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CIVIL DIVISION OF THE  
ATTORNEY GENERAL'S OFFICE  
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HARARE

Our Ref : 4/JUST/432 VM

Your Ref:

19 December 2005

20 DEC 2005

The Administrator  
SMM Holdings Limited  
6<sup>th</sup> Floor  
Batanai Gardens  
57 Jason Moyo Avenue  
HARARE

Attention: Mr A Gwaradzimba

Re SMM HOLDINGS LIMITED v THE MINISTER OF JUSTICE, LEGAL AND  
PARLIAMENTARY AFFAIRS : HC 12064/2004

The above matter refers. As you are aware, we represent the Honourable Minister in this matter which is pending before the High Court.

The matter was initially set down for hearing on the 15<sup>th</sup> of May 2005 but was later postponed *sine die* at the instance of the Applicant who indicated their intention to reach an out of court settlement with the Respondent, our client.

However, the matter is still pending and in the event that no meaningful settlement is reached between the Applicants and the Respondents it still remains our obligation to defend the Minister's position in Court.

Despite the fact that we have previously discussed the matter with your colleague Mr Sibanda and also that you have furnished us with some useful information in this matter, it is however our view that there is further need to clarify the issue of indebtedness in order for us to be able to make meaningful submissions before the court in the event that the hearing of this matter resumes. The issue arises from the grounds upon which the review application is premised.

1. Firstly Applicants allege that they were not afforded a hearing before the Reconstruction Order was issued. Applicants make issue about the non notification to

creditors, members and employees whom they allege are not excluded from notification in terms of the Proviso to section 4 of SI 217/2004 (As amended).

It is appreciated that the Respondent's reasons for non-notification in the circumstances is a result of the urgency of the matter that warranted immediate action to prevent irreparable harm. Could you however provide proof to show that the Ministers actions were meant to prevent irreparable harm from occurring. For instance it is contented by the Respondent that the employees of the company had gone for some months without remuneration and also that the company had closed down for some weeks. Could you please avail supporting proof thereof so that we are able to support our argument on the imminence of the matter and also highlighting the irreparable harm involved.

2. Applicants allege non-existence of the jurisdictional facts to warrant reconstruction as at 6<sup>th</sup> September 2004. In other words they deny that they were a state indebted insolvent company as at 6<sup>th</sup> September 2004.

It is Respondent's contention that SMM Holdings Limited was placed under Reconstruction because of its financial indebtedness to the state. The following are the facts which were relied upon to support the above.

#### Indebtedness to MMCZ

- a) As at 6<sup>th</sup> September 2004 Applicant was indebted to the MMCZ in an amount of \$396 000,00 being the balance remaining from an outstanding loan granted by the MMCZ to the company in July 2001 and which loan was guaranteed by the Government. In order to support this averment, it will be necessary to avail documentary proof on:
  - i) whether there was a guarantee agreement in place for the government to take over repayment in the event of default by the company.
  - ii) whether the loan had become due and whether MMCZ had called for the loan before the 6<sup>th</sup> of September 2004.
  - iii) whether there are any supporting documents to show that the company was in breach of the Loan Agreement terms and conditions to warrant the passing of liability to a third party i.e. the Government of Zimbabwe.

Such documents are very essential as they will help to prove that the Government guaranteed the loan in issue and that by breaching the terms of the Loan Agreement, the company caused public funds to be utilized to meet its debts.

In terms of clause 10(1)(e) of the Loan Agreement between MMCZ and SMM, if the borrower commits an act of insolvency, then they shall be

deemed to be in default. In light of that please provide an audit statement by the SMM auditors to prove that the company was insolvent.

3. **Indebtedness to RBZ**

The company is said to have been indebted to the RBZ in an amount of \$28,8 billion being money advanced by the RBZ under the Productive Sector Fund (PSF).

You have availed proof that the PSF was the source of the loan from the Reserve Bank of Zimbabwe. You have also availed a letter from Zimbank dated 3<sup>rd</sup> November 2004 which explains the role of Zimbank in that transaction which was merely to facilitate payment of the money.

It is however essential to prove how the money became due to the State.

We need to use that information to prove to the court that indeed SMM was a State indebted company in terms of the Act.

You have also availed to us a schedule of SMM's indebtedness to the Government of Zimbabwe which you labelled as Appendix A and is annexed 'G'.

The schedule serves to demonstrate SMM's indebtedness to the Government of Zimbabwe by way of listing the respective amounts owed to:

- i) ZESA
- ii) MMCZ
- iii) NSSA
- iv) R.B.Z.

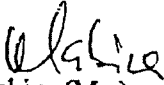
However in order for that information to be useful, it needs to be supported by evidence.

It is a legal requirement that the creditor should enforce his rights first by way of calling for the debt before the intervention of the guarantor. Hence it will be necessary to prove that the money was due and had been called for by the creditor.

It will also be necessary to show how the Government got involved in all the transactions.

Failure to avail the necessary proof in all the highlighted aspects would tend to support Applicants' notion that there are ulterior motives behind the issue of the Reconstruction Order.

Please address the above and furnish us with your response by the 28<sup>th</sup> of December 2005.



V. Mabiza (Mrs)  
For DIRECTOR  
**CIVIL DIVISION**

/IM

c.c. Mrs Maxwell  
c.c. Mr Costa  
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