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IN THE SOUTH GAUTENG HIGH COURT

JOHANNESBURG

CASE No. 20235/2006

Reportable only in the electronic law reports



In the matter between:

SMM HOLDINGS (PVT) LIMITED

Plaintiff

and

MUTUMWA DZIVA MAWERE

First Defendant

PARMANATHAN MARIEMUTHU

Second Defendant

JUDGMENT

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 That court order was rescinded on application to this court in November 2004 on the basis that it was fraudulently obtained.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

¹ Under Case No. 04/10496

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 be 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 the 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;
- (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 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 Johannesburg² 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

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

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.

[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 Bankin 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 it 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 went 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 to 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 Oosthuizen, 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 group 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 come 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 SAS³ 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 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

3 Under case number 06/2007

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 Sanangura 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, Canadian dollars 600 000 and R4,5 million. He said, however, 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 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 role 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 claim⁴, which claim has been pursued;

99.1.2 This application 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

⁴ Under case number 2004/26770

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 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

⁵ Under case number 2005/20057

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

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 application⁸ for an order reviewing and setting aside of the decision of a representative of the Master of the High Court to admit, as proved, 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

⁷ Under case no. 2006/7836

⁸ Under case number 2006/20467.

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,

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 French-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

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 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'.

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.

[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 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

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].

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.

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 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;

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]

- 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 party'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

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]

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 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,

28 2001 (1) SA 967 (SCA)

29 1995 (2) SA 915 (A) at 917G - I

- (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 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*

30 (578/2012) [2012 ZASCA 119 (18 September 2012)

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]

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, its 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.

³⁴ 2009 (1) SA 538 (SCA)

³⁵ Paragraph [31] of *Fourie v Firstrand Bank Limited*; paragraph [29] of *Saincic*.

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

DATED AT JOHANNESBURG THIS 11th DAY OF OCTOBER , 2012

N.P. WILLIS

JUDGE OF THE HIGH COURT

Counsel for the Plaintiff: Adv *H. C. Bothma*

Attorneys for the Plaintiff: Brink Cohen Le Roux Incorporated

First Defendant: In Person

Second Defendant: In Default of Appearance

Dates of hearing: 10-14 ; 17 -19; 27 September, 2012

Date of judgment: 11 October, 2012

ANNEXURE 'A' (the complaint by the first defendant about the court to the Judicial Service Commission) appears overleaf:

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4 October 2012

The Judicial Services Commission
 c/o Chief Justice of the Republic of South Africa
 Constitutional Court
 1 Hospital Street
 Constitution Hill
 Braamfontein

Attention: Your Lordship Mr. Chief Justice Mogoeng Mogoeng:

Re: Complaint against His Lordship Mr. Justice N. Willis

1. I am lodging this complaint in terms of Section 14(4)(e) of the Judicial Service Commission Act 9 of 1994 as amended by Judicial Service Commission Amendment Act 20 of 2008 in relation to the Presiding Judge, His Lordship Mr. Justice N. Willis, in the matter SMM Holdings (Private) Limited ("SMM") v Mutumwa Mawere & Parmanathan Mariemuthu under Case Number 20235/2006 in the South Gauteng High Court.
2. I am the First Defendant in the above-mentioned matter.
3. The Plaintiff in the matter is SMM, a company that was placed under reconstruction, on 6th September 2004, pursuant to the operation of a decree promulgated by President R. Mugabe allowing for the control and management of the company to be vested in a state-appointed administrator on allegations that the company was indebted to the government of Zimbabwe and, therefore, the government could not rely on the existing laws to protect itself as a purported creditor. A copy of the Reconstruction Act is attached hereto as **Annexure MDM1**.

4. I was born in Zimbabwe and acquired South African citizenship in 2002 having been resident in the country since 1995.
5. I am a businessman and prior to my taking residency in South Africa, I was employed by the World Bank in Washington DC as a Senior Investment Officer in the Oil, Gas & Mining Department.
6. In March 1995, I founded Africa Resources Limited (ARL”), a company incorporated under the laws of the British Virgin Islands (“BVI”) that acquired in March 1996 the entire shareholding in the holding company of SMM, SMM Holdings Limited (“SMMH”), a company incorporated under the laws of the United Kingdom.
7. The facts of the matter before His Lordship Mr. Justice Willis relate to a period in which SMM was under my control and management.
8. SMM’s control and management was divested through an act of state in the jurisdiction of Zimbabwe. Accordingly, it is submitted that the control and management of the Plaintiff was altered pursuant to the operation of a law that offends the South African constitution as set out below.
9. It is common cause that the Plaintiff is a company that was placed under reconstruction on 6 September 2004.
10. SMM represented in this action as strictly a private company is in truth and fact, an organ of the state of Zimbabwe in so far as the control and management of the company was divested from its shareholders.
11. The absurdity of this matter is that were it not for the extra-judicial intervention of the government of Zimbabwe, this action would not have been instituted as it

would be tantamount to me suing myself as the companies concerned were all under my control at the material time.

12. The abuse by the Zimbabwean government of this forum in far as using the Courts of this country to implement a scheme to expropriate my assets in Zimbabwe and assert rights acquired pursuant to a draconian legislation did not start with this action but this is the only action in which I am a defendant in claim instituted by a company that was under my control during the material time.
13. Be that as it may, SMM is claiming from Mr. Mariemuthu and myself, jointly and severally, an amount of R18,043,373.21 in terms of Section 424(1) of the Companies Act 61, of 1973.
14. SMM alleges that as a consequence of a fraudulent scheme, the said R18 million flowed to Petter Trading (Pty) Limited ("Petter")(in liquidation) from Southern Asbestos Sales (Pty) Limited ("SAS")(in liquidation).
15. The summons was issued on 13 September 2006.
16. I was a director of Petter and SAS until 1 March 2004 when I resigned together with other directors appointed to the boards of South African based companies following a decision taken in response to the actions of the government of Zimbabwe in denying the Plaintiff access to foreign currency to pay its foreign creditors.
17. As a consequence, Mr. Mariemuthu was appointed a director of both SAS and Petter on 6 May 2004, the day on which the High Court of South Africa granted the cession court order.
18. As stated above, SMM, SAS and Petter were under my control and beneficial ownership.

19. The government of Zimbabwe (“GOZ”) caused SMM to rescind the cession court order as well as authorising the Administrator to institute the various litigations in South Africa including the application for the liquidation of Petter and SAS.
20. Although the summons was originally issued against me, Mr. Mariemuthu was joined in the proceedings by SMM on account of disputed admissions regarding the timing of payments that were made by SAS to Petter in the ordinary course of business and, therefore, could not be remotely considered to be part of any fraudulent scheme when regard is made to the fact that such payments were made prior to the date the cession order was granted.
21. On Monday 10 September 2012, the trial commenced before His Lordship Mr. Justice Willis.
22. Mr. Frederick Kyle who withdrew his services following concerns regarding the manner in which the trial was being handled represented Mr. Mariemuthu and myself.

Factual Background to the Case

23. SMM was until 1 March 2004; a company controlled by its board of directors and was ultimately beneficially me.
24. I became a target of the Zimbabwe government following my decision to decline taking a position of an office bearer of the ruling party’s provincial committee in October 2003 after being elected in absentia and without being consulted.
25. Beginning in mid-December 2003 when the current governor of the Reserve Bank of Zimbabwe was appointed, a number of businesspersons were targeted

for foreign currency violations and the law was changed to make failure to remit foreign currency proceeds from exports a criminal offence and investigations were commenced against selected exporters including the Plaintiff.

26. Accordingly, foreign currency violations were described as externalisation and at the core of this matter is the attempt by the government of Zimbabwe to apply the Zimbabwean legislation extra-territorially in that the cause of action in this matter relates to a company, SAS, that is registered in South Africa and it is alleged that this company failed to remit foreign currency proceeds to Zimbabwe using a court order that had the effect of allowing the company to divert funds to a company, Petter, also registered in South Africa. However, for this law to be applied in South Africa, the control and management of the Plaintiff had first to be divested from its private shareholders to allow the government of Zimbabwe to superimpose itself in commercial transactions and approach this jurisdiction dressed as a normal company pursuing a bona fide commercial debt.
27. It is significant to state that during the material time, exporters were allowed to retain in foreign currency only a portion of the export proceeds that could then be used to procure inputs from external suppliers.
28. In December 2003, the Reserve Bank of Zimbabwe ("RBZ") unilaterally and arbitrarily lowered the percentage that SMM could retain from 75% to 50% and this had the effect of reducing the amount of foreign currency available to pay to the company's foreign creditors including Petter.
29. As a result, SMM could no longer timeously meet its obligations to Petter, a key supplier to the mines resulting in the disruption of mining operations.
30. Mr. Mariemuthu was then approached by the then Chairman and CEO of SMM to sit on the board of the holding company of SAS and Petter i.e. AR Projects

Services (Pty) Limited (“ARPS”)(in liquidation) as it was felt that the it was in the best interests of the group that all directors representing the Plaintiff including Mr. Mawere resign from the boards of all South African registered companies in the group.

31. Consequently, he was appointed a director and Chairman of ARPS and subsequently a director and Chairman of SAS and Petter.
32. He was fully briefed about the challenges faced by the group in so far as the deteriorating relationship with the GOZ was concerned and the threat it posed to the continued viability of the mines and the South African companies associated with SMM.
33. In fact during May 2004, an investigation team from the RBZ visited South Africa to meet with Mr. Mariemuthu . The team demanded to see the books of SAS and was informed that there was no legal basis for a Zimbabwean investigating team to have records and documents of a South African company without a court order in South Africa. Threats were then made that action would be taken in Zimbabwe against SAS and all companies associated with me.
34. To confirm the deteriorating relationship between SMM and the GOZ, a dispensation granted in 1998 for the company to export its own asbestos was withdrawn with effect from 1 April 2004 and this had the effect of disturbing the business model that was in place whereby inter-company transactions would take place between the companies in the group.
35. The relationship between SAS and SMM’s wholly owned subsidiary, African Associated Mines (Private) Limited, evolved from that of an agent to a distributor in December 2002.
36. Notwithstanding, His Lordship Mr. Justice Fevrier, established that at the time

the cession court order was obtained there was no valid and enforceable agreement between SAS and AAM and stated in his judgment that: *“It appears that the parties did not refer to the Act because, had they done so, they would have realised that in terms of Section 46 of the Act, the duration of validity of the exemption was a for a maximum period of twelve months, namely, from (1) December 1997 to 30 November 1998.”*

37. SMM was indebted to Petter at the time in the amount of R27 million far in excess of what SAS had paid to Petter prior to the cession court order that has been used over the past 8 years to justify the interference of the government in the affairs of SMM. Accordingly, SMM had constructive knowledge that SAS in the ordinary course of business had made payments to Petter to allow for the continued supply to the mines otherwise the suppliers to Petter and in turn to AAM would not have continued to support the mines without payments.

38. The cession court order was granted on 6 May 2004 and on 11 May 2004, Mr. Obed Dube. Managing Director of AAM wrote to me instead of the directors of SAS informing me for the first time after he had signed the cession agreement that that the agreement was unworkable fully knowing that I was no longer a director of SAS and Petter. It is submitted that for him to write the letter in the manner he did, he was already working with the authorities in Zimbabwe whose objective was to find a connection between me, the holder of the shares in SMM, with the alleged fraud. It took more than two years for this action to be instituted after the letter from Mr. Dube was written.

39. However, on 17 May 2004, a warrant of arrest was issued in terms of Section 33(1) of the Criminal Procedure and Evidence Act (CAP) 9:07 of Zimbabwe on the suspicion that I had committed a crime during 1 January 2000 to June 2003 of fraud or alternatively violating the Exchange Control Regulations of Zimbabwe.

40. On 25 May 2005, I was arrested in South Africa pursuant to an extradition application instituted by the government of Zimbabwe. It is ironic that SMM was not the complainant. None of the directors of SAS and Petter were mentioned in the extradition application notwithstanding the fact the alleged fraudulent cession agreement was duly signed by representatives of the companies concerned i.e. SAS, Petter and AMM by Messrs. Sanangura, Lovemore Dube and Obed Dube; respectively..

41. It was alleged in the extradition application that I and not SAS had amounts in my personal accounts held outside Zimbabwe and it was suspected that some of the export earnings allegedly owed by SAS to SMM went into these accounts:

US\$18,464,595.27,
Can\$ 628,071.84, and
ZAR4,515,367.48

42. It is significant that at the time, the authorities in Zimbabwe were operating on the assumption that I was still a Zimbabwean citizen in which case the alleged holding of foreign funds by a resident of Zimbabwe would have fallen within the ambit of the Zimbabwean exchange control regulations hence the choice of words above.

43. The extradition application was dismissed on 29 June 2004.

44. The board of SMM was then forced by the Reserve Bank of Zimbabwe to formally meet on 1 July 2004 for the sole purpose of passing a resolution that the company's consent to the granting of the cession court order was unauthorised and, therefore, the court order was to be rescinded.

45. Immediately after the board meeting, the Chairman of SMM, Dr. William Mudekunya, left the country and has since not returned to the country for fear of

being arrested by the authorities.

46. On 9 July 2009, I was specified in terms of the provisions of the Prevention of Corruption Act of Zimbabwe on the same allegations of causing SAS not to remit funds allegedly due to SMM. The same figures as mentioned above were used in justifying his specification.
47. On 13 August 2004, an Investigator was appointed in terms of the Prevention of Corruption Act of Zimbabwe to investigate my affairs and in particular my alleged role in respect of the cession court order. The effect of specification was to legally disable me from challenging the actions of the government of Zimbabwe and more significantly alienating me from the control and management of my Zimbabwean companies.
48. On 26 August 2004, SMM was also specified together with other companies deemed to be under my control.
49. On 3 September 2004, a decree was promulgated by President Mugabe using state of emergency powers to place SMM under the control of Mr. Gwaradzimba, as Administrator. It is on Mr. Gwaradzimba's authority that these proceedings and others have been instituted in South Africa.
50. On 6 September 2004, SMM was placed under the control of an extra-judicially appointed Administrator on allegations that the effect of the cession court order was to divert funds allegedly due to SMM from SAS and, therefore, SMM was denied of working capital necessitating the government to intervene as a super creditor protected by the decree.
51. A copy of the Reconstruction of State Indebted Insolvent Companies whose application is retrospective is available should the JSC wish to review it. The law is a penal one and it is submitted that it offends the provisions of the South

African constitution.

52. The fact that a number of litigations have been entertained in this jurisdiction based on the rights conferred on the litigants by this draconian law must be a cause of concern to all South African investors in Zimbabwe and no doubt a source of celebration and vindication in Zimbabwe that laws of this nature pose no real threat to the rule of law in South Africa.
53. The facts of this matter will confirm that this matter goes beyond the pursuit of any normal foreign-based creditor for a bona fide monetary claim against a South African debtor. Rather the rights sought to be asserted in this jurisdiction arise from an act of a foreign state.
54. It is submitted that Mr. Mariemuthu was not cited as a Defendant in the original summons confirms that no facts existed linking us jointly to the allegations and more importantly the decision to join him in these proceedings were motivated simply by a recognition that the case against me was weak and more significantly was not supported by concrete evidence.
55. A reading of the particulars of claim will confirm that the cause of action is predicated on a link between the alleged fraud and the purported monetary loss of R18,043,373.21.
56. It is submitted that all that we expected would be evidence that such funds were in truth and fact diverted as alleged and more significantly that SAS had the funds to be so diverted as well as confirmation that such funds were solely dedicated for payment to SMM.
57. It is submitted that the particulars of claim were amended opportunistically to deal with the embarrassment of failing to join a director of SAS and Petter at the material time who would and should have known about the alleged payments

that were made as a consequence of the cession court order. In the absence of concrete evidence supporting the connection between the alleged misrepresentation of facts in obtaining the cession court order and the purported monetary loss, it can be understood why Mr. Mariemuthu's alleged utterances are now being used with the support of His Lordship Mr. Justice Willis as a substitute for concrete evidence of the manner in which the alleged payments to Petter by SAS to the cent were made and the timing of such payments.

58. As expected, no evidence was led confirming that payments were indeed made as alleged. During the trial, SMM's witnesses confirmed that Petter was owed by SMM in amounts in excess of the alleged payments made by SAS to it, which would suggest that SMM couldn't approach a court claiming a monetary loss caused by its non-payment to a South African company.

59. This is an unusual matter in which I am the primary target because I hold the shares that the government wanted to acquire without paying any compensation and hence the need to pursue this claim to complete the expropriation look as Section 12 of the Reconstruction Act provides for the forfeiture of the assets of a culpable and liable person to the government.

60. I was de-specified by the Ministry of Home Affairs that is now responsible for administering the Prevention of Corruption Act of Zimbabwe following investigations about the alleged fraudulent cession scheme. It is important to state that until January 2010, both the Prevention of Corruption Act and Reconstruction Act were administered by the Minister of Justice and Legal Affairs, Hon. P. Chinamasa, who has been the driving force of this matter.

61. It is ironic that one arm of the Zimbabwean government would come to the conclusion that the cession agreement was not fraudulent and more specifically that I committed no offence while another would hold a different view without the burden in this jurisdiction of leading evidence in support of the cause of action

and pleadings.

Proceedings at the Trial

62. The trial started on 10 September 2004 before the Honourable Mr. Justice Willis.

63. I approached the court with clean hands expecting that the Court would deal with issues of authority and also the critical fact that a law of a penal nature in a foreign state is being used to assert rights in this jurisdiction.

64. I will not bore you with the content of the proceedings but will draw your attention to the fact that all motions that were advanced on behalf of the Defendants were dismissed with costs including the issues of authority ignoring the constitutional implications of this trial on the integrity of South Africa in so far as it can claim that the constitution of the country does provide protection to citizens and the judiciary has an obligation to safeguard and protect the democratic constitutional order.

65. My attorney withdrew after realising that the attitude of the Court was subjective.

66. I was not granted an opportunity to find a replacement attorney rather I was given two alternatives either of proceeding with the trial without an attorney or face the consequence of a default monetary judgment. I chose to proceed with the trial in the hope that His Lordship Mr. Justice Willis will rise above his personal prejudices to deal with the core issues of this matter whether in the first place, a creature of statute in a foreign state can be given audience by the Courts in South Africa to assert claims of a penal nature and then proceed to allow evidence that prove or disprove the allegation that the alleged fraudulent cession court order was used to divert funds purportedly due to SMM from SAS.

67. It is submitted that this complaint must not be construed as an attempt to influence His Lordship Mr. Justice Willis who reserved his judgment rather it must

be seen in the context of the failure by His Lordship to be the gate keeper on a matter that is critically important to the protection of the reputation that the judiciary in post-apartheid South Africa has gained as a guarantor of the Bill of Rights that are enshrined in the constitution.

68. One would have expected His Lordship Mr. Justice Willis who clearly has lost confidence in the objectivity of the Higher Courts to deal with the constitutional matters raised before dealing with the merits of the matter.

69. The record of the relevant aspects of the trial is contained in the attached transcript as **Annexure MDM2** that I believe will assist the JSC appreciating the context in which this complaint is framed.

70. It is important to state that an application for the recusal of His Lordship Mr. Justice Willis was made on my behalf; but as expected was also dismissed by His Lordship.

The Complaint

71. I have reviewed the contents of the transcript for the proceedings on 10 April 2012 being Volume 1 – pages 1 to 91 and believe that this is so grave a matter that it cannot wait lest other innocent litigants may be exposed to the same injustice without the JSC knowing what is really happening at the coalface of justice.

72. The third plea on behalf of the Defendants dealt with the constitutional aspects of this matter. I quote what His Lordship Mr. Justice Willis said on page 22 of the transcript as follows:

“....Is it not convenient to deal with it (constitutional aspects) as part of the bigger story? The owner is, as I understand it that you are complaining of is a socialist one. It is a radical; it is reminiscent of socialist ideology. I do not get a sense that the courts above

*us in South Africa aretowards measures, on the contrary. I mean I have actually even given a judgment, and you see scant affirmation of the importance of private property on line. So in other words I cannot even sit here in conscience...even though the point might be a good one, if it is supported by the evidence and it comes out, even if it comes out I am not sure you are going to have any chance of success. **It is not even likely, as I understand the jurisprudence emerging from on high.**"*

His Lordship Mr. Justice was making the point he has no confidence in the higher courts of South Africa upholding the values and principles of the constitution. One would naturally have expected His Lordship to be the gatekeeper and, therefore, deal with the issue as the court of first instance but regrettably the comments were clearly made not to advance any conceivable legal point but to undermine the rule of law.

I feel strongly notwithstanding the fact that in previous matters, South African presiding judges have taken a similar approach, this matter involves a liquid claim and in the event that a judgment is made against me, the very assets that I would need to make good on such an order are in the hands of the government that is now controlling SMM.

In addition, SAS, Petter and myself have already been declared culpable and liable in Zimbabwe terms of the law that gives the Administrator the authority to represent SMM in the legal proceedings in South Africa on the same allegations and facts as contained in this action.

The separation of issues would have allowed the court to clearly see the direct role of the government of Zimbabwe and the fact that SMM is not a voluntary litigant but an organ of a foreign state that has no respect of the sovereignty of South Africa and the rule of law.

I had never expected that the doors of justice would be shut in this jurisdiction and expediency would override justice.

73. The exchange that follows between Mr. Kyle on behalf of the Defendants and His Lordship Mr. Justice Willis will help the JSC to appreciate why this matter ought to be ventilated outside the confines of the court:

MR KYLE: *M'Lord, we are dealing with a very peculiar Act M'Lord, which makes provision in Section 4 for the government of Zimbabwe to have superior rights as a creditor.*

COURT: *Ja.*

MR KYLE: *And to take control of a company without affording the company or shareholders any right to deal with. Now it is in terms of the South African constitution where we have a right to a fair impartial hearing M'Lord. We say that one cannot give an ear to a legislation which was designed specifically to prefer one creditor over another, where the creditor is his own jury and judge, and by implication has already taken a punitive measure by expropriating my client's shareholding in the Plaintiff, to become an owner, and then still come to South Africa while they are in control of all these assets, to seek an enforcement of a monetary claim well knowing that they have got all the assets.*

COURT: *But I repeat I have got – firstly is it not convenient to determine that as part of the greater issue, and while I personally may be sympathetic, I have no confidence that even if that point is established, that it is going to be held to be enforceable in a South African court by either the Supreme Court of Appeal or the Constitutional Court. You must remember I have been a judge for 14 years, I have seen the thrust of judgments coming from them, they are not going to sit....I do not know.*

MR KYLE: *M'Lord can I have two minutes to take further instructions?*

COURT: *Well do you want me to give reasons? Then should I not give my reasons?*

MR KYLE: *As the court pleases.*

COURT: *Well what do you – well are you thinking of an instruction to withdraw the point or what do you want to do? I mean surely – my reasons are, well I will give them do you in two minutes, in a minute.*

MR KYLE: *M'Lord the first and second defendant is primarily of the concern that before one can give audience to this Act, the constitutional nature and the issues has to be dealt with M'Lord. It is not so much an issue of convenience. If it is found that this Act is in contravention of the South African Constitution by impeding on the defendants' rights to a fair and partial hearing, and by – basically expropriating the assets and then trying to enforce it by obtaining a monetary judgment M'Lord, one needs to deal with that issue first before one leads evidence. Because if one starts leading evidence the issue as to whether or not the Act can be enforced, sort of loses effect.*

COURT: *No, but I think you must – I mean I am not saying that you cannot close the point. What I am putting to you is that firstly let us hear the trial, let us proceed with the trial. If all the facts become apparent, and you wish later to appeal on high on that being one of the grounds, that is something that we will consider at that stage and not now. That is what I am putting to you.*

MR KYLE: As the Court pleases.

COURT: The argument, is on behalf of the second defendant only or

MR KYLE: Mainly the first defendant.

COURT: First Defendant

74. Then His Lordship Mr. Justice Willis ruled as follows on this important matter:

“The First Defendant has now sought a separation of issues once again, the basis as I understand it is that it is alleged that the majority shares in the Plaintiff were unlawfully expropriated by the Zimbabwean government.

The first difficulty is that this does not even appear in the pleadings; although I have been given to understand that it will be appear in the amended plea, raised as a special plea, concerning the question of constitutionality.

If it is true that the shares were unlawfully expropriated,...also it is true that the majority of the shares in the Plaintiff were expropriated by the government of Zimbabwe, I am not embarrassed to place on record that I am personally sympathetic to that situation. However, there are two reasons why I think it inappropriate to a give a ruling that would amount to a separation of issues to determine the constitutionality of that particular point.

The first is that I think altogether more convenient that the issue be dealt with together with all the evidence, and it may ultimately, at the end of the day, depending on how the trial proceeds, be a ground of appeal in the event that the Plaintiff is successful wholly or in part, in the main action.

*But the second is that I have been a judge for some 14 years and from what I can see of judgments delivered by the Supreme Court of Appeal and the Constitutional Court, it cannot be said that they ant sympathetic to socialist measures. **This is certainly a socialist measure if it is true that a person’s shareholding was expropriated by the state, but as I say there is scant indication that the courts in authority over us***

here, are sympathetic to such arguments, and accordingly even if the point is ultimately established in the First Defendant's favour, namely that shares were expropriated from it in the Plaintiff, without any compensation, I am far from confident that the argument would carry weight on an appeal in this country.

Accordingly the application is dismissed with costs."

75. It is submitted that His Mr. Justice Willis is contemptuous of the manner in which the SCA and CC have dealt and are dealing with the issue of protection of property rights and, therefore, the impression I got is that he has no confidence with both the SCA and CC upholding the bill of rights enshrined in the constitution let alone protecting this court from abuse by foreign states who do not subscribe to generally acceptable constitutional and rule of law norms.

76. South Africa is a signatory to a number of international conventions that compel the judiciary to enforce and respect standards that are generally accepted yet in this case, it is the position of His Lordship Mr. Justice Willis that granting audience to a company whose shareholding has been altered by an act of state and that is now an organ of state does not pose any threat to the integrity of the South African constitutional order.

77. It is for this reason that Mr. Kyle refused to be part of a trial presided by a judge who clearly feels that the superior courts are no longer fulfilling the duties set out in the constitution.

78. The application for leave to appeal on this constitutional question was dismissed by His Lordship Mr. Justice Willis as follows:

"According I am satisfied that the correct legal decision is to dismiss the application with costs. The following is the order of the court: The application of leave to appeal against the ruling which I gave regarding the constitutionality or otherwise of the Zimbabwe Reconstruction of State Indebted Insolvent Companies Act 24:27,

is dismissed with costs.”

79. Following the withdrawal of my attorney, I continued with trial and His Mr. Justice Willis continued to make disparaging remarks about the SCA and CC in so far as the two institutions can be relied upon to enforce the provisions of the South African constitution. On page 34 of the transcript, His Lordship Mr. Justice Willis remarked as follows:

COURT: I am not saying ... [inaudible] absolutely clear, what I am saying is that I am not aware of a single judgment of the Constitutional Court where the issue of property rights has been contested, keenly contested. ... [Inaudible] property rights, in other words it is extremely difficult to evict people from property that they are unlawfully occupying, that is number one. **You have had pronouncements from the Constitutional Court about the privileges of ownership, and if it is tougher on you as the owners of property it is tough luck.** We are not - in other words the tone is not ... [inaudible] the courts are there to protect property right. You have got a presumption in law that the municipal rates and taxes are to be paid before a property can be transferred; I think that that is brutally offensive to property rights. have been a candidate myself for the Constitutional Court, I have raised in written documents, my personal misgivings about a number of judgments of the Constitutional Court that I think have not defended property rights as they should have been defended.

The result of that is that I was not even shortlisted for appointment. In other words not only has the court got that view but the Judicial Service Commission, with the minister sitting there, truly those objections that I raised, it was like water off a duck's back. It was speaking to deaf ears. **So all I am saying is I have really - I have no confidence, and it is a matter of genuine intellectual conviction, I have no confidence that if you take this challenge to the Constitutional Court they are going to say if it is true,** and I do not know what the facts are, but if it is true that

shares were taken unlawfully ... [inaudible] taken from you by the government of Zimbabwe without compensation, I have no confidence that the Constitutional Court in South Africa is going to say it is unlawful therefore all these proceedings are vitiated. That is what I was saying, and I hope it is clear.

80. Based on the above, my own confidence with the judiciary has been compromised and accordingly I feel that this is so grave a matter that merits the urgent attention of the JSC.

81. Section of 14(4)(e) of the JSC act reads as follows: “(e) Any other wilful or grossly negligent conduct, other than conduct contemplated in paragraph (a) to (d), that is incompatible with or unbecoming the holding of judicial office, including any conduct that is prejudicial to the independence, impartiality, dignity, accessibility, efficiency or effectiveness of the courts.”

82. I have no doubt that the JSC will concur with me that the unsolicited views regarding the competence or otherwise of the SCA and the CC to deal with constitutional matters that relate to the protection of citizens to their property fall within the ambit of the section in that the alleged conduct is prejudicial to the dignity and accessibility of the higher courts.

83. As a result of the personal views of His Lordship Mr. Justice Willis regarding his failure to be appointed as a judge of the CC, I feel that the doors of the SCA and CC were closed to me in a manner that is prejudicial to the accessibility, efficiency or effectiveness of the courts.

84. What was alarming is that although His Lordship Mr. Justice Willis was contemptuous of the SCA and CC, he was unwilling during the trial to address the constitutional matters inherent in this matter and in so doing he effectively denied me the right to justice and a fair trial.

85. His Lordship Mr. Justice Willis effectively gave me no choice but to proceed with the trial on his terms. The application for separation of issues provided an opportunity for the constitutional matters to be dealt with in South Africa and I submit that this would have given the court the full factual and legal matrix of this complex matter.

86. The fact that an organ of the Zimbabwean government was already in the South African Forum created an opportunity to raise questions that can never be raised in Zimbabwe regarding the constitutionality of the Reconstruction Act and its implications on the rule of law in Zimbabwe.

87. The failure by His Lordship Mr. Justice Willis to protect the constitution of South Africa and its obligations in terms of international law is incompatible with or unbecoming of the holding of judicial office.

88. His Lordship Mr. Justice Willis by refusing to address the constitutional matters that he said he had no confidence that the higher court would be able to objectively and fairly deal with, he effectively acted in a manner that is inconsistent with the conduct of a judge operating in a jurisdiction that respect the rule of law.

Conclusion

89. I believe that I have set the grounds on which this complaint falls within the ambit of Section 14(4)(e) of the Act.

90. In addition, I feel strongly that this a matter that ought to attract zero tolerance from the judiciary of South Africa as its implications on investors in Zimbabwe whose rights may very well be compromised unless the judiciary in this jurisdiction speaks with one voice on what matters.

91. The Reconstruction Act exists and given the trading relationship between South

Africa and Zimbabwe, the probability of it being used as a back door mechanism to expropriate assets is high necessitating this application in the hope that a declaration can be made on this important aspect of international law.

92. While I appreciate that His Lordship Mr. Justice Willis may be frustrated by the rulings of the higher court, I feel that this is a matter that should not have been brought in these proceedings and I fail to appreciate the relevance of the attitude of the higher courts to the matter for which he was called upon to be the custodian of the very justice that he feels is now a privilege and not a right in South Africa.

93. Without prejudging his findings in this matter, my confidence with the judiciary has sufficiently been shaken and compromised by utterances from the branch of the state that I so much respect.

94. As a litigant in this matter, the least I would have expected is for His Lordship Mr Justice Willis to keep his personal views on the higher courts to which I must look to for justice in the event that His Lordship Mr. Justice rules against me.

95. This court was uniquely equipped to hear all the facts and allow for their ventilation especially given that the trial was allocated 10 days and only four witnesses were called to give evidence.

96. Each time I tried to cross-examine SMM's witnesses on matters relating to the status of SMM as an organ of state and to adduce evidence on the role of the government of Zimbabwe in instigating the legal proceedings in South Africa, I was warned that I may get a cost order if I followed that line of questioning. The full record of the trial has not yet been transcribed but suffice to say that contrary to the promise that the constitutional matters that were flagged would be dealt with during the trial, His Lordship Mr. Justice Willis was not prepared to allow witnesses to be cross examined on the facts surrounding the reconstruction of

SMM and my specification.

97. My decision to take South African citizenship was primarily informed by the security that the constitution offers to citizens and the ability of the judiciary to provide the kind of checks and balances that protect citizens and their right to property.

98. To the extent that His Lordship Mr. Justice Willis has given up faith in the ability of the higher court to be objective and impartial, I am left with no choice but to bring this serious matter before the attention of the JSC and believe that the gravity of the matter will allow this issue to be nipped in the bud.

99. Should any clarification be required, please do not hesitate to contact the undersigned.

Yours Faithfully,

Mutumwa Mawere

Cc: His Lordship Mr. Justice Willis (.....)
His Lordship Deputy Judge President, South Gauteng Court, Mr. Justice Mojaelo (....)