

EXECUTIVE SUMMARY OF THE FINAL
REPORT ON THE FINDINGS
OF AN INVESTIGATION INTO THE AFFAIRS OF SMM
AND ALLEGATIONS OF EXTERNALISATION AGAINST Mr.
MAWERE

Attached is a summary of the significant findings resulting from the investigation into SMM Holdings Private Limited ("SMM"). The investigation was conducted by the Investigator, Assistant Commissioner, Mr. S. Mangoma appointed in terms of the Prevention of Corruption Act assisted by Chief Superintendent, Mukwazhi and a team led by Principal Director of the Anti-Corruption Unit in the President's Office

DATE: DECEMBER 10, 2010

EXECUTIVE SUMMARY

On 22 May 2004, a warrant of arrest was issued against Mr. Mutumwa Mawere, the sole shareholder of Africa Resources Limited (ARL), a company incorporated in the British Virgin Island (BVI), on allegations that he had externalised US\$18.5 million, CAD\$628,071 and ZAR4.5 million representing the alleged claims of SMM against its marketing agent, Southern Asbestos Sales (Pty) Limited (SAS), a company registered in the Republic of South Africa.

Following an application for the extradition of Mr. Mawere on 25 May 2004, he was arrested in South Africa. At the time, Mr. Mawere was a resident and citizen of South Africa. The records reviewed confirm that he acquired the citizenship of South Africa voluntarily in 2002.

In 1996, ARL acquired the entire shareholding of SMM Holdings Limited (SMMH), a company registered in the United Kingdom that is the sole shareholder of SMM.

Our investigations have revealed that there was no direct connection between Mr. Mawere and SMM. He was not a director of the company. His interest in SMM was through his shareholding in ARL.

SMM is the holding company of the two asbestos mines situated at Zvishavane and Mashava. The allegation was that funds due to SMM from SAS in respect of asbestos exports were diverted as a direct consequence of a cession court order granted by the High Court of South Africa to Petter Trading (Pty) Limited, a company registered in South Africa that was the principal supplier of goods and services to the SMM group.

Both SAS and Petter were ultimately owned by Mr. Mawere. He was not actively involved in the operations of the two companies.

The extradition application was dismissed by the Court in June 2004. On 9 July, 2004, Mr. Mawere was specified in terms of the Prevention of Corruption Act. On 13 August 2004, Assistant Commissioner, Mr. S. Mangoma, was appointed as Investigator into the affairs of Mr. Mawere.

On 26 August 2004, SMM and related companies in the group were specified and Mr. Reginald Saruchera was appointed as Investigator.

On 6 September 2004, pursuant to the operation of a reconstruction order, SMM was placed under the control and management of an Administrator.

The rationale for placing SMM under reconstruction was that SMM was deprived of working capital by its controlling shareholder leading the company to seek government intervention in the form of financial support.

The investigation had to focus on the allegations of externalisation that informed the decision to specify Mr. Mawere and all the companies that were deemed to be under his control. To the extent that SMM was placed under reconstruction, it was also important to establish whether in truth and fact SMM was state indebted as at 6 September 2004.

Following extensive and exhaustive investigations, it was established that the allegations of externalisation against Mr. Mawere were unfounded and baseless. It was also established that Mr. Mawere was neither a director nor shareholder of SMM. There was no direct legal and factual nexus between him and the company.

It was also established that SMM filed a claim against SAS for the same amounts allegedly externalised by Mr. Mawere. Investigations

revealed that SAS had no funds in its possession that would have been diverted using the cession court order.

Both the Advisory Report of the Governor of the RBZ and the evidence obtained from the Exchange Control Department of the RBZ confirmed that there externalisation allegations were not supported by any evidence. Accordingly, the RBZ was not a complainant in the matter.

According to the RBZ records, SMM's outstanding CD1 forms had a value of about US\$2 million far below the amounts allegedly externalised.

The claim filed in South Africa was examined and a number of fatal inconsistencies were observed. The basis of the claim is contradictory as on the one hand the relationship between SAS and SMM was that of agent and principal and on the other hand such relationship was treated as that of principal to principal.

Taking the position that SAS was an agent of SMM, the basis of the claim against SAS cannot be for goods exported by SMM because such goods could not have been meant for SAS. In the circumstances, the burden of proof that SAS did receive funds from SMM's customers lies with SMM. Regrettably such proof has not been provided.

The team also obtained information that instructions were given to SAS' debtors not to pay to the company. This flies in the face of the allegations that all the alleged outstanding amounts due to SMM were externalised.

Mr. Gwaradzimba has admitted under oath that in the period after 31 March 2004, SAS did remit substantial amounts to SMM.

Notwithstanding, such amounts were not used to reduce the amount allegedly externalised.

It has also been established that among SMM's foreign creditors, Petter was the largest. The group of companies under the SMM umbrella were all procuring goods and services from Petter and the combined amount outstanding at the time of specification was in excess of ZAR74 million.

Evidence obtained from the Master of the High Court in South Africa and the liquidators of SAS, Coma Transport and Petter indicated that at no time did Mr. Gwaradzimba avail himself to assist in the recovery of assets for the benefit of the creditors of these companies given that the only route through which the alleged externalised amounts could be recovered was using the South African justice system as Zimbabwean laws have no application to companies registered in South Africa.

Subsequent to the granting of the cession court order, we have established that no funds were diverted to Petter as alleged.

Before Mr. Saruchera had completed his investigations into the affairs of SMM, the company was already placed under reconstruction.

The specification order issued in relation to SMM was meant to allow for investigations to be completed before any action could be taken. In terms of Section 10(2) and (7) of the Prevention of Corruption Act, the assets of a specified person cannot be dealt with without the permission of the Investigator and any transaction that is concluded without obtaining such permission is voidable.

The protection of the assets of a specified person is vested with the Investigator yet in this matter; the Administrator appointed in terms

of the Reconstruction Laws was permitted to dispose of the very same assets that were supposed to be secure.

What issue that needed to be examined was whether the reconstruction laws and the Prevention of Corruption Act could operate jointly in relation to a specified person. The legal advice obtained suggests that the assets of a specified person cannot be tempered with while the investigations are underway.

The facts of this matter are that during 9 July 2004 through 19 May 2010, Mr. Mawere was specified. He was, therefore, legally disabled from defending himself in any court of law without the permission of the Investigator. Equally, SMM was also legally disabled.

Both the High Court and Supreme Court ruled that the purpose of specifying a person is merely to allow for investigations to be conducted without the interference of the specified person.

Mr. Mawere has since formally approached the Co-Ministers of Home Affairs for the recovery of his assets. Regrettably at the time of specification, no inventory was taken of Mr. Mawere and SMM's assets. However, the statutory instrument issued in relation to SMM identified all the companies under the group making it easier to establish what assets should be returned to Mr. Mawere.

The Administrator of SMM did not consult or obtain the permission of Mr. Saruchera in dealing with the assets of SMM making Section 10(7) applicable in the matter.

In the circumstances, all the actions of the Administrator in relation to SMM's assets are voidable and the responsibility for reversing such transactions lies with the Co-Ministers of Home Affairs.

With respect to the allegations that SMM was state indebted and insolvent, no evidence has been furnished to support the basis on

which SMM was placed under reconstruction. The evidence examined show that SMM was indeed indebted to various state owned institutions and such indebtedness was incurred in the ordinary course of business. Accordingly, at the time SMM was placed under reconstruction, it did not owe any money to the state directly rather it was up to the relevant institutions to assert their rights against SMM.

The real question that has to be addressed is whether a specified person's assets can be dealt with in terms of another legislation that did not exist at the time of specification.

The report also addresses some of the matters that have been raised by Mr. Gwaradzimba in relation to the acquisition of SMM and the legality of the payment mechanism. It was also important to establish the facts surrounding the granting of government guarantees to SMM.

We have established that there is no connection between the acquisition of SMM and the guarantees granted to SMM. The guarantees were used to convert expensive short-term facilities into a medium term loan. The facility was structured and negotiated by SMM's financial advisors, First Merchant Bank (FMB).

The acquisition of SMM was not guaranteed by the government rather it was a leveraged buy-out in which the assets of SMM were used to acquire the shares in its holding company under an arrangement approved by the RBZ.

Mr. Gwaradzimba was the auditor of SMM during 1996 through 2001. Mr. Manikai was the legal advisor of SMM and ARL from 1996 through 2004. Notwithstanding, Mr. Gwaradzimba was appointed Administrator of a company that he once audited. Mr. Manikai is

now acting against his former client. This raises serious legal and ethical questions that need to be addressed at the appropriate time. However, it is the considered opinion of the Investigators that the appointment of Gwaradzimba and Manikai was ill considered and, therefore, inappropriate.

Finally, the question of the true ownership of SMM was considered. Contrary to the position taken by Gwaradzimba that AMG, a company in which he is a beneficial shareholder of, is the legitimate holder of the bearer share warrants, the true position is that SMMH is the true shareholder of SMM and this position remains unchanged. More significantly, SMMH is owned by Africa Construction Limited (ACL), a company wholly owned by ARL, and T & N remains as a creditor.

No title passed to AMG as a consequence of the deal concluded in November 2004 with T & N. In the circumstances, Mr. Gwaradzimba has consistently misrepresented the true facts in his various reports to Hon. Chinamasa. Given that the true shareholder of SMM is SMMH, the facts of this matter would seem to suggest that the confirmation of the reconstruction order was fraudulently obtained. The law provides that the consent of the shareholders and creditors is needed before the reconstruction order can be confirmed by a Judge. This appears not to have been the case.