount of R74 872 468,49 which claim arose by virtue of an alleged cession to PETTER of part of SAS's indebtedness to SMM in the current matter. One would have expected SAS which disputes the indebtedness relied upon by an applicant in winding-up proceedings to be candid and forthcoming, which has not been the case in this matter. It bears mention, of course, that both PETTER and SAS are what can be referred to as 'Mawere Companies'."*

[28] The reasoning referred to by Epstein AJ was further strengthened by the finding of Willis J when he went on to find that the applicant Mr Mawere did not plead that SAS had paid the R18 million to PETTER before Van Oosten J issued the order of 6 May 2004. Willis J went on to find that:

> *"Taken in context the first defendant's plea contains a clear admission that the payment of some R18 million by SAS to PETTER was effected consequent upon judgment obtained per Van Oosten J on 6 May 2004."*

[29] The applicant never had a valid nor *bona fide* defence to the claim by the respondent. It has failed dismally to create a new defence and has in the process abused the legal system. This matter should have ended when the

Supreme Court of Appeal pronounced on his prospects of success on appeal. In saying so my conclusion rests upon not only my experience but also on the experience of other judges who dealt with this matter before me.

[30] The arguments advanced in support of the applicant's contentions are so far-fetched and legally untenable that they require no further consideration. The applicant generated a mass of paper which serves little or no purpose save to envelope the real issues in the fog which hides or distorts reality. The application to rescind as well as the application to stay the writ of execution including all the prayers in the Notice of Motion must accordingly fall.

COSTS

[31] In the application the applicant raised several issues which had been decided upon in previous judgments for example the authority of Mr Gwaradzimba as well as the power of the Administrator under the Reconstruction Act of Zimbabwe. These matters had been ventilated in previous applications involving the same parties and finality reached yet the applicant saw it fit to raise them afresh

[32] The application itself served before two judges on which instances all sorts of new material was sought to be introduced for instance after my Brother Francis J had postponed the matter during October 2013 it served before Vilakazi AJ on the 15th November 2013. It was on that day that the

applicant sought to introduce a supplementary affidavit which effort was correctly opposed by the respondent. This was yet another act of adding more meaningless paper work. It is this conduct that I have come to the conclusion that it should be visited by a punitive costs order as applied for by the respondent.

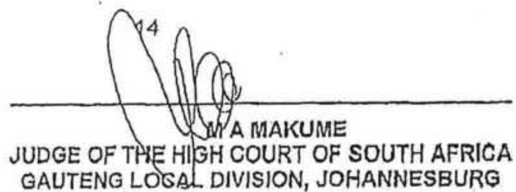
[33] I accordingly make the following order:

1. The application for rescission of the judgment by Willis J dated the 12th October 2012 is dismissed.

2. The application to stay execution of the writ of execution including all the other prayers in the Notice of motion are dismissed.

3. The applicant is ordered to pay taxed costs of the application on an attorney and client scale.

4. It is further ordered that the costs of the proceedings before Vilakazi AJ be paid jointly and severally by the applicant Mr Muthumwazlwa Mawere, his attorney Masewawatla Attorneys and his counsel Adv N S Petla *de bonis propriis* the one paying the other to be absolved.



M A MAKUME
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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DATE OF JUDGMENT:	02nd May 2014