

Exhibit 1



INTERNATIONAL COURT OF ARBITRATION\* | INTERNATIONAL CENTRE FOR ADR | LEADING DISPUTE RESOLUTION WORLDWIDE

## TERMS OF REFERENCE

INTERNATIONAL CHAMBER OF COMMERCE (ICC)  
INTERNATIONAL COURT OF ARBITRATION  
33-43 avenue du Président Wilson, 75116 Paris, France  
T +33 (0)1 49 53 29 05 F +33 (0)1 49 53 29 33  
E arb@iccwbo.org www.iccarbitration.org

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**ICC INTERNATIONAL COURT OF ARBITRATION**

**CASE No. 17720/ARP/MD/TO**

**1. AMAPLAT MAURITIUS LTD**

(Mauritius)

**2. AMARI NICKEL HOLDINGS ZIMBABWE LTD**

(Mauritius)

**vs/**

**1. ZIMBABWE MINING DEVELOPMENT CORPORATION**

(Zimbabwe)

**2. THE CHIEF MINING COMMISSIONER, MINISTRY OF MINES, ZIMBABWE**

(Zimbabwe)

This document is a certified true copy of the original of the Terms of Reference established in conformity with the Rules of Arbitration of the ICC International Court of Arbitration.

**IN THE MATTER OF AN INTERNATIONAL CHAMBER OF COMMERCE  
ARBITRATION CASE NO. 17720/ARP**

**BETWEEN:**

1. **AMAPLAT MAURITIUS LIMITED**
  2. **AMARI NICKEL HOLDINGS ZIMBABWE LIMITED**
- Claimants

- and -

1. **ZIMBABWE MINING DEVELOPMENT CORPORATION**
  2. **THE CHIEF MINING COMMISSIONER, MINISTRY OF  
MINES, ZIMBABWE**
- Respondents

**TERMS OF REFERENCE**

**1. PARTIES**

1.1 The First Claimant is Amaplat Mauritius Limited ("Amaplat"), a company incorporated under the laws of Mauritius. The Second Claimant is Amari Nickel Holdings Zimbabwe Limited ("Amari"), also a company incorporated under the laws of Mauritius. Amari is a wholly-owned subsidiary of Amari Resources International Limited, an international resource investment company focused on exploration and mining in sub-Saharan Africa. The Claimants have their principal place of business at Amari, 3<sup>rd</sup> Floor, Melrose Boulevard, Melrose Arch, Johannesburg, South Africa.

1.2 The First Respondent is Zimbabwe Mining Development Corporation ("ZMDC"), a body corporate established under the Zimbabwe Mining Development Corporation Act (Cap. 21:08) of the Republic of Zimbabwe ("the Act") having its address at Ground Floor, MMCZ Building, 90 Mutare Road, Msasa, Harare, Zimbabwe. ZMDC's business includes investing in mining and mining development on behalf of the Government of Zimbabwe.

1.3 The Second Respondent is The Chief Mining Commissioner, Ministry of Mines, Zimbabwe, having his address at 7<sup>th</sup> Floor, Zimre Centre, Private Bag CY 7709, Causeway, Harare, Zimbabwe.

**2. ADDRESSES FOR PURPOSES OF NOTIFICATION**

2.1 The addresses of the parties to which notifications or communications arising in the course of the arbitration may validly be made are;

- (1) **The Claimants:** To their lawyers, Advocate Neil Lazarus SC and Advocate Courtenay Wright, Group One, Sandown Chambers, Sandown Village, Maude Street





corner Gwen Lane, Sandown, South Africa. Telephone +27 11 290 4000; fax +27 11 783 6331/4; email [neill@blts.co.za](mailto:neill@blts.co.za); [courtenay.wright@gmail.com](mailto:courtenay.wright@gmail.com); and David H Botha, Du Plessis & Kruger Attorneys (Ref: P J Du Plessis/ss), 4<sup>th</sup> Floor National Bank Building, 84 Market Street corner Simmonds, PO Box 8013 Johannesburg 2000, South Africa. Telephone +27 11 838 1214; fax +27 11 836 8740; email [pdp@bdk.co.za](mailto:pdp@bdk.co.za).

(2) **The Respondents:** To their lawyers, Mutamangira & Associates, 2<sup>nd</sup> Floor Travel Plaza, Cnr Mazoe and J Chinamano, Harare, Zimbabwe. Telephone +263 799249/702436; fax +263 799249; email [jacob@mutamangira.co.zw](mailto:jacob@mutamangira.co.zw).

2.2 Any change to the Claimants' principal place of business or the Respondents' addresses or the contact details of their respective lawyers listed in this section must be immediately notified to all the parties, each member of the Arbitral Tribunal ("the Tribunal") and the Secretariat of the International Court of Arbitration of the ICC ("the Secretariat"). Otherwise, any communication or notification sent to the addresses specified in this section will be regarded as valid.

2.3 All written communications or notifications to or by the parties (including pleadings, submissions, witness statements and exhibits) shall be valid if sent by email to the parties' representatives to the email addresses shown in this section (with PDF or Word attachments, unless the documents in question are too big to be attached to the email).

2.4 Apart from short or routine correspondence, which may be set out in the body of an email, letters should be attached as a PDF to the email.

2.5 With the exception of correspondence from or to the Tribunal or between the representatives of the parties, confirmation paper copies of documents (including pleadings, submissions, witness statements and exhibits) sent by email should, unless requested otherwise by the parties or the Tribunal, be provided and sent by courier or post to the other party and the Tribunal.

2.6 Notifications or communications shall be deemed to be received on a day if received by email before 18.00 hours local time on that day, provided this is a business day in the place of receipt.



2.7 A copy of any communication by any party to the Tribunal shall be sent simultaneously and by the same means to the other parties and to the Secretariat at ICC International Court of Arbitration ("the Court"), 38 Cours Albert 1<sup>er</sup>, 75008 Paris, France. Telephone +33 1 49 53 28 36; fax +33 1 49 53 57 78; email: [ica4@iccwbo.org](mailto:ica4@iccwbo.org).

### 3. RELEVANT BACKGROUND

3.1 ZMDC hold 45% of the shares in Zimari Nickel (Pvt) Ltd ("Zimari Nickel"), a joint venture company incorporated by those parties to prospect for nickel and develop a mine pursuant to a Memorandum of Understanding between Amari Holdings Ltd ("Amari BVI"), a company incorporated in the British Virgin Islands, and ZMDC dated 22 November 2007 ("the Nickel MOU"). According to the Claimants, Amari holds 55% of the shares in Zimari Nickel but this is disputed by the Respondents.

3.2 By a Deed of Novation dated 6 June 2008 between Amari BVI, Amari and ZMDC, with effect from 1 May 2008 Amari BVI was released and discharged from its rights and obligations pursuant to the Nickel MOU upon Amari's undertaking to Amari BVI and ZMDC to perform Amari BVI's obligations pursuant to the Nickel MOU and be bound by its terms and conditions as if Amari had been the original party to the Nickel MOU in place of Amari BVI. By clause 3.1 of the Deed of Novation, Amari BVI and ZMDC acknowledged that Amari would be solely entitled to the entire rights and benefits under the Nickel MOU as if Amari were the original party to it in place of Amari BVI.

3.3 ZMDC holds 50% of the shares in Zimari Platinum (Pvt) Ltd ("Zimari Platinum"), a joint venture company incorporated by those parties to prospect for various metals and develop a mine pursuant to a Memorandum of Understanding between Amaplat and ZMDC dated 25 July 2008 ("the Platinum MOU"). According to the Claimants, Amaplat holds 50% of the shares in Zimari Platinum but this is disputed by the Respondents.

3.4 The Nickel and the Platinum MOUs (together "the MOUs") were concluded by Mr M J Nunn on behalf of the Amari BVI's and Amaplat respectively and by Mr Dominic Mubayiwa, ZMDC's General Manager, on ZMDC's behalf.

3.5 By a letter dated 10 November 2010 from ZMDC to the Claimants, ZMDC *inter alia* noted that there was "a corrupt relationship which unduly influenced the signing of the [Platinum MOU]"; stated that there was "no Joint Venture Agreement regulating our relationship"; and concluded that:





*"As a result of the above, we advise you that your conduct is unacceptable, improper and directly undermines the basic tenets of corporate governance principles which we so cherish and adhere to. It contravenes the Zimbabwean laws and we reserve the right to report you for prosecution. Your conduct goes to the core of our relationship and as such we are no longer prepared to engage yourselves for negotiations to the next stage of a Joint Venture Agreement. In fact our relationship terminated for both platinum and nickel properties."*

3.6 By a letter dated 22 November 2010 in reply, the Claimants *inter alia* disputed ZMDC's allegations and its entitlement to terminate the MOUs and maintained that those agreements were legally binding and of full force and effect.

3.7 By letters dated 14 January 2011, ZMDC reiterated its position that the MOUs had been "cancelled".

#### 4. SUMMARY OF THE PARTIES' RESPECTIVE CLAIMS AND RELIEF SOUGHT

4.1 The purpose of the summaries set out below is to fulfil the requirements of Article 18(1)(c) of the ICC Rules of Arbitration in force as from 1 January 1998 ("the Rules"), without prejudice to any further allegations, arguments or contentions contained in the pleadings or submissions filed to date or to be filed.

4.2 No factual or legal statement or omission in the summary of either party is to be interpreted as a waiver of any issue of fact or law. By signing these Terms of Reference, neither party subscribes to, or acquiesces in, the summary of the other party's position set out below.

#### The Claimants

4.3 The Claimants' contentions appear from the Request for Arbitration and attached Statement of Claim dated 31 January 2011 ("the Request"); the Notice of Amendment to the Statement of Claim dated 12 May 2011; the Amended Statement of Claim dated 25 May 2011; the Replication ("the Reply") and Notice of Amendment to the Statement of Claim each dated 29 August 2011; and the Notice of Amendment to the Statement of Claim dated 9 November 2011.

4.4 The Claimants contend that:

- (1) The Tribunal has jurisdiction to hear and determine the dispute.



(2) The MOUs remain valid and binding.<sup>1</sup>

(3) The Respondents have waived any right that they might otherwise have had or else are estopped from contending that the MOUs are not valid and binding as, with knowledge of the purported invalidities on which they now rely, they gave effect to and implemented the MOUs in various respects.<sup>2</sup>

(4) Contrary to the Respondents' allegations, the necessary board and shareholders approval was secured in respect of the Nickel MOU. Alternatively, ZMDC is estopped from relying on any failure to secure such approval as a result of its failure to use its best endeavours to procure it;<sup>3</sup> and the Respondents have waived any right that they may otherwise have had or else are estopped from contending that such approval was not obtained.<sup>4</sup> Also, the Deed of Novation constituted an express or implied renewal of the Nickel MOU such that a new agreement on identical terms to the Nickel MOU (as supplemented by the Deed of Novation) came into existence.<sup>5</sup>

(5) Contrary to the Respondents' allegations:

(a) the Minister's approval in terms of the Act was not a term of the MOUs and the absence of such approval does not have the legal effect for which the Respondents contend;

(b) such approval was in fact obtained;

(c) the Respondents are estopped from contending that such approval was not obtained.<sup>6</sup>

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<sup>1</sup> Reply §15.

<sup>2</sup> *Ibid.*, §4, 5 and 16.

<sup>3</sup> *Ibid.*, §8.

<sup>4</sup> *Ibid.*, §9 and 10.

<sup>5</sup> *Ibid.*, §11.

<sup>6</sup> *Ibid.*, §12 to 14.



(6) Contrary to the Respondents' allegations, there was no corrupt relationship between ZMDC's General Manager and the Claimants entitling ZMDC to repudiate the MOUs or at all.<sup>7</sup>

(7) In the event that the Amari is not a shareholder in Zimari Nickel and/or that Amaplat is not a shareholder in Zimari Platinum or the MOUs are for any reason invalid or unenforceable, ZMDC has been unjustly enriched at Amaplat's expense in an amount of US\$574,000,000 alternatively US\$287,500,000 and at Amari's expense in an amount of US\$55,000,000 alternatively US\$27,500,000 or such other amounts as the Tribunal may determine.<sup>8</sup>

4.5 In the above circumstances, the Claimants seek:

- (1) a declaration that the MOUs are valid and binding;
- (2) a declaration that ZMDC is bound to continue to give effect to and implement the MOUs;<sup>9</sup>
- (3) damages in the sums of US\$287,500,000 and US\$27,500,000, in the event that ZMDC fails to give effect to or implement the MOUs;<sup>10</sup>
- (4) restitution to the Claimants of the sums referred to in paragraph 4.4(7) above;<sup>11</sup>
- (5) interest at the rate of 15.5% from the date of any award until the date of payment;
- (6) an order that the Respondents pay the Claimants' legal and other costs of the arbitration.

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<sup>7</sup> *Ibid.*, §19 and 20.

<sup>8</sup> Notice of Amendment to the Statement of Claim dated 9 November 2011 §12.

<sup>9</sup> *Ibid.*, §13.

<sup>10</sup> Notice of Amendment to the Statement of Claim dated 12 May 2011; the Amended Statement of Claim §26 to 28; Notice of Amendment to the Statement of Claim dated 29 August 2011.

<sup>11</sup> Notice of Amendment to the Statement of Claim dated 9 November 2011 §14.





The Respondents

4.6 The Respondents' contentions appear from the "*First and Second Respondent's* [sic] *Statement of Opposition* dated March 2011 (*"the Answer"*) sent to the Secretariat by email on 22 March 2011 (under cover of a letter 17 March 2011).

4.7 The Respondents contend that:

(1) The Tribunal lacks jurisdiction to determine the present dispute because:

(a) the Nickel MOU lapsed on 31 December 2007 pursuant to Article 9 thereof and became of no force or effect; and the arbitration provisions in Article 11 thereof are an integral part of the Nickel MOU which also lapsed and consequently became of no force or effect.<sup>12</sup>

(b) The MOUs are invalid and tainted with illegality under the laws of Zimbabwe for non-compliance with the mandatory provisions of the Act which required that any agreement entered into by ZMDC must be approved by the Minister of Mines and Mining Development (*"the Minister"*). To give effect to the arbitration clause of an agreement tainted with illegality is to grant specific performance of the illegal agreement and it is contrary to the public policy of the Republic of Zimbabwe effectively to grant such specific performance.<sup>13</sup>

The remainder of the Respondents' contentions are without prejudice to their challenge to the Tribunal's jurisdiction.

(2) A condition precedent to the Nickel MOU was not fulfilled since the necessary board and shareholders' written approval on or before 31 December 2007 was not secured for it. Consequently, the Effective Date (as defined therein) of the Nickel MOU never arose and the Nickel MOU never became operative or else lapsed after that date.<sup>14</sup>

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<sup>12</sup> Answer §9.

<sup>13</sup> *Ibid.*, §10.

<sup>14</sup> *Ibid.*, §11 to 16.



(3) The MOUs were repudiated by ZMDC on the grounds that they were procured by reason of a corrupt relationship between its General Manager and the Claimants. This position is not saved in respect of the Nickel MOU by the Deed of Novation.<sup>15</sup>

(4) Since ZMDC failed to obtain the Minister's approval for its acquisition of shares in Zimari Nickel and Zimari Platinum as required by paragraphs 20 and 21 of the Schedule to the Act:

(a) ZMDC lacked the capacity to enter into the MOUs, which are accordingly null and void; and

(b) the MOUs are tainted with illegality and the Claimants cannot seek specific performance thereof.<sup>16</sup>

(5) No joint venture agreement as contemplated by the MOUs was ever entered into.<sup>17</sup>

(6) The Claimants are not shareholders in Zimari Nickel and Zimari Platinum.<sup>18</sup>

(7) There is no basis for and the Claimants are not entitled to restitution of the sums claimed or to any sums on the ground of unjust enrichment or otherwise.

4.8 In the above circumstances, the Respondents seek<sup>19</sup>:

(1) A declaration that the Tribunal lacks jurisdiction in respect of the dispute.

(2) Alternatively, if the Tribunal has jurisdiction, the dismissal of the Claimants' claims.

(3) An order that the Claimants shall pay their legal and other costs.

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<sup>15</sup> *Ibid.*, §17 to 24 and 35.

<sup>16</sup> *Ibid.*, §25 to 28.

<sup>17</sup> *Ibid.*, §29 to 31.

<sup>18</sup> *Ibid.*, §32 and 33.

<sup>19</sup> *Ibid.*, §50.



5. **THE ARBITRATION CLAUSES**

5. Article 11 of the Nickel MOU and Article 9 of the Platinum MOU provide that:

*"In the event of a dispute or disputes arising, such disputes, controversies or differences between the Parties, which may arise out of or in relation to the MOU, and which cannot be settled by the Board, the parties shall first try to resolve it amicably through negotiation. In the event that no settlement can be reached through negotiation in reasonable time, any Party may submit the dispute to the ICC International Court of Arbitration in Paris for arbitration in accordance with the procedural rules of arbitration of the said Arbitration Court in effect at the time of applying arbitration, the award of which shall be final and binding upon the Parties. The language in Arbitration shall be in English."*

6. **ISSUES TO BE DETERMINED**

6.1 The issues to be determined shall be those resulting from the parties' submissions, statements and pleadings which are relevant to the determination of the parties' respective claims and defences and any further questions of fact or law which the Tribunal, in its own discretion, may deem necessary or appropriate to decide upon, after hearing the parties, for the purpose of resolving the present dispute.

6.2 The issues which may have to be determined (but not necessarily all of these and not necessarily in the following order) are:

(1) Does the Tribunal have jurisdiction to hear and determine the dispute?

(2) Are the MOUs valid and binding? In that regard:

(a) Did the Nickel MOU ever become operative and, if so, did it lapse after 31 December 2007 on the grounds that the necessary board and shareholder approvals was not secured in respect of it?

(b) If any necessary board and shareholder approval was not secured in respect of the Nickel MOU:

(i) is ZMDC estopped from relying on any failure to secure such approval?

(ii) have the Respondents waived any right they may otherwise have had or else are estopped from contending that such approval was not obtained?





- (iii) is the effect of the Deed of Novation to bring into existence a new agreement on identical terms to the Nickel MOU (as supplemented by the Deed of Novation?
- (c) was the Minister's approval in terms of the Act in fact obtained in respect of the MOU?
- (d) if not, are the Respondents estopped from contending that such approval was not obtained?
- (e) Was ZMDC entitled to terminate the MOUs on the grounds that they were procured by reason of a corrupt relationship between its General Manager and the Claimants?
- (f) What is the effect, if any, of ZMDC's failure to obtain the Minister's approval for its acquisition of shares in Zimari Nickel and Zimari Platinum as required by paragraphs 20 and 21 of the Schedule to the Act?
- (g) Was no joint venture agreement as contemplated by the MOUs ever entered into; and, if that is the case, what are the consequences in the context of the present dispute?
- (h) Have the Respondents waived any right that they might otherwise have had or else are they estopped from contending that the MOUs are not valid and binding as, with knowledge of the purported invalidities on which they now rely, they gave effect to and implemented the MOUs in various respects?
- (3) Are the Claimants shareholders in Zimari Nickel and Zimari Platinum?
- (4) If the MOUs are valid and binding, are the Claimants entitled to a declaration to that effect?
- (5) If the MOUs are valid and binding, are the Claimants entitled to a declaration that ZMDC is bound to continue to give effect to and implement the MOUs?



(6) Are the Claimants entitled to damages in the event that ZMDC fails to give effect to or implement the MOUs and, if so, in what amount?

(7) In the event that the Amari is not a shareholder in Zimari Nickel and/or that Amaplat is not a shareholder in Zimari Platinum or the MOUs are for any reason invalid or unenforceable, has ZMDC has been unjustly enriched at the Claimants' expense and, if so, is ZMDC liable to make restitution to the Claimants and, if so, in what amounts?

(8) If the MOUs are not valid and binding, are the Respondents entitled to have the Claimants' claim dismissed?

(9) What is the incidence and amount of any interest which should be awarded to the Claimants?

(10) What is the incidence and amount of legal and other costs?

7. **THE ARBITRATION**

7.1 The arbitration clauses did not specify the number of arbitrators.

7.2 By paragraph 9 of the Request, the Claimants requested the appointment of a Sole Arbitrator.

7.3 By a letter dated 10 March 2011 from Mutamangira & Associates, the Respondents stated that they objected to the appointment of a Sole Arbitrator and requested the appointment of three arbitrators.

7.4 The parties were unable to agree on the number of arbitrators.

7.5 The parties were also unable to agree on the place of the arbitration.

7.6 On 12 May 2011, the Court decided *inter alia*:

(1) pursuant to Article 8(2) of the Rules that the matter would be submitted to three arbitrators:



(2) pursuant to Article 14(1) of the Rules to fix Lusaka, Zambia, as the place of the arbitration.

7.7 On 27 September 2011, the Secretary General of the Court, pursuant to Article 9(2) of the Rules, confirmed Judge Meyer Joffe as co-arbitrator upon the joint nomination of the Claimants and confirmed Mr James Prince Mutizwa as co-arbitrator upon the joint nomination of the Respondents.

7.8 On 27 October 2011, pursuant to Article 9(3) of the Rules the Court appointed Mr Stuart Isaacs QC then of 3-4 South Square, Gray's Inn, London WC1R 5HP and now of Berwin, Leighton Paisner, Adelaide House, London Bridge, London EC4R 9HA as Chairman of the Tribunal, upon the proposal of the United Kingdom National Committee.

7.9 In accordance with the Court's decision taken on 12 May 2011 pursuant to Article 14(1) of the Rules, the place of the arbitration is Lusaka, Zambia.

7.10 The applicable procedural rules which govern the proceedings before the Tribunal shall be those resulting from the Rules. Where the Rules are silent, the applicable procedural rules shall be such rules as may be agreed upon from time to time by and between the Tribunal and the parties; and, failing such agreement, as may be determined by the Tribunal.

7.11 In accordance with the arbitration clauses, the language of the arbitration is English.

7.12 In accordance with Article 12.7 of the Nickel MOU and Article 10.8 of the Platinum MOU, the present dispute is to be determined under the laws of Zimbabwe.

7.13 If either party fails within the prescribed time to present its case or comply with any direction of the Tribunal at any stage of the proceedings, the Tribunal may, of its own volition or at the other party's request, after reasonable notice to the parties, proceed with the arbitration and make an award.

## **8. ACKNOWLEDGMENT OF THE PARTIES**

8.1 By signing these Terms of Reference, the parties acknowledge that they agree to submit to this arbitration and expressly waive any procedural objections they may have with respect to known events, including the appointment of the Tribunal.





8.2 The Tribunal's role and function includes (with the parties' agreement) assisting the parties to resolve their dispute at any stage of the proceedings and by any means, including a negotiated settlement. If the parties request such assistance from the Tribunal, it will be on the basis that the parties expressly agree that the provision of such assistance shall not disqualify the Tribunal from continuing to serve. Such express agreement shall be considered to be an effective waiver of any potential conflict of interest that may arise from the Tribunal's participation in such process or from information which the Tribunal may learn in the process. If the assistance by the Tribunal does not lead to final settlement of the dispute, the parties remain bound by their waiver. However, notwithstanding such agreement, the Tribunal shall resign if, as a consequence of its involvement in the settlement process, it develops doubts as to its ability to remain impartial or independent in the future course of the arbitration proceedings.

8.3 A party shall inform the Tribunal, the ICC and the other parties about any direct or indirect relationship between the party (or a company in the same group as the party or a company in which a party has a material interest) and the Tribunal. The party shall provide this information on its own initiative as soon as the party becomes aware of such relationship.

9. **CONFIDENTIALITY**

9. Unless disclosure is required by (1) statute, ordinance or regulation or (2) to protect or pursue a legal right of the parties, the parties and the Tribunal undertake as a general principle to preserve the private and confidential nature of this arbitration and, in particular, all the documents produced by the other party in the proceedings not otherwise in the public domain.

10. **AGREEMENT TO TERMS OF REFERENCE**


10.1 The Terms of Reference are signed in seven originals on the dates as shown below by the legal representatives of the parties hereto, who hereby represent that they have the authority to execute this document on behalf of their respective party.

10.2 Without prejudice to the provisions of Articles 18(3) and 24(1) of the Rules, the date of the Chairman's signature on the Terms of Reference shall be for all purposes the date of the Terms of Reference.



10.3 Each original of the Terms of Reference forms an original arbitration agreement for the purposes of Articles II and IV(1) of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Signed and dated in Johannesburg, Republic of South Africa on 28 November 2011



David H Botha, Du Plessis & Kruger for and on behalf of the Claimants



Mutamangira & Associates for and on behalf of the Respondents

  
Judge Meyer, co-arbitrator  
James Prince Mutizwa, co-arbitrator  
Stuart Isaacs QC, chairman