In the matter of an arbitration
under the Rules of Arbitration of
the International Centre for
Settlement of Investment Disputes

Case No. ARB/18/21

Video conference
via Zoom

Wednesday, 23rd June 2021

Hearing on Jurisdiction and the Merits

Before:
RT HON LORD PHILLIPS KG PC
MR J TRUMAN BIDWELL JR
MS BARBARA DOHMANN QC

BAY VIEW GROUP LLC
and
THE SPALENA COMPANY LLC
Claimants

-v-

GOVERNMENT OF RWANDA
Respondent

Secretary to the Tribunal: ALEX B KAPLAN

Transcript produced by Anne-Marie Stallard
and Georgina Vaughn on behalf of Trevor McGowan
APPEARANCES
FOR CLAIMANTS
STEVEN COWLEY, Duane Morris LLP
BRYAN HARRISON, Duane Morris LLP
RODERICK MARSHALL, Bay View Group LLC
FOR RESPONDENT
RICHARD HILL QC, 4 Stone Buildings
ALASTAIR TOMSON, 4 Stone Buildings
MICHELLE DUNCAN, Joseph Hage Aaronson LLP
DANIEL MCCARTHY, Joseph Hage Aaronson LLP
DANIELLE DUFFIELD, Joseph Hage Aaronson LLP
LUCY NEEDLE, Joseph Hage Aaronson LLP
NARCISSE DUSHIMIMANA, Rwanda Mining Board
SPECIOZA KABIBI, MINIJUST, Government of Rwanda

THIRD PARTY OBSERVERS
LISA GROSH, United States Office of International Claims and Investment Disputes
JOHN DALEY, United States Office of International Claims and Investment Dispute
NICOLE THORNTON, United States Office of International Claims and Investment Dispute
CATHERINE GIBSON, Office of the United States Trade Representative
MICHAEL COFFEE, United States Department of Justice
DONNA CHAPIN, United States Department of Justice

INTERPRETERS
SARAH ROSSI, French-English interpreter
ELIZA BURNHAM, French-English interpreter
ROBERT WOLFENSTEIN, French-English interpreter
JEAN CLAUDE MUGENZI, Kinyarwandan-English interpreter
ROSE-MARIE MUKARUTABANA, Kinyarwandan-English interpreter

SUPPORT STAFF
JAMES WATKINS, FTI Consulting
DAVID BRODSKY, FTI Consulting
ANNA LOUTFI, assistant to the Tribunal
COLLEEN FERGUSON, ICSID paralegal
IZABELA CHABINSKA, ICSID intern
## INDEX

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Discussion re procedural matters</td>
<td>1</td>
</tr>
<tr>
<td>MR RODERICK MARSHALL (continued)</td>
<td>5</td>
</tr>
<tr>
<td>Cross-examination by MR HILL (continued)</td>
<td>5</td>
</tr>
<tr>
<td>Discussion re procedural matters</td>
<td>74</td>
</tr>
<tr>
<td>Tribunal questions</td>
<td>141</td>
</tr>
<tr>
<td>Discussion re procedural matters</td>
<td>143</td>
</tr>
</tbody>
</table>
THE PRESIDENT: Yes, let's see if there are any matters of housekeeping.

MR HILL: There's one matter from my side, Mr President.

THE PRESIDENT: Yes, Mr Hill.

MR HILL: There was a request yesterday from Mr Cowley for metadata in relation to three documents. That was, if you like, put reciprocally, because we had asked for metadata in relation to one document.

THE PRESIDENT: Yes.

MR HILL: We have provided the metadata in relation to three documents -- sorry, I should say we have provided the metadata that we have in relation to two documents, the other one is in hard copy so there is no metadata, and we provided that a little while ago to both ICSID, so it should get to the Tribunal, and also to Mr Cowley. So that's just the housekeeping. So we obviously await his version as soon as possible. One point that emerges --

THE PRESIDENT: Excuse me, just before -- I'm very ignorant.

MR HILL: We have provided the metadata in relation to three documents -- sorry, I should say we have provided the metadata in relation to one document.

THE PRESIDENT: Yes, thanks.

MR HILL: Two points. If it were a real point we want to can ask FTI to actually pull up the native form to Mr Marshall while he is in the witness stand, so if Mr Cowley could confirm his consent in the native form to Mr Marshall while he is in the witness stand, so if Mr Cowley could confirm his consent in the native form, so that in cross-examination or submission, anyone who wants to can ask FTI to actually pull up the native form and demonstrate the metadata. We assumed that would be uncontested, but Mr Cowley has put in an objection.

I'm not quite sure what metadata is. I imagine it's the data that tells you the genesis of the electronic document?

MR HILL: Exactly, it tells you the information in particular when it was created or worked on.

THE PRESIDENT: Yes, thanks, yes.

MR HILL: And one point just arises out of that, which is that one of the documents -- we've asked for the documents to be uploaded in native form onto the system so that in cross-examination or submission, anyone who wants to can ask FTI to actually pull up the native form and analyse it, test it, analyse it, Mr Marshall has tried to get access to this and prepare for the hearings and they refused, and then now to say that they believe it's un contestable, that they can just throw it at us without him reviewing it and then question him on it, I think is highly inappropriate.

It was a request we made for them to send it to us. They say they did. We'll look at it, we'll talk to them. If they want to make a request to submit it at some time to the Tribunal, we'll talk to them about that because we may have a similar request for our own metadata on documents that they challenged, but this should be a subject of discussion between the parties and not an ambush of Mr Marshall at these hearings.

THE PRESIDENT: My understanding of the request that's been made to you is that it's a request in relation to the form in which one document is put in cross-examination to your witness. What I suggest is, we're going to have a half an hour break after an hour and three-quarters. In that break, that will give you a chance to open the envelope, see what's in it, and decide on your response to it; is that fair enough?

MR COWLEY: But Mr Marshall will not, as I understand it, and the only reason they don't have our metadata yet is because we're not permitted to speak with Mr Marshall about our evidence. Our evidence includes the document that they want in metadata form, so no one from our firm has sat down and worked with Mr Marshall to obtain it in native format yet. We were expressly told not to talk to him about such records. We're waiting for the opportunity to do so and we'll provide it to them.

I never had the chance to review --

THE PRESIDENT: Just pausing there, I think if we have a word with Mr Hill he certainly will make no objection to your discussing that matter with Mr Marshall.

MR HILL: Yes, two points. If it were a real point we certainly wouldn't object to that limited discussion, but...
12:07 1 Do you recall that yesterday you made an allegation that
2 this was a fabricated document, fabricated for this
3 arbitration; yes? Do you recall that?
4 A. I don't believe it was written in May 2012, definitely
5 not.
6 Q. Well, in the light of what you were saying in your
7 evidence, we have been back to that document and
8 provided your lawyers, and indeed the Tribunal, with
9 electronic information of that document, establishing
10 that it was in existence in May 2012. Do you have any
11 basis for your allegation that this was a document not
12 in existence in May 2012?
13 MR COWLEY: Mr President, unfortunately I have to lodge
14 an objection to a representation on the record that we
15 just explored in our housekeeping discussion. No one
16 has seen this document, that representation cannot
17 possibly be contested, and to spring it at Mr Marshall
18 as if it's truth established with us is simply
19 inappropriate.
20 MR HILL: Well, I'm in the Tribunal's hands. I see this
21 question as an appropriate one. I am asking if he has
22 any basis for his allegation that this is a fabricated
23 document?
24 A. I don't believe that Evode was in that position at that
25 time. He had been a tag manager, he had come over,
12:11  
1 page 11 it says near the top:
2 "At Nyatubindi three massive dam walls were raised
3 in sequence along the Nyatubindi River to retain
4 suspended material that is introduced through mining
5 activities ..."
6  
7 And perhaps just to be clear on what we're talking
8 about, if FTI could go one page back, so it's
9 environmental mitigation 2011 to 2015.
10  
11 A. So back on the page we were on:
12 "At Nyatubindi three massive dam walls were raised
13 in sequence along the Nyatubindi River to retain
14 suspended material that is introduced through mining
15 activities ... further upstream."
16 Nyatubindi I to V. So just pausing there, it is
17 quite clear, isn't it, that in the period being dealt
18 with there are continuing mining activities as a result
19 of which environmental action is proposed; yes?
20 A. No. My understanding at that time, and certainly during
21 the period we were there we were doing a lot of
22 environmental work. This is what I referred to
23 yesterday as where the Belgians had done a lot of what
24 they called ground sluice mining, which means they
25 literally turn on fire hoses and wash down the hillside,
26 and there was no mining going on there specifically
27 because it was too complicated to try and dam up the

12:15  
1 figures are included in the aggregate production figures
2 from January 2010, aren't they?
3 A. Yes, but, you know, you're confusing terms. Nyatubindi
4 is reference to an area. The whole area is maybe,
5 I don't know, 15 kilometres by 10 kilometres. There are
6 some particularly sensitive areas where the ground
7 sluicing is going on, there was something going on in
8 some other part of it which was not going into the
9 Sebeya River catchment, possibly. Not during my time,
10 but possibly before. But certainly not contributing --
11 everybody is -- for NRD, this was the most sensitive
12 area because everybody knew that the Belgians had left
13 a mess -- not just the Belgians. The Belgian and the
14 national mining industry when it was owned by the State
15 continued it (overspeaking) --
16 Q. I suggest to you -- sorry, carry on?
17 A. -- it's a very sensitive issue and very sensitive place.
18 Q. Well, I would suggest to you that it's quite clear that
19 there was continuing mining on Nyatubindi and that
20 Minister Kamanzi's letter, to which you gave an
21 intertemperate response was a fair one, and that is
22 reflected by your subsequent, more moderate response to
23 the Mayor that we looked at yesterday.
24 A. No, no, I think you're mistaken. The Mayor went
25 immediately in front of a crowd of 300 people, riled

Page 9

12:13  
1 silt that would have come down if we were continuing
2 that approach. It's a large site of 3 kilometres wide.
3 To my knowledge there may be some illegals, I mean, this
4 is not a small area, which were stirring up the area and
5 thereby creating silt. Our work there was remedial. We
6 were, at this time, before 2010 and during our time,
7 this is why we brought over the team of environmental
8 management from Olomouc University, and that team was
9 specifically focused on environmental works. There was
10 no mining going on.
11 Q. Just to be clear, this document is an NRD document, it's
12 talking about dam walls being raised to retain suspended
13 material that is introduced through mining activities.
14 So it's dealing with continuing mining activities, isn't
15 it?
16 A. You need to go visit. It's illegal mining activities
17 which is increasing the suspension of silt, not legal
18 mining activities. We --
19 Q. Can you go to page 83 of this document?
20 A. We were not mining there and it would be irresponsible
21 to do it.
22 Q. At page 83 of this document, we have production on the
23 Nemba site there, and if you go on to page 85, still in
24 production we have production aggregated for Rutisiro.
25 Sebeya, Kabaya, Nyatubindi and Mara. So Nyatubindi

Page 10

12:16  
1 them up, caused us a great deal of worry whether we were
2 going to be harmed or killed. It was a political rally.
3 He was not talking about Nyatubindi -- he was not
4 talking about Rutisiro, which is where he claimed he was, if
5 it was Nyatubindi which is an entirely different place,
6 and he went so far as to threaten to take away all of
7 our concessions if we didn't clean up the Belgian works
8 within, I forget what he said, a month or two months.
9 Q. We've looked at exactly what he said in his letter and
10 we can look at a fair characterisation in his letter.
11 Now, I'm going to move on. We were dealing
12 yesterday evening with the Benzinge story
13 in August 2012. Can we go to bundle R-231. And this is
14 your letter complaining on 3rd August to the RDB, and
15 can FTI go on in this letter, please. A bit more. Keep
16 going. My apologies, one back, FTI, please.
17 Thank you. So you're complaining about RDB being
18 taken in by Mr Benzinge, and you say, fourth paragraph:
19 "I am sorry to tell you this, but what Ben Benzinge
20 has argued to you and your staff is breathtaking in its
21 absurdity. It is astounding that your staff believes
22 him, or, indeed, that they think that it is their job to
23 make determinations on issues where the Rwandan courts
24 have already made their decision. The facts are
25 these ..."
12:18 1  And so on. So you are going in quite hard in this
2 letter, but not suggesting for a moment that there have
3 been physical threats to the RDB staff which was
4 a suggestion you made in your testimony yesterday?
5 A. No, not to the staff, to the registrar herself. That
6 was -- what she told us was the reason she made the
7 change. I'm not sure you understand how --
8 Q. You're dealing -- just to interrupt -- I'm sorry to
9 interrupt, but just to be clear --
10 A. -- (overspeaking) I answered this.
11 Q. -- I'm going to take it a stage at a time, you can give
12 your answer in a minute. You are dealing in this letter
13 with your complaint at the RDB staff for making this
14 change. So if you had a complaint that it was a
15 registrar who was responsible because she was
16 threatened, you would have said so in this letter,
17 wouldn't you?
18 A. We didn't know how it was decided at this time. What we
19 knew was we were owners of a company, we were management
20 of a company, we have a group of foreign investors, and
21 now it's all gone. All of it.
22 Q. That's now a different version of events from your
23 version of events yesterday --
24 A. I'm sorry. I'm sorry, can I finish please?
25 Q. Please finish?

Page 13

12:19 1  A. Please don't keep interrupting me, it's very --
2 Q. But please try and keep your answers concise, then.
3 A. Thank you. The reason that this was such an emotional
4 moment for us was we had done, as far as we knew,
5 everything right, we had checked with the US Embassy on
6 everything, we had done every step according to Rwandan
7 law, and all of a sudden we were informed, not by the
8 Ministry, not by the registry, but by Ben Benzinge who
9 shows up in our office and says "I own your company".
10 This was a very frightening moment for us.
11 Q. I let you run on, but that was not in fact an answer to
12 my question. My question was, this is a different
13 version of events from your version yesterday. Your
14 version yesterday was that you did know, on your case,
15 that some member of staff had been threatened, but you
16 were choosing not to mention it in your letter to the
17 RDB and your version of events today is that you didn't
18 know. Which is true?
19 A. You're intentionally mixing up the timeline for purposes
20 of not getting the facts right.
21 This letter was written before we knew how
22 Ben Benzinge had persuaded them, or threatened them in
23 this case, to remove us from the commercial registrar
24 certificate. The only identification so far as I know
25 as to who owns property, company property, is that

Page 14

12:20 1  registrar. At the time that I wrote this letter, we
2 didn't know how that had come about. Ben Benzinge had
3 showed up in our office and said: you guys go home,
4 I now own everything.
5 Q. Well, Mr Marshall --
6 A. This was a very frightening prospect for us --
7 Q. Mr Marshall --
8 A. We had a series of meetings and in those series of
9 meetings we came to find out that the registrar had been
10 threatened by Ben Benzinge.
11 Q. Mr Marshall, I'm going to suggest that is a different
12 version of events to yesterday's and we can all go and
13 look at yesterday's transcript to confirm that.
14 I'm going to move on. Only three days after this
15 letter on 3rd August, the RDB responded to you with
16 a letter that we have at C-146. This is a letter from
17 the Rwanda Development Board and they say:
18 "Reference is made to our previous discussions
19 regarding the status of Natural Resources Development.
20 Following our recent meeting with you and your lawyer,
21 we have received documentation ..."
22 I should say, this is addressed to Mr Benzinge, not
23 to you:
24 " ... from the majority shareholder; Natural
25 Resources Holding GmbH ... this documentation shows the

Page 15

12:22 1  legal representative and sole Managing Director of the
2 holding company to be Mr Roderick Marshall. In this
3 capacity, he is mandated to secure the interests of the
4 holding company in the Rwandan subsidiary ..."
5 He then explains about:
6 "... he has forwarded a written complaint company
7 (herewith attached) ... you have transferred a
8 significant amount of company assets ... please note
9 that as the Managing Director, you have fiduciary duties
10 towards the company and therefore may not embark on any
11 actions that are either to the detriment of the company
12 or against the express interests or consent of the
13 shareholders. Failure to respect these duties may
14 result in civil liabilities.
15 "Due to these complaints from the authorised
16 representative of the holding company protesting that
17 the interests of the majority shareholder are being
18 jeopardised, we hereby inform you that the position of
19 Managing Director has been suspended and no person shall
20 hold this position in the company until we have further
21 investigated these complaints to ensure that the
22 interests of all the shareholders in NRD Rwanda are
23 secure."
24 So, just pausing there, the RDB have been faced with
25 at this stage competing positions, and in the light of
12:23 1 that they are warning Mr Benzinge about his fiduciary
2 duties and suspending the position of managing director
3 until further investigation is taken; do you recall
4 that?
5 A. I recall the letter. I still don't understand what it
6 really means.
7 Q. Well, it's a fair and reasonable position for them to
8 take, isn't it?
9 A. I understand, but maybe you can explain to me what it
10 means.
11 Q. Well, I'll go on. Now go to bundle R-114.
12 A. But what does this letter mean? You know, you can't --
13 somebody has to be running the company.
14 Q. Now go to bundle R-114.
15 A. What we understood the letter to mean was that they were
16 saying: we're embarrassed by what has happened so we're
17 going to suspend Mr Benzinge.
18 Q. Yes, they were suspending him and suspending the
19 position of managing director altogether for what you
20 will see is a short time while they investigate.
21 Then you go to bundle R-114. So the last letter we
22 looked at was 6th August and here we have a letter the
23 next day, 7th August, from the RDB, so 24 hours later:
24 "We refer to your letter to the Rwanda Development
25 Board ... in which you question the Registrar General's

Page 17

12:24 1 decision to rectify the registration of Managing
2 Director from Roderick Marshall to Ben Benzinge. You
3 make misrepresentations about RDB's role and/or
4 intention in this matter and I would like to emphasise
5 that RDB is a facilitator of shareholders' wishes and
6 cannot appoint or remove a Managing Director as that is
7 within the remit of shareholders.
8 "I have, nonetheless, raised the issues in your
9 letter to the Registrar General, who is empowered by law
10 to oversee company registration matters. I take note
11 that she has written to you and Mr Benzinge; copies of
12 which are attached hereto, and decided to suspend any
13 holder of that title until you furnish her with
14 information currently absent in your file. I am
15 therefore confident that the existing issues will be
16 resolved. Please do cooperation with the Registrar
17 General until it is ... resolved."
18 And that is, again, a fair position for the RDB to
19 take, isn't it, given the absence of material in your
20 file and given that there are competing claims from
21 people purporting to be shareholders?
22 A. Well, that's exactly the point. There was no absence of
23 material, in fact, they had a stack of materials which
24 at the time they claimed were missing. They
25 subsequently found those materials and then reappointed

Page 18

12:25 1 me, but what was interesting -- and I don't think you're
2 recognising here -- the first letter from the RDB --
3 sorry -- the registrar's office is under the auspices of
4 the RDB and that's why you saw in the other letter RDB
5 Office of the Registrar as the heading. There was some
6 confusion at this time whether -- Ben Benzinge seemed to
7 believe that being the managing director meant being the
8 owner of the company, not that the owners of the company
9 appoint a managing director, and so this was part of the
10 ongoing confusion. It's not that there was Ben Benzinge
11 who was considered the majority shareholder: he
12 interpreted it as being ownership, and that's why it
13 went back and forth and became very heated, because we
14 had been dispossessed without explanation, without
15 notice.
16 Q. I'm asking you to focus on the position of the RDB,
17 faced with these competing claims, and the position
18 they've taken so far, which is they're suspending the
19 position of managing director pending investigation is
20 a fair one to take, isn't it?
21 A. And what I'm trying to explain to you is what the
22 meaning of those words are. There was no lack of
23 documentation. There was no competing claim by
24 Ben Benzinge. Ben Benzinge did not have ownership in
25 our opinion. He claimed to have a 15% ownership. In

Page 19

12:26 1 either case it didn't give him the right to appoint
2 himself as managing director.
3 Q. Well now let's go to bundle C-070.
4 A. Not only managing director; he claimed to own 100% of
5 the company.
6 Q. Now we go to C-070. Same day, so they're obviously
7 continuing investigations, and on the same day the RDB
8 write to the Mayor of Bugesera, and they say:
9 "We have recently received legal and authenticated
10 documentation showing that the holding company of
11 NRD Ltd... is wholly owned by Spalena ... an American
12 company, incorporated in Delaware ..."
13 "In his capacity therefore as the sole shareholder
14 of the holding company, he submitted copies of a
15 notarised resolution appointing an acting managing
16 director for the company. The appointed Managing
17 Director is Roderick Marshall (please find attached all
18 the relevant documentation ...)
19 "In this regard, we therefore request that you
20 facilitate the transfer of the company property
21 including keys to the premise of the company to
22 Mr Roderick Marshall."
23 So within five days of your initial complaint, RDB
24 had responded to your representations and, based on the
25 information you provided, they had taken steps to ensure
Anne-Marie Stallard

Page 21

12:28 1 company and property and access was returned to you;
2 correct?
3 A. Partly correct. The documentation says that we were
4 not -- the assets and our bank accounts were not
5 returned so quickly, but they had made a written
6 decision within five days, yes.
7 Q. Now, you have a complaint about actions that you suggest
8 Mr Benzinge took in the few days after the registration
9 information was changed, and before the position was
10 restored, but you accept, don't you, that those were the
11 actions of Mr Benzinge and not of the RDB or of any
12 state body; correct?
13 A. Without the enablement of the body, he could not have
14 done those things.
15 Q. Can we go to bundle C-048. This is a letter you wrote
16 after these events, copied to a number of people. Can
17 we just look at the last page of the letter. This is on
18 10th August. You say:
19 "It is clear to me and our investors that the RDB
20 staff was completely misled by the threats and illegal
21 actions of this man, Ben Benzinge. It appears that he
22 has taken advantage of RDB's goodwill and exploited
23 a gap in Rwanda's laws. This is not a civil matter, it
24 is a criminal matter."
25 So your view at the time, on 10th August, was that

Page 22

12:29 1 the RDB had been misled by Mr Benzinge; yes?
2 A. I couldn't perform my own investigation, it was some
3 combination. Was I giving them an out? I was certainly
4 trying to.
5 Q. You weren't suggesting at the time the proposition you
6 advanced in your testimony yesterday, that there had
7 been some registrar or member of staff who had been
8 physically threatened; correct?
9 A. There was. Just ask her, call her up, she's not going
10 to deny it. This was a terrible time.
11 Q. Nor are you suggesting that RDB were in any way
12 collusive in Mr Benzinge's actions, or behaving
13 corruptly, or anything like that?
14 A. Whatever actions Ben Benzinge took to get them to
15 pretend that they had lost all our files, which were
16 subsequently all rediscovered, yes, somebody, or some
17 people, were participating in this scam, and they
18 were --
20 A. They were certainly surprised that we objected to losing
21 all of our property.
22 Q. Could you go to the Claimants' Counter-Memorial on
23 preliminary objections at paragraph 35. So
24 paragraph 35. Sorry not to give you a page number.
25 Thank you. You deal here with this episode and you say

Page 23

12:31 1 there, in your Memorial, that Ben Benzinge, second
2 sentence, was:
3 "... inexplicably and falsely credited by the RDB as
4 the managing director of NRD."
5 Then you explain about your complaints about what
6 Mr Benzinge did, and you say:
7 "In essence, Respondent, by and through the RDB,
8 used Benzinge as a pawn to make clear to Claimants that
9 they could be stripped of their entire investment on
10 a whim."
11 Now, that is not at all what you thought at the time
12 was happening?
13 A. It was absolutely what I thought at the time.
14 Q. Because we've seen your letters where you accepted at
15 the time that RDB had been misled by Mr Benzinge, and
16 we've also seen that RDB, as soon as you made the
17 complaint, investigated and corrected matters; yes?
18 A. No. Mr Benzinge, in collusion with some people of the
19 RDB, did these things. Who they were, I don't know.
20 All our files, as I say, went missing. As a way of
21 enabling the registrar to have some kind of face-saving,
22 I used the phrase that "somebody had been misled". That
23 was a courtesy, an indulgence on my part. These were
24 criminal acts. We had been dispossessed, we were not
25 sure that we were going to get it back. I had a very

Page 24

12:33 1 difficult and very unpleasant conversation with the head
2 of the RDB, Clare Akamanzi, who was explaining to me why
3 I was no longer the owner the company. That's not
4 unintentional; that's very intentional. We wouldn't
5 have had that ongoing dispute if that hadn't been the
6 case.
7 Q. Now, again you are introducing allegations that have
8 never been said before, in any witness statement of
9 yours, or even in your Memorial, and you are making it
10 up as you go along, aren't you, Mr Marshall?
11 A. No. If it was a thousand pages, maybe you would get
12 more of this kind of information, but for you to dismiss
13 it is very unfair.
14 Q. No, it's right to say, isn't it, that Mr Benzinge
15 subsequently lodged an appeal against the RDB decision
16 to suspend him; do you recall that?
17 A. No, I didn't know that.
18 Q. And he subsequently -- well, don't worry, because
19 I'm going to try and press on -- he subsequently
20 launched arbitration proceedings in October of that
21 year, so that's 2012, to vindicate what he saw as his
22 rights; you recall that, yes?
23 A. Yes.
24 Q. I'm going to come back to that arbitration, and first,
25 because I'm going to try to keep it broadly

Anne-Marie Stallard

for Trevor McGowan

As amended

by the Parties
Day 3 -- Hearing on Jurisdiction and the Merits  
ICSID Case No. ARB/18/21  
Wednesday, 23 June 2021

<table>
<thead>
<tr>
<th>Page 25</th>
<th>Page 26</th>
</tr>
</thead>
<tbody>
<tr>
<td>112:36</td>
<td>12:34</td>
</tr>
<tr>
<td>13 March 2013. The site manager Mr Gaspard said that</td>
<td>chronological so we can all follow, I'm first going to</td>
</tr>
<tr>
<td>the police commander came on site and seized around</td>
<td>come to something else that happened in the second half</td>
</tr>
<tr>
<td>750kg of wolfram at Bucyangenda's house in Bwiza center,</td>
<td>of 2012, and you have a complaint about this period</td>
</tr>
<tr>
<td>Murundi sector. The police was alerted by the neighbour</td>
<td>about what you say are military arrests and seizures of</td>
</tr>
<tr>
<td>of Bucyangenda. Contacted, the police commander in</td>
<td>minerals in Sebeya.</td>
</tr>
<tr>
<td>Rutsiro district said that the minerals were seized but</td>
<td>Now, can you go to Mr Niyonsaba's second witness</td>
</tr>
<tr>
<td>no people arrested; the report was done and it's ready</td>
<td>statement where he has an annex, and can I ask you to be</td>
</tr>
<tr>
<td>to be sent to Gihango court. In the meantime, the</td>
<td>shown the annex to his second witness statement.</td>
</tr>
<tr>
<td>mineral is still kept at Rutsiro police station. During</td>
<td>MR BRODSKY: Can you say that name one more time?</td>
</tr>
<tr>
<td>the visit, it was observed that lots of illegal miners</td>
<td>MR HILL: Yes, Niyonsaba, and his second witness statement.</td>
</tr>
<tr>
<td>are on the site. The company manager tries to resolve</td>
<td>Mr Niyonsaba, of course, is the man who was working</td>
</tr>
<tr>
<td>this ...&quot;</td>
<td>in the Pact ITRI programme. I just want to look at the</td>
</tr>
<tr>
<td>And just going over the page:</td>
<td>annex to this, there's an annexure 1 at the end of the</td>
</tr>
<tr>
<td>&quot; ... situation but face difficulty. During the day</td>
<td>statement, it's on the seventh page.</td>
</tr>
<tr>
<td>of the visit, the iTSCI technician attended a meeting</td>
<td>So this is dealing with the complaint by you that</td>
</tr>
<tr>
<td>organised by the district environment officer Mr Olivier</td>
<td>you see in the summary in the second row:</td>
</tr>
<tr>
<td>Kabanda Manzi, the NRD representative, during which it</td>
<td>&quot;NRD had informed iTSCI that the Rwandan military</td>
</tr>
<tr>
<td>was agreed that illegal miners for a cooperative.</td>
<td>had allegedly come to the site, seized minerals, and</td>
</tr>
<tr>
<td>However, iTSCI reminded that the site was still</td>
<td>arrested 5 employees. Subsequent iTSCI investigations</td>
</tr>
<tr>
<td>suspended. August 2016: NRD suspended by GMD and no</td>
<td>revealed that NRD has been suspended by the Government</td>
</tr>
<tr>
<td>tags and logbooks. No further action possible.&quot;</td>
<td>for environmental reasons. Reports of the seizure of</td>
</tr>
<tr>
<td>So that gives a different complexion, doesn't it, to</td>
<td>minerals could not be confirmed.&quot;</td>
</tr>
<tr>
<td>your story of military arrests and seizures?</td>
<td>Then the iTSCI report has &quot;Actions ... to be taken&quot;:</td>
</tr>
<tr>
<td>A. No, those are unrelated. This is a different</td>
<td>&quot;GMD was informed. Joint field visit by GMD/iTSCI</td>
</tr>
<tr>
<td>description of a different series of events.</td>
<td>to be done next month. The site was visited on</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Page 27</th>
</tr>
</thead>
<tbody>
<tr>
<td>12:37</td>
</tr>
<tr>
<td>Q. Now, staying in the second half of 2012, I'm going to</td>
</tr>
<tr>
<td>come back to the licence --</td>
</tr>
<tr>
<td>A. Can I explain where your error is, or do you want to</td>
</tr>
<tr>
<td>move on?</td>
</tr>
<tr>
<td>Q. I may be coming back to that so you may get another</td>
</tr>
<tr>
<td>chance, or if not it can be picked up in re-direct,</td>
</tr>
<tr>
<td>I really need to try and move on because I want to try</td>
</tr>
<tr>
<td>and --</td>
</tr>
<tr>
<td>A. You can't throw out -- I'm sorry but I thought this was</td>
</tr>
<tr>
<td>getting to the truth --</td>
</tr>
<tr>
<td>Q. But I'm asking you, and I'm happy to take your evidence.</td>
</tr>
<tr>
<td>A. -- and the way of getting to the truth is being able to</td>
</tr>
<tr>
<td>respond to concrete allegations. You say -- if you go</td>
</tr>
<tr>
<td>back one page, I can explain to you why the military</td>
</tr>
<tr>
<td>arrests was in a completely different location than the</td>
</tr>
<tr>
<td>area described here.</td>
</tr>
<tr>
<td>Q. Well, you have just said that. I am going to move on.</td>
</tr>
<tr>
<td>Could we go to bundle C-045. I'm going to come back to</td>
</tr>
<tr>
<td>the licence issue, and here we have -- we're now at --</td>
</tr>
<tr>
<td>so we're in the second half of 2012. Yes, they are</td>
</tr>
<tr>
<td>in September of 2012.</td>
</tr>
<tr>
<td>A. Sorry, what's the date? September what?</td>
</tr>
<tr>
<td>Q. 13th September 2012.</td>
</tr>
<tr>
<td>A. Okay.</td>
</tr>
<tr>
<td>Q. And it's a letter from Mr Kamanzi and he says:</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Page 28</th>
</tr>
</thead>
<tbody>
<tr>
<td>12:39</td>
</tr>
<tr>
<td>&quot;Reference is made to my letter dated</td>
</tr>
<tr>
<td>20th February 2012, extending the previous licence of</td>
</tr>
<tr>
<td>Natural Resources Development (NRD) for three months</td>
</tr>
<tr>
<td>which expired in May 2012.</td>
</tr>
<tr>
<td>&quot;In view of the ongoing work on reorganising the</td>
</tr>
<tr>
<td>mining sector which will have a bearing on the new</td>
</tr>
<tr>
<td>contracts that will be negotiated as has been</td>
</tr>
<tr>
<td>communicated to all the existing concession holders,</td>
</tr>
<tr>
<td>I have the pleasure to extend your licence up to October</td>
</tr>
<tr>
<td>2012, to allow for the ongoing work to be completed.&quot;</td>
</tr>
<tr>
<td>And --</td>
</tr>
<tr>
<td>A. But this struck us as particularly odd because as you</td>
</tr>
<tr>
<td>pointed out, the letter is dated September 13th, and</td>
</tr>
<tr>
<td>it's the licence up to October 2012, so for roughly two</td>
</tr>
<tr>
<td>weeks' extension, and we couldn't understand why he</td>
</tr>
<tr>
<td>would send that when there was no communications between</td>
</tr>
<tr>
<td>us at that point.</td>
</tr>
<tr>
<td>I mean, it was very nice, very pleasant of him to</td>
</tr>
<tr>
<td>send a two-week extension, but it was meaningless to us.</td>
</tr>
<tr>
<td>Q. But you're saying meaningless; by this stage your</td>
</tr>
<tr>
<td>previous extension had expired?</td>
</tr>
<tr>
<td>A. No --</td>
</tr>
<tr>
<td>Q. You were operating without a licence?</td>
</tr>
<tr>
<td>A. It's something political. All other concession holders</td>
</tr>
<tr>
<td>were in progress negotiating long-term concession</td>
</tr>
</tbody>
</table>
12:40 | licences. We were the only one at this point who was 
2     not actively in negotiations because they wouldn't, and 
3     we don't know why to this day. We got this letter in 
4     the middle of that saying: okay, you're extended for two 
5     weeks. 
6     Q. Now, I would like you just to focus, rather than making 
7     speeches, Mr Marshall, I want you to answer my question. 
8     A. (Overspeaking) information. 
9     Q. Just please focus on my questions and answer them. 
10    The reason you needed to have a letter of this kind 
11    is that your last licence extension had expired, and for 
12    you not to be an unlicensed operator, you needed to be 
13    given a licence extension; correct? 
14    A. Our licence was an ongoing -- for all concession 
15    holders, we were all treated the same in this respect, 
16    that all of them were deemed to be continuing 
17    licences -- 
18    Q. No, it's not a question of deemed to be continuing. 
19    You've seen the correspondence. 
20    A. There are specific -- there are specific rights and 
21    responsibilities of a concession holder. At all times 
22    we were treated to have those rights and 
23    responsibilities as a concession holder. It never 
24    changed. 
25    Q. We've seen the correspondence where there was a previous 

Page 30

12:41 | licence extension. You needed to be a licensed 
2     operator, and this licence was granted -- here we have 
3     another licence extension granted until October 2012; 
4     yes? 
5     A. Yes. So a two-week extension. 
6     Q. And it's making sure you are a licensed operator over 
7     until October 2012, otherwise you would not be 
8     a licensed operator. 
9     A. Up to October 2012. 
10    Q. And there's nothing in here promising that a long-term 
11    licence is going to result, is there? 
12    A. No. All concession holders at this time in 2012 were in 
13    active negotiations for the terms and conditions of that 
14    long-term licence. We never had that opportunity. 
15    Q. So I think you're agreeing with me, there's nothing in 
16    this letter indicating that a long-term licence is going 
17    to result, is there? 
18    A. There's nothing which contradicts it, and there are lots 
19    of other forms of communication which you've decided to 
20    take from our -- your client has decided to take from 
21    our offices. 
22    Q. Well, you keep saying that, and just, I should make 
23    clear that's not accepted, that Rwanda has removed 
24    anything from your offices, and it's also not accepted 
25    that you do not have access to vast amounts of material. 

Page 31

12:42 | I just want to make that clear. 
2     Now, by this stage, you had not made any application 
3     for a long-term licence, had you? 
4     A. Yes, we had. 
5     Q. Subject to your point about your argument that 
6     the November 2010 application counted? 
7     A. That was deemed an application for a long-term licence 
8     according to the staff at the licensing and supervision 
9     division. 
10    Q. Now let's keep that page on the screen, if we can, and 
11    look at paragraph 34 of your witness statement. You say 
12    at paragraph 34: 
13    "On September 13, 2012, Minister Kamanzi wrote to 
14    NRD granting another extension of the NRD mining 
15    licences, stating that the long-term contracts 'will be 
16    negotiated.'" 
17    Q. Could you just show me where in the letter from 
18    Mr Kamanzi he says that the long-term contracts will be 
19    negotiated? 
20    A. It says "new contracts", referring to long-term 
21    contracts, "that will be negotiated". 
22    Q. Why do you say that's referring to long-term contracts? 
23    A. Because everybody was being treated the same. 
24    Q. You had no basis for thinking long-term contracts were 
25    being negotiated because all you had applied for was 

Page 32
12:46

1. A. I don't know. Are you claiming that it was not received?
2. Q. Yes. It was not received because it was not sent.
3. A. I would have to go back and check whatever logs we have.
4. Can you show me the signature page?
5. Q. Yes. It's going to be the last page of the letter, and you will see it's signed although there's no company stamp on the document?
6. A. Yes, it would be very unusual if I hadn't -- you would have to check with Zuzana. I would guess that I had. There's no reason for us not to. We came, we had several meetings with them explaining what had happened.
7. So I don't know what the content of the letter was, it may have been -- if you believe that it had not been sent, there may be a different version, you know, which was sent, but it would be very unusual for me to sign a document and not have it sent.
8. Q. Can we go to Mr Sindayigaya's second witness statement at paragraph 15.
9. A. I believe the statement in the document to be true, by the way.
10. Q. In Mr Sindayigaya's second witness statement at paragraph 15, Mr Sindayigaya gives evidence on this document. He says in paragraph 15: "I have never seen this document before, and all of the allegations made in it against me are false. I also do not believe that this letter was ever sent to the police, for the following reasons.
11. "The letter is addressed 'Kigali Chief Police Supervisor'..."
12. And then he goes on at 15.1, if FTI could pull that up:
13. "The letter is addressed 'Kigali Police Chief Supervisor' at 'Kigali Police'. I do not believe such a position exists, or that there is such a thing as 'Kigali Police'. Each district has its own police station, and that is where complaints are made. Whenever we had complaints to make to the police, we would submit them to either the Remera or Kimihurura Police Stations in Kigali which were the nearest to the NRD offices. When complaint documents are presented at the police station, they are stamped stating the date of reception and the name of the receiving officer and a copy provided to the person making the complaint. The September 2012 Letter is not stamped and therefore does not appear to have been presented to any police station at all.
14. "15.2. I believe that Mr Marshall was familiar with this process of submitting complaints to the police as I understood that he had filed complaints against..."

Page 33

12:50

1. former employees of NRD including William Quam...
2. Julius Kabera... and Valery Mpongo..."
3. "15.3 If the September 2012 Letter had been submitted to the police, I would have been summoned to a police station and interviewed about the allegations which on the face of the letter are very serious. This never happened. Nor did Mr Marshall ever raise these allegations with me in person. Instead, I had only attended the Remera Police Station the previous month to give a witness testimony concerning the wrongful actions of Mr Mpongo, which I discuss in further detail below.
4. In fact, during my employment with NRD, my only involvement with the police was as a whistleblower in two cases that led to the firing of employees and police investigations ..."
5. And, contrary to what you just said in an earlier answer, Mr Sindayigaya wasn't interviewed by the police, was he?
6. A. I'm sure he was interviewed by the police. I can't imagine -- I wasn't involved with an interview between him and the police, so I can't say for sure.
7. 100% this was delivered. It was the basis on which we fired him. We did an investigation, we found out that what Aime had been doing, both in the books and with other equipment for his own personal gain.
8. Q. Now, we can see what you're doing here, which is conflating different stories. Firstly, you did not send this letter and Mr Sindayigaya was not interviewed by the police; that's right, isn't it?
9. A. I can't imagine -- I wasn't involved with an interview at all.

Page 36

Page 35

Page 34
Q. Secondly --
A. (Overspeaking) the police filing, whether it's this copy or a different copy, I can't say.
Q. Secondly, you are conflating two different stories in that you do have complaints about a bulldozer and money that had been made from the hire of it, but Mr Sindayigaya had actually been the whistleblower on that complaint, and you and Mr Sindayigaya had made a complaint to the police about the actions of the other employee, and that's correct?
A. Valery Mpongo was doing it with Aime.
Q. Well, Mr Sindayigaya had been the whistleblower and assisting you in the complaint to the police about Mr Mpongo, that's correct, isn't it?
A. Not that I know of. He certainly never shared to me that he was, in effect, fingerling his partner.
Q. And you and he had jointly made a complaint to the police about the hire of the bulldozer; correct?
A. He was the one who was leasing it. I personally went to find where the bulldozer was because it was missing, and it was at a woman's house and it had been leased to her by Aime.
Q. What you have done in this complaint is used by Aime.

Page 37

12:51
12:54
12:55
13
14 Mr Sindayigaya deals with all your allegation. I'm only picking out some of them. 23.12:
"Mr Marshall states that he wants an explanation to my 'role in the situation regarding illegal Actros sale and [the] relationship with Mr Kayomba which resulted in 150 million Rfw loss'. The sale of the Actros truck was arranged by Mr Julius Kabera, NRD’s CFO who sold the truck at a substantial undervalue -- he sold it at its book (ie depreciation) value rather than at market value which was substantially higher. I was not involved in the transaction. In fact, I reported ..."
FTI, could you go over.
" ... [this] irregularity to Mr Marshall and am now shocked to see him trying to blame me for this."
That's correct, isn't it?
A. No.
Q. Can we go --
A. I would refer you to Zuzana Mruskovicova who was handling these transactions and the internal investigation. I don't have direct -- at the moment a direct memory of this.
Q. Can we go on into item 15. Your next complaint is:
"His role in the Motorcycles business resulting in 15 million loss to NRD."
And then we can see Mr Sindayigaya's response:

Page 38

Page 39

13 (Pages 37 to 40)

Anne-Marie Stallard
for Trevor McGowan

As amended
by the Parties
12:59

Q. Whether it was typed -- I'm sorry, I don't know what the date on it is, I can't see it.

THE PRESIDENT: Well, the date is 20th September.

A. Yes, if this was a draft and we decided not to send it, we sent a different version, I don't know.

THE PRESIDENT: 20th September.

A. But I would refer you to Zuzana Mruskovicova about this. This would have been, you know, her investigation, her preparation of these materials.

Q. So this was certainly a draft. Whether it was actually delivered in this form or a different form, I couldn't be sure unless I had the copy which had the stamp on it.

THE PRESIDENT: Well, I understand your answer that this is a contemporaneous document --

A. Yes.

THE PRESIDENT: -- produced with the date that it bears.

A. Yes. It's certainly contemporaneous.

THE PRESIDENT: Thank you, Mr Hill.

Q. Let's move on.

MR HILL: I'm going to move on now to a different topic. September 2012, Minister Kamanzi suspended all mining activities in the Sebeya catchment in the Western Provinces; correct?

A. Yes.  It's certainly contemporaneous.

THE PRESIDENT: -- produced with the date that it bears.

A. Yes. It's certainly contemporaneous.

THE PRESIDENT: Thank you, Mr Hill.

Q. Let's move on.

A. When was that letter typed?

Q. Well, it was clear, I would suggest, from the language of the long-term concession with the mining concession holders --

A. Yes.

THE PRESIDENT: Mr Marshall, is it your signature on that letter?

A. Yes.

THE PRESIDENT: And was that letter typed on the day that -- of the date it bears, or has it been typed more recently?

A. It certainly was not in preparation -- if you mean in preparation for these hearings, 100% not true.

THE PRESIDENT: And was that letter typed on the day that --

A. I don't recall what the issue is or what it was referring to when it says "Regarding accident of workers", so I can't help you on that.

Q. It's just an example, isn't it, Mr Marshall, of how you make unfounded allegations against anyone who you disagree with; correct?

A. That's slanderous and outrageous and really not helpful in trying to elicit truth in this process.

Q. Let's move on.

THE PRESIDENT: Mr Hill.

MR HILL: Yes.

THE PRESIDENT: It's not clear to me -- and I doubt if it's clear to Mr Marshall -- whether you are suggesting that this letter was not typed on 20th September 2012 but has been produced much more recently for the purpose of this arbitration.

MR HILL: Mr Marshall, would you like to give -- you've heard the President's question. Would you like to say your understanding of whether this letter has been typed more recently, or not?

Q. Do you recall that? I hope it isn't contentious, I just want to help everyone on the timeline.

A. As far as I know it would have been sent to the police, but I refer you to Zuzana Mruskovicova who was handling it. This would be unlikely to be a copy that would have been confirmed by the police. As I say, when we delivered letters to the police or any ministry, we would take a copy, a signed copy, but photocopy, and take it to wherever we were delivering it and have them put the stamp on it to indicate that it had been received.

So this is not that copy. I don't know what this copy is, it may be --

THE PRESIDENT: Mr Marshall, you received your August 2011 letter you received from Mr Kamanzi your August 2011 letter you received from Mr Kamanzi by that stage, end of October, your November 2010 application had not been accepted; correct?

A. Yes. They're all being treated the same and they're all being deemed to be still large-scale mining concession holders --

Q. And by that stage --

A. -- (overspeaking) statutes.

Q. -- (overspeaking) statutes.

A. Yes.  It had been accepted. We had not been told that it had been refused.

Q. Well, it was clear, I would suggest, from your August 2011 letter you received from Mr Kamanzi what the position was; correct?

A. No. No, because we -- at that point we were negotiating the language of the long-term concession with the
Anne-Marie Stallard

For Trevor McGowan

Bay View Group LLC and The Spalena Company LLC -v- Republic of Rwanda
ICSID Case No. ARB/18/21

Day 3 – Hearing on Jurisdiction and the Merits
Wednesday, 23 June 2021

Q. So: [113:03]

Q. Can we go to bundle C-054. Now, this is an application that you had in 2011, is it?

Q. I'm sorry, can you go back to the top for a second? We had already been through that process in 2010, did we not?

Q. And by that point you hadn't put in an application on a concession by concession basis; correct?

Q. The same information as he had already given you in 2012, correct?

Q. And by that point you hadn't put in an application on a concession by concession basis; correct?

Q. So, this is a letter to the RDB?

Q. Yes, from Mr Kamanzi, as said.

Q. Okay, sorry.

Q. So this is a letter to the RDB?

Q. Yes. So it's January 2013, so we're now at the beginning of 2013.

Q. So, this letter is written at the beginning of 2013.

Q. Yes. So it's January 2013, so we're now at the end of 2012; correct?

Q. The application for a long-term licence; do you recall that?

Q. And by that point you hadn't put in an application on a concession by concession basis; correct?

Q. So, this is the letter from Mr Kamanzi to the acting CEO, Ms Akamanzi, of the RDB, and it says:

Q. Yes. So it's January 2013, so we're now at the end of 2012; correct?

Q. And by that point you hadn't put in an application on a concession by concession basis; correct?

Q. Yes. It's January 2013.

Q. Let's look at C-160. This is a letter from the Minister of Natural Resources, Mr Kamanzi, to the acting CEO of the RDB.

Q. Yes. So it's January 2013, so we're now at the end of 2012; correct?

Q. That's not how that was resolved. We went back to Minister Kamanzi's office and explained that he had been misled by Dr Michael in saying that Dr Michael had only agreed to a number of items, and send it to us now.

Q. That's not how that was resolved. We went back to Minister Kamanzi's office and explained that he had been misled by Dr Michael in saying that Dr Michael had only agreed to a number of items, and send it to us now.

Q. But we know, for instance, from Mr Kamanzi's letter that the company had been offered two concessions instead of five. That's not how that was resolved. We went back to Minister Kamanzi's office and explained that he had been misled by Dr Michael in saying that Dr Michael had only agreed to a number of items, and send it to us now.

Q. Yes, from Mr Kamanzi, as said.

Q. Okay, sorry.

Q. So this is a letter to the RDB?

Q. Yes. So it's January 2013, so we're now at the end of 2012; correct?

Q. And by that point you hadn't put in an application on a concession by concession basis; correct?

Q. So, this letter was written in that premise, because there was no possibility of you just getting a long-term concession agreement.

Q. So he remains of the same view, which is that any new licences were to be obtained, they should be negotiated for on a concession by concession basis.

Q. A. I recall we got called by the Ministry to say: Yes, we have your application from 2010, here's what we want you to do, and we called back at the beginning of 2013, and this is the document.

Q. Can we go back to the top?

Q. A. It's in the same kind of application as everybody else was in negotiation with the Ministry.

Q. Yes. It's January 2013.

Q. A. Well, that's what the letter said. You could make a viable application for; correct?

Q. So he remains of the same view, which is that any new licences were to be obtained, they should be negotiated for on a concession by concession basis.

Q. And by that point you hadn't put in an application on a concession by concession basis; correct?

Q. Yes. So it's January 2013, so we're now at the end of 2012; correct?

Q. So he remains of the same view, which is that any new licences were to be obtained, they should be negotiated for on a concession by concession basis.

Q. And by that point you hadn't put in an application on a concession by concession basis; correct?
13:07 1 A. It is not what I’ve made up, and that’s exactly what happened.
2 Q. And let’s look at the covering letter. You start off by saying:
3 "This letter is to provide you with an update of the amended application [NRD] for a long-term mining concession licence. The original NRD request for the long-term mining licence was submitted to your office on or about 11/29/2010 (a copy is enclosed for your convenience)."
4 Now, that was trying to give the false impression, wasn’t it, that the previous application had been for a long-term licence; yes?
5 A. No.
6 Q. Let’s go on.
7 A. This was -- this was at their request. This was not our initiative.
8 Q. If it had been at their request you would no doubt have said:
9 "Further to your request, here is an application."
10 Correct?
11 A. No.
12 Q. And if it had been at their request, you would have mentioned that at some point previously in these proceedings, either in one of your memorials or in your
Page 49

13:08 1 witness statements?
2 A. There is lots and lots of communication that are not reflected in this narrow thread of sentences that you’re trying to hook together to come up with your own narrative.
3 Q. Now, if you look at the next paragraph, you refer to an investment of approximately €15 million. Can we go to page 4 of the document. You describe there achievements in research, production and processing versus targets, and then you talk about the original business plan being submitted by NRD in 2006, and you refer to the 39 million figure, and you say in the last sentence of that paragraph:
4 "The targets outlined in the original business plan and the operating practices that have since been discovered were seriously flawed and inappropriate."
5 And that’s a rehash of something that was said in the November 2010 application; correct?
6 A. That was addressing Zarnack’s proposal to build a tantalum processing refinery which cost many hundreds of millions of dollars.
7 Q. Just in answer to my question: that is a rehash of something that that was said in the 2010 application; correct?
8 A. I don’t know that it’s a rehash; it’s a reference to
Page 50

13:09 1 Mr Zarnack’s original business plan proposal.
2 Q. It’s virtually the same words, isn’t it?
3 A. I don’t know.
4 Q. Then look at the next paragraph:
5 "When the management of NRD was changed in the end of 2010, the focus of activities and investments changed to support realistic projects to support and significantly increase semi-industrial mining in a way that will also greatly small-scale artisanal mining in multiple places, with an emphasis on increasing the standards of safety in the workplace and protecting the environment. During the period 2008 through 2012, total capital investment and other expenditures of more than €15 million were made and are evident of a commitment to the development of a sustainable mining industry of Rwanda and its people."
6 So you’re claiming an increase of €6 million on the €9 million said to have been invested in the 2010 application; yes?
7 A. I don’t recall what the numbers were, but that’s what this says.
8 Q. And then if you go to the next page, you can see the figures, and these are the figures I took you to on the first day of your cross-examination.
9 A. Yes.

Page 51
13:13 A. This was not an open-ended: please tell us the history of your company. This was very narrowly targeted by the advisor to the Minister.

Q. If you look at -- so pages 5 and 6 you set out your proposed activity plan for the period 2013 to 2018. If we look at page 6 we can see that the reserve -- that for your plan for 2013 to 2018, involved a number of projects and deposits prioritised and earmarked for follow-up investigation. Then you have a list there: "Rutsiro: Detailed calculation of reserves of Rutsiro primary wolframite deposits."

"Nemba: Detailed calculation of Nyatubindi Laterite deposit..."

"Nemba: Reserve calculation of all other secondary cassiterite deposits."

"Nyatubindi: Detailed reserve calculation..."

Now, two points here. Firstly, these are the same proposals, aren't they, as was proposed in the 2010 application; correct?

A. I don't know. We were under instruction. As far as I know, these tables were provided to us by the Ministry for inclusion. I can ask --

Q. Just to be clear, I'm not looking at the table, I'm looking at the bullet points underneath "Reserve calculations".

Page 54

13:16 you would have said so loud and clear when you said it was unfair that the applications hadn't been accepted.

A. No, there are two issues. The applications that weren't accepted were those where we didn't have the technical information because our offices had been seized. This document, and the original 2010 application, in fact going back to the 2007 application for a mining licence, all that technical information is provided by the Ministry. That's what they expect. It's their way of saying what they expect from the mining companies, and if the mining companies can't fulfil that expectation, then there would be some negotiation. You could even lose your licence. But the process is very cooperative throughout, until the 2014/2015 one-liners.

Q. Mr Marshall, the reality here, and we can see it from the other document, is that all you have done is rehashed material that was in the 2010 application, and that shows a number of things, Mr Marshall --

A. You're not listening, I'm sorry, I'm explaining it's all an interactive process, this is what the Ministry says, this is what they identify, the deposit area, and they say: well, this is what we think you should be able to get out of it, and that's what we expect to be able to hold you to.

Q. And this shows a number of things, Mr Marshall --
13:19 1 will be given a commercially reasonable long-term licence agreement. Everybody else was in negotiation for what that commercially reasonable long-term licence agreement would say; we were not.
2 Q. And this was work that needed to be done under Article 2 of the contract, and you were told in August that it hadn't been done, August 2011 hadn't been done?
3 A. You're making stuff up now. We were told to put this document together in this format. They did not ask for the other geological research which was ongoing by our European, Czech and Slovak geologists and their team.
4 Q. Can we go back to the bottom of --
5 A. We had more ex-pat geologists working in Rwanda than any other company.
6 Q. Can we go back to the bottom of page 3. We have "Production highlights" and you give production figures for 2007 to 2011, and it's right to say, isn't it, that the reason you don't give production figures for 2012 is that they were so low under your watch; correct?
7 A. I don't know that that would have been the reason.
8 Q. Can we go to Dr Biryabarema's witness statement at paragraph 15. He says: "On 30 January 2013, NRD made what it called an updated application for a 30-year concession,

Page 57

13:21 1 although this was in fact the first application that it had made for a 30-year concession at all, because the application made in November 2010 was for new five-year licences. The January 2013 application was entirely inadequate -- it contained none of the detail that would have been required even for short term licences, let alone the 30-year licences now being requested."
2 Q. And that's a fair and reasonable view and summary, isn't it?
3 A. Absolutely outrageous and completely inconsistent with everybody else we spoke to at the Ministry.
4 Q. Well, Dr Biryabarema, as you know, was one of the people who would have been evaluating this?
5 A. He was also under criminal investigation for most of the period we were there.
6 Q. Mr Marshall, this is yet another extravagant claim from you, isn't it?
7 A. No. We spent many meetings discussing Dr Michael's corruption with internal intelligence, indeed, external intelligence.
8 Q. Until you got into the witness box you have never suggested that Dr Michael Biryabarema was corrupt in any way, have you?
9 A. Yes, I did. In fact, I think I told you that he was being bribed by Anthony Ehlers or Anthony Ehlers had disclosed to us that (overspeaking) --
10 Q. Until you got into the witness stand, you have never made any allegation of this kind, have you?
11 A. To the Rwandan authorities, yes. You should talk to them.
12 Q. In this arbitration you've never made any allegation of this kind, have you?
13 A. I don't know whether it's included in any of our other documents but it's true.
14 Q. It's not, and the reason it's not is because you have just made that up, speaking from the witness stand?
15 A. No, that's not true. Talk to internal intelligence, talk to external intelligence. I suspected that he was going to be gone before we were.
16 Q. Let's look at Mr Imena's witness statement at paragraph 23.
17 A. The military people that we were working for just asked us to be patient, do nothing precipitous, but he was being investigated for corruption. We fully expected him to be removed from his position. He's known throughout the community for corruption.
18 Q. Let's look at paragraph 23. This is Mr Imena's reaction to your application:
19 "That draft agreement had been sent with what was described as an 'investment plan report summary' in

Page 58

13:22 18 (Pages 57 to 60)
13:23 Q. Mr Marshall, I don't want to argue with you but you than we had.
22 A. As far as we knew our application had not been surpassed by anybody else and nobody else had done more research.
19 Q. We've already seen in this testimony over the last days, always told us that of all the applications, and we read many of them from many of the other concession holders, ours was far superior to any other application. So I think this was just prepared for the arbitration and nothing else.
21 Q. Staying in Mr Imena's witness statement, can we just go back to paragraph 22. He is dealing there with the draft contract that you attach to this application. He says:
25 "At paragraph 36 of his witness statement..."
13:24 A. Well, you would have to ask Mr Bidega who the staff were at that time and others who were there at that time.
3 Q. That doesn't work. He had left by then. He was with you. He had joined your organisation shortly after the correspondence that we were looking at.
6 A. You're really talking about several things, right? You're talking about the 2010 application. That was reviewed by the application licensing and supervision board as being the best of all the applications.
10 Q. Mr Marshall, I'm looking at this application. You say --
12 A. But you're saying that it was later deemed to be insufficient for some reason. That was never communicated to us.
15 Q. We've already seen in this testimony over the last days, various examples of you being told it was insufficient. So it was communicated to you?
18 A. Yes, and I think I have told you in response, most of those are due to bias because of allegations of corruption and other matters.
21 Q. Let's go back to Mr Imena's witness statement --
22 A. As far as we knew our application had not been surpassed by anybody else and nobody else had done more research than we had.
25 Q. Mr Marshall, I don't want to argue with you but you could not possibly have thought that given the correspondence you were in fact receiving.
13:25 A. I absolutely knew it because I'd been to all the other sites.
5 Q. And the only things you rely on to support your suggestion you took a different view is conversations, or some parallel stream of communication, that are not supported by the material that we have; correct?
9 A. No, it's -- those conversations occurred, we were having regular, several times a week meeting with senior grade officers from the military who repeatedly assured us just to be patient. We visited every other concession.
12 We viewed every other concession application.
14 You know, the only application I think which was superior in some respects was Rutongo, and for the very simple reason that they had had access to all of the Belgian resources and research for their 40 years of working at Rutongo, so it was an additional process that they were doing, not a greenfield site like we were doing.
21 Q. Staying in Mr Imena's witness statement, can we just go back to paragraph 22. He is dealing there with the draft contract that you attach to this application. He says:
24 "At paragraph 36 of his witness statement..."
13:27 Mr Marshall suggests that the draft long-term licence agreement that was enclosed with his 30 January 2013 letter to Minister Kamanzi had been agreed with us.
3 That is not correct -- in fact we never actually reached the point of discussing contractual terms with NRD because we never got to the point in their application process at which it was necessary to do so. I do not know the origin of the draft agreement enclosed with Mr Marshall's 30 January 2013 letter, but I do not believe it was prepared or produced by the Government. Although Mr Marshall states that it is 'in conformity with the template which your Ministry provided to us', it is not in a style or format that we would use and includes information, for example, investment and profitability estimates, that I do not believe we ever include in the body of our agreements."
17 And that is entirely correct, isn't it?
18 A. No, I would say that's entirely made up for the purposes of this arbitration. We negotiated in good faith with Dominique Bidega and his staff, they gave us the template, as I think I explained to you yesterday or the day before, it was the Gifurwe -- you can check it -- Gifurwe Mining concession template that they gave us to make changes to, and so we did, and we reached the end of that negotiation, he explained to us that it had been
| Page 65 | 13:28 | 1 | referred up to Dr Michael and that then Minister Kamanzi and it had been approved and had been sent to the cabinet with a positive recommendation. |
| | | 2 | Q. I don't want to go back round on that, but it's quite obvious if that had been remotely true, you would have been saying so in the letter to Mr Kamanzi, saying this has already been agreed, approved by Dr Biryabarema, approved by you, Mr Kamanzi, and sent to cabinet. None of that happened because none of that is true; correct? |
| | | 3 | A. No, of course it happened, and they knew it perfectly. |
| | | 4 | Q. Why didn't you say so in your letter? |
| | | 5 | A. I obviously didn't think it was necessary. There's nothing that they didn't know about this process. |
| | | 6 | Q. Why didn't you mention in your letter that Mr Kamanzi has already approved this, Minister Kamanzi has already approved this contract and it is sitting with cabinet? |
| | | 7 | A. I don't know that it was sitting at cabinet at that point. |
| | | 8 | Q. What's the purpose of the application on your case? |
| | | 9 | A. He's renegotiating, that's my point. |
| | | 10 | Q. That's volunteered by you, isn't it? |
| | | 11 | A. He knows the language of the original agreement, he |
13:33 1. So you were allowed to resume activities in the short term while negotiations progressed, correct?
  2. A. That's what it reads, that negotiations did not progress, but that's what it reads.
  3. Q. And this wasn't a letter from the Minister which would have been granting an actual extension; this is from Dr Biryaharema giving you, if you like, an ad hoc, informal permission to remain on the concessions; correct?
  4. A. No, we were always treated as mining concession holders as defined by law, except with respect -- no, always treated as mining concession holders. In a few select instances like this issue of the Sebeya River catchment, there was a declaration that the catchment was closed, but we were always treated with respect as long-term concession holders.
  5. Q. But this didn't involve an extension of the licence, that's my -- just focus on my question: this didn't involve an extension of the licence, did it?
  6. A. Your question was whether we had independent rights, and my point is, we were always treated like long-term concession holders, it's the course of dealing.
  7. Q. Right, you're relying on a course of dealing?
  8. A. May I finish, please? We never changed from when we got the licences in 2007, we were always treated with both...

13:36 1. it's not like in many countries where you can fence off a mining area. The areas in the concessions are large, they're in some cases hundreds of thousands of people. So people do come and mine selectively where they want, and you can't control it.
  2. Q. Well, it was --
  3. A. Rutongo was able to get support from the military. We don't know why. We tried to get support from the military, and two brigades -- two entire brigades were posted at their concessions to stop the illegal mining.
  4. Q. Well, your concessions were particularly --
  5. A. (Overspeaking).
  6. Q. Mr Marshall, your concessions were particularly large and that was one of the problems you faced: was that you couldn't control activity on your concessions; correct?
  7. A. No. The concession areas are established by law. It's not something that anybody had an option to, unless they were going to change the law before granting them to us. The concession areas, as a matter of practice, are always handled as a police matter. It's not like you can control someone going in or coming out; these are widely scattered, very small deposits, and what you do...is you provide those artisan miners with various kinds of support.
  8. Q. Plainly, Mr Marshall, the government thought that you...

13:35 1. rights and responsibilities, except that in certain cases, like Sebeya River catchment, things were closed because of, in this case, environmental degradation.
  2. Q. And nothing on this letter gave you any assurance that any long-term licence would be given; correct?
  3. A. "... Proceed with [the] negotiation on your request for new contracts..."
  4. Q. Exactly. And this permission was given on the strength of your assurance that you would curb illegal mining on the concessions through the hiring of demobilised soldiers; yes?
  5. A. I would point out to you, you were accusing us earlier of mining by illegal miners, not by NRD miners in this area.
  6. Q. This permission was given on the strength of your assurance that you would curb illegal mining on your concessions through the use of -- the hire of demobilised soldiers; yes?
  7. A. That's what they wanted us to do, yes.
  8. Q. And that reflected, didn't it, that it was NRD's responsibility to maintain order on its concessions and prevent damage on its concessions?
  9. A. No, that's not true in Rwanda. You can make reasonable efforts. The country is so crowded that you cannot --

Page 69

Page 70

Page 71

Page 72
13:39 1 handle this problem. So we were unique among the mining
2 concession holders and said: why don’t we set up
3 a programme to hire these demobilised soldiers, it
4 solves a government problem of what to do with
5 demobilised soldiers who may be difficult to deal with,
6 and we can give them work.
7 Q. Mr Marshall, something that --
8 A. So a jobs programme, from our point of view, and
9 innovative: nobody else had done that.
10 Q. Mr Marshall, something that was happening as a matter of
11 good faith was that the Rwandan Government were granting
12 you an indulgence by permitting you to remain on the
13 concessions after your licences had expired; correct?
14 A. No, we had -- we were deemed to be long-term mining
15 concession holders, which is a defined term under Rwanda
16 statute. That never varied. Concession --
17 Q. Come on, Mr Marshall, you were not deemed to be
18 long-term concession holders, were you?
19 A. Yes, we were.
20 Q. You never had a long-term concession.
21 A. Everybody was --
22 Q. You had a contract for four years, which by this stage
23 was no longer extant --
24 A. Everybody --
25 Q. Just listen to my question. You had a contract for four

Page 73

13:40 1 years, which was no longer extant, and you had licences
2 which were expired. You were never deemed to be
3 long-term concession holders, were you?
4 A. No, our contracts were executory. We had done -- we had
5 granted the indulgence that the Rwanda Government had
6 asked us, we had set up operations, we had invested
7 considerable amounts, with the expectation that we would
8 be granted this long-term commercially reasonable
9 contract, and as a matter of law we were deemed to be
10 long-term concession holders, and specifically holders
11 of those concessions, by statute, not by right. We had
12 fully performed under the contract, we had done what
13 we had promised to do. They promised to give us
14 a commercially reasonable long-term licence agreement,
15 and that was the negotiation and the agreement we were
16 waiting for.
17 MR HILL: Mr President, I wonder if that is a convenient
18 moment for a break?
19 THE PRESIDENT: Yes, I think it’s a very convenient moment
20 and we’ll have an extra five minutes, I think, and come
21 back in 35 minutes, at quarter-past.
22 (1.41 pm)
23 (A short break)
24 (2.16 pm)
25

Page 74

14:16 1 THE PRESIDENT: Yes, could I just ask Mr Cowley?
2 MR COWLEY: Yes.
3 THE PRESIDENT: Did you have time to open the envelope and
4 consider its contents?
5 MR COWLEY: We opened the original email. The
6 representation to us was we were going to be asked to
7 confer with our client about one document.
8 THE PRESIDENT: Yes.
9 MR COWLEY: And admitting it today for questioning of Rod
10 Marshall. I never received such a request. I took it
11 as probably indicative of the fact that the questions
12 they asked have already been asked, but if not, I still
13 did two things: I looked into -- our IT staff has
14 received the package, they have the metadata that was
15 submitted to us by letter this morning.
16 I’ve got follow-up questions for them about what --
17 their comments. They don’t know anything about the
18 trial, the background, they don’t know what to really be
19 looking for. So I have follow-up questions with them,
20 and I may answer all my questions, or those follow-up
21 questions may have to be answered by Respondent’s
22 counsel.
23 I also have questions for them about what this new
24 ability to produce metadata by the Respondent covers
25 beyond what we’re holding, so I have additional

Page 75

14:18 1 questions and, in any event, I ask Mr Marshall as
2 an academic matter, should anybody have an email in
3 native format or another document in Word format, PDF
4 format, in native as opposed to electronic or PDF, does
5 he have any ability to talk about the differences
6 between the two, does he have any ability to talk about
7 metadata in native compared to something else, and he
8 says absolutely not. I confirmed with him that in order
9 for him to even talk about what is in metadata or in
10 a particular document in metadata, he has to confer with
11 an IT professional.
12 So there is no substantive testimony from the
13 witness that could be obtained today in any event,
14 regarding metadata, so I suggest this change in position
15 with regard to discovery and production of documents
16 should be a subject of actual discussion between the
17 parties’ counsel -- we’ve never had any -- and we report
18 back to the Tribunal, probably not today, but we report
19 back after we have had an actual conversation.
20 THE PRESIDENT: Right. Thank you.
21 Mr Hill, that sounds sensible.
22 MR HILL: Well, we certainly can’t deal with it now.
23 THE PRESIDENT: Yes.
24 MR HILL: So let’s park it now, I think.
25 THE PRESIDENT: Thank you.
Then let us have Mr Marshall back, please.

MR WATKINS: Okay, bringing the witness in right now.

MR HILL: Mr Marshall, can you be given C-057. This is a letter from the RDB to NRD setting out its position in respect of the licences, and the RDB note in the first paragraph that the contract expired in 2011, and the company has been working on a short-term extensions;

yes, do you see that?

A. Yes.

Q. And as they say there:

"As the Government of Rwanda has taken the decision to negotiate licence agreements separately for each mining site, we wish to initiate negotiations with the company for the issuance of a small mine exploitation licence for the Nemba site."

So at this stage the government is making it clear, isn’t it, that they want to negotiate licence agreements separately for each concession, and at this stage they’re interested in negotiating a small mine licence for Nemba; correct?

A. Possibly. It also may be that they were not articulating the situation well and that they were in error. For example, right at the top of the page, it’s addressed to Mr Zarnack, who hadn’t been associated with the company for many years.

I don’t know, we were certainly -- we took it as an invitation to come and negotiate a long-term concession licence --

Q. How could you have taken it as that, Mr Marshall, given they’re telling you they want to negotiate each one separately and they’re inviting you to negotiate for a five-year small mine licence for one concession?

A. Well, I don’t know that that’s truly what they meant.

All the other concession holders were in long-term licence concession holder agreements.

Q. But it is truly what they said, isn’t it?

A. Sorry?

Q. It’s truly what they said in this letter.

A. You mean the sentence you’re reading?

Q. That’s what they’re saying.

A. They’re contradicting me; is that what you mean?

Q. Yes. Are you saying you don’t know what that’s meant, but it’s exactly what they said.

A. Yes, and my point is that everybody is at this point going through a negotiation for long-term concession licence. We had no reason to believe that we were going to be treated any differently even though it is written inartfully here.

Q. You say everybody at this point, but that is simply not the case, is it? They’re explaining what they’re prepared to negotiate and it is not long-term concession licences; correct?

A. As far as I know, all large-scale mining concession holders were being brought in for long-term licence contracts, and all of them are negotiating what both parties would hopefully find to be a commercially reasonable agreement.

Q. Shall we look at your response to this?

A. For Rutongo, for example, it took them three years of negotiation, I don’t know why, but we hadn’t even begun.

So we were -- we were glad to find somebody willing to talk about what had happened to us and what the original long-term licence agreement text had been.

Q. You say you hadn’t even begun, but I thought your evidence elsewhere was that you had begun and indeed you had an agreed contract which had been agreed by the Minister and gone to cabinet.

A. You’re trying to twist my words, I think, sir, so excuse me. What I’m trying to say is I think you will appreciate we had negotiated a long-term contract, it had gone to the Parliament, cabinet, so we were told, it was tabled, it had not gone ahead. We saw that this was -- this letter we were optimistic that we were going to be able to be like everybody else, like every other large-scale concession holder negotiating for a long-term concession agreement.

Q. Let’s look at your response to this, Mr Marshall.

C-058?

A. By the way, let me give you just one important side to this. They had all the leverage in the world because they had our assets --

Q. I’m going to stop you there, Mr Marshall, because that is not beginning to be an answer to any of my questions and we must get on and I’m not going to allow you to digress into matters which are not answers to my questions. So will you please go to C-058.

Now, this is your response to the letter from the RDB, and we pick up in the beginning, first paragraph, a point about the addressee. I’m not going to bother you with that. I’m going to look at your next paragraph:

"I perhaps should add that, as you note in CEO Akamanzi ‘invitation letter’, the term of the original ‘Contract’ has passed without NRD receiving the agreed upon ‘Long Term Licence’ and we would like to express our appreciation that we can now discuss that."

Just pausing there, you knew that there was no agreed-upon long-term licence and you knew that you were not being invited to discuss a long-term licence, didn’t you?
14:25 1. A. No. As you said before, this is the plain language. We expected to be negotiating for a long-term licence, similarly to how we had been negotiating it with Dominique Bidega in 2011.

5. Q. So this is a deliberate, I would suggest, misinterpretation of a letter which you have copied.

9. A. That's the double question. Can I answer the first one first, please?

11. Q. Yes, please.

23 A. What we understood was that we were being finally invited to negotiate commercially reasonable long-term licences. We hadn't had anybody to talk to about the terms of that licence. From our perspective, we had fully performed. We had negotiated the agreement once, it had been sent to the cabinet, tabled, and it hadn't gone ahead. Now we were given a second opportunity to be able to negotiate what the language of that long-term licence would be --

21 Q. You wanted to give a full -- yes, carry on?

22 A. What was your second question?

23 Q. Yes, you sent it to -- and I suggested, and it's the same suggestion I'm making again now, you sent this letter to a number of other recipients in order to give my recollection.

14:28 1. A. All documents in Rwanda are delivered by hand. There's really no meaningful mail service. So, for example, the stamp there next to the addressee, I don't see others, the Rwanda Natural Resources Authority, that meant that we took it to them, and our copy we were keeping, we got them to stamp it as evidence that they had received it.

7. THE PRESIDENT: Thank you. I understand.

8 MR HILL: Thank you, Mr President. I'm just seeing if I can skip the next thing just to try and move things along a bit. If you just give me one moment.

11 A. I would add, Mr President, two additional administrative practices in Rwanda is, one, that all documents, all received letters are entered into a logbook, so when they stamp it they also enter it into their logbook, and every letter that they send out, where the minister sends out a letter, for example, they also enter that into a logbook, so it's like the US Army, where they keep a record of every communication, and then there's some dispute about whether it's seven days, or seven business days, you have to respond to that letter on both sides.

22 THE PRESIDENT: Thank you. That's the practice.

23 A. That's the practice, sir.

24 MR HILL: Yes. Can you now go to C-159. This is a meeting of the RDB that you attended, and you see at the beginning of the note of the meeting it says, second sentence: "Ms Rusagara informed NRD that it had not received any comments from the Company on the Mining Agreement and the due diligence questions that it had submitted to NRD on 4th April 2013 ... Ms Rusagara noted that in the absence of comments from NRD, the meeting could be used to focus on broader issues [relating] to the Agreement and due diligence questions, or addressing clarifications in connection with that Agreement."

11 So the RDB went into this meeting wanting to negotiate or to discuss the agreement which you had not yet commented on, and that was the five-year Nemba agreement; correct?

15 A. I don't know what the draft was. I don't recall.

16 Q. And what happened at this meeting is you weren't ready to discuss that draft, and I don't want to go to the detail of the minute, but it's clear from the minute that you raised a number of complaints, and it was agreed that there would be a meeting with Mr Imena, which took place subsequently; do you recall that?

22 A. I recall that there was no meeting with Dr Imena subsequently, that this was a preliminary meeting for purposes of negotiating a long-term contract. That was my recollection.
14:31 Q. Well, I'll just interrupt you there -- sorry, I don't mean to interrupt -- following up on you there: it wasn't a preliminary meeting for discussing the long-term licence, it's quite clear that from RDB's point of view it was a preliminary meeting for discussing the short-term licence that you were not in a position to discuss; correct?

14:32 A. I don't ever recall that there was a conversation of us having a discussion about a short-term agreement at all, so, that's my recollection.

14:33 Q. Then we have your letter to Mr Imena.

14:34 A. Can I read the rest of this --

14:35 Q. And you say --

14:36 A. Can I read the rest of this? It may remind me.

14:37 Q. And you say --

14:38 A. Can I read the rest of this --

14:39 Q. Then we have your letter to Mr Imena.

14:40 A. I don't believe there was any inconsistency between that and the prior minutes, but you wouldn't let me read the prior minutes so I'm not sure what you're referring to.

14:41 Q. Now you then say --

14:42 A. (overspeaking) we weren't twisting any language, we weren't misrepresenting anything.

14:43 Q. Now, let's just look at some of the items on your list.

14:44 MR HILL: So you pick out some issues that you want to discuss with Mr Imena, starting with A at the bottom of the page:

14:45 MR BRODSKY: Okay, thank you.

14:46 MR HILL: That's right, where you are, that's fine.

14:47 MR BRODSKY: Okay, thank you.

14:48 MR HILL: So you pick out some issues that you want to discuss with Mr Imena, starting with A at the bottom of the page:

14:49 "The continuing harassment of NRD, which includes the de facto closure of NRD's western mining concessions as a result of the lack of security and of the actions taken by the Rwanda Natural Resources Authority."

14:50 Now, that itself is a very unfair characterisation,
State action. Is it because RNRA wants to compel NRD investors to give up their investment in the Rwanda mining industry?" So this is a letter that emerges from you to the Minister in response to the request to negotiate a five-year licence for Nemba, and do you consider this is an appropriate request to make of the Minister? A. I think you're mischaracterising it again. The issue that was decided was that we would be raising issues that were impediments to our ongoing ability to work in Rwanda of any kind, and so these were an opportunity to discuss issues we wanted to discuss with Minister Imena who, until this point, was really unwilling to speak to us.

Q. The reality is, there hadn't been any --

A. In fact, I would like to make one last point: there are maximum 10 large concession mining companies in the whole country. The fact that he did not find time to talk to us meant that he was avoiding us, not that he was too busy with other matters.

Q. And far from being the target of any official or unofficial state action, all of NRD's problems are ones it had brought upon itself, for example, by being unable to curb illegal mining on its large concessions; correct?

A. No.

Q. Let's look at the next item, paragraph 2.

A. Other mining concession holders had much more difficulty with illegal mining than we did. Rutongo was among the biggest complainers about that.

Q. Let's look at the next item:

"Grant to NRD the long-term 30-year mining concession provided by Rwandan law and promised under the 2006 exploration and exploitation Agreement, which grant has been repeatedly delayed and manipulated by RNRA. NRD has fully performed under the 2006 Agreement and, in accordance with that Agreement, NRD has confirmed that it is satisfied by its exploration results in some concessions and, in some areas within a concession, wishes to continue exploration."

Now, let's take this in stages. There's no 30-year licence promised under the 2006 contract, is there, that was a distortion of the contract; correct?

A. No, at all times we were the statutorily defined long-term large-scale mining concession holder, which is a defined term under Rwanda statute, and there it specifies as the long-term holder it is for a mandatory 30 years, there's no lesser period. And the Rwanda Government always was making the argument: we would like to be sure of what the terms of the so-called commercially reasonable long-term licence say and that was the sole reason for their delaying it.

Q. And there had been no, as you say, manipulation, by the RNRA, had there? The first application by you for a long-term licence was not until January 2013, and that was the nine-pager that we looked at earlier; correct?

A. No, this is your fanciful narrative and I understand that you are trying to thread together lines from different sentences, but that is not what was happening on the ground.

Q. And then you say that NRD had fully performed under the agreement, but you had already been told repeatedly by the government that NRD had not fully performed under the agreement, hadn't you?

A. That's not true. We had been given some letters from Dr Michael, Minister Kamanzi, and later from Minister Evode, but virtually everybody else in the Ministry had confirmed that we had fully performed -- in fact, performed better than anybody else.

Q. So all your letters --

A. And more than that -- if I may finish, please -- and more than that we had a parallel line of negotiation with the government through the Rwanda military and they were telling us that we had fully performed and there was a corruption problem that their internal security was working on.

Q. All the letters from the people with senior responsibility and authority were against that position, but you're relying, are you, on conversations with people like Mr Bidega who joined your organisation; yes?

A. I'm -- it's an ongoing negotiation. We knew what people thought. We knew that they were investigating corruption. We believed Dr Michael and Minister Evode were going to be removed almost immediately. In fact, Evode was removed, but six months after we left the country.

Q. And this was a wholly distorted position --

A. No.

Q. -- that you were presenting to the Minister and copying to the US Ambassador so that he himself --

A. The US Ambassador --

Q. Just let me finish -- so that he himself would have a false impression of what was going on; that is fair, isn't it?

A. No. He has his own sources of information, he is fully part of the community, everybody in the US Embassy is fully part of the community. We played with all of the cards facing up. They knew what was good, what was bad, what was happening day-by-day, and they always, always provided a representative from the US Embassy to go with
that was.

Q. They were being told by you, inaccurately --

A. (Overspeaking).

Q. -- they were being told by you inaccurately how unfair things were; correct?

A. I think you're overjudging my capabilities. They are very adept people, they understand the Rwanda community, they knew what they were doing, they knew who they were talking to, and that yes, we were being treated much less fairly than anybody else.

Q. Now, we've arrived in the story at the second half of 2013. Mr Kagubare joined NRD in the second half of 2013, didn't he; yes? Remember him?

A. He started, I want to say, November, but it was -- he was a consultant, not an employee, and his real job was for the Directorate of Military Intelligence, and he was sort of our go-between with General Jack Nziza to prepare memoranda for him on topics that were interesting.

Q. Let's look at what he says, following his arrival.

Paragraph 9 of his witness statement. So he explains that fairly sums up the position: NRD did not manage its staff and miners in a professional way, did it?

A. That's a wholly fabricated statement, completely untrue.

Q. That was all a very long answer to a question about what he found in relation to the way you ran the company.

A. Next question, please go to paragraph 15 of Mr Kagubare's witness statement. He says that what he found is although -- as he arrived at the end of 2013:

"Although the company was entirely dependent on artisanal mining, it did not manage its staff and contractors in an effective way. Ms Mruskovicova had a habit of firing people at will. It was not uncommon for her to walk up to an employee or miner and fire them for allegedly stealing, or because she thought they were lazy. Ms Mruskovicova also seemed to regard payments due to the artisanal miners as discretionary rather than obligatory, and would sometimes decide that they should not be paid as agreed (after every sale) claiming there were more urgent issues to sort out. An excuse I disapproved and got to learn was the cause of the company's many legal problems with its employees and contractors and it was involved in a large number of court cases concerning claims for unpaid salary, wrongful dismissal or failing to pay the artisanal miners for their minerals. I remember at least one court case that was brought by a group of miners who had not been paid -- although a settlement was eventually agreed and a payment programme implemented, NRD did not comply with the payment programme and the miners went unpaid.

So far as I can [tell], NRD lost almost all of the cases brought against it but still refused to pay their former employees and the miners the amounts that were due to them."

And that fairly sums up the position: NRD did not manage its staff and miners in a professional way, did it?

A. That's a wholly fabricated statement, completely untrue. All companies are dependent on giving support to groups of artisanal miners. That's the fact in Rwanda. We managed them in an effective way, I would say we were better at managing them than most companies, I don't have a clear parameter for that, but I know our staff were always paid and always paid in full.

To the extent that there may have been any legal problems with any miners, the only ones that I know about were from the Starck period, and I don't even know...
14:47  1.  that they know that these people had sued the company.
2.  We could never find out any information about who they
3.  were or what they sued for. As far as I know, we never
4.  had a lawsuit for unlawful dismissal, except in those
5.  cases where there was a perfunctory lawsuit where we had
6.  fired someone for theft or embezzlement, like Aime, for
7.  example, he may have brought a claim. As far as I know,
8.  those would have been dismissed, although the courts are
9.  very reluctant not to give some kind of damages, even as
10.  nominal damages (overspeaking) --
11.  Q.  Mr Marshall, we know there were lots of court cases --
12.  A.  -- unfair dismissal claim.
13.  Q.  Mr Marshall, we know there are lots of court cases and
14.  judgments, including judgment for unfair dismissal --
15.  A.  No, it's a gross misrepresentation. No, it's not true.
16.  The bailiff came to us with a list of so-called
17.  employees from maybe the west, we don't know where, we
18.  couldn't -- we never get -- wait a second. He would
19.  never give us a judgment, he would never give us a court
20.  document. We don't know who they were.
21.  Q.  The more accurate position is that the bailiff came and
22.  he had judgments that he was enforcing?
23.  A.  If he did, he wasn't showing them. That's my point.
24.  Q.  We'll come back to that. Can we go back to
25.  paragraph 16?

Page 97

14:49  1.  Q.  We know it's accurate, Mr Marshall, because it coincides
2.  with the documents you have produced, which show the
3.  company -- which are the company's documents which show
4.  an absence of investment in the period of NRD --
5.  A.  That's not true.
6.  Q.  -- and we've been through that material.
7.  A.  That's not true. You bifurcated the proceedings, you
8.  did not want that information until the second part.
9.  With regard to this specifically, "I believed this
10.  involved industrialising mining", he knows well that
11.  industrialising mining in Rwanda is interpreted to mean
12.  giving more and more assistance and support to artisan
13.  miners and their mining activities; it's not to create
14.  massive open-pit mining operations, and it's
15.  a misrepresentation to say that we were happy to
16.  continue buying minerals from artisan miners. That's
17.  what every mining company does. Everybody -- no, there
18.  are no full-time miners. There are full-time support
19.  staff, but there are no full-time miners. Everybody
20.  buys from the miners and sells that production to the
21.  comptoirs or traders.
22.  Q.  Now let's look at page 18 of his statement, dealing with
23.  Rutsiro.
24.  A.  Well, you go through a sentence -- excuse me, just to
25.  make an observation --

Page 99

14:48  1.  A.  All of this is fraudulent and I would ask you to address
2.  these issues to Ms Mruskovicova.
3.  Q.  Back to paragraph 16:
4.  “Although I had been hired on the understanding that
5.  I would assist NRD in its production strategies and
6.  security, which I believed involved industrialising its
7.  operations, none of the sort happened as Mr Marshall and
8.  Ms Mruskovicova were not willing to invest any money in
9.  the company. It quickly became apparent to me that NRD
10.  was happy to continue buying minerals from artisanal
11.  miners and reselling those minerals for a profit rather
12.  than investing in and developing the company's
13.  operations. During the time that I worked for the
14.  company, it made very little capital investment. It did
15.  not make any investment into industrialising its
16.  operations”.
17.  And that is accurate, isn't it?
18.  A.  No, it is not. He was a full-time employee of the
19.  Directorate of Military Intelligence, he was giving us
20.  assistance on security matters. It was represented to
21.  me by a mutual friend that he could help because he
22.  carried the weight of the Directorate of Military
23.  Intelligence to be able to stop some of the harassment
24.  we were getting by small communities and small mafia
25.  groups. All of this is creative writing, at best.

Page 98

14:50  1.  Q.  No, I'm not allowing you to make an observation.
2.  Mr Marshall, you have answered my question. Please go
3.  to paragraph 18 --
4.  A.  Can I interject a comment, please? You read a paragraph
5.  and you say "That's all true, isn't it", and you don't
6.  let me respond to it item by item, and that's not very
7.  fair.
8.  Q.  I've given you a long opportunity -- very many
9.  opportunities for long answers, Mr Marshall, I need to
10.  move on.
11.  A.  You can't -- you're reading six or eight sentences and
12.  you don't give me an opportunity to answer each of those
13.  allegations.
14.  Q.  Let's look at paragraph 18, Mr Marshall. He deals there
15.  with the Rutsiro plant and what he says in the middle of
16.  the paragraph is:
17.  "That plant at Rutsiro was not operational and I was
18.  told by employees that had worked for NRD when it was
19.  owned by HC Starck, that the plant had never worked and
20.  could not process any minerals because it had several
21.  missing parts."
22.  He's dealing here with 2013 now, and it's right to
23.  say, isn't it, that that plant was not operational?
24.  A.  The plant was absolutely operational. It's a farcical
25.  statement, it's so bluntly untrue. Not only were we
14:51 Q. Can we go to the invitation, which is at C-060. He says:
"I am pleased to invite you to a discussion meeting between your Company and the Ministry of Natural Resources to be held in the Ministry's meeting room on Tuesday October 29, 2013, at 9.00 am."

14 A. Yes.

Q. During this meeting we will discuss several issues related to mining activities of your company including:
- "Mining licences;"
- "Environment, safety and security concerns in NRD's western mining perimeters;"
- "and complaints against NRD raised by Districts' authorities."

14:54 Q. Especially as you know that RDB had only invited you to discuss at this point a five-year concession agreement for Nemba. It's a misreading of a letter, isn't it?

A. Yes. I was leading the mining association discussions avoiding us. The sole purpose of the meeting was the OECD delegation that was coming to Kigali, I would say, within a matter of four or five days. He was very worried about -- and this was to deal with the tagging process and whether it was causing undue harm in the DRC, and whether there was a knock-on effect in Rwanda. The OECD meeting had never been held in Rwanda before. They were very worried about what was going to be said, and whether we, as the mining association, were going to be able to sufficiently articulate that there were challenges to the tagging process which were not being addressed. That was the sole topic of the meeting. If he sent this, I don't remember, but 100% we didn't discuss any of these issues because he had a much more important thing to worry about.

Q. None of this is true, and we're about to go and look at what was discussed at the meeting, but let's start -- before we get there, let's start by seeing what you say in your witness statement about this letter. You say -- you've just given evidence that you don't remember receiving this message, but you in fact deal with it in your witness statement. A. Okay.

Q. Paragraph 38. So why did you tell the Tribunal you don't remember receiving this message when it's one you actually deal with? So it's the first sentence --

A. Yes, okay. I had misremembered.

Q. So first sentence.

Q. Well it says -- what you say in fact is:
"... inviting us to discuss the terms of the long term concession agreement ..."

Q. Well, it says:
"During this meeting we will discuss several issues related to mining activities of your company including:
- "Mining licences;"
- "Mining licences..."
- "Mining licences..."
- "Mining licences..."

A. That's your distinction.

Q. Especially as you know --

A. (overspeaking).
said, whether we the mining association were going to be able to sufficiently articulate that there were challenges to the tagging process which were not being addressed. That was the sole topic of the meeting."

That's what you just told the Tribunal.

But even on the basis of your witness statement, if we look at paragraph 38, you are dealing with a different topic of the meeting because it's about licences, on this version of events, and negotiations for a long-term licence.

MR COWLEY: Mr Hill, if I might be permitted, I hate to interrupt you, but yesterday you were reminded about talking quickly. You talked so quickly that time I didn't catch much of what you said. That's not as important as me just reminding you, again, when you talk so quickly it's very hard to follow a whole question like that.

MR HILL: Thank you, Mr Cowley.

So, Mr Marshall, to ask this question again, the answer you gave to the Tribunal a moment ago about this meeting and its topic, you said: "They were very worried about what was going to be said and whether we as the mining association were going to be able to sufficiently articulate that there were challenges to the tagging process, which were not being

14:57

said, whether we the mining association were going to be able to sufficiently articulate that there were challenges to the tagging process which were not being addressed. That was the sole topic of the meeting."

But when we go to paragraph 38 of your witness statement you describe a completely different topic of the meeting.

A. Well, with regard to the topic of the licences, this was said: the meeting was almost entirely about the OECD delegation.

Q. Can we go to --

A. It was enough for us because it was very reassuring, he needed our help, he reassured us that the language of the agreement would be continuing shortly, the discussion of the language of the agreement would be continuing shortly.

Q. What in fact was said at this meeting was a number of things: first, he told you you had been operating without a licence since October 2012; correct?

A. No. He never said that.

Q. Secondly, he told you that that could not continue, and you needed to make a compliant application for a licence?

A. Not at this meeting, he never said anything like that.

Q. Thirdly, he told you that he considered that NRD did not have the capacity for five sites and should focus on two, Nemba and Rutsiro, with redrawn mapping to exclude protected areas; yes?

14:59

A. No, never happened. That was never discussed in this meeting. This meeting was almost exclusive about the OECD meeting coming up within a few days, it may have been a week, I don't recall. He did give us assurances as a way to assure us: look, please, we know that you are helping us out here, be patient, everything is working out.

Q. Can you go to bundle R-112.

A. Part of the reason for that by the way is they had nobody else to articulate a position for the Rwanda Government on the tagging process.

Q. This is R-112, this is a minute of the meeting, and if you look at the second page, you can see it was prepared by Mr -- yes, we have both pages open. We can see this minute was prepared by the third gentleman on the list, Mr Peter Martin Niyigena, who was an advisor to the Minister, so its meeting minute. Of the three points that I just suggested to you, we can see them in the minute, we see at the bottom of the page, having first recited the same points as were in the invitation letter, it says: 

"[Honourable] Imena continued his remarks by acknowledging the efforts done by NRD Ltd. eg construction of the plant; however he added on that NRD license was expired and not yet renewed. It is now time to get new one."

So you were told, weren't you, that you needed to apply for a new licence, yes?

A. I believe that this is a fraudulent document. Some of the information in this document I believe is true, but not at this meeting.

Q. He also said --

A. Minister Evode never told us it's now time to get a new one, except in the context of: we can tell you that the negotiations will shortly begin with the RDB. It was not his staff; it was the RDB that was negotiating these things.

Q. Next paragraph of the minute, there's a point about production:

"[NRD's] production considerably decreased all along this year. For this reason, NRD effort should focus to only two mine sites; Rutsiro, where the plant has been installed, and Nemba, however the first mine site will be remapped to exclude the protected areas such as rivers and forests."

So it's right, isn't it, as I said, that you were told to focus on two areas because of your capacity; yes?

A. It certainly didn't come up in this meeting, and I don't know that this came up in any meeting, as articulated by
Anne-Marie Stallard
for Trevor McGowan

Bay View Group LLC and The Spalena Company LLC v Republic of Rwanda
Day 3 -- Hearing on Jurisdiction and the Merits ICSID Case No. ARB/18/21
Wednesday, 23 June 2021

15:02
1 A. Minister Evode. There are some elements in here, but
2 they're from a later meeting after the OECD meeting.
3 I can only think that maybe Mr Peter Martin got his
4 dates confused and what was discussed confused. Before
5 these proceedings I had never seen these minutes.
6 Q. Well, we can see --
7 A. Ordinarily -- ordinarily you circulate them to both
8 sides, and he did not circulate this to us.
9 Q. Well, we can see that what was discussed is precisely
10 the agenda in the invitation letter that he had sent to
11 you shortly before the meeting; correct?
12 A. I don't know if it's precisely, but it covers some of
13 the topics that are in the agenda, but they were not
14 discussed at that OECD meeting, at that precursor to the
15 OECD meeting, sorry.
16 Q. Then if we look at the paragraphs that follow, we can
17 see that you and Ms Mruskovicova explain the steps that
18 are being taken to try and gain control of your
19 concessions with guards; yes?
20 A. Yes, as I say, there are elements of truth to this but
21 this is not how it was discussed and it was certainly
22 not at this meeting.
23 Q. And it was envisaged at this meeting that there would be
24 a series of follow-up meetings, although in fact only
25 one follow-up meeting took place; do you recall that?

Page 109

15:05
1 "... we met Minister Evode and again asked when we
2 would be issued the long term licence agreement. He
3 assured us that negotiations on the language of the
4 agreement would be continuing shortly at the RDB
5 offices."
6 Just pausing there, that evidence is inaccurate,
7 isn't it, because we can see from the minute that he in
8 fact told you it was time to get a new licence and that
9 you should focus on two concessions; yes?
10 A. You're sticking to a false narrative. The language in
11 this paragraph talks about what was going to happen with
12 the long-term licence. The purpose of the October 30th
13 meeting was only OECD. He may have made comment: Rod,
14 please be patient, you know, this is going to all work
15 out. The minutes that you have from the October 30th
16 meeting never happened, not on October 30th, and I think
17 they are mischaracterisations of a later meeting.
18 Q. Now, we agree, I think, that there was only one
19 follow-up meeting and the reason that there was only one
20 follow-up meeting was that at that meeting you were
21 insistent that NRD should try and hold out for all five
22 concessions for future licences?
23 A. That never came up in any meeting I've ever had. Nobody
24 ever said: Rod, we want you to take two instead of five
25 or four instead of five or one instead of five. Nobody

Page 110

15:06
1 ever did that.
2 Q. Well, they did.
3 A. Dr Michael's letter from 2012 says that he had that
4 conversation with me in his report to the Minister.
5 That conversation never happened.
6 Q. Well, it was confirmed --
7 A. (Overspeaking) deferred.
8 Q. That conversation was confirmed --
9 A. It was not confirmed.
10 Q. -- (overspeaking) in time going backwards, Mr Marshall,
11 but that conversation --
12 A. It was not confirmed.
13 Q. Listen to the question --
14 A. He said "I prefer(?) it", as you read in my letter.
15 It's not the same thing.
16 Q. That conversation was confirmed and that position on the
17 part of the government was confirmed by
18 Minister Kamanzi's letter in January 2013 that we looked
19 at, and it's being confirmed again at this meeting by
20 Mr Imena; correct?
21 A. No. No. As you'll recall, Minister Kamanzi's letter
22 says: I understand from Dr Michael you were offered two
23 of the five or you would take nothing, is the threat,
24 and therefore since you're not willing to take two of
25 the five, then you take nothing. And that never
Day 3 -- Hearing on Jurisdiction and the Merits
ICSID Case No. ARB/18/21
Wednesday, 23 June 2021

15:07
1. happened. That conversation with Dr Michael, the
2. precursor conversation never happened. I was never
3. offered two. I was never offered five. I was never
4. offered any of them. I was offered a long-term
5. concession licence.
6. You can include lots of things in a commercially
7. reasonable long term concession licence, but that's not
8. what this process was.
9. Q. Now, despite Mr Imena telling you again in October 2013
10. that your licence had expired and you needed to be
11. applying for new licences --
12. A. No, 100% he did not say that in that meeting.
13. Q. -- you didn't in fact do so for nearly a year; that's
14. correct, isn't it?
15. A. No, that never happened. That conversation never
16. happened in that meeting.
17. Q. Now, I'm going to move to 2014 and you're aware, aren't
18. you, that between February and May 2014, the previous
19. 2008 Mining Law was repealed and a new 2014 Mining Law
20. came into effect; correct?
21. A. I'll take your word for it.
22. Q. Don't worry, this isn't a memory test in that respect.
23. By 2014, you accept, don't you, that you didn't have
24. any existing licence because your last extensions
25. expired in October 2012?

Page 113

15:09

15:10
1. hadn't applied for any new licences, had you?
2. A. We fully applied for long-term mining licences under the
3. old law. I see that he is making a representation that
4. under the new law that those contracts are deemed void.
5. That was not our interpretation. As far as we were
6. concerned, our contract was fully executory. We had
7. performed. We were waiting for Rwanda to perform.
8. Q. Now, can we go to paragraph 39 of your witness
9. statement, and keeping that -- FTI, if you could keep
10. the previous letter on the screen as well so we can see
11. both at the same time. You say in paragraph 39:
12. "On April 2, 2014, Minister Evode invited NRD to
13. negotiate the terms of the long term contract."
14. Where do you say in this letter Minister Evode is
15. inviting you to negotiate the terms of a long-term
16. contract?
17. A. "In this regard, the Minister of Natural Resources would
18. like to call your company ... to renegotiate new mining
19. agreements..."
20. Q. He's not saying anything about a long-term contract, is
21. he?
22. A. Well, do you mean does it say the words "long-term
23. contract"? No, it does not say the words "long-term
24. contract".
25. Q. And you didn't apply --

Page 115

15:11
15:12
1. A. (Overspeaking) before that under our existing contract,
2. we were still treated, for all legal purposes as
3. a long-term large-scale mining concession holder as
4. defined by the law.
5. Q. And you did not apply for new licences in response to
6. that letter, did you, and had to be chased in August
7. before making a new application in September of that
8. year; correct?
9. A. We certainly were never asked for a new application.
10. I don't think this letter is a request for a new
11. application.
12. Q. Now, I'm going to come back to that point, but I first
13. want to deal again with Mr Benzinge, because by this
14. stage we're in the middle of the --
15. A. The negotiations would be chaired by the Rwanda
16. Development Board for renegotiation of the mining
17. licences -- mining agreements.
18. Q. I'm going to come back to that point in a moment. First
19. I want to go to Mr Benzinge, because we're now in
20. mid-August -- sorry, the middle of 2014. Now, you will
21. recall, we were looking at documents relating to
22. Mr Benzinge's attempts to have the RDB change the
23. registered information in August 2012, and as we agreed,
24. he subsequently commenced an arbitration. That
25. arbitration came up for hearing in April 2013; correct?
15:13  1 A. Yes.
        2 Q. And if you go to C-144, there's a letter here from you
        3 to the Arbitration Centre in Kigali, addressed to the
        4 chairman of the Arbitration Centre, in which you sought
        5 to object to the arbitration hearing by this letter
        6 which you sent only the day before the hearing; correct?
        7 A. That was the process.
        8 Q. You had been on notice of the hearing for some time
        9 before --
       10 A. Our lawyer, Alloys Mutabingwa was giving us instruction
       11 on what this letter should say. As far as I can recall
       12 it, he actually drafted this letter and it was submitted
       13 timely.
       14 Q. You had been on notice of the hearing for some time
       15 before that, hadn't you?
       16 A. Yes.
       17 Q. And having sent this letter to the chairman of the
       18 Arbitration Centre, you didn't then attend the
       19 arbitration hearing, did you?
       20 A. That was the process. You submitted an objection the
       21 day before the hearing, under their law, and you do not
       22 appear.
       23 Q. You also -- NRD had been aware of the arbitration itself
       24 from an early stage, hadn't you, and you had
       25 participated in court proceedings relating to the

15:14  1 constitution of the panel; correct?
        2 A. I'm sorry, where are you reading from?
        3 Q. I'm not reading from anything, I'm asking if you
        4 remember?
        5 A. I'm sorry, you'll have to ask me again.
        6 Q. I'll put it again. NRD had been aware of the
        7 arbitration from the outset; correct, and it had
        8 participated in court proceedings relating to the
        9 constitution of a Tribunal?
       10 A. Yes. Both. We had objected on numerous grounds because
       11 it was without merit and we went to court to be able to
       12 argue that it was without merit, and no basis for
       13 an arbitration.
       14 Q. Just to be clear, you didn't object to the idea of there
       15 being an arbitration. The dispute, we can see from the
       16 description of it, was as to the constitution of the
       17 panel, in particular, NRD's --
       18 A. No --
       19 Q. Sorry, just let me finish the question and you can tell
       20 me if you think I'm wrong.
       21 NRD's position was that there should be three
       22 arbitrators, Mr Benzinge's position was that there
       23 should be one.
       24 A. Two separate issues. First, we objected that there
       25 should be any arbitration. Secondly, the court, as

Page 117

15:17  1 Q. We have the judgments on both appellate courts in the
       2 bundle and that point was never suggested as being
       3 a point.
       4 A. I would be very surprised.
       5 Q. So if you had made the correct ground of objection to
       6 the arbitrator and it had not been considered, then
       7 that's obviously a point that would have been
       8 available point of appeal, but it's one you didn't
       9 take; correct?
       10 A. No, that's hypothetical. I don't know about it.
       11 Q. Let's look at what actually happened. We can see from
       12 the arbitration award:
       13 "The arbitrator summoned both parties but the
       14 defendant neither appeared before the court nor notified
       15 the court [by which that is meant the arbitrator] of the
       16 legal reason for his absence before the Arbitration
       17 tribunal."
       18 So you didn't notify the arbitrator herself, did
       19 you, of your objection?
       20 A. That would have been our lawyer. I can't, I don't know
       21 who was notified, what the appropriate process is.
       22 Q. Then what happens in this award, and we don't need to go
       23 to the detail of it, is that in substance, first the
       24 award found in favour of NRD and against Mr Benzinge in
       25 an application for summary judgment, effectively,
### Day 3 -- Hearing on Jurisdiction and the Merits
ICSID Case No. ARB/18/21
Wednesday, 23 June 2021

#### 15:18

<table>
<thead>
<tr>
<th>No.</th>
<th>Line</th>
</tr>
</thead>
<tbody>
<tr>
<td>15:18</td>
<td>summary relief. Then it went on to consider the substantive claims, and it found in favour of Mr Benzinge and against NRD; fair summary, or do you just not know?</td>
</tr>
<tr>
<td>15:19</td>
<td>Q. Now, the upshot was that NRD had an award against them in an arbitration which you had notified of but chose not to participate in; correct?</td>
</tr>
<tr>
<td>15:20</td>
<td>A. No, which we timely gave notice of objection to, and as you can tell, I'm not a litigator, but our lawyers provided the necessary objection in accordance with Rwandan law. We believed that they had performed their services properly. We had no reason to know otherwise.</td>
</tr>
<tr>
<td>15:21</td>
<td>Q. And it's right, isn't it, that the effect of the award was that the transfers of a shareholding to NRD GmbH and HC Starck were ruled null and void; correct? Those transfers.</td>
</tr>
</tbody>
</table>

#### 15:20 (continued)

<table>
<thead>
<tr>
<th>No.</th>
<th>Line</th>
</tr>
</thead>
<tbody>
<tr>
<td>15:20</td>
<td>A. The wording is something to that effect, although it is not clear what is meant by it --</td>
</tr>
<tr>
<td>15:21</td>
<td>Q. Well -- sorry, you finish.</td>
</tr>
<tr>
<td>15:22</td>
<td>A. Yes. We took this judgment to Mr Sangano at the RDB who is their in-house legal counsel specifically for the commercial registry. He prepared an analysis for us.</td>
</tr>
</tbody>
</table>

#### 15:22

<table>
<thead>
<tr>
<th>No.</th>
<th>Line</th>
</tr>
</thead>
<tbody>
<tr>
<td>15:22</td>
<td>&quot;Referring to the aforementioned explanations, the courts finds that it cannot base on article 47 ... on arbitration and conciliation in commercial matters to annul the decision taken by the arbitrator because NRD was notified of her appointment in accordance with the law in force, and the company did not start any procedures opposing her appointment as provided for in the aforementioned law.&quot;</td>
</tr>
<tr>
<td>15:23</td>
<td>Q. No.</td>
</tr>
<tr>
<td>15:24</td>
<td>A. But I don't recall any of this, so ...</td>
</tr>
<tr>
<td>15:25</td>
<td>Q. Yes, and in May 2014, the Rwandan Supreme Court also upheld the arbitration award and it's right to say --</td>
</tr>
</tbody>
</table>

#### Page 121

### Page 122

<table>
<thead>
<tr>
<th>No.</th>
<th>Line</th>
</tr>
</thead>
<tbody>
<tr>
<td>15:20</td>
<td>about what the effect of the decision was, and those determinations did not change the shareholding of the company. They did, for reasons which are not clear, appoint Ben Benzinge as managing director. Ben Benzinge had a fundamental problem with understanding that there's a difference between being managing director and being owner. So what the registry instructed us to do -- and I think it's one of the exhibits to this process -- was to have a shareholder meeting before the judgment was to come in effect, and that was to remove Ben Benzinge as managing director even before he came managing director under the order.</td>
</tr>
<tr>
<td>15:21</td>
<td>Q. Now --</td>
</tr>
<tr>
<td>15:22</td>
<td>A. So, therefore, it was all -- it had actually no effect on the company.</td>
</tr>
<tr>
<td>15:23</td>
<td>Q. The effect of the judgment, the arbitration award, was that the shareholding reverted back to the Zarnacks and Benzinge and the position of managing director reverted back to Mr Benzinge. That was the consequence of the arbitration award, wasn't it?</td>
</tr>
<tr>
<td>15:24</td>
<td>A. That's not the way the commercial registry interpreted it.</td>
</tr>
<tr>
<td>15:25</td>
<td>Q. And can you go to bundle R-014.</td>
</tr>
<tr>
<td>15:26</td>
<td>A. He makes very odd sort of undiplomatic comments like: I don't know what these people are doing here so this is just not know?</td>
</tr>
</tbody>
</table>

#### Page 123

<table>
<thead>
<tr>
<th>No.</th>
<th>Line</th>
</tr>
</thead>
<tbody>
<tr>
<td>15:22</td>
<td>&quot;Referring to the aforementioned explanations, the courts finds that it cannot base on article 47 ... on arbitration and conciliation in commercial matters to annul the decision taken by the arbitrator because NRD was notified of her appointment in accordance with the law in force, and the company did not start any procedures opposing her appointment as provided for in the aforementioned law.&quot;</td>
</tr>
<tr>
<td>15:23</td>
<td>Q. No.</td>
</tr>
<tr>
<td>15:24</td>
<td>A. But I don't recall any of this, so ...</td>
</tr>
<tr>
<td>15:25</td>
<td>Q. Yes, and in May 2014, the Rwandan Supreme Court also upheld the arbitration award and it's right to say --</td>
</tr>
</tbody>
</table>

#### Page 124

<table>
<thead>
<tr>
<th>No.</th>
<th>Line</th>
</tr>
</thead>
<tbody>
<tr>
<td>15:22</td>
<td>&quot;Referring to the aforementioned explanations, the courts finds that it cannot base on article 47 ... on arbitration and conciliation in commercial matters to annul the decision taken by the arbitrator because NRD was notified of her appointment in accordance with the law in force, and the company did not start any procedures opposing her appointment as provided for in the aforementioned law.&quot;</td>
</tr>
<tr>
<td>15:23</td>
<td>Q. No.</td>
</tr>
<tr>
<td>15:24</td>
<td>A. But I don't recall any of this, so ...</td>
</tr>
<tr>
<td>15:25</td>
<td>Q. Yes, and in May 2014, the Rwandan Supreme Court also upheld the arbitration award and it's right to say --</td>
</tr>
</tbody>
</table>

#### Page 124 (continued)

<table>
<thead>
<tr>
<th>No.</th>
<th>Line</th>
</tr>
</thead>
<tbody>
<tr>
<td>15:22</td>
<td>&quot;Referring to the aforementioned explanations, the courts finds that it cannot base on article 47 ... on arbitration and conciliation in commercial matters to annul the decision taken by the arbitrator because NRD was notified of her appointment in accordance with the law in force, and the company did not start any procedures opposing her appointment as provided for in the aforementioned law.&quot;</td>
</tr>
<tr>
<td>15:23</td>
<td>Q. No.</td>
</tr>
<tr>
<td>15:24</td>
<td>A. But I don't recall any of this, so ...</td>
</tr>
<tr>
<td>15:25</td>
<td>Q. Yes, and in May 2014, the Rwandan Supreme Court also upheld the arbitration award and it's right to say --</td>
</tr>
</tbody>
</table>

#### Page 124 (continued)

<table>
<thead>
<tr>
<th>No.</th>
<th>Line</th>
</tr>
</thead>
<tbody>
<tr>
<td>15:22</td>
<td>&quot;Referring to the aforementioned explanations, the courts finds that it cannot base on article 47 ... on arbitration and conciliation in commercial matters to annul the decision taken by the arbitrator because NRD was notified of her appointment in accordance with the law in force, and the company did not start any procedures opposing her appointment as provided for in the aforementioned law.&quot;</td>
</tr>
<tr>
<td>15:23</td>
<td>Q. No.</td>
</tr>
<tr>
<td>15:24</td>
<td>A. But I don't recall any of this, so ...</td>
</tr>
<tr>
<td>15:25</td>
<td>Q. Yes, and in May 2014, the Rwandan Supreme Court also upheld the arbitration award and it's right to say --</td>
</tr>
</tbody>
</table>

#### Page 124 (continued)

<table>
<thead>
<tr>
<th>No.</th>
<th>Line</th>
</tr>
</thead>
<tbody>
<tr>
<td>15:22</td>
<td>&quot;Referring to the aforementioned explanations, the courts finds that it cannot base on article 47 ... on arbitration and conciliation in commercial matters to annul the decision taken by the arbitrator because NRD was notified of her appointment in accordance with the law in force, and the company did not start any procedures opposing her appointment as provided for in the aforementioned law.&quot;</td>
</tr>
<tr>
<td>15:23</td>
<td>Q. No.</td>
</tr>
<tr>
<td>15:24</td>
<td>A. But I don't recall any of this, so ...</td>
</tr>
<tr>
<td>15:25</td>
<td>Q. Yes, and in May 2014, the Rwandan Supreme Court also upheld the arbitration award and it's right to say --</td>
</tr>
</tbody>
</table>

#### Page 124 (continued)

<table>
<thead>
<tr>
<th>No.</th>
<th>Line</th>
</tr>
</thead>
<tbody>
<tr>
<td>15:22</td>
<td>&quot;Referring to the aforementioned explanations, the courts finds that it cannot base on article 47 ... on arbitration and conciliation in commercial matters to annul the decision taken by the arbitrator because NRD was notified of her appointment in accordance with the law in force, and the company did not start any procedures opposing her appointment as provided for in the aforementioned law.&quot;</td>
</tr>
<tr>
<td>15:23</td>
<td>Q. No.</td>
</tr>
<tr>
<td>15:24</td>
<td>A. But I don't recall any of this, so ...</td>
</tr>
<tr>
<td>15:25</td>
<td>Q. Yes, and in May 2014, the Rwandan Supreme Court also upheld the arbitration award and it's right to say --</td>
</tr>
</tbody>
</table>
15:24 1 apparently appeal had been made and the court affirmed
2 that judgment, that ruling by the arbitration court.
3 Q. Can you go to bundle R-032. This is a letter from you
4 to the minister at the RDB.
5 A. Yes.
6 Q. Can you go to page 4 of the letter. You see, again,
7 this is another letter copied very widely, including to
8 the Ambassador.
9 A. Yes.
10 Q. And if we go to page 3 of the letter now. I'm just
11 going to look at items (c) and (d) on this page. You
12 say there:
13 "The NRD company statutes require that there be
14 three arbitrators of 'international reputation'
15 appointed to arbitrate between the parties.
16 Ben Benzinge has both a personal relationship with
17 Ms Nelly Umugwaneza and she has no international
18 experience, this makes her unfit to arbitrate in this
19 matter."
20 Then you say:
21 "NRD notified Ms Nelly Umugwaneza, the Kigali
22 Arbitration Centre and the Ombudsman's Office and the US
23 Embassy of our objections. And yet Ms Nelly claims to
24 have had an 'Arbitration' meeting without our presence
25 and issued her 'decision'. Obviously it is
Page 125

15:26 1 We were instructed by our then counsel that we should
2 not attend that meeting, which we did not attend, and
3 then she went ahead and issued -- listened to
4 Ben Benzinge and issued her decision.
5 Q. I would suggest to you this is a misleading and
6 tendentious letter sent to the RDB minister and copied
7 to all these other individuals.
8 A. Well, that's the best I understood it at the moment. If
9 I was misinformed by my stuff about what had happened,
10 then I was.
11 Q. Now, you also met with Mr Imena in a meeting at which
12 you discussed the Benzinge issue; correct?
13 A. Yes.
14 Q. And contrary to what you have alleged, he did not say
15 that he had decided that Mr Benzinge owned 100% of NRD, did he?
16 A. I disagree with you. He absolutely insisted Ben was the
17 owner of our company.
18 Q. And you wrote a follow-up letter to him which is very
19 similar to the letter we've just looked at, in which
20 again you did not make clear that Benzinge had an award
21 from an arbitration which you had been notified of but
22 which you had chosen not to attend.
23 A. Sorry, the arbitration award does not say that
24 Ben Benzinge is the owner of our company.
Page 127

15:28 1 Q. No, I'm not on that point. All I'm saying is you wrote
2 a follow-up letter to Mr Imena, similar to the one we've
3 just looked at, in which you, again, did not make clear
4 that Mr Benzinge had an award from an arbitration which
5 you had been notified of but chosen not to attend;
6 correct?
7 A. Everybody was aware of the arbitration award. I'm not
8 hiding anything. If you would show me the letter, I can
9 respond specifically to your question.
10 Q. It's very similar to the one we just looked at and you
11 similarly repeated allegations of bias which were
12 (overspeaking) --
13 A. Well, show it to me then. Let me respond in
14 a meaningful way.
15 Q. Well, I'm trying to save time. You essentially cut and
16 pasted the same point?
17 A. Well, then don't make the point if you are not going to
18 back it up with something I can respond to.
19 Q. Well, okay, then let's look at C-090. This is the
20 letter.
21 A. Yes.
22 Q. If you go to -- it's a long letter, so I'm not going to
23 take time on it. We can start with the fifth page?
24 A. It's an important letter. In fact, this is one of the
25 most important letters of all, I think, don't you?
Q. It's the same letter as we've seen and it's one in which you make a number of points, but what you do not do is make clear that this was – the position you were in resulted from an award in an arbitration which you had been notified of, but had chosen not to attend first. Just let me finish.

Two points you don't make clear at any point in this letter: first, that you had an award from an arbitration you had been notified of but chosen not to attend; secondly, that the allegations of bias you had made in your letters are not ones you had pursued before the courts.

MR COWLEY: Mr President, I would ask if we could get a clarification or correction. A number of these questions started with "chose not to attend". This line of questioning put in front of the witness objections that were raised, talked about hearings, talked about appeals, obviously there was a defence. At some point the questions, and perhaps unintentionally, changed the word "attend" to "defend", and I would ask that Mr Hill really reconsider whether he intends to use the word "defend" after establishing it was defended and instead revert back to "attend".

MR HILL: Can I -- I don't normally like Mr Cowley to interrupt, but I had certainly meant to say attend and...
15:34
1. conformity with EDPRS 2, Millennium Development Goals
2. and African Mining Vision.
3. "We were greatly surprised when Dutch Embassy called
4. us and said that you have sent a letter to the Dutch
5. Embassy which informed them that the NRD concessions are
6. 'expired'. We met at length with the Dutch Embassy and
7. Prime Minister's Office. We have found that your letter
8. was unfortunately misleading because it did not explain
9. that all Concession licences are 'expired' but that NRD
10. retains its mining rights pending receipt of the
11. 'Long-term licence' (all being defined terms under
12. Rwanda law)."
13. Now, what Mr -- you describe something that Mr Imena
14. has said as being misleading because it didn't explain
15. that all concession licences had expired, but the truth
16. is that your licence had expired, licences had expired,
17. and Mr Imena, by this stage, had been repeatedly
18. requesting you to apply for new licences; isn't that
19. right?
20. A. He never -- no, never, he never asked us once to apply
21. for a new licence, that's wholly apocryphal, and
22. particularly at this time, he was, I would say, not
23. responsive at all. We had been working diligently for
24. months with this Dutch grant agency, it's a very lengthy
25. and involved process, we were chosen the seventh-most--

Page 133

15:37
1. And that's fair, isn't it, because at this point,
2. we're only in June 2014, there are essentially competing
3. claims, both as to who is the correct management, and as
4. to what the right shareholdings are as a result of
5. Mr Benzinge's award?
6. A. I'm sorry, but that's nonsensical. There was never any
7. claim by Ben Benzinge that he had a right -- I mean, he
8. may have thought he had a right to be the managing
9. director, but he owned, according to the RDB, 0.2% of
10. all shares.
11. Q. The effect of the award was that the position of
12. managing director, as a result of the award, reverted to
13. him; correct?
14. A. And it's equally correct that the RDB instructed us to
15. file shareholder minutes instructing that Ben Benzinge
16. not take that position, as owners of the company. They
17. recognised us as owners, they accepted our shareholders'
18. resolution, effective as of the moment Ben Benzinge was
19. to be appointed they instructed us and we provided the
20. corporate minutes saying that he was not going to be the
21. managing director.
22. Q. Now, you also wrote about the Benzinge situation to the
23. Minister of Justice, Mr Busingye. Can we have that at
24. R-198?
25. A. Notwithstanding that he was not the owner and he was not

Page 134

15:38
1. the managing director, he had possession of -- well,
2. together with the bailiff -- our concessions and our
3. corporate offices.
4. Q. This is your letter to --
5. A. For reasons we still don't know.
6. Q. This is your letter to the Minister of Justice, R-198,
7. and we can see a number of copies, we can see on the
8. second page you also sent the same letter to
9. Mr Ambassador, to the Ambassador, we see that on page 2,
10. if FTI could go to page 2. It's a note from you and you
11. deal with the arbitration proceedings at item 5 of your
12. note which is the last page of the exhibit?
13. A. Sorry, just so you're aware, this is an honorary
14. title -- sorry, I have lost the ambassador letter, if
15. you could go back. That's an honorary title for the
16. head of the Cabinet Office, that's not an actual
17. ambassador, he was not serving at this time as a Rwanda
18. ambassador in any foreign country. That's an honorary
19. title that he keeps whatever his position. The
20. primature is the cabinet, as I understand, or perhaps
21. it's the Prime Minister's office, I'm not sure which.
22. Q. Let's look at the last page where you deal with your
23. complaint about the arbitration.
24. A. But just so you're aware, at this time we have nothing.
25. We have lost all of our assets. We are being told by

Page 135

Anne-Marie Stallard
for Trevor McGowan

As amended
by the Parties

37 (Pages 133 to 136)
Day 3 -- Hearing on Jurisdiction and the Merits  
ICSID Case No. ARB/18/21  
Wednesday, 23 June 2021

<table>
<thead>
<tr>
<th>Time</th>
<th>Page 137</th>
<th>Page 138</th>
<th>Page 139</th>
</tr>
</thead>
<tbody>
<tr>
<td>15:40</td>
<td>the police and the military and the bailiff, we have no</td>
<td>15:41</td>
<td>answer is inaccurate?</td>
</tr>
<tr>
<td></td>
<td>rights to anything anymore.</td>
<td></td>
<td>A. I don't know that we lost that point. It was overcome</td>
</tr>
<tr>
<td></td>
<td>Q. Now, you say there, this is item 5:</td>
<td></td>
<td>2. by events. It was not a court-appointed; it was</td>
</tr>
<tr>
<td></td>
<td>&quot;Benzinge convinced the Arbitrator and the Rwanda</td>
<td></td>
<td>3. a court-affirmed. It was Beninge's choice. He went to</td>
</tr>
<tr>
<td></td>
<td>Courts that NRD had harmed him. Beninge did not claim</td>
<td></td>
<td>4. the court, he said: this is my choice, and the court</td>
</tr>
<tr>
<td></td>
<td>against the NRD shareholders themselves because then he</td>
<td></td>
<td>5. affirmed it, nothing more. Didn't look at her --</td>
</tr>
<tr>
<td></td>
<td>could not 'seize' NRD as his prize. Beninge convinced</td>
<td></td>
<td>6. I don't know what the process is --</td>
</tr>
<tr>
<td></td>
<td>the Arbitrator to give him a 'Default Arbitral Award'</td>
<td></td>
<td>Q. She was on a list of court-appointed arbitrators, wasn't she?</td>
</tr>
<tr>
<td></td>
<td>when NRD refused to participate in a false arbitration</td>
<td></td>
<td>A. I have no idea.</td>
</tr>
<tr>
<td></td>
<td>10. proceedings. This was affirmed by the Supreme Court.&quot;</td>
<td></td>
<td>Q. And you don't explain in this letter, which goes to</td>
</tr>
<tr>
<td></td>
<td>11. Now, a number of points there. You don't explain</td>
<td></td>
<td>12. a lot of people, that what you describe as the false</td>
</tr>
<tr>
<td></td>
<td>there that what you describe as a false arbitration</td>
<td></td>
<td>13. arbitration was the subject of court hearings which</td>
</tr>
<tr>
<td></td>
<td>13. proceeding is one in which the arbitrator was appointed</td>
<td></td>
<td>14. approved and determined the constitution of the panel; correct?</td>
</tr>
<tr>
<td></td>
<td>by the Rwandan court; correct?</td>
<td></td>
<td>15. A. I'm sorry, you'll have to ask me again.</td>
</tr>
<tr>
<td></td>
<td>A. It was not appointed by the Rwandan court; it was</td>
<td></td>
<td>16. Q. There were court hearings which determined,</td>
</tr>
<tr>
<td></td>
<td>Ben Benzinge's personal selection. Under our corporate</td>
<td></td>
<td>17. resolved on what the constitution of the panel would be;</td>
</tr>
<tr>
<td></td>
<td>articles there are supposed to be three arbitrators.</td>
<td></td>
<td>18. yes?</td>
</tr>
<tr>
<td></td>
<td>Ben had chosen Ms Nelly, I think her name was. He would</td>
<td></td>
<td>A. Yes.</td>
</tr>
<tr>
<td></td>
<td>19. not accept any additional arbitrators to be appointed.</td>
<td></td>
<td>Q. And you also don't explain in this item that this was</td>
</tr>
<tr>
<td></td>
<td>20. That was the basis for our objection, and the basis on</td>
<td></td>
<td>22. not a default award; it was, in fact, a reasoned award</td>
</tr>
<tr>
<td></td>
<td>21. which we didn't show up as her hearing.</td>
<td></td>
<td>23. on the merits. They rejected -- the arbitrator actually</td>
</tr>
<tr>
<td></td>
<td>Q. It was a court-appointed arbitrator, wasn't it,</td>
<td></td>
<td>24. rejected the application for summary judgment.</td>
</tr>
<tr>
<td></td>
<td>Mr Marshall? But you're right in saying there was</td>
<td></td>
<td>A. Well, okay, I'm -- again, I plead ignorance to</td>
</tr>
<tr>
<td></td>
<td>an objection which you lodged in court, about whether</td>
<td></td>
<td>litigation, but we objected to her as an arbitrator. We</td>
</tr>
<tr>
<td></td>
<td>25. there should be three or one, but other than that, your</td>
<td></td>
<td>understood and were instructed that the process, when</td>
</tr>
<tr>
<td></td>
<td>115:42</td>
<td>the police and the military and the bailiff, we have no</td>
<td></td>
</tr>
<tr>
<td></td>
<td>15:44</td>
<td>answer is inaccurate?</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Q. Let's go back to the first --</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>A. It's not false and it was not misleading. I was</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>And so what you are seeking to do is, because</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>there's a result in an arbitration that you didn't</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>participate in, you are now -- which is upheld on</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>appeal, you are now asking the Minister of Justice to</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>cancel or vacate the Supreme Court judgment; yes?</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>A. I was -- certainly I was asking him to examine the</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>issues carefully. He's a far more capable arbitrator,</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>litigator, than I will ever be, so I was giving him</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>If you think that he's not capable of assessing those</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>things, you know, I think you're wrong. I think he's</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>very capable of assessing what I say and what it means</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>and whether it's appropriate or not.</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>If you think that he's not capable of assessing what I say and what it</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>means and whether it's appropriate or not.</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Q. Let's go back to the first --</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>A. It's not false and it was not misleading. I was</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>And so what you are seeking to do is, because</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>there's a result in an arbitration that you didn't</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>participate in, you are now -- which is upheld on</td>
<td></td>
</tr>
</tbody>
</table>

38 (Pages 137 to 140)
15:45
1. "I am hoping that your company lawyers can translate what is contained in your email as 'civil claims' into one or more civil actions, cite the relevant provisions of the law, build the evidence to prove your claims and file them in the appropriate courts.
2. "Secondly, what you think are criminal activities can only remain potential criminal cases until again your company files criminal complaints with the relevant agency/agencies as by law required."
3. And that's a fair and reasonable response from the Minister of Justice, isn't it, to your request?
4. A. Well, obviously I thought it was unfair.
5. Q. Now, I'm going to change topics and pick up some points about the bailiff, Mr Bosco.

15:49
1. MR HILL: And I'm obviously proceeding in all my questions on that assumption. So I'm not advancing that as a belated knockout blow, and no doubt, Mr Cowley would say it's rather unfair for me to bring it up now if I were to try and run it late.
2. MS DOHMANN: Mr Hill, I would be grateful also if you would revisit your submissions under the heading "lack of jurisdiction ratione personae", and really sort out exactly what the case is in relation to Benzinge.
3. MR HILL: Yes.
4. MS DOHMANN: Because I do find it difficult to ignore what appears to be in evidence in relation to a very important point.
6. THE PRESIDENT: This is probably a good time to take a break.

16:19
1. Mr Cowley in relation to the metadata on his side. The reason it arises is, we've got an obligation to put in a witness statement from Mr Ehlers about the document.
2. THE PRESIDENT: Yes.
3. MR HILL: Mr Ehlers's position is that he said in his first witness statement he didn't recall. That is still his position, and it is fair that he gets to see the full document and the native form in order that he can grapple with it in his witness statement.
4. MR COWLEY: Yes. Then after this hearing, I've scheduled a meeting with our -- well, an online meeting.
5. Mr Marshall will be logged into our computer system, which he is not now, and our IT staff, which happen to be situated in Philadelphia, will work with Mr Marshall on our computers, so they'll make it happen for him, a downloading of the email, his emails with metadata.
6. You made the point yesterday that you thought we already had the email with metadata. We don't: we have an email a downloading of the email, his emails with metadata.
7. You made the point yesterday that you thought we already had the email with metadata. We don't: we have an email a downloading of the email, his emails with metadata.
8. You made the point yesterday that you thought we already had the email with metadata. We don't: we have an email a downloading of the email, his emails with metadata.
#### Page 145

<table>
<thead>
<tr>
<th>Line</th>
<th>Text</th>
</tr>
</thead>
<tbody>
<tr>
<td>16:19</td>
<td>So it's not the same. We need to get that, and it's scheduled to happen after this hearing, and we will follow right up.</td>
</tr>
<tr>
<td>16:20</td>
<td>in the warehouse of Minerals Supply Africa; correct? Do you recall that?</td>
</tr>
<tr>
<td>16:21</td>
<td>the miners; yes? So, in a sense, NRD and the miners won that court battle?</td>
</tr>
<tr>
<td>16:22</td>
<td>NRD and certain of the individual miners, took court proceedings to challenge the enforcement on the basis that the minerals were not NRD's at all, but were still in the ownership of the individual miners because they hadn't been paid; do you recall that saga?</td>
</tr>
</tbody>
</table>

#### Page 146

<table>
<thead>
<tr>
<th>Line</th>
<th>Text</th>
</tr>
</thead>
<tbody>
<tr>
<td>16:13</td>
<td>A. That's my understanding.</td>
</tr>
<tr>
<td>16:16</td>
<td>Q. Yes.</td>
</tr>
<tr>
<td>16:20</td>
<td>A. Pascal, it's not clear on what the judgment was based on, but that's not your question, so please go ahead.</td>
</tr>
<tr>
<td>16:21</td>
<td>Q. Yes. And one of his actions as bailiff was to seize some minerals -- this is in connection with that judgment -- was to seize some minerals which were stored in the warehouse of Minerals Supply Africa; correct? Do you recall that?</td>
</tr>
<tr>
<td>16:22</td>
<td>the miners; yes? So, in a sense, NRD and the miners won that court battle?</td>
</tr>
<tr>
<td>16:23</td>
<td>A. Okay, I would have to see the documents but I get the gist of what you are saying.</td>
</tr>
</tbody>
</table>

#### Page 147

<table>
<thead>
<tr>
<th>Line</th>
<th>Text</th>
</tr>
</thead>
<tbody>
<tr>
<td>16:24</td>
<td>A. Yes.</td>
</tr>
<tr>
<td>16:25</td>
<td>Q. And the reason I'm taking you to it is that there was no impropriety at any stage or anything corrupt or improper or wrong in anything Mr Bosco was doing. His position was clear in that he was only purporting to execute on the minerals on the basis that they were NRD's property, and all that happened was someone was able -- NRD and the miners acting together with the same lawyer were able to establish that the miners had personal title; yes?</td>
</tr>
</tbody>
</table>

---

Page 40 (Pages 145 to 148)

Anne-Marie Stallard
for Trevor McGowan

As amended by the Parties
16:26 1 A. No, not with regard to this case. Bailiff Bosco was exceeding his authority for several months already at this point. Pascal had been a contract employee of HC Stark before we got there, so this was a Stark liability that was now our responsibility. He is the nephew of the Minister of Defence, and he brought a claim for wrongful dismissal and was awarded the unprecedented sum of $120,000, when an average judgment for such claims is $2,000. He was by far the largest recipient of a wrongful termination claim.

11 So Jean Bosco, Bailiff Bosco, began seizing different assets from NRD, claiming that they all had to be -- to satisfy this debt which was largely, as we saw it, a political calculation by James Kabarebe and therefore we objected and we were not cooperating with the bailiff at that point.

17 Q. Now just looking at what you said there --

18 A. At the time he had already seized more than $120,000 at this point.

20 Q. -- from the position of the bailiff he was at all points acting lawfully and on the basis of court judgments that he had, wasn't he?

23 A. No, he was not.

24 Q. And afterwards, leaving aside that claim, he was also appointed in 2014 as bailiff to execute on Mr Benzinge's reimbursable judgment information. We never knew what it was about.

16 Q. Coming back to Mr Bosco, can you go to R-074?

17 A. That's what it says but that's not correct.

18 Q. And I'm going to suggest that at every stage, Mr Bosco was -- this is one of many examples and he explains it?

19 A. He had been contracted by some debt holders to enforce judgment and the judgment of some 25 former employees; correct?

20 Q. He was enforcing on judgments that he had, wasn't he?

21 A. He had been contracted by some debt holders to enforce on judgments and went way beyond his authority. He didn't follow any of the due process rules.

22 Q. And I'm going to suggest that at every stage, Mr Bosco was following the due process rules and he was acting entirely within his authority as bailiff executing judgments, and that's right, isn't it?

23 A. Sorry, you said you're going to make that argument. It's not possible, but you can try.

24 Q. Well, let's look at paragraph -- first, I'll say the creditors who instructed Mr Bosco were not the only creditors. NRD also owed money to Minerals Supply Africa; correct? We've looked at that yesterday.

Page 150 16:30 1 he's informing you about an auction that he intends to hold, and he identifies indebtedness he is seeking to satisfy, and it includes 28 people with individual claims, and a claim from the Rwanda Revenue Authority representing over a million francs; yes? Do you recall that?

2 A. Absolutely not. This was prepared in preparation for this hearing.

3 Q. So you're suggesting that this was another fabricated document, are you?

4 A. Yes, I do. And it was certainly never delivered to us. If he prepared it and put it into his filing cabinet I wouldn't know. I was never, until this very moment, aware that he claimed to represent the Rwanda Revenue Authority.

5 Q. He was -- this is one of many examples and he explains them in a witness statement, where he is acting in a regular manner and observing his duties as bailiff; yes?

6 A. All bailiffs are contract bailiffs. Did he receive a contract from the Rwanda Revenue Authority? I never heard it. I don't know -- and I'm sure that the 28 people -- we don't know any of these. He never delivered any document to us which would give us evidence of any indebtedness. The Pascal decision we
16:32 1 knew from the court, but all the rest we did not.
2 Q. Can we go to C-071. This is a letter from you to
3 Mr Busingye.
4 A. No, this is to Johnston. This is the Minister of
5 Justice.
6 Q. Sorry, Mr Marshall. So, looking at the first three
7 paragraphs of this letter, you are updating Mr Busingye
8 on what you describe as the criminal acts of
9 Ben Benzinge and others, and you refer to taking
10 possession of the property, and then you refer to
11 complaints to the Ombudsman office, and then you say:
12 "We had discussions there today and as a result of
13 these discussions we were advised to send you this
14 request. Bailiff Nsengiyuma tried to have an auction of
15 the entire property of Natural Resources Development
16 Rwanda Ltd last Friday. That auction was cancelled
17 because nobody came to the announced place."
18 Now, just pausing there, you were aware of this
19 auction that I've just taken you to in the letter
20 because you deal with it in this letter from you?
21 MR COWLEY: Mr Hill, before he answers, I think you are
22 going to like this interruption again, I think you want
to correct, you started that question by saying the
23 letter was to Mr Benzinge. I don't think you meant
24 that. You might want to just look at the transcript.

16:35 1 He then has to give notice of an auction. There are
2 commercial terms for that auction. And there has to be
3 so many participants, there has to be such and such
4 a percentage to the value. Following up that if there
5 is a sale, pursuant to such an auction, he has to
6 provide details and evidence of what happened to the
7 proceeds.
8 Never did he do even the first of those steps. He
9 comes around and is -- acts like mafia and waves
10 a document and says: I have a list of people who you or
11 Starck before you owe, and that's as far as he ever
12 went. There was never a legitimate process with Bailiff
13 Bosco.
14 Q. Can you go over the page here. You say:
15 "This letter is also to respectfully request that
16 your office suspend the mandate of Bailiff Nsengiyumama
17 Jean Bosco with respect to NRD and its assets until the
18 matter of the Bailiff's fraudulent sale of NRD minerals,
19 as reflected in the attached Court decision, is fully
20 investigated and resolved."
21 And that's a reference, isn't it, what you call the
22 fraudulent sale of minerals, isn't that a reference to
23 the MSA story that we've already looked at where Bosco
24 was in fact --
25 A. No.

16:36 1 Q. No?
2 A. No, that's a different transaction.
3 Q. But at all times --
4 A. In that case he was able to seize the minerals, bring
5 them outside the compound, the MSA compound, and he
6 claims to have had an auction and we were never given
7 notice or information about it, and he went off with the
8 money. We don't know what happened to the proceeds.
9 Q. Well, that's not right. We know that the MSA minerals
10 is just one story. We know how it ends in the end, but
11 we also know at all stages in that story, Bosco was
12 acting in accordance with his duties, and his perception
13 that these were NRD minerals because they had been
14 tagged by NRD; correct?
15 A. No, you're confusing two incidents. He tried -- it's my
16 recollection, it may have been more than twice -- but he
17 tried to seize minerals at the MSA compound on more than
18 one occasion.
19 This one I think is referring to that instance where
20 he had -- he was able to get the minerals outside of the
21 MSA compound and he had an auction on the street. We
22 were never informed, we were never consulted on any --
23 we have no idea what happened to the proceeds.
24 Q. Now, after receiving this letter from you with your
25 description of what Mr Bosco was up to, Mr Busingye, the

Page 153
Page 154
Page 155
Page 156
16:37 1 Justice Minister, did in fact suspend Mr Bosco's powers
to carry on with his execution, didn't he? We can see
that at bundle C-072; do you remember that?
2 A. He did temporarily.
3 Q. And if we look at this document, C-072, that's in
Kinyarwandan, I'm not sure if the English is in the same
tab or not. It is. I think it might be in the same
4 tab.
5 A. Don't forget, I want to alert you that this date, so
this is July, they're still in possession of our entire
11 company. So --
12 Q. Just focus on my questions, if you would?
13 A. I have to interject, because I'm not even sure that they
consider us to be owners of the company at this point.
14 You can say that: well, fine, you made these complaints,
but I'm not sure we were recognised as the owner at this
time.
15 Q. Just looking at here, what the Justice Minister in fact
says is he addresses Bosco and he says:
16 "Based on the letter of 14 July 2014 [that is the
letter we just looked at] addressed to me by NRD Rwanda
... asking me to stop the auction of their assets that
you were anticipating to carry ... on ... and to stop
your projects."
17 And then he says:
18
Page 157

16:39 1 "After examining all issues that are based on the
way execution of judgments lost by NRD is being carried
out; after hearing what different bodies who observed by
a closer the activities you have carried out related to
the execution of judgments between NRD and Ben Benzinge
and others that they mention, I find it concerning in
the way these judgments are being executed.
8 "For that reason, based on the responsibility of the
Ministry of Justice/Services of the Attorney General to
establish and inspect the execution of laws and justice
to all, and in order to respect justice for all
beneficiaries of the execution of judgments against NRD,
namely NRD themselves, Ben Benzinge, employees who
brought and won legal cases against the company ...
15 "You are currently suspended from all activities to
do with execution of judgments against NRD Rwanda ... so
that the status of issues in question may be examined to
know if they are disputes to be brought to the courts,
or functionality and management, or mindsets among all
who had interests in the case so that you will be able
to continue in peace the activities you are carrying
out."
23 So it's a temporary suspension, based on, in part,
your letter, and while further investigation is carried
25 out; correct?

Page 158

16:40 1 A. That's right. We're very grateful that he was willing,
for this purpose, to consider us at that time the owner
of NRD.
2 Q. And then we go to C-073. This is a letter from -- this
is after further investigation from the Minister of
Justice. He says --
3 A. What's the date of it, can you tell me?
4 Q. This is 26 August. So it's about -- just over a month
9 later.
10 A. 26 August.
11 Q. He says:
12 "Dear Madam/Sir.
13 "Reference is made to my letter ... dated
14 [23 July 2014] which suspended temporarily the execution
15 of judgments and arbitration award rendered against NRD
16 Rwanda Ltd.
17 "Reference is also made to a number of judgments
18 (around fifteen) and an arbitration award pronounced
19 against NRD Rwanda Ltd annexed to the present letter.
20 "Further reference is made to lots of correspondence
21 that you have addressed or copied to me recently;
22 "In light of the above, we have studied the problem
23 and come to the conclusion that NRD Rwanda ... has:
24 "(a) Corporate governance issues which it is their
duty to settle or seek resolution of the pending ones

Page 159

16:41 1 through legal channels. Over this the Attorney General
has no power.
2 (b) Legitimate judgment creditors who won cases
against the company and must be paid.
3 "In respect of (a) above, I find the Attorney
4 General has no power to enforce solutions. Legal
5 channels exist."
6 And Mr Bosco's powers -- sorry, I should just say:
7 "In respect of (b) you are kindly advised to
8 voluntarily execute the judgments and award because,
9 short of that, the company's seized assets will be
10 liquidated to settle these judgments debts."
11 So he was explaining that on investigation the
12 Ministry of Justice was satisfied that these were
13 legitimate judgment creditors and therefore that Bosco
14 was entitled to execute; correct?
16 A. No, because you've lost the timeline here. What has
18 happened -- our company was seized about June 11th, 2014
19 by Bosco and Ben Benzinge. During the next
20 three months, they looted our concessions, they stole
21 our assets, and whether he called it execution or not,
22 he sold our assets.
23 By the end -- by the middle of August -- at the same
time as this is going on we're giving assistance to the
25 military because they were interested in procurement of

Page 160

43 (Pages 157 to 160)
military assets from the west, and that will become important in a second. The military was with Bosco and the bailiff. We were dispossessed of our entire company, we were not recognised as owners for any purposes, so the fact that at least nominally the Minister was willing to recognise us for purposes of these communications, we were appreciative. During that 90 days or -- sorry, 60 days, they looted the concessions, they looted our office, they had riots, one man was -- (answer cut off by questioning).

Q. Mr Marshall, I'm going to stop you --

A. I have to insist --

Q. -- because this is not an answer to my question?

A. -- I have to insist -- you won't understand this letter unless I explain this, please bear with me for two more minutes.

Q. No, it's not the question --

A. I'm sorry, you have to understand what happened. This came -- this letter is after we got our concession back and after the killing stopped. 40 people were murdered.

40. We were out of the concession area, we were left alone. Do we suspect that maybe the military took us out of there and gave it to Benzinge while the killing was going on? We don't know. It was absolutely the most terrifying time in my life.

Q. Mr Marshall, what the Minister of Justice is explaining is that his department have examined the issues and they are satisfied that these were legitimate judgments creditors and therefore that Bosco was entitled to execute; correct?

A. No. Their execution was on our concessions. They took over $800,000 worth of equipment, fencing, other supplies. That was an execution.

Q. And all of Mr Bosco's actions at each stage were the lawful actions of a bailiff, weren't they?

A. No. We never got one notice. We still don't know what those claims were. We know the Pascal claim.

Q. And they arose because of a series of judgments against NRD as a result of which NRD was a judgment debtor?

A. A series of so-called judgments which were not made available to us. We have no idea who they were or what those claims were, and the seizure of our NRD concessions wasn't taken, in the sense of that was how he was going to auction assets to pay the creditors, and it was far less, it was maybe $30,000 in total, and instead they took the whole concession and sold some by auction, some by theft, some by whatever means, and only on August 22nd did we get it back. The delegation arrives with the military on the 24th, and the military calls us up and says: please come and take responsibility for your concessions, and at that point the killing stopped.

Q. That answer, I don't accept any of that at all, but it has nothing to do with the questions I asked, and I'm going to move on.

Q. I'm now going to go back to the topic of --

A. It's a bailiff seizure; isn't that responsive?

Q. I'm going to go back to the topic of the licences.

Q. You will recall that you had been invited in April 2014 to apply for licences under the new rules.

Q. We looked at that earlier; yes? Do you recall that letter?

Q. By August 2014 --

A. Nothing came up, I'm sorry.

Q. By August 2014, you had not made any application for new licences, had you?

A. We had been making -- our application goes all the way back to 2010. No document came up. I don't know what you're referring to.

Q. Please go to C-064.

This is a letter from Mr Imena to NRD in August 2014, and you can see that it is addressed to the company and not to any individual at the company in particular; do you see that?

A. Yes.
16:48 1 for the possible renewal of the mining licence for the
2 above mentioned concessions has stalled and did not
3 yield any positive result since its initiation in
4 2012 ..."
5 Then he refers to the new Mining Law, and then he
6 says at the bottom:
7 "... I am requesting NRD Ltd to re-apply for the
8 licences of some or all of the former mining areas. The
9 list of what is required in this application is attached
10 to this letter. Each concession is a separate entity
11 and should be applied for individually ... this
12 application should be done within 30 days ... each
13 application will be assessed on its own merit. It is
14 key to note while applying that the government is
15 looking for optimal investment in each of the mining
16 areas mentioned above."
17 So he's requesting you again to apply for licences;
18 correct?
19 A. It reads that way, under the new law.
20 Q. He makes clear that the application should be made
21 within 30 days, will be assessed on its merits, and
22 should be done separately for each of the concessions;
23 correct?
24 A. That's what I read.
25 Q. And he also provided an annex, didn't he, which gave you

Page 166

16:49 1 a detailed list of what was required to support the
2 application; correct?
3 A. I don't see it, but he may have.
4 Q. We can go to it. If FTI could keep going down, you'll
5 see the annex, which might prompt your memory. Do you
6 see there?
7 A. Okay.
8 Q. So that was the list of targets you had to hit for the
9 application?
10 A. It may well be. But you will understand, of course,
11 that there were two issues we were facing at this time.
12 One, we did not have any access to any of our
13 documentation. We were strictly custodians of the
14 mining concession at the instruction of the Rwanda
15 military. We had no other documentary evidence of
16 anything. This letter was sent to many companies but
17 not to the concession holders, except for us. Rutongo
18 was in exactly the same position and did not have to
19 re-apply.
20 Q. Rutongo, by this point, had a well advanced licence
21 application which had been on the cusp of receiving --
22 for some time, had been on the cusp of receiving
23 long-term licences. They were in a completely different
24 position from you?
25 A. That's absolutely untrue. They didn't receive their

Page 167

16:50 1 licence until the beginning of 2015 and you can question
2 Kevin on it.
3 Q. And you've alleged that Minister Biruta told you that
4 the re-application was a formality, but that's not true,
5 is it?
6 A. We had the conversation with him, he absolutely assured
7 us that we had been mistreated, and in fact, his words
8 were, as I recall: as long I am minister, you are not
9 going to lose your long-term concessions.
10 Q. What he in fact would have said is as long as you comply
11 with the law you would be treated fairly?
12 A. No, he did not. It was a very different conversation.
13 I beg to differ with you. You were not there.
14 Q. And Mr Imena's letter made it clear that each
15 application would be assessed on its own merits, so you
16 had to make an application that hit the targets that he
17 identified and would be considered on its own
18 merits; correct?
19 A. I don't see that, but --
20 Q. That's what he said in the letter: each application
21 would be assessed on its own merit.
22 A. Yes, you know, for me, we were being treated
23 differently. We were being asked to re-apply for
24 something that we had already fully satisfied our
25 obligations under.

Page 168

16:51 1 Q. And you had no doubt at all, did you, what was required,
2 because you were told specifically what was required?
3 A. No, that's simply not true and you weren't there. You
4 know, we had a terrible time with Minister Evote because
5 he was off on his own frolic. We had started with
6 an indulgence, yes, we'll bring money, we'll bring
7 investment, and now they're again looking for
8 an opportunity, an excuse, to be able to say: oh, you
9 failed and now we're going to keep everything, without
10 compensation.
11 Q. Well --
12 A. Rutongo, for legal purposes --
13 Q. Just to be clear, Mr Marshall, my question is you had no
14 doubt about what was required because he told you in
15 this letter what you had to do, and gave you a list of
16 targets to hit, didn't he?
17 A. I understand, and I'm telling you that we had
18 communications with his office that this is not -- it
19 must be intended for other people but not for us because
20 you know us, you know what we have invested, you know
21 what research we've done and what is this formality.
22 Q. Now you've just invented that?
23 A. No, that's why we went to Minister Biruta and asked him
24 the question. He gave us absolute unconditional
25 assurance we were not going to lose our licences.
16:52 Q. You just invented this story about other people in
Minister Imena's office telling you it was a formality
or whatever you just said, because the only evidence
you've given before is that Minister Biruta said
something, and now you've invented something about other
people in Minister Imena's office --
7 A. I'm sorry, what was my quote, I don't ...  
8 Q. Let's look at your quote. You said:
"I understand and I'm telling you that we had
communications with his office that this must be
intended for other people but not for us."
11  You have just invented that, haven't you?
13 A. No, we believe that to be true. This is a generic
letter written for people who have just arrived in the
country, not for somebody who has already been here for,
at this point it was seven years. It's written as if
they don't even know who we are or what our name is.
18 I would like to point out to you that, for example,
19 Musha, another concession holder, arrived and three
months later was awarded the 30-year concession without
any investment or any research so there's very disparate
treatment between people who are applying for licences.
21 At this point we had a problem with Dr Michael and
24 they were trying to create a false test process which
25 they would then declare we failed.

Page 169

16:55 Q. You say a false test process, but you've just said, even
on your own evidence, that this is something that other
people were required to comply with. It's not bespoke
to you, is it?
5 A. As if you'd never known them before. They've known us,
they've seen our work, they've seen our investment.
7 Q. But your work has been considered inadequate before and
you have been repeatedly told to apply to licences,
which you haven't done.
10 A. If your point were true then you would think that they
would have a narrowly tailored conversation about what
needed to be done differently. Not: please tell us your
name and do you have any bank accounts.
14 Q. I'm going to come back to the application you made.
16 Let's go onto the story of tagging because we're now in
the summer of 2014, and one of your complaints in this
arbitration is that from the summer of 2014, Mr Imena
was unwilling to provide tags to NRD for the mineral
tagging system; yes? That's one of your complaints?
20 A. Yes, I think it began in March -- well, the way the
tagging process worked is that some tags were --
a quantity of tags, if there was a secure place in the
mine, would be kept at that mine site. So even though
Minister Imena instructed that no tagging be done on any
of our concessions anymore, it took some weeks before it

Page 170

16:57 fully kicked in and we were completely out of tags.
2 Q. Now, the tagging system was intended for licensed
operators, wasn't it?
4 A. All operating mines had tags.
5 Q. No, just answer my question. The tagging system was
6 intended for licensed operators, wasn't it?
7 A. All companies in our position had tags.
8 Q. If you go to Mr Niyonsaba's supplemental witness
9 statement at paragraph 16.
10 MR BRODSKY: Forgive me, that name one more time?
11 MR HILL: Niyonsaba.
12 MR BRODSKY: Thank you.
13 MR HILL: Paragraph 16. He is the man who is the Pact ITRI
14 man. He explains in paragraph 16 --
15 MR BRODSKY: Supplemental?
16 MR HILL: Sorry, supplemental, I'm so sorry.
17 MR BRODSKY: That is, this is the supplemental.
18 MR HILL: Exactly:
19 "Tags are only issued to licensed mining
20 operations."
21 So the way the scheme works is you need to be a
22 licensed operator in order to have tags; yes?
23 A. We were the only mining operation in the history of ITRI
24 that had our tags withheld from us for no reason.
25 Q. Well, your licence had expired and you had been asked to
apply for new licences and you hadn't done so.

Page 171

2 A. All licences had expired. We were in exactly the same
position as every other company.
4 Q. You had been asked to apply for new licences and you had
not done so?
6 A. Rutongo was in the same position, they had no licence.
7 Q. Rutongo had applied for new licences, hadn't they?
8 A. With the same application we had given.
9 Q. Not remotely the same application you had given, because
your application had not been accepted and you had made
no renewed application as you had been asked to do by
this stage repeatedly, correct?
13 A. No, it's completely a misrepresentation of the fact
pattern and, more than that, you know, as Dr Michael
kept saying, look, these are half of all the mining
areas in Rwanda are being held by NRD, and by
withholding tagging from us, that meant effectively the
tagging system had no effect in Rwanda.
19 Q. And by the summer of 2014 you should have been applying
for a licence, shouldn't you, and you had been asked to;
21 correct?
22 A. You're misrepresenting, he didn't ask us for anything.
23 He said: Ben Benzinge owns your mines and therefore
24 we're not going to give you the tags. He later came up
with the argument that the tagging licence hadn't been
Day 3 -- Hearing on Jurisdiction and the Merits  ICSID Case No. ARB/18/21 Wednesday, 23 June 2021

16:58 1 A. That's completely (overspeaking) --
2 Q. -- that fairly summarises what you're up to, doesn't it?
3 A. Absolutely not.
4 Q. And that would be contrary to the scheme of the iTSCi
5 system, isn't it?
6 A. No, the iTSCi system is -- and I'm sorry, I don't want
7 to lecture you -- but the iTSCi system in tags are
8 withdrawn from those companies who violate iTSCi rules,
9 no other reason. We are the only company who on
10 Mr Evode's say so, had the tags withdrawn. No other
11 company in the history of the iTSCi programme did that
12 happen to.
13 Q. Now, the second point that Mr Imena made is that
14 Mr Benzinge had the benefit of this arbitral award,
15 supported by court decisions, and the effect of that was
16 that you were neither the lawful management nor the
17 correct shareholders of NRD, and that was a fair summary
18 of the consequence of the arbitral award, wasn't it?
19 A. No, obviously not, because the registrar didn't change
20 the registration.
21 Q. And Mr Benzinge --
22 A. Mr Benzinge, at the end, before and after the
23 arbitration, still held 0.2% of all shares. Nothing
24 more.
25 Q. And at that point, Mr Benzinge was himself threatening

17:00 1 proceedings if GMD issued tags to you, or to you as
2 purported controllers of the company, such that Mr Imena
3 was at that stage faced with competing claims, wasn't
4 he?
5 A. No, I never heard he was going to bring a claim but
6 I wonder if I had threatened to bring a claim whether he
7 would have reversed himself. So as I take it from your
8 comment, if you threaten suit, then they buckle and say
9 the owner is not the owner and we're not going to give
10 tags to anybody?
11 Q. It isn't a question of threatening suit, is it,
12 Mr Marshall --
13 A. Well, it sounds like he's threatening suit.
14 Q. -- Mr Benzinge at that point had a Supreme Court
15 judgment which validated his possession, didn't he?
16 A. No, you just said that Mr Evode was faced with the
17 threat of a suit from Benzinge.
18 Q. Yes, he was faced with competing claims and one of the
19 claims on the other side to you was a claim from someone
20 who said he shouldn't be issuing tags to you because you
21 weren't the lawful controller of the company and he had
22 a Supreme Court judgment to back him up; that's fair?
23 A. No. Under Rwanda law, the registrar of a company
24 registry is the one who records who owns what. It's not
25 a matter of ongoing debate to be determined by
17:03

1. questions that's based on that question. What's the
point --

2. Q. No, I'm not, I'm just asking you about what happened at
a meeting and I'm going to ask you to now go to the
minute of the meeting. R-203, this is the note of the
meeting with Mr Imena in September, and I'm going to
look at what you said at this meeting, and you can see
that the first discussion is about NRD and Benzinge.

3. I'm going to ask, can we go to page 2 of this minute.

4. We have here:

5. "Next discussed point was ... tags. NRD in its
letter (as attached) asked the Minister to provide tags
for the NRD concessions. Minister said that he will not
approve to provide the tags if NRD doesn't have licence.
NRD pointed out that from 2011 there is no licence and
NRD was allowed to mine and tag. Invitation for the
negotiations for the long term licence was sent from
Minister in April 2014."

6. And that's right.

7. "Then the Minister said that he received letter last
week from Benzinge that Benzinge doesn't want the
Minister to give NRD tags. Benzinge signed it as 'Managing Director of NRD'. NRD said that it makes no
sense if individual is sending letter and Minister
ignores the letter sent by Minister of Justice in which

Page 177

17:06

1. Now, it's right, isn't it, that you didn't request
this extension until this meeting which was on
16 September, only two days before the deadline; yes?

2. A. My recollection is they couldn't get a meeting until two
days before it was due.

3. Q. And you didn't request an extension until then, either
by correspondence or in a meeting; correct?

4. A. You'll have to ask Ms Mruskovicova, I don't know that.

5. Q. And the problems, as the Minister said, the problems of
getting into your Kigali office were indeed your
problems, weren't they, because they resulted from
lawful court rulings that NRD was subject to; correct?

6. A. No. No. We were the only company in Rwandan history,
so far as we know, that was seized in its entirety for
a great deal of access to material in any event;
correct?

7. A. No.

8. Q. And much of the material that was required, and we
can -- we'll go to some of it in a moment, but it didn't
even need access to company files because it involved

Page 178

17:09

1. acquiring it from third parties; correct?

2. A. No.

3. Q. For example, you were required to obtain tax clearances
and that was just a question of seeking confirmation
from the Rwandan Revenue Authority; yes?

4. A. No. We were not recognised at that time as the owner of
the company, you will recall. RRA would not speak to
us.

5. Q. And the reason that you did not obtain tax clearances is
not for that reason, nor because you didn't have access
to your office, but because NRD hadn't been paying its
taxes and owed unpaid debts to the Revenue and you could
never have got a clearance from the Revenue, could you?

6. A. No, that's a gross misrepresentation and that's slander.

7. Q. You knew very well that the Revenue regarded you as
having outstanding debts to it, didn't they?

8. A. No, as we talked about yesterday or the day before,
there was an allegation from the Rwandan Revenue
Authority that HC Starck had not accounted for some of
the money that it had paid to casual labourers, and
pursuant to which some amount of social security tax
would be due. That was the beginning and the end of the
dispute. There was no -- I'm sure that HC Starck
accountants and others were not wrong in their judgment.

9. The agreement we had reached with the Rwanda Revenue

Page 180
17:08 Authority was that they would come in and do a proper audit, which they had still not yet done, and the matter was being left to that. There was no other outstanding debt, as far as I know.

Q. They regarded you as having outstanding unpaid debts and would never have given you a Revenue clearance, would they?

A. That's untrue and slanderous.

Q. Let's look at the application you did put in on 18th September 2014. We have it at C-084. Now, although it's dated 18th August on its face, it's common ground, and there's no dispute, that that's supposed to read 18th September 2014, so this is a September application.

If we look at the first paragraph, you say: "This letter and the attached information are submitted to you based upon the discussion you had in your office on Tuesday, 16 September ... with our Finance Director ... and our Director of Operations ... By way of short explanation, the instruction in your letter dated 18 August 2014 that the investors in NRD were glad to receive the letter by email (to our personal accounts) but had been informed that this was a mass-mailing to all licence-holders and that the information requested from us, as investors, would wait for resolution of the claims by Mr Benzinge."

Now, you knew very well, didn't you, that the request for the application had been directed at NRD, as a company, and Mr Imena was not concerning himself with any particular investors; correct?

A. No. Our understanding that that was a letter that was being sent to everybody, that this was how they were going to proceed with new licence applications and it was a new process, for new arrivals to Rwanda.

Q. You knew very well, didn't you, that -- well, let's look at the second page. So this is the information that you give. You say, starting with the third paragraph -- well, you start in the second paragraph:

"The contract provides for purpose of the agreement and for the rights and obligations of the parties to the agreement and authorises NRD to proceed with its obligated activities ..."

And then you say:

"Article 2 sets out certain of the obligations of the parties and Article 3/4 provides for NRD's rights to cassiterite, wolframite and tantalum anywhere within the mining concession areas for a minimum period defined by statute for 'mining concessions' of a minimum of 5 years, renewable. The definition of 'mining concessions' is specifically noted in Article 10 as being defined under 'existing Rwandan legislation'.

"NRD has completed its obligations under Article 2 and 3/4 and the agreement has endured to date and has not been terminated. "It is therefore, respectfully, incumbent now on the part of the Government of the Republic of Rwanda to grant the necessary mining rights for a period of 35 years renewable to NRD, hereinafter referred to as the 'long-term licence'."

Now you didn't think at all that it was the case that the contract provided for automatic right to mine for 35 years, did you?

A. I think it's an error, it should say 30 years.

Q. You didn't think that either, did you?

A. Yes, "It shall have the right" is the language of the original contract.

Q. And you knew that you had not satisfied the requirements of Article 2 of the contract in respect of the reserves feasibility report, didn't you?

A. The representations from the beginning were the same. We were always treated as the long-term licence-holder as defined by law, we, as an indulgence started the investment before we were granted the long-term concession agreement which we expected them to be commercially reasonable.

Q. Nor had you submitted at any point --

A. Everybody else got a long-term concession licence except us.

Q. Nor had you submitted at any point a feasibility report that was at all likely to be seen positively by the government; correct?

A. No, we had submitted a feasibility report. The feasibility report was for us to be able to determine, as in any long-term licence application in the mining industry, as the basis on which we determined whether we would want to go ahead with our investment.

Q. You also knew, didn't you, it was wrong to say the agreement had endured to date; correct?

A. No, we believed it had been ended to date. We had fully performed on our side of the agreement and we were just waiting for performance on their side.

Q. Now, coming on to the next paragraph, you refer to the injection of funds. You say:

"In a period starting before the signing of the above named contract to this date, NRD has to date invested funds in excess of US$20 million into the project."

We've been through the amounts invested and that
<table>
<thead>
<tr>
<th>Page 185</th>
<th>Page 186</th>
<th>Page 187</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>17:14</strong></td>
<td><strong>17:15</strong></td>
<td><strong>17:16</strong></td>
</tr>
<tr>
<td>1. statement was untrue; correct?</td>
<td>1. submitted an application, then we start negotiating the terms of a long-term concession. If there was some reason, business reason for changing that procedure, we would be happy to do it.</td>
<td>1. industry. He alone had the ability.</td>
</tr>
<tr>
<td>2. A. No, it was correct.</td>
<td>3. Q. So you just chose to ignore Mr Imena's letter?</td>
<td>2. Q. Now, you provided what purported to be a feasibility report, which we have at C-085, and can we go to that document. Can we go to page 40.</td>
</tr>
<tr>
<td>3. Q. You then attached some limited documents, and we'll go through those in a minute, but it's right, isn't it, that you didn't even purport to put in an application on a concession by concession basis as you had been requested to, correct?</td>
<td>4. A. We were not subject to this. Everybody else was treated as a long-term concession holder and invited to a negotiated agreement. If they wanted to at some point be able to say in that negotiation: no, this concession is too large or we need to allow you to focus on these particular pieces of infrastructure.</td>
<td>3. A. This, by the way, is the environmental problem I was telling you about where they did the ground sluicing.</td>
</tr>
<tr>
<td>4. A. We had fulfilled the terms of the original arrangement. We had submitted an application in 2010. The application was deemed sufficient. If they were asking for additional breakdown of information then it had never been clearly articulated to us in a way that said it's an amendment to the original agreement where we had fully executed.</td>
<td>5. Q. You were told what to do, which is to apply on a concession by concession basis, providing the information requested, and you didn't even attempt to do so, did you?</td>
<td>4. A. This, by the way, is the environmental problem I was telling you about where they did the ground sluicing.</td>
</tr>
<tr>
<td>6. A. I'm sorry, where are you reading from, or what period?</td>
<td>7. A. No, it was correct.</td>
<td>5. A. This, by the way, is the environmental problem I was telling you about where they did the ground sluicing.</td>
</tr>
<tr>
<td>7. Q. I'm reminding you of a letter we looked at only a few moments ago, which is Mr Imena's letter in August, telling you specifically you had 30 days to apply on a concession by concession basis and to provide the information requested?</td>
<td>8. A. In Nemba? No.</td>
<td>6. A. No, the investments were ongoing.</td>
</tr>
<tr>
<td>8. A. The agreement we had with the government was that we submitted an application, then we start negotiating the terms of a long-term concession. If there was some reason, business reason for changing that procedure, we would be happy to do it.</td>
<td>9. Q. He was telling you you were subject to it, and he sent you a letter telling you what to do and you chose to ignore it; that's fair, isn't it?</td>
<td>7. Q. Well, you don't identify in this application, in this feasibility study, any material new investment in infrastructure, do you?</td>
</tr>
<tr>
<td><strong>17:16</strong></td>
<td><strong>17:17</strong></td>
<td><strong>17:18</strong></td>
</tr>
<tr>
<td>1. A. No. No. It's not fair. We disputed that we were subject to it, we wanted to be treated the same as all other holders. We had all of our documentation and research and expertise in our office, and he was not giving it to us, so we assumed that this was a set-up. He just wanted to be able to say: you failed. Otherwise he would have given us our office back.</td>
<td>10. A. No. No. It's not fair. We disputed that we were subject to it, we wanted to be treated the same as all other holders. We had all of our documentation and research and expertise in our office, and he was not giving it to us, so we assumed that this was a set-up. He just wanted to be able to say: you failed. Otherwise he would have given us our office back.</td>
<td>8. A. No, all investments were ongoing. The Nemba plant didn't exist in 2010 so, you know, with regard to that item alone, but all upgrades have to -- it's a work in progress. You can't stop investing in the mining.</td>
</tr>
<tr>
<td>2. A. He absolutely did. He was in charge of the mining.</td>
<td>11. Q. Let's go back to that bottom paragraph and look at it again.</td>
<td>9. Q. &quot;NRD's investments in respect of the plants themselves are summarised in the NRD Application 2010.&quot;</td>
</tr>
<tr>
<td>3. A. He absolutely did. He was in charge of the mining.</td>
<td>12. A. Okay.</td>
<td>10. Q. Making it quite clear that the investment had taken place before November 2010 and is summarised in that document; yes?</td>
</tr>
<tr>
<td>5. A. He absolutely did. He was in charge of the mining.</td>
<td>14. A. All of it was correct.</td>
<td>12. Q. That's what your document says that you submitted; correct?</td>
</tr>
<tr>
<td>6. A. He absolutely did. He was in charge of the mining.</td>
<td>15. Q. &quot;NRD's investments in respect of the plants themselves are summarised in the NRD Application 2010.&quot;</td>
<td>13. A. It may be inartfully worded, but the Nemba plant wasn't built until after 2010.</td>
</tr>
<tr>
<td>7. A. He absolutely did. He was in charge of the mining.</td>
<td>16. Q. Making it quite clear that the investment had taken place before November 2010 and is summarised in that document; yes?</td>
<td>14. Q. Can we go to page 71. This is a section dealing with</td>
</tr>
</tbody>
</table>

Bay View Group LLC and The Spalena Company LLC v Republic of Rwanda

Anne-Marie Stallard
for Trevor McGowan

As amended by the Parties

Day 3 -- Hearing on Jurisdiction and the Merits
ICSID Case No. ARB/18/21

Wednesday, 23 June 2021

Page 186

50 (Pages 185 to 188)
17:19 1 exploration works. It actually starts, if you could go
to back one page, if FTI can put the previous page up as
well at the same time. We've got a section dealing with
satellite image tools, and then on page 71, it says,
three paragraphs down:
"In addition to the research reflected in the
supplemental materials to this Feasibility Study ...
several field campaigns of exploration works were
performed..."
A. And then you say:
11 "In the text below we roughly summarise performed
work."
13 Can you see where I'm reading from? It's
immediately above the 4.9:
"For detail we refer on report NRD 2010 and
2008-2010 Annual Status Reports and supporting
materials."
So it's clear, isn't it, that as regards this work
also, surveying work, this feasibility study identified
no material new work that had not been identified in
the November 2010 application?
A. No -- well, I'm not saying that it's directly stated,
but certainly we had teams of geologists permanently in
Rwanda from the Czech and Slovak Republics.
Q. If you had done any material new surveying work you
would have identified it in this application, wouldn't you,
and not just directed the reader to
the November 2010 application; correct?
A. No.
Q. Let's go to page 88.
A. It may be less promotional than it should be, it may be
less of a statement to show how great we are, but that's
what we wrote.
Q. And the reality is, also, Mr Marshall, it's not just
this document, although we'll keep going to it, you had
other opportunities to supplement your material, you
were given a number of opportunities by the government
and you never produced any updated investment or
surveying data, did you?
A. I beg to differ. I think we did provide -- every time
the geologists did work they spoke with their
counterparts at the Ministry, they would have provided
them with those studies --
Q. You never --
A. -- (overspeaking) not providing them to us today doesn't
mean that the work wasn't done.
Q. You never improved this part of your application, even
though you were given repeated attempts to improve on
your application, did you?
A. No, we did improve on this part of the application.

17:22 1 Q. Now, let's look at paragraph 88. This is dealing with
mineral reserve modelling. Can we start with --
starting with exploration and sampling, and at the
beginning of the first paragraph it says:
"Wolframite sampling: initial reserve estimates were
carried out (pre-2010) for the primary wolframite
deposits at Rutshiro and their associated secondary
tailings deposits."
So again there, the work done for reserve estimates
was pre-2010; yes?
A. No, that says initial reserve estimates were carried out
then.
Q. And no other work is identified; correct?
A. Well, you'll have to let me read it. If you want me to
read it, I'll double-check, but ...
Q. It's just describing the work that we see in
the November 2010 application?
A. Yes, but all of the sampling was ongoing. As we're
mining, we're sampling. We were unique among all mining
companies in the ability to do that because we were the
only mining company with a lab. I beg to differ with
you about what this means. If you are saying that we
failed because we didn't specify much of the exploratory
work after 2010, that's not to say it didn't happen.
Q. I think your staff, your client's staff would be able to
verify it. We took thousands of samples.
A. If you had done that, you would have identified them.
Q. Let's go to Mr Imena's witness statement at
paragraph 33.
A. These seem to be questions of fact to me, you know, and
I would urge you to go back and do a more detailed
investigation, since you are accusing me of not doing
something when you have the information to be able to
demonstrate whether it's true or not.
Q. Now, Mr Imena deals with this application, and he
summarises his take on it. He says:
"On 18 September 2014, NRD submitted a partially
complete application for the issuance of long-term
licences. It included a 'feasibility study update'
which, although some 90 pages in length, contributed
almost nothing new -- it was largely a reworking of
the November 2010 Application with some generic
geological reports obtained from public records."
And that is a fair assessment, isn't it, of the
feasibility report that you submitted?
A. It's entirely unfair, because I know that our staff
spent hundreds of hours on it, and I wish you would do
a close comparison rather than referring to conclusory
remarks by somebody who is very biased.
Q. We're very happy to do a close comparison of this
MR BRODSKY: Did you say Imena supplemental?

MR HILL: Imena supplemental, paragraph 19.

MR BRODSKY: Thank you.

MR HILL: He says:

“In my first statement at paragraphs 12 to 13 and 71, I explain how the sampling done by NRD was superficial and that they had only obtained 115 samples for three concessions, which equated to 1 sample for every 191 hectares. At paragraph 25 of the second supplemental statement of Mr Marshall, he claims that NRD was the only company doing sampling on a daily basis using new XRF spectrometers. This cannot be true, and is not consistent with my understanding at the time. First, if NRD was taking samples on a daily basis I believe this would have been recorded in their November 2010 Application (or indeed any later applications) -- but it was not. The November 2010 Application states only that ‘a total of 115 samples were collected’ and this is consistent with the explanation I gave in my first statement. Second, NRD was not the only company using a XRF spectrometer and in fact they were commonly used in Rwanda.”

And what he says is right, isn’t it?

A. No. It’s entirely untrue. A couple of traders, MSA and Phoenix, had an XRF and I think those were the only ones in the country, perhaps Chris Huber as a trader also had an XRF, but other than that. They’re expensive, about $50,000 with the related equipment, and so for most companies they would rather rely on the judgment of the trader of -- for the value of the minerals they were selling. We did not -- I would say that he has also made several other conclusions which are, you know, not based in reality -- not based in truth. There were detailed samples that HC Starck sent back to Europe for additional analysis, and as I recall, and I would have to go back and look at the application, those were the 115 samples, so it’s a bag of 20 kilos and 115 sent back for that specific purpose.

But they were ongoing -- they were doing ongoing sampling and the XRF was a Bay View asset, Bay View Group asset which was being used by NRD, I think, at that point.

Q. Mr Marshall, if there had been lots and lots of samples, as you suggest, you would have made that clear in your application, but you didn’t suggest that in your application, did you?

A. No, I think you’re making a mistake about what I thought was relevant in the application and what you, with 20/20 hindsight, claimed is relevant.

Q. Now, you also supported this application with the...
17:31 1 document we have at C-092 as an indication of your financial resources, and can we just look at C-092. 2 A. No, our financial resources was the investment we'd already made. 3 Q. They are interested, the government are interested in what investment you can make going forward in support of your application for a long-term licence, aren't they? 4 That's what they're interested in? 5 A. No, they're interested in whether we're going to be able to make any investment. Remember, this is a new application. This is a list of transactions for me as a professional. It's nothing to do with financial capability. The investment they're interested in is can you make any financial investment in Rwanda, and we'd already made $20 million in investments. 6 Q. Well, this might be your answer. Let's just look at this document. This is what you put in as being relevant to your application to support the idea that you had financial resources in order to make you a worthy applicant for a long-term licence. 7 Let's look at what this document is. It's headed "Jillson and Marshall Associates, Counselors at Law". 8 A. Can you show us the requirement, what provision this is supposed to be responsive to, because this is not my memory that this would have been submitted as responsive to a question of whether we had financial capability? 9 Q. Why do you think you submitted it? 10 A. I don't know that it was submitted. 11 Q. It was. This is one of the documents you relied on in support of the application. 12 A. What does the language say, and then maybe I can give you an explanation? 13 Q. It's your explanation and we don't have a description from you why you're submitting it. 14 A. What does the government say the requirement was? What were they asking for? 15 Q. It doesn't matter. You tell us why -- 16 A. It does matter, because I need to know what you're claiming I'm responsive to. This is prepared by my staff, I was not in the country, as you saw from the meeting on the 16th. 17 Q. So you say you didn't read the application and the supporting material? 18 A. I was not in the country. They were responding to all of these provisions themselves. Did they make a mistake? Entirely possible. But I'm asking you what it says. 19 Q. You tell us what you think this document is. 20 A. This is a list of our transactions as a law firm. 21 Q. Yes. That's what I thought. This is a list of the transactions done by -- you've advised on as lawyers; correct? 22 A. Yes.

Page 197

17:33 1 licence beyond the historic investment that had already been done? 2 A. We had no ability to talk with anybody about what their expectations might be over and above what we had already invested. There was no dialogue. There was no -- all of these processes are iterative. They're all done on a collegial -- collegial basis, we had no chance to talk to anybody about what was expected in any item on this list. As I say, I was out of the country at the time, but I don't even understand why we were having that discussion. We had an agreement. We had fulfilled our part of the agreement, and now they're changing the rules. 3 Q. Let's go to R-020. This is an evaluation provided of your application -- that was made of your application by a license application -- licence evaluation team, and you can see that at the top of page 1. So it's to the "Honourable Minister", from "Licence Evaluation Team", and if you look at the -- just to see who the team are, if you look at the last page of the document, page 8, you can see there are four names as being the team. Do you see that? 4 A. Yes. 5 Q. And then were you aware that there had been an evaluation of your application by a team which made
Page 201

17:36 1 a recommendation to the Minister?
2 A. Of course not.
3 Q. Can we look at page 7 of the document. This is the
4 recommendation:
5 "After all observations seen above, the technical
6 evaluation team recommends that Natural Resources
7 Development (NRD) may not be granted five concessions,
8 namely Nemba, Rutsiro, Giciye, Mara and Sebeya. This is
9 because NRD did not submit all the requirements
10 requested, and even those that were submitted are deemed
11 not satisfactory according to request letter for the
12 Minister of State in charge of Mining, which requested
13 NRD to re-apply for some or all former mining areas by
14 NRD.
15 "The Evaluation ... team analysed documents
16 submitted by NRD and the team found that in the
17 motivation letter for the application of the licence,
18 NRD Rwanda Ltd [did] not indicate which kind of Mining
19 Concession NRD Rwanda Ltd was willing to operate in, the
20 type of the licence was also not mentioned according to
21 the new law. And also the company did not indicate the
22 licence period it wanted.”
23 And their recommendation was not to grant the
24 licences; yes? Do you see that?
25 A. I see the language you’re pointing to. This is all new

Page 202

17:37 1 to me, and this is the first time I'm aware that they
2 ever held this kind of evaluation without simultaneously
3 conferring with people like us who might have been the
4 recipient of the licence.
5 Q. And between pages 3 and 6 of the document, if FTI could
6 go to page 3. What you will see is between pages 3 and
7 6, the team listed all the items Mr Imena had been
8 requested to be provided. Perhaps if 3 and 4 could come
9 up, thank you. In the letter of 18 August, and they
10 commented on whether they were provided and they made
11 observations on their content.
12 So, for example, if you look at the bottom of
13 page 3, there was "Tax Clearance Certificate from the
14 Rwanda Revenue Authority", "submitted: no", and then
15 their observation is that:
16 "The company is said to have [294] million Rwandan
17 francs as a tax liability to the Government of Rwanda.
18 This is according to the audit from
19 PricewaterhouseCoopers which can be evidenced in the
20 letter addressed to the commissioner general on
21 7 December 2010. See page 3 under summary of tax
22 liabilities. Further consultation can be done with RRA
23 to know the accurate liability.”
24 So that's just one example of your failure to
25 provide a tax clearance and the perception by the

Page 203

17:38 1 government that there is in fact a tax liability; do you
2 see that?
3 A. I see the language. It's not correct.
4 Q. And then we look at the bottom of page 5.
5 A. This is the first I've seen this document.
6 THE PRESIDENT: Today? Today? That's the first time you've
7 seen it?
8 A. No, I never saw it during this period, sorry.
9 MR HILL: So you have seen it in preparation for this case,
10 presumably?
11 A. In preparation of this case, but not at that time.
12 I question whether it was contemporaneous. It's
13 surprising to me, and the reason I say that, it would be
14 very unusual for the government to prepare this kind of
15 document without sharing it with the party who is
16 applying. They ordinarily are very meticulous in going
17 through each item so they fairly give people a chance to
18 respond.
19 Q. Looking onto page 5, there's a section "Requirements of
20 Mining and Exploration Plan", and in a section which
21 says:
22 "Minimum investment commitment on each Mining area”.
23 The answer:
24 "No. The company did not submit the requested
25 Minimum investment on each of the mining area ie Nemba,

Page 204

17:40 1 Giciye, Rutsiro, Mara and Sebeya. However in the
2 document submitted the company shows that it will spend
3 €382,000 to exploration over the five concessions. From
4 2011 to 2015. The evaluation team found out that that
5 information is not an updated information rather
6 old one and there is no expenditures allocated to
7 Mining/exploitation.”
8 And that's a fair analysis of the feasibility study
9 you submitted, isn't it?
10 A. No, as a practical matter, the Ministry provides the
11 applicant with the amount of the expected investment at
12 each and every location, and the expected amount of
13 production that would come from the mining.
14 The reason for that, just so you understand, is that
15 that's part of a commercially reasonable long-term
16 concession licence so that there are performance
17 characteristics, goals, requirements, in the contract
18 itself, which could lead to termination if you didn't
19 meet it.
20 But for us to -- we would never presume, and it's
21 always been the dialogue in the past: what do you think
22 this can provide, what do you think is the amount of
23 investment required. If we hadn't had that conversation
24 in recent couple of years, then we would have
25 necessarily gone back to the information that the

Anne-Marie Stallard
for Trevor McGowan

As amended
by the Parties
| Page 205 | 17:41 | 1 | Ministry had provided to us before. |
| 2 | Q. Well, you knew, didn't you, that this was one of the |
| 3 | items on Mr Imena's list, because this report is going |
| 4 | through the list. I'm going to pick up another one. Do |
| 5 | you want to answer that? |
| 6 | A. But my point is that by this process, they've changed |
| 7 | their approach. It's no longer a collegial give and |
| 8 | take about these issues. From what I'm hearing from you |
| 9 | is: he sent you these requirements, you didn't answer, |
| 10 | or you didn't answer in the way that he expected, |
| 11 | therefore you failed. That was never the process in |
| 12 | Rwanda before this time. |
| 13 | Q. Let's go to page 5. Let's go to page 5. You were asked |
| 14 | to provide minimum work commitment on each mining area, |
| 15 | to which their response is: |
| 16 | "No. The company did not submit the information |
| 17 | requested, however the company in its document that seem |
| 18 | to be not updated shows some proposed activity in |
| 19 | research, production, reserve, calculation, processing |
| 20 | environmental mitigation and work safety for the |
| 21 | period [January 2011] to [January 2015]." |
| 22 | And, again, your work proposal hadn't been updated |
| 23 | since the November 2010 application, had it? |
| 24 | A. No, you have the office, you have the documents, I can't |
| 25 | be sure because, again, this is the first time that this |

| Page 206 | 17:43 | 1 | kind of comment would be made. In fact, I've never |
| 2 | heard of it being made without a consultation with the |
| 3 | applicant. |
| 4 | Q. Then the next bit, a little lower down on the same page, |
| 5 | the penultimate row: |
| 6 | "The financial capacity to support each commitment |
| 7 | with supporting documents to prove such a capacity, for |
| 8 | example a bank guarantee from any financial recognised |
| 9 | institution by the Rwandan Government." |
| 10 | So, again, you're being asked to demonstrate |
| 11 | financial capacity and their answer is no, their |
| 12 | evaluation is: |
| 13 | "No. The company did not submit any kind of proof |
| 14 | for financial capacity to support any of their |
| 15 | activities planned." |
| 16 | That, again, is a fair assessment of the application |
| 17 | you put in, isn't it? |
| 18 | A. No, it's very unfair. |
| 19 | Q. Are you suggesting you did submit proof of your |
| 20 | financial capacity to support the planned activities? |
| 21 | A. Correct me if I am wrong, but this is for all new |
| 22 | applicants, for people they don't know anything about, |
| 23 | not somebody that has invested significant amounts of |
| 24 | money already. |
| 25 | Q. In answer to my question -- |

| Page 207 | 17:44 | 1 | A. So where's the category for what has already been done? |
| 2 | Q. In answer to my question: you did not submit any kind of |
| 3 | proof for financial capacity to support any of the |
| 4 | activities planned, did you? |
| 5 | A. Well, I'm sorry, I don't mean to be rude, but we've |
| 6 | already invested. We've already invested $20 million, |
| 7 | isn't that proof of financial capacity? Why does it |
| 8 | start from zero? Why does the application suggest that |
| 9 | anything you've done so far is meaningless? Now tell us |
| 10 | what you're going to do and what it means in the future |
| 11 | without even talking to us? |
| 12 | Q. So the answer to my question is in terms of the planned |
| 13 | activities going forward, which is what this document |
| 14 | was supposed to indicate, you did not provide proof of |
| 15 | financial capacity, did you? |
| 16 | A. I have -- we were never asked in that context. |
| 17 | Q. You were asked specifically because it was one of the |
| 18 | items on the list; correct? |
| 19 | A. No. No. No, we were asked do we have the ability to |
| 20 | build out these concessions. We've invested $20 million |
| 21 | and now we -- we assume that's to address that |
| 22 | question. What is your financial capacity? $20 million |
| 23 | this year. What more do you need? Nobody has invested |
| 24 | $20 million in the industry even since then. I don't |
| 25 | think there are three companies in Rwanda right now with |

| Page 208 | 17:45 | 1 | more than a million dollars investment. |
| 2 | Q. No, I don't accept that $20 million figure for a moment |
| 3 | and we have been through that, but now let's look at |
| 4 | what Mr Imena says about your report. |
| 5 | A. Pick a number then. We've already invested. What |
| 6 | you're saying, if you follow the logical conclusion of |
| 7 | your question, what you're saying is everything that's |
| 8 | done doesn't count anymore, it's only about what you're |
| 9 | going to do now. That's a very -- "thank you very much, |
| 10 | you've given that to us". |
| 11 | Q. Mr Imena received this recommendation, can we look at |
| 12 | what he says at paragraph 33 of his witness statement. |
| 13 | And in the second half of that document he refers to the |
| 14 | evaluation by this team and he says: |
| 15 | "They found that NRD had failed to provide numerous |
| 16 | documents that were required of them including a Tax |
| 17 | Clearance Certificate ... a recommendation from the |
| 18 | Rwanda Environmental Management Authority on the status |
| 19 | of the environment at the five concession areas; proof |
| 20 | of financial capacity to support each commitment, ie to |
| 21 | invest and develop the mines; and work plans in relation |
| 22 | to each mining area, ie plans as to what they were |
| 23 | planning at each of the five concession areas and how |
| 24 | they would go about this. These documents were critical |
| 25 | to our evaluation of NRD's application; for example, the |
tax clearance certificate was necessary to demonstrate that NRD had been paying taxes; and the recommendation from REMA as to the status of the environment was critical because we had concerns about environmental damage occurring at NRD's sites."

And that was a fair evaluation of the flaws or some of the flaws in your application, isn't it? A. No, I think you're fundamentally mistaken. First of all, we could not get anything from the Rwanda Revenue Authority, they didn't recognise us, for whatever reasons they had, as the owner. There was no basis on which we could get them to negotiate anything. Would you not recognise us. We tried.

With regard to the Rwandan Environment Management Authority, we went there to talk about what regions they could either do or support, consult, to look at whether there are environmental challenges that had to be met. Their official position is, they don't do any work until a licence is awarded. None, zero. They don't -- they're not going to do speculative work. They say if you own that licence for that specific area, then yes, we will come and review it. So we were stymied there, we had nothing more we could ask.

Q. Mr Marshall, you are again coming up with points which are a fiction, aren't you? A. No, and I think he has entirely misunderstood what we meant. It was mandatory; that he, as part of due process, required to; yes?

And it's right, isn't it, that he gave you a seven-day opportunity to appeal, despite not being required to; yes?

A. My understanding from the Minister at that time was that it was mandatory; that he, as part of due process, took to be the principle: that we should be like any new investor, if you were considering us as a new investor, that the $20 million that's already invested be credited to us. What additional proof do you need of our financial capability?

Q. Now, just a couple more questions on this area before I move on, or before we have a break, in fact.

Paragraph 35 of this statement, Mr Imena summarises his response, that the evaluation team determined that many of the documents were: "... unsatisfactory, including the financial document I have referred to ... and that NRD had [failed] to provide any tangible document that proved its financial capacity to develop mines. Accordingly, by letter dated 28 October 2014, I advised NRD that had a decision been made not to grant it any mining licences, but that NRD had seven days to file an appeal against this decision. I gave NRD this right to appeal despite being under no obligation to do so."

And it's right, isn't it, that he gave you a seven-day opportunity to appeal, despite not being required to; yes?

A. My understanding from the Minister at that time was that it was mandatory; that he, as part of due process, took to be the principle: that we should be like any new investor, if you were considering us as a new investor, that the $20 million that's already invested be credited to us. What additional proof do you need of our financial capability?

Q. Now, just a couple more questions on this area before I move on, or before we have a break, in fact.

Paragraph 35 of this statement, Mr Imena summarises his response, that the evaluation team determined that many of the documents were: "... unsatisfactory, including the financial document I have referred to ... and that NRD had [failed] to provide any tangible document that proved its financial capacity to develop mines. Accordingly, by letter dated 28 October 2014, I advised NRD that had a decision been made not to grant it any mining licences, but that NRD had seven days to file an appeal against this decision. I gave NRD this right to appeal despite being under no obligation to do so."

And it's right, isn't it, that he gave you a seven-day opportunity to appeal, despite not being required to; yes?

A. My understanding from the Minister at that time was that it was mandatory; that he, as part of due process, took to be the principle: that we should be like any new investor, if you were considering us as a new investor, that the $20 million that's already invested be credited to us. What additional proof do you need of our financial capability?

Q. Now, just a couple more questions on this area before I move on, or before we have a break, in fact.

Paragraph 35 of this statement, Mr Imena summarises his response, that the evaluation team determined that many of the documents were: "... unsatisfactory, including the financial document I have referred to ... and that NRD had [failed] to provide any tangible document that proved its financial capacity to develop mines. Accordingly, by letter dated 28 October 2014, I advised NRD that had a decision been made not to grant it any mining licences, but that NRD had seven days to file an appeal against this decision. I gave NRD this right to appeal despite being under no obligation to do so."

And it's right, isn't it, that he gave you a seven-day opportunity to appeal, despite not being required to; yes?

A. My understanding from the Minister at that time was that it was mandatory; that he, as part of due process, took to be the principle: that we should be like any new investor, if you were considering us as a new investor, that the $20 million that's already invested be credited to us. What additional proof do you need of our financial capability?

Q. Now, just a couple more questions on this area before I move on, or before we have a break, in fact.

Paragraph 35 of this statement, Mr Imena summarises his response, that the evaluation team determined that many of the documents were: "... unsatisfactory, including the financial document I have referred to ... and that NRD had [failed] to provide any tangible document that proved its financial capacity to develop mines. Accordingly, by letter dated 28 October 2014, I advised NRD that had a decision been made not to grant it any mining licences, but that NRD had seven days to file an appeal against this decision. I gave NRD this right to appeal despite being under no obligation to do so."

And it's right, isn't it, that he gave you a seven-day opportunity to appeal, despite not being required to; yes?

A. My understanding from the Minister at that time was that it was mandatory; that he, as part of due process, took to be the principle: that we should be like any new investor, if you were considering us as a new investor, that the $20 million that's already invested be credited to us. What additional proof do you need of our financial capability?
Page 213

17:51 1 the advice of the military people who encouraged us to wait for the internal investigations to play out.
2 Q. You did submit some very limited additional information, but that was only in response to a request to do so from Mr Imena which comes later, and I'm going to come to that.
3 I wonder if now is a convenient moment, Mr President?
4 MR COWLEY: I have a housekeeping issue, Mr President, and I'm just asking for help, not blaming anybody for the something wrong, I'm just pointing out what I heard. So I shouldn't be, but there are so many allegations being thrown around. I'm not suggesting anybody has done something wrong, I'm just pointing out what I heard. So I'm just asking for help, not blaming anybody for the situation we are all in, I think both packages are in the same place.
5 THE PRESIDENT: Yes, understood, and I hadn't inferred any criticism on your part.
6 MR HILL: No, nor me.
7 THE PRESIDENT: Right, let us continue, please, with the last round of cross-examination for Mr Marshall.
8 MR WATKINS: Okay, we're bringing the witness in right now.
9 Mr Marshall, carrying on with the licence last round of cross-examination for Mr Marshall.
10 MR HILL: Mr Marshall, my application following a recommendation from his team, and I would like to look at your response to Mr Imena's refusal, which is at bundle C-165. This is a letter from you to the Rwandan police; yes? That's "CG, CID", isn't it?
11 A. Yes, that's the police.
12 Q. And it's headed "Formal Complaint Against Apparent Corruption", and in this letter you are, on its face, complaining to the police, aren't you, that Mr Imena has been corrupt?
13 A. Yes. I haven't read this letter, but I do recall sending a letter informing the police about Mr Imena's corruption.
14 Q. And this is --
15 A. That's not the only one.
16 Q. -- this is not stamped and doesn't have the company's seal, this letter, and I'm just asking you, are you sure you sent this letter? It seems unclear that you did?
17 A. I'm sure we sent the letter to the police about his corruption.
18 Q. And can we look at the last page of the letter? We can see that you copied the letter, if you did send it, to the President, the Prime Minister, other ministers and the US Ambassador?
19 A. Yes.
20 Q. You were seeking to do maximum damage, weren't you, to

Page 214

18:08 1 completed is Mr Buyskes, and I don't have the schedule committed to memory, but I think it impacts the next witness, though they may skip -- I bring it to the Tribunal's attention not because I think the Tribunal can solve it, but if there's any ability to suggest that members of the Respondent who may not already know, but that assistance may be needed and can probably be helpfully provided by representatives of the Respondent to get the packages through.
2 THE PRESIDENT: This is hardware, is it, to do with the actual filming?
3 MR COWLEY: It's the computers and cameras. There's the 360 camera is --
4 THE PRESIDENT: Yes.
5 MR COWLEY: So a computer that's connected to the internet, whether it's FTI's or not, has the capability to link in, but they don't necessarily have the same capability to allow FTI to do everything they may need to do to help people or other things, I'll let FTI explain the difference between just anybody's computer and theirs.
6 The one big difference is most people don't have available to them an equivalent 360-degree camera, that make-do or workarounds for that might be far more limited, and those are the two things I know.
7 THE PRESIDENT: Yes.
8 MR COWLEY: I have a housekeeping issue, Mr President, and I'm just asking for help, not blaming anybody for the something wrong, I'm just pointing out what I heard. So I shouldn't be, but there are so many allegations being thrown around. I'm not suggesting anybody has done something wrong, I'm just pointing out what I heard. So I'm just asking for help, not blaming anybody for the situation we are all in, I think both packages are in the same place.
9 THE PRESIDENT: Yes, understood, and I hadn't inferred any criticism on your part.
10 MR HILL: No, nor me.
11 THE PRESIDENT: Right, let us continue, please, with the last round of cross-examination for Mr Marshall.
12 MR WATKINS: Okay, we're bringing the witness in right now.
13 MR HILL: Mr Marshall, carrying on with the licence application, we just dealt with Mr Imena's refusal of your application following a recommendation from his team, and I would like to look at your response to Mr Imena's refusal, which is at bundle C-165. This is a letter from you to the Rwandan police; yes? That's "CG, CID", isn't it?
14 A. Yes, that's the police.
15 Q. And it's headed "Formal Complaint Against Apparent Corruption", and in this letter you are, on its face, complaining to the police, aren't you, that Mr Imena has been corrupt?
16 A. Yes. I haven't read this letter, but I do recall sending a letter informing the police about Mr Imena's corruption.
17 Q. And this is --
18 A. That's not the only one.
19 Q. -- this is not stamped and doesn't have the company's seal, this letter, and I'm just asking you, are you sure you sent this letter? It seems unclear that you did?
20 A. I'm sure we sent the letter to the police about his corruption.
21 Q. And can we look at the last page of the letter? We can see that you copied the letter, if you did send it, to the President, the Prime Minister, other ministers and the US Ambassador?
22 A. Yes.
23 Q. You were seeking to do maximum damage, weren't you, to

Page 215

18:09 1 Mr Hill, do you think your clients could do their best to unblock the customs so that this stuff gets through?
2 MR HILL: Yes, I hadn't, I am afraid, heard of this at all.
3 Q. It hadn't got to me. I will take instructions and see what can be done. I am afraid it's a complete unknown to me, but I will certainly take instructions and see what can be done.
4 MR HILL: Good. Thank you very much.
5 THE PRESIDENT: Yes, let's break for 15 minutes.
6 (5.52 pm)
7 (A short break)
8 THE PRESIDENT: Yes, let's break for 15 minutes.
9 (5.52 pm)
10 (6.07 pm)
11 MR COWLEY: I have a housekeeping issue, Mr President, and I'm just asking for help, not blaming anybody for the something wrong, I'm just pointing out what I heard. So I shouldn't be, but there are so many allegations being thrown around. I'm not suggesting anybody has done something wrong, I'm just pointing out what I heard. So I'm just asking for help, not blaming anybody for the situation we are all in, I think both packages are in the same place.
12 THE PRESIDENT: Yes, understood, and I hadn't inferred any criticism on your part.
13 MR HILL: No, nor me.
14 THE PRESIDENT: Right, let us continue, please, with the last round of cross-examination for Mr Marshall.
15 MR WATKINS: Okay, we're bringing the witness in right now.
16 MR HILL: Mr Marshall, carrying on with the licence application, we just dealt with Mr Imena's refusal of your application following a recommendation from his team, and I would like to look at your response to Mr Imena's refusal, which is at bundle C-165. This is a letter from you to the Rwandan police; yes? That's "CG, CID", isn't it?
17 A. Yes, that's the police.
18 Q. And it's headed "Formal Complaint Against Apparent Corruption", and in this letter you are, on its face, complaining to the police, aren't you, that Mr Imena has been corrupt?
19 A. Yes. I haven't read this letter, but I do recall sending a letter informing the police about Mr Imena's corruption.
20 Q. And this is --
21 A. That's not the only one.
22 Q. -- this is not stamped and doesn't have the company's seal, this letter, and I'm just asking you, are you sure you sent this letter? It seems unclear that you did?
23 A. I'm sure we sent the letter to the police about his corruption.
24 Q. And can we look at the last page of the letter? We can see that you copied the letter, if you did send it, to the President, the Prime Minister, other ministers and the US Ambassador?
25 A. Yes.
26 Q. You were seeking to do maximum damage, weren't you, to

Page 216

57 (Pages 213 to 216)
18:13 1 Mr Imena?
2 A. I don't recall that, but it's possible.
3 Q. Well, it says CC, and you were seeking to do maximum
4 damage to Mr Imena, weren't you?
5 A. No, my objective was to get fair treatment for our
6 investors and I knew Mr Imena was corrupt.
7 Q. Let's look at some of the points you make. Can you go
8 to the first page of your letter. We have this
9 complaint, and under the complaint you say:
10 "A. We have lost our mining business through what
11 appears to be a State 'taking' or nationalisation of our
12 company's assets, including mining licences ... which
13 was announced by Minister Evode on 28 October 2014."
14 So you are describing his notification that your
15 licence application has been unsuccessful as a State
16 "taking" or nationalisation of the company's assets,
17 which is a crime on his part; is that what you're
18 saying?
19 A. No, I think you're taking it out of context. I think
20 the seizure of our business, the closure of our office,
21 the shifting of an application from one that had already
22 been in process for a long time to a new one where there
23 was no communication other than a written response, of
24 which there was then no follow-up or no discussion, we
25 saw, to use the vernacular, we thought the fix was in.

Page 217

18:16 1 bailiff process, so to me that was corrupt.
2 Q. You then at E -- and I'm not going to take every point
3 in this letter, because it's a long letter. Taking up E
4 you say:
5 "We have lost millions of USD of income, beginning
6 more than 5 months ago, because Minister Evode illegally
7 shut down our business. He shut us down by refusing us
8 the ITRI 'control tags' which are required by law before
9 any minerals can be sold. This was illegal and without
10 due process: we had no hearing, received no notice of
11 closure, and were repeatedly refused an audience with
12 Minister Evode."
13 But, as we've seen, and as you don't explain here,
14 NRD had no licence, and Mr Imena was also facing
15 a competing claim; yes?
16 A. The licence issue as an excuse didn't come up until much
17 later.
18 Q. That's not right. Just stop there, Mr Marshall. That's
19 not right, because we've already been to the meeting
20 with you at which this was discussed, Mr Imena set out
21 his position in relation to the licence and that is
22 before this October letter. We've been to that meeting.
23 A. You're missing the timeline I'm referring to, I'm sorry.
24 Q. Well, you carry on.
25 A. He stopped the tagging in March. The tagging took full

Page 219

18:14 1 Q. You are saying, and you're referring to this taking or
2 nationalisation being announced by Minister Evode on
3 28 October 2014. That's his letter declining your
4 application for licences, and you are saying to the
5 police that this is a corrupt nationalisation of your
6 assets, aren't you?
7 A. I was giving the whole context for what had happened and
8 why we believed it to be corrupt, yes.
9 Q. And then underneath that, you say:
10 "There has been systematic stripping of our capital
11 investment assets by numerous criminal scams, including
12 Bailiff 'seizure' scams, which the authorities refuse or
13 are unable to stop."
14 But again, you had raised that with the Minister of
15 Justice and he had told you that on investigation that
16 these are lawful judgments that you should be getting on
17 and settling; correct?
18 A. No, no, that wasn't how we understood it. We did have
19 several meetings with the Minister of Justice. He, at
20 first, was very sympathetic. We were told that he had
21 gotten some political guidance and he changed his mind.
22 The bailiff was, you know, not behaving like a bailiff
23 should or could. We still had no information about,
24 other than the Pascal seizure, what any of the seizures
25 were, no court orders, and he followed none of the

Page 218

18:17 1 bite in the beginning of April 2014. And we didn't hear
2 from him what it was about or why, just he refused.
3 Then we had a meeting late May, you can tell me what the
4 date was, where he explained that Ben Benzinge was the
5 owner of our concessions. So there was no -- as of that
6 point, there was no discussion about "regularising", as
7 he called it, licences. Ben was the owner, we were out.
8 We were losing everything and being told in no uncertain
9 terms to go home.
10 So for us this was a very frustrating process. He
11 did refer to it as a piece of plastic and you should
12 just continue mining and storing, which was a very hard
13 concept for him to suggest we should follow.
14 Q. Contrary to what you say in this letter to the police,
15 you had had meetings with Minister Evode, hadn't you?
16 A. Not meaningful ones. We had a meeting with
17 Minister Evode in March with his lawyer, I mean May,
18 this is the exciting one where Isaac, formerly our
19 lawyer, announced that Ben was the owner and the
20 Minister agreed with him.
21 Q. Then you had a meeting in September, didn't you?
22 A. Well, we could have.
23 Q. We've been to that today.
24 A. Which was that -- oh, Zuzana had a meeting with him
25 in September, I'm sorry, I see what you're saying.
18:18  1 Q. Minister Evode did meet with you, and what you said in
2 this letter is inaccurate?
3 A. Look, this is a very small community. Ordinarily we
4 would have near daily contact with these people. We had
5 been put out into the cold. No other mining company was
6 treated this way. We simply didn't know things. We had
7 to find things from the other mining concession holders
8 what was going on. In earlier periods, we had simply
9 stopped by, they would stop by our mine, it was very
10 collegial. It's a small group trying to solve a handful
11 of problems.
12 Q. Let's look at what's then said in item 2 of your
13 complaint:
14 "The letter dated 28 October 2014 from
15 Minister Evode to NRD is drafted to read as if
16 Minister Evode is merely denying a 'mining licence
17 application'. Minister Evode has selectively used the
18 facts to pretend that the relationship between NRD and
19 the Government of Rwanda is only in respect of
20 an application for a mining licence. This is not true.
21 In fact, it appears that because Minister Evode's letter
22 cancels 'all' relationships, he is 'taking' or
23 nationalising the NRD business. Minister Evode's letter
24 does not follow the usual and customary Rwandan
25 administrative practices."

18:19  1 A. No, of course not.
2 Q. It's a long letter, I can't pick up all of it. Can we
3 go to the fourth page of the letter, and I'm going to go
4 to item G.
5 MR BRODSKY: I'm sorry, in this same document?
6 MR HILL: Yes. It's the same -- sorry, I apologise, we're
7 back in C-165.
8 MR BRODSKY: Thank you.
9 MR HILL: Fourth page, item (g) at the bottom. You say:
10 "There are many instances where Minister Evode
11 indirectly threatened NRD and its management and owners.
12 Among these, on (or about) August 14th, 2014, he told
13 NRD business partner, David Bensusan ... that he 'will
14 nationalise NRD as a help to MSA' ..."
15 And then you go on:
16 "According to Bensusan, Minister Evode separately
17 told him that he will 'stop NRD from having income,
18 bankrupt them and take the mining licences'..."
19 And Mr Bensusan was shocked.
20 Q. And this is a complete distortion, isn't it, that you're
21 putting forward to the police of what has happened in
22 Minister Evode's letter?
23 A. No, it's not. It's the truth.
24 Q. It's a long letter, I can't pick up all of it. Can we
25 Q. We have Mr Bensusan's evidence on it and he gives
26 evidence, can we go to paragraph 8 of Mr Bensusan's
27 witness statement. He says:
28 "I have been shown a copy of Mr Marshall's letter to
29 the CID dated 30 October 2014 ..."
30 And then he quotes the bit I have just read out, and

18:21  1 acquiring arms. We helped them on acquiring arms. We
2 don't know what they ultimately purchased, but we set up
3 relationships they didn't otherwise have.
4 Q. Can you look at the second page. So this is from the
5 Ministry of Natural Resources. He says:
6 "This letter serves also to inform you that the
7 Ministry has terminated all prior working relationships with
8 your company. Consequently, if no any other contrary
9 decision is taken within the notification period
10 mentioned ... you are requested to proceed with the
11 closure process of mining operations ..."
12 It's quite clear, isn't it, that what he is
13 regarding as at an end is your relationships with regard
14 to the concession and the mining. Nothing to do with the
15 military or anything else, is it?
16 A. That's not the way we read it.
17 Q. That's what the letter says.
18 A. And that's why we asked our colleagues in the military
19 how we should handle it, and they advised us to raise it
20 as part of this letter that we prepared at that time.
21 Q. And this is a complete distortion, isn't it, that you're
22 putting forward to the police of what has happened in
23 Minister Evode's letter?
24 A. No, it's not. It's the truth.
25 Q. It's a long letter, I can't pick up all of it. Can we

then he says at paragraph 9: "These statements are false. Minister Imena did not ever make [those] comments to me, and I certainly never told Mr Marshall that he did."

Then if we go on to paragraph 10: "Further, the suggestion that Minister Imena would have made such statements to me is completely implausible. I met Minister Imena on numerous occasions through my position at MSA and always found him to be highly professional. It is simply not credible that he would have made such statements to me about any mining company, including NRD."

And the truth is, you have invented this allegation for the purposes of this letter, haven't you? A. Absolutely not, and what you're saying is slandering. David is not mistaken, he is lying here. David had the biggest concession comptoir in Rwanda, he was partners with General James Kabarebe who was the then Minister of Defence. I met with them on some occasions. Every weekend they were meeting to talk about bringing minerals in from Congo. They wanted our mining concessions. He made repeated proposals to me at various times, none of them were so that we could get out. I was terribly worried if we merged with this company he would squeeze us out and we might not be able to pay any of the investors back.

His effort, to use Evode, I would be guessing at, but I know that he would tell me things when we were good friends. We found him to be duplicitous, after several years, it took a long time before we understood it. We found that his business with General Kabarebe and moving minerals and pretending that they were of Rwandan origin was something we could never be part of anyway, but for us --

Q. Just pausing there, this is yet another person in a very long list, Mr Marshall, who says something you disagree with and you immediately launch into accusations of criminality; yes?

A. No. We and several other investors in the Rwanda mining community went to his parent company, Cronimet, a German company owned by the Pilarski family. We all shared information on the duplicitousness and he would do things like he would change the internal computer in the Niton so that he would get a different reading and therefore didn't have to pay the miners the full amount due to them.

Q. Mr Marshall, you are simply digressing into a series of allegations you have never made before which are not true and are simply illustrating your propensity to slur anyone who you disagree with.
Page 229

18:29 1 Ben was the owner of the company. He was facing a claim
2 and he regarded there as being management issues that
3 needed to be resolved before he would issue tags.
4 A. No.
5 Q. And you had no basis whatsoever, did you, for your
6 allegation of criminal conspiracy?
7 A. No, you're being mean-spirited. Other concession
8 holders had internal disputes too; ours was the only one
9 where the Minister took a side in it and dispossessed us
10 from both our offices and our concessions. Those
11 decisions cannot be made without his authority.
12 Q. Now let's look at (c) in this, down at the bottom of the
13 page:
14 "Minister Evode has refused to give 'control tags'
15 to NRD because, according to him, the ownership of NRD
16 is in what he says is a 'dispute'. He has not provided
17 any evidence of that so-called 'dispute' other than by
18 repeating Benzinge's unsubstantiated allegations."
19 Now, what you describe as the unsubstantiated
20 allegations are, in fact, an award from an arbitrator
21 backed by judgment from the Supreme Court; correct?
22 A. That's not what the award says, which is where you're
23 misreading this.
24 Q. And this is a distortion of the position which you are
25 giving to the police, isn't it?

Page 230

18:30 1 A. No, the reason they gave it back to us in August 22 was
2 because they said: yes, you are the owner.
3 Q. Now, let's go to item 4.
4 A. It was only Minister Evode who was claiming, along with
5 Bailiff Bosco, that Ben was the owner.
6 Q. Let's go to item 4:
7 "In addition to the evident malfeasance by
8 Minister Evode, other State officials have apparently
9 'targeted' us and are victimising NRD. It would appear
10 that Minister Evode's harassment of NRD and its
11 management and investors has 'emboldened' others to
12 attack NRD and its assets.
13 "Most prominent amongst these is State Court Bailiff
14 Jean Bosco Nsengiyuma, who has committed several crimes
15 against NRD but who is apparently 'protected' by the
16 police and other State authorities."
17 You then go on and say that:
18 "Last Friday we were informed by Metropolitan Police
19 authorities that the Court Bailiff, Jean Bosco, has
20 announced to them that he will begin auctioning more NRD
21 assets to collect (approximately) $82,000 in alleged
22 court judgments. And yet these are the same Court
23 Judgments which he has already executed upon and fully
24 satisfied."
25 Now, this was a point -- it was not true, was it, to

Page 231

18:32 1 say that Mr Bosco was enforcing on judgments which were
2 fully satisfied?
3 A. Yes, it is.
4 Q. This was a point which was taken up in a meeting, wasn't
5 it, by the police and Mr Bosco and Ms Mruskovicova, and
6 she declined to provide any substantiation for this
7 assertion?
8 A. I'm sorry, you've got it backwards. It's the bailiff
9 that has to be able to substantiate what the claim is.
10 Q. No, he --
11 A. We never got a document from the bailiff showing what
12 the orders were or on what basis he could make the
13 claim, never.
14 Q. Mr Marshall, you have it the wrong way around. The
15 bailiff had valid claims. You complained to the
16 Minister of Justice who told you to pay up on the valid
17 claims. Your next line of defence which was raised at a
18 meeting with the police attending was that somehow these
19 claims had already been paid off and you were asked to
20 provide substantiation for that and you did not do so,
21 and that's the correct position, isn't it?
22 A. You can ask Zuzana, I think some of the names were
23 recognised. We never got orders from the court to say
24 what those claims were, never. I'm repeating myself 100
25 times and I apologise for it, but you're missing the

Anne-Marie Stallard
for Trevor McGowan
61 (Pages 229 to 232)

As amended
by the Parties
18:34 1 to you at that point; yes?
  2 A.  That was --
  3 Q.  You're complaining vociferously about what you describe
  4 as your mistreatment, so the claims that you now pursue
  5 in this arbitration were all apparent to you at this
  6 point, weren't they?
  7 A.  Were all apparent?
  8 Q.  Were apparent to you at this point: you were aware of
  9 the points that you now advance as claims in this
 10 arbitration.  We can see it from a letter, because you
 11 are --
 12 A.  I'm sorry, please ask the question a different way.
 13 Q.  You were aware --
 14 A.  Yes.
 15 Q.  -- you were aware of the matters that you now complain
 16 about in this arbitration, because you are complaining
 17 about them in this letter.  So you were already fully
 18 aware of this proposition that you had been expropriated
 19 by virtue of being declined licences, you were aware of
 20 the suggestion you've been expropriated by or harshly
 21 treated by reference to Mr Benzinge's actions and
 22 Mr Bosco's actions, it's all there in this letter, isn't
 23 it?
 24 A.  No, I disagree.  You know, we wanted to be able to do
 25 the right thing.  We had a great relationship with the

18:37 1 to everybody.  We had assumed that it was not applicable
  2 to us because our offices were closed and that -- as
  3 were our concessions.  So we were already out of
  4 business.  We assumed that this letter was a mass
  5 mailing and not specifically addressed to us, but we did
  6 take the step of setting up a meeting with Minister
  7 Biruta who had just taken on his functions roughly
  8 a week before, and this was the first day we could speak
  9 to him.  Evode was not willing to speak to us at this
 10 time.  We got that meeting two days -- because of his
 11 availability, two days before it was due, but you're
 12 right, the mass mailing came out 30 days before the
 13 18th.
 14 Q.  Go to the next page.  You talk about another company
 15 being given two years, but by this point you hadn't had
 16 a licence, had you, since October 2012, so you have been
 17 out of licence for more than two years; correct?
 18 A.  They were in exactly the same position: they had been
 19 out of a licence for two years as well.  This is Rutongo
 20 I'm referring to.
 21 Q.  You had been out of licence for two years since your
 22 licence had expired in October 2012; yes?
 23 A.  And they had been the same.
 24 Q.  And you had not made any application at all in that
 25 licence period until this licence application; correct?

18:38 1 A.  This is a new argument that started much later.  When we
  2 submitted the application, it was by far the best, we
  3 saw the other applications, we knew --
  4 Q.  That's just not right, is it?  We'll come onto Rutongo
  5 a little later, but the reality is that Rutongo were in
  6 a completely different position and that they had a well
  7 advanced licence application which had already been
  8 favourably received by the government, entirely
  9 different from you who had no licence application on
 10 foot until you launched this one in the autumn of 2014.
 11 A.  You are being casual about your terms.  Their licences,
 12 by your standard, expired the same time ours did.
 13 I don't agree that they expired at all, but the
 14 four-year period ended about the same time that ours
 15 did.  They had two side-by-side applications, Rutongo
 16 and Tinco -- ETI, sorry.
 17 Q.  Don't worry, we're going to come to it because we have
 18 evidence from Mr Imena explaining what happened at
 19 Rutongo so I can show you exactly what happened.
 20 MR COWLEY:  Mr President, I would ask, the question was put
 21 to him challenging him to disagree with Rutongo was in
 22 a much better situation.
 23 A.  Yes, well, you are sort of right.  The letter came but
 24 it was a form letter that we understood was being sent
 25 Page 234

Page 235

Page 236

Page 233

Page 234

Page 236

62 (Pages 233 to 236)

Anne-Marie Stallard
for Trevor McGowan

As amended
by the Parties
the question he asked, or to let him answer the question he asked, but not to just say he's done answering it and move on.

MR HILL: I don't mind if Mr Marshall wants to continue the answer now, but we are coming back to this topic later, so I hope he doesn't repeat it later.

A. You made the point that somehow you think Rutongo or ETI, which is Nyakabingo, were somehow in a different position. They were in exactly the same position we were. Both of them were under long-term negotiation at this point. They'd been talking about them for two years.

But the terms of those licences were essentially identical to ours, they were four-year agreements, they had that four-year period, and I'm not agreeing it's at termination, but that four-year period had ended two years before.

They were being treated as a negotiation partner, the negotiations were ongoing, and we had no chance to negotiate our agreement, much less the two agreements that they were negotiating side-by-side.

Q. Rutongo had 20 times your production levels, didn't they?

A. I don't know that.

Q. Well, there is a document from you that confirms exactly that. Do you want me to show it to you?

A. Yes, please.

Q. Go to R-107.

A. What am I looking for?

Q. Just give me one moment. (Pause).

I'll come back to that question. I said I would deal with Rutongo later, and I will.

No, let's go back to the letter we were on. So we're in C-086, second page. And under "Prior negotiations" you say:

"Note that NRD submitted the application for a long term mining licence in 2010 and had to wait for 4 years for this so-called 'opportunity' to 're-apply.'"

Now, that is simply not correct, is it, because you had been invited specifically to re-apply and you could have re-applied at any point prior to now?

A. No. Those forms were not created until that time when they requested the information. There was no process before this, I think you're mistaken. You need to go back and talk to your client. I'm certain about that.

Q. Well, Mr Marshall, the difficulty with that is you did make an application, a very defective one, in January 2013, didn't you?

A. Whatever application process we adhered to was at their instruction.

Q. You knew you could re-apply?

A. You started this question by saying we did not do something which we ought to have done, and my point to you is we were following all instructions at all times.

Q. You knew you could re-apply because you had an attempt at re-applying in January 2013, which was the nine-pager that we looked at; correct?

A. No, we follow the instructions of the Ministry. If the Ministry calls up and says: we need an application, which says X, Y, Z, that's what we put together. It's not a question of our taking the initiative or not.

That's not the way the system works. They come to us and say this is what you need to do now.

Q. And you had been specifically asked to re-apply by Mr Imena at the end of -- in late 2013, and you hadn't done so; correct?

A. I don't know what you're talking about.

Q. We looked at the meeting minute of the meeting in which he asked you to re-apply.

A. I think I specifically told you that that meeting did not cover that topic. 100%, I'm quite certain he did not ask us to re-apply at that meeting.

Q. It is entirely wrong to say you have had to wait four years --

A. You're creating an assumption based on something that I disagreed with before.

Q. It's entirely wrong, isn't it, to say you had to wait four years for an opportunity to re-apply for licences?

A. We had applied in 2010. We were waiting for the negotiation which was ongoing for Rutongo. Why was Rutongo given the opportunity to negotiate the long-term agreement and instead we have to so-called re-apply.

Why didn't Rutongo have to re-apply, or Nyakabingo, or any of the others?

Q. Let's go to the next page.

A. We were treated like we had just arrived and they didn't know anything about it and it was very unfair.

Q. Let's go to the next page, first bullet.

A. (overspeaking) it was an excuse to be able to set us up for taking our assets. That's the bottom line here.

It's not like neutral: okay, you can't invest here, fine, you can go home. No, we've already invested and they're trying to take it, and it was very upsetting.

Q. That's the point we are about to come to. Top of this page, this bullet:

"Our investors invested over US$20 million of new invested money (not reinvested from operational cash flows)."

Now, that is a representation that there has been $20 million of new invested money, and that is simply
Q. That $20 million figure is the figure in dollar conversion that we've already looked at?
A. No, it is not a figure we've already looked at --
Q. It's the lion's share of --
A. -- we have not already agreed. We contributed from NRD, I mean they (inaudible) to NRD. We already had the investment which was made by HC Starck, and we intend to be able to show you that that is the money. But you --
Q. Now, the lion's share -- just listen to my question.
A. -- (overspeaking) process and bifurcated from this.
Q. If you listen to my question. The lion's share of that money, as we saw earlier in this cross-examination, came in from HC Starck, and even that money, there's no basis for saying it's new invested money as opposed to re-investment from operational cash flows; correct? We talked about that earlier?
A. No, without going through that research I can't tell you that.
Q. And then the other --
A. If I may draw an example for you. I don't know of one other company other than Rutongo who invested $1, any money. Maybe Musha Piran maybe has invested $1 million or $2 million, I don't know it, but I don't know any other mining company who has invested at all at this point. All those that have invested for their own reasons have left.
Q. So FTI, we're C-086, and now going to the next paragraph. So I was just looking at -- yes, sorry, we're on the next -- oh no, sorry, that's right.
A. Well, I appreciate that you are raising issues for the Government of Rwanda. The Government of Rwanda came, they saw our books, they saw our investments, and they never objected, and I wish you would give us the chance to be able to go through those amounts and be able to demonstrate what that number was, but I understand it's a bifurcated process so we can do it then, or whatever you suggest, but for me, this is a question of being able to show that information, not reach it on a conclusory basis.
Q. You have made in your correspondence along the way a number of allegations about the $20 million investment. Not until this point did you ever suggest that this was $20 million of new invested money not reinvested from operational cash flows; correct?
A. No. I can't tell you the answer to that information without going through that exercise.
Q. That is an invention, isn't it, on your part?
18:51 1 A. I'm making an argument, you know, for me. For them to
2 say that you now have to go home and you have to leave
3 your assets behind, that has a practical monetary result
4 for us. So, you know, if that's what they were going to
5 do, and that's what I was afraid they were going to do,
6 I wanted to alert them that there would be other people
7 looking at this, and hopefully somebody would review it
8 and at least encourage them to behave properly.
9 Q. That was on 1st November. You wrote another letter on
10 5th November, which we have at C-171, to
11 Minister Biruta. Let's look at that. And you say in
12 the first paragraph you've been.
13 Q. "... victimised..."
14 A. Yes.
15 Q. "... by the acts of Minister of State Evode Imena and we
16 ask that you intervene..."
17 A. Yes.
18 Q. Then two paragraphs down you say:
19 "... Minister of State for Mining Evode has
20 maliciously targeted NRD..."
21 A. Yes.
22 Q. Then in the next line you refer to "abuse of powers"?
23 A. Yes.
24 Q. Then you have in this letter a list of accusations
25 against Mr Imena.

Page 245

18:54 1 Q. Let's look at item 8.
2 A. Sorry, it also begs the question of why he stopped us
3 from tagging if there was an investment dispute. The
4 tagging goes to the business, not to the individuals.
5 Q. Item 8.
6 A. Why would he stop the company being tagged if it was
7 a person-to-person or a group-to-group dispute? It made
8 no sense to us. That's --
9 Q. It does make sense because you have different people
10 claiming to be in control of the company. Now let's go
11 to item 8. Minister Evode --
12 A. You're misunderstanding the ITRI rules. The ITRI rules
13 are that the tags are issued to companies, companies
14 function -- if there is an internal dispute within the
15 company, that's not an ITRI issue.
16 Q. Let's go to item 8.
17 A. No ITRI participant was ever cancelled for that reason
18 other than us.
19 Q. Let's go to item 8:
20 "Minister Evode demanded a 're-application' from us
21 for all of the NRD mining areas and maliciously violated
22 normal Rwanda administrative procedures:
23 "(a) Minister Evode refuses to acknowledge ... that
24 agreements exist between the Government of Rwanda and
25 NRD dating back to 2006 ..."

Page 247

18:56 1 Do you see that?
2 A. Yes.
3 Q. Now, that agreement was no longer extant and you had not
4 met your obligations under it; correct?
5 A. It was fully executory; correct?
6 Q. No, that agreement was defunct because you had failed to
7 meet your obligations under it?
8 A. We had fully performed and we were waiting for the
9 negotiation for the language of the commercially
10 reasonable long-term licence.
11 Q. Item (b) in your complaint to Minister Biruta:
12 "(b) Minister Evode insisted that we 're-apply' for
13 the mining licences on 2-days notice ..."
14 Q. That's simply incorrect, isn't it? He gave you 30
15 days' notice to apply?
16 A. We assumed that it did not apply to us for all the
17 reasons I've already given you. We had two days in
18 which to reply when we were told that yes, you have to
19 reply despite the fact you don't have access to your
20 files --
21 Q. This is what you were putting forward to another
22 minister, incorrectly, as evidence of corruption on the
23 part of Minister Evode; correct?
24 A. No, I think it's absolutely correct: Minister Evode
25 would not meet with us, period.
18:57 1. Q. Could you look at now C-098 --
2. A. Until two days before.
3. Q. Let's look at C-098. This is the response from
4. Minister Biruta:
5. "Reference is made to your letter of 5 November 2014
6. requesting for urgent help in connection with your
7. company being victimised and seeking for my
8. intervention."
9. "Recalling different open dialogues the Ministry had
10. with you where you raised issues concerning your company
11. of re-application process for the expired mining
12. licence; the Ministry advised that you don't personalise
13. issues but rather comply with the mining law
14. requirements."
15. "Therefore, the Ministry takes this opportunity to
16. clarify that (1) Minister of State Evode Imena made
17. decisions on behalf of the Ministry and in his capacity
18. as State representative in charge of mining industry
19. developments in Rwanda; (2) the services you requested
20. cannot be accessed without a valid mining licence; (3)
21. you have gone beyond your boundaries to raise serious
22. baseless allegations against the Minister of State and
23. this is unacceptable.
24. "In this case, you are hereby requested to respect
25. the Government of Rwanda institutions and comply with

Page 249

18:59 1. A. They didn't -- you were too quick for me. Can you
2. scroll up?
3. Q. I just read the second paragraph.
4. A. I understand. November 12th, 2014. And who is it from?
5. Q. This is from the Ministry of Natural Resources to you.
6. A. I understand, but who, particularly? Is this from
7. Minister Imena?
8. Q. This is from Imena, yes. So the first point he is
9. making is that, contrary to the suggestion in your
10. letter --
11. A. We disagreed, it's clear.
12. Q. Now, the next point, if you go over the page, and in
13. fact if FTI could get up that second page, and also the
14. third page of the document, the next page of the
15. document, you can see that the Ministry gave you a list
16. of the missing documents and gave you an express
17. opportunity to improve your application; yes?
18. A. Yes.
19. Q. So, again --
20. A. But we didn't see it as a question of improving
21. an application when we were being treated differently
22. from everybody else --
23. Q. Again, fair --
24. A. -- we could not (overspeaking) the process continue.
25. Q. Fair and transparent and more than they were required to

Page 250

19:01 1. do given you had made a defective application.
2. A. Not fair, not transparent, we were being treated
3. distinctly differently from all other concession
4. holders.
5. Q. Now let's go --
6. A. We were the only ones being asked to provide this
7. additional detail as if they had never met us before.
8. Q. Let's look at the letter you wrote two days later in
9. response to this. This is R-214. This is a letter
10. you're now writing to the President of Rwanda.
11. A. Yes, I don't think this letter was sent. This letter
12. was contemporaneous, but I don't think this letter was
13. sent.
14. Q. Well, it may not be, it's not signed. You're suggesting
15. this one was not sent? (overspeaking) wasn't signed?
16. A. (overspeaking) I would have written -- it was
17. contemporaneous, I'm sure, I do remember writing it, but
18. we were very reluctant on what to write to the Minister
19. so I don't know that I sent this letter. We don't have
20. any document -- particularly with the President's office
21. we would certainly have gotten a stamp and that makes me
22. think I was just blowing off steam on this letter.
23. Q. In that case I won't take time on it. Let's go to
24. C-088. This is your letter providing further
25. information to Mr Imena.

Page 251

Anne-Marie Stallard for Trevor McGowan

As amended by the Parties

66 (Pages 249 to 252)
19:02 A. Yes.

Q. And we've been told at paragraph 88 what the totality of the package of information you provided to Mr Imena was. So we've already looked at C-085, which was the 2014 feasibility study update. We've looked at C-092, which was your Jillson and Marshall transaction document, and in addition to that, there was a company corporate information and documents which were important information and documents which were either lacking or for which you did not submit complete explanations you gave and considering the requirements of the Law ... we would like to inform you that there are important information and documents which were either lacking or for which you did not submit complete information and yet they are the minimum requirement for any further step.

And then he says:

"[Based] on the documents you submitted and on explanations you gave and considering the requirements of the Law ... we would like to inform you that there are important information and documents which were either lacking or for which you did not submit complete information and yet they are the minimum requirement for any further step."

Page 253

19:03 "The missing documents are into two categories: (1) proofs of your company's capacity to develop the concessions; and (2) Detailed plans for the period of the licence being applied for."

And then he goes on and asks you to provide "in the nature and form mentioned, the following", and he gives you a list of what is missing. If we can scroll down:

"Clear evidence of NRD Rwanda ... financial viability from supporting bank(s) or any other reputable financial institution(s);

"Financial statements of NRD Rwanda Ltd's and financial statements of NRD's parent company(ies), or financial statement of the company(ies) owning NRD's parent company;

"Any tangible documented proof showing the current financial viability of either NRD’s parent company of the parent of its parent company;

"A tax clearance certificate issued by Rwanda Revenue Authority.

"You are also requested to provide, separately for each concession, the following: Detailed proposals with clear timeframe for work plans and business plans for the period of the licence being applied for. The planned activities and investments needed shall be detailed enough."

Page 254

19:05 Can we scroll down, please, FTI:

"It is [also] important to note that only will be considered valid the proofs of financial statements and viability for NRD Rwanda, its parent company(ies) and the parent of its parent company(ies) if they are companies duly recognised in the certificate of company registration issued by [RWB].

"All the documents mentioned above should not submitted not later than January 16 ...

"Please be also informed that it is of concern and it doesn't help at all to say that 'Rutshiro plant is operational and that it is the most successful design of its kind in Rwanda and that it is designed to serve all NRD’s Western concessions' when it is known and obvious that the plant barely worked in the several years it has been in place."

So all of this is a fair and transparent approach, isn't it?

A. No, I would say it is slanderous, manipulative, if they had given us our office back -- we knew we couldn't respond to many of these questions, and we didn't even understand the point of it.

Q. He has identified --

A. Why were we singled out for this kind of treatment and why did they double down -- why not just give us our office back and then see what we could produce.

Q. He has identified genuine gaps in the material you have provided and given you an opportunity to remedy it, hasn't he?

A. No. You take away our office, you say: look, if you happen to have it at your home we can use the material that you have at your home, then you can apply, otherwise, I'm sorry, too bad, you don't deserve to have your office back and be able to supply a meaningful application, much less the fact that nobody else among the concession holders had to provide these kinds of materials, nobody, not one.

Q. You didn't need your office to be able to give financial information of the backers and the parent of NRD, did you?

A. Yes, we do.

Q. No, you don't, Mr Marshall, because it's you and your --

A. How can you possibly presume to know what's in our office or not?

Q. Because it's you and your investors that you are being asked to provide financial information in respect of, that's the request, and you didn't need your office to do that?

A. I'm sorry, but we understood the fix to be in and we understood that it was sort of pro forma: yes, we will

Page 255
Anne-Marie Stallard As amended for Trevor McGowan

Day 3 -- Hearing on Jurisdiction and the Merits  
ICSID Case No. ARB/18/21  
Wednesday, 23 June 2021

Bay View Group LLC and The Spalena Company LLC -v- Republic of Rwanda

Day 3 -- Hearing on Jurisdiction and the Merits
ICSID Case No. ARB/18/21
Wednesday, 23 June 2021

19:07
1. Provide the documentation that we have access to, tax office, as you say, the environmental office are not
2. going to provide us with anything. We knew that you
3. were setting us up for failure. We knew.
4. Q. This is an opportunity Mr Imena didn't even need to give
5. and he is giving you a third chance and identifying the
6. missing material, isn't he?
7. A. You tell me. I don't know what Mr Imena by rule or
8. practice or law had to do or not do, all I know is we
9. were unfairly prevented from getting access to any of
10. our documentation for reasons I still don't know to this
day, and then yet unceremoniously, you know, four months
11. after you say we lose everything, you give us our office
12. back. What was the point of that?
13. Q. Let's see your response at C-096 on 16th January 2015.
14. A. I can well imagine they become increasingly intemperate.
15. Q. So you say at item 1, the company's financial viability:
16. "As per our previous correspondence, we mentioned to
17. you that in the recent past, although without a mining
18. licence, we were able to raise 2 million USD with
19. participation from the Dutch Government ... we also have
20. firm funding commitments from other internationally
21. recognised entities, and all this is as a result of our
22. impeccable investment reputation and track record."
23. Now, if you had had -- genuinely had firm funding

Page 258

19:09
1. A. What makes you think that that would have made the
2. slightest bit of difference at this point? We're being
3. set up. We understand that. We just don't know what
4. the next step is going to be.
5. Q. You then said in the next paragraph:
6. "In addition, we submitted to you our list of
7. successful investment transactions of over 40 billion
8. USD. These investors would gladly bear testimony of our
9. trustworthiness."
10. Now, that is a reference to the list of transactions
11. to which your legal firm gave transactional legal
12. advice; yes?
13. A. Yes.
14. Q. So that you were, as I put to you earlier, relying on
15. that as evidence of the company's financial viability?
16. A. This goes to trustworthiness, not to whether they were
17. going to provide cash for it. I don't know on what
18. basis or what the thinking was at the time. Is it
19. responsive, or it goes to our trustworthiness, certainly
20. more trustworthy than many of the people who are in the
21. mining industry in Rwanda, and we thought that that
22. would be helpful for the minister to understand who
23. he was dealing with. Maybe I was mistaken and, if so,
24. you know, so be it.
25. Q. Then if you go down --

Page 259

19:11
1. A. We weren't trying to mislead anybody. This is a very
2. difficult business.
3. Q. We then go down, you have "current financial viability".
4. So you say you were barred from the offices, but in fact
5. you were able to retrieve copies of NRD's financial
6. statements, so there is, in fact, no difficulty in
7. relation to NRD's financial statements, and then there's
8. a reference to --
9. A. We had some -- as I think I mentioned to you, we have
10. the office computers and we have our home computers, and
11. if by chance we happened to have documents on our home
12. computers, yes, we had access. That was -- that's the
13. material we submitted.
14. Q. But what this is all showing is that the important
15. deficiencies in your application, which had been
16. identified to you, none of the problems arose from
17. having -- from the documents being in the Kigali office.
18. A. I couldn't --
19. Q. We've dealt with company -- parent company.
20. A. I couldn't --
21. Q. We're now looking at current financial viability.
22. A. Couldn't disagree more. From our point of view the
23. financial viability question had already -- nobody has
24. invested. Nobody. From our point of view we were the
25. sole standing investors who remained in the country, and

Page 260

Anne-Marie Stallard  
for Trevor McGowan  

68 (Pages 257 to 260)  
As amended by the Parties
19:12 1 that was proof. You didn't need additional proof.
2 Did they come back to us and say: well, what we want
3 to know is, okay, you've invested whatever disputed
4 amount you want to say, you've invested this much but
5 now we need to know that you're going to be able to
6 invest X more. Those conversations never happened.
7 We couldn't find anybody to talk to at this point.
8 Q. And the other point --
9 A. I believe a political decision had been made.
10 Q. The other point that you make, in the next paragraph, is
11 about Spalena. You say:
12 "NRD's investors created The Spalena Company LLC.
13 An LLC is a legal entity widely used in the United
14 States where each investor is responsible for their own
15 taxes worldwide."
16 And beyond saying that, you're not providing any
17 further information, are you?
18 A. Because we didn't need to. We fully satisfied it by the
19 $20 million we had already put in.
20 Q. Let's look at the third item, which deals with tax
21 clearance.
22 "As to the tax clearance from Rwanda Revenue
23 Authority:
24 "Much as with other State institutions, Rwanda
25 Revenue Authority no longer considers us to be in

Page 261

19:15 1 been resolved. The only outstanding issue, as
2 I understood it, was the company had incurred expenses
3 for casuals, and by that I mean somebody would do a job
4 at a mine site and they would give them 5,000 francs, or
5 something. So it was very much what they called casual
6 labour, and Starck had not been properly documenting it,
7 and I don't know if the problem was in the field or it
8 was at the headquarters, but the complaint from the tax
9 office was that we had not set aside social security
10 contributions in respect of that one-time payment.
11 And it was a large amount of one-time payments, but
12 it was all accumulative of what they just called
13 payments for casuals.
14 Q. As a result of that you would not have been able to get
15 a tax clearance at that point in time; would you?
16 A. Zuzana's answer is the correct one. We went there and
17 they were told we're not a company and they don't
18 recognise us, so we were not able to get one.
19 Q. I don't accept that but, leaving that aside, you would
20 not have been able to get a clean bill of health, would
21 you, because they regarded you as owing tax; correct?
22 A. No. No. It was under -- the agreement we had reached
23 with them -- and this was 2011 -- that they would come
24 in and perform a true audit. They had done some kind of
25 superficial audit with Anthony Ehlers and not properly

Page 262

19:16 1 looked at the books. They agreed. And we were waiting
2 for them.
3 Q. Well --
4 A. So this is four years later and we're still waiting for
5 them to --
6 Q. Even on your version of events they regarded you as
7 owing tax, but they might have been prepared to
8 recalculate the amount; yes?
9 A. I don't know whether we're owed anything. It could have
10 been zero. In fact our point was that they owed us
11 because they held a $100,000 deposit from us.
12 Q. Let's go to R-023.
13 A. Zuzana had the direct -- participated in the
14 conversation with the tax office, so please ask her that
15 question.
16 Q. R-023, this is the MINIRENA team assessment of your
17 further round of information, and if we could just look
18 at item 1 on "Assessment and Comments":
19 "Item 1: Clear evidence of NRD[s]' financial
20 viability ..."
21 "The company has provided no evidence at all as
22 regards its financial viability supported by any bank(s)
23 or financial institution(s) for its present and future
24 mining operations. Indeed, among documents submitted
25 none had any information with supporting elements as

Page 263

Page 264

Anne-Marie Stallard
for Trevor McGowan

As amended
by the Parties
25. A. And this is a question for a first-time applicant that they don't know.

24. Q. So you chose to ignore it because you regarded it as not being --

23. A. We believed it was fully satisfied. Somebody's invested $20 million bucks. You don't say: oh, you have nothing, goodbye.

22. Q. Let's look at item 5:

21. "Detailed work and business plans for each mining perimeters and clear timeframe.

20. "There were no separate applications for each 'concession' as per the requirement in the Minister's letter which would indicate the merits to consider when assessing the application for each 'concession'. The technical report submitted was of a very general nature and did not present details on the work done in every 'concession'. It is, however, necessary to note here that there was some useful information presented in the session called 'Nemba Project' which provided a general assessment of the resource (cassiterite and coltan) in Nemba 'Concession' and the possibility of putting up a processing plant. However, the information is insufficient as regards proper mine development for the Nemba mining perimeter.

19. "The company did not submit a detailed work and business plan for each of the mining 'concessions' as requested in the Minister's letter and there is no current financial viability of either the company's parent company or the parent of the parent company. "No documents have been submitted in this respect."

18. And it's fair to say, isn't it, that despite being given opportunity after opportunity, you had not met the requirements given to you by the ministry? A. Please, I'm sorry. Tell me again?

17. A. No. We had already satisfied the requirement by investing $20 million, and this was an exercise to be able to try to say: oh, it's not enough, or whatever the standard would be.

16. Q. And then at item 2 they deal with:

15. "NRD[s]' ... financial statements, financial statements of NRD's parent company, or financial statement of the company (ies) owning NRD's parent company."

14. And they identify that partial financial statements had been provided for the company, but then they identify no material for anything above the company, and that's accurate as well, isn't it?

13. A. I'm sorry. Tell me again?

12. Q. It's -- I'm going to move on because I've actually shown you the documents and I've put it to you by reference to your application. Let's go to item 3.

11. A. I didn't understand the question.

10. Q. Don't worry. I'm going to move on.

9. "Item 3: Tangible documented proof showing the current financial viability of the company's

8. parent company [or] the parent of the parent company. "No documents have been submitted in this respect."

7. And it's fair to say, isn't it, that despite being given opportunity after opportunity, you had not met the requirements given to you by the ministry? A. Please, I'm sorry, again I'm going to repeat myself: this is a question for a new investor who has just appeared, they don't know anything about him, please give us some proof of something so that we know or have some idea. Not somebody who has been in the country for eight years, invested $20 million, or whatever you claim the disputed amount is. This is for a new person that they don't know anything about. So for them to say: oh, well your $20 million doesn't count so we need to see something else. We interpreted this to mean: no, we've proven our financial viability. If they're asking for additional financial viability, that would make us different from these guys, but that's not what's happening here.

6. Q. Can you go to section 2.5 in his report.

5. A. I didn't understand the question.

4. Q. Don't worry. I'm going to move on.

3. A. We believed it was fully satisfied. Somebody's invested $20 million bucks. You don't say: oh, you have nothing, goodbye.

2. Q. So you chose to ignore it because you regarded it as not being --

1. A. We believed it was fully satisfied. Somebody's invested $20 million bucks. You don't say: oh, you have nothing, goodbye.
<table>
<thead>
<tr>
<th>Page 269</th>
<th>Page 270</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Not: how do we help this company to follow the usual</td>
<td>1. Technically NRD Ltd did not apply for any 'concession'.</td>
</tr>
<tr>
<td>2. administrative process of let's sit down and figure out</td>
<td>2. It was clearly stated in the Minister's letter that each</td>
</tr>
<tr>
<td>3. what we need and what they need and come up with</td>
<td>3. 'concession' should be applied for as an entity.</td>
</tr>
<tr>
<td>4. a solution.</td>
<td>4. Secondly the documents submitted were insufficient and</td>
</tr>
<tr>
<td>5. Q. That's not fair at all is it, Mr Marshall? We just</td>
<td>5. not specific to any 'concession'.</td>
</tr>
<tr>
<td>6. looked at the evaluating team's assessment of your work</td>
<td>6. “The company has not shown any financial or</td>
</tr>
<tr>
<td>7. and business plan and they made a fair point that in</td>
<td>7. technical viability and is therefore not qualified to</td>
</tr>
<tr>
<td>8. relation to the Nemba concession there was some useful</td>
<td>8. such a large and potential area. If it had been</td>
</tr>
<tr>
<td>9. material. So where there is useful material, they do</td>
<td>9. cooperative, negotiations for one concession, say Nemba,</td>
</tr>
<tr>
<td>10. say so.</td>
<td>10. would be viable and reasonable.</td>
</tr>
<tr>
<td>11. A. No, I disagree with you, because they're giving credence</td>
<td>11. “The company has publicly and on several occasions</td>
</tr>
<tr>
<td>12. to one small application in one small respect. They</td>
<td>12. stated that it has so far invested 20M US$ in the</td>
</tr>
<tr>
<td>13. knew about our company. Some of them had spent many</td>
<td>13. concessions. A look at the list of expenditures</td>
</tr>
<tr>
<td>14. hours with us, and that's the usual, as I say, collegial</td>
<td>14. includes huge payables without documentation, like</td>
</tr>
<tr>
<td>15. process that everybody goes through until now. It's not</td>
<td>15. a reported foreign consultation fees of about five</td>
</tr>
<tr>
<td>16. only a new process which gets applied to us as a holder</td>
<td>16. billion [Rwandan francs]. There might be need to</td>
</tr>
<tr>
<td>17. and not to anybody else. But it's a whole different</td>
<td>17. request the Auditor General's Office to audit the</td>
</tr>
<tr>
<td>18. process where a list is given: oh, you didn't answer it</td>
<td>18. finances of the company to stop it from making any</td>
</tr>
<tr>
<td>19. the way we wanted or what we expected, so sorry, you are</td>
<td>19. unsubstantiated claims.”</td>
</tr>
<tr>
<td>20. insufficient, and therefore not worthy of a license, so</td>
<td>20. And that is all a fair summary of the position,</td>
</tr>
<tr>
<td>21. goodbye.</td>
<td>21. isn't it?</td>
</tr>
<tr>
<td>22. Q. Then you have paragraph --</td>
<td>22. A. No, I would suggest that they have retained British</td>
</tr>
<tr>
<td>23. A. This is (inaudible) extracting our mining assets from us</td>
<td>23. counsel to come up with these arguments and this</td>
</tr>
<tr>
<td>24. and not compensating for it.</td>
<td>24. language, because this is not the way they write and,</td>
</tr>
<tr>
<td>25. Q. Then you have paragraph 2.5 from Mr Biryabarema's</td>
<td>25. until this time, not the way they've ever communicated</td>
</tr>
</tbody>
</table>

---

<table>
<thead>
<tr>
<th>19:24:00</th>
<th>19:26:00</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. review. And he starts off by essentially saying the</td>
<td>1. with us, and certainly not the words they ever would</td>
</tr>
<tr>
<td>2. same thing as his previous reviewing team, but he adds</td>
<td>2. have used with us. This is very confrontational, very</td>
</tr>
<tr>
<td>3. to it, you can see in the middle of the paragraph:</td>
<td>3. litigation-focused, and very distilled, entirely unlike</td>
</tr>
<tr>
<td>4. &quot;However, the information is insufficient as regards</td>
<td>4. their usual writing style. Perhaps you gave him some</td>
</tr>
<tr>
<td>5. the development of a proper mine plan for that</td>
<td>5. help in preparing this, but this is not what we've ever</td>
</tr>
<tr>
<td>6. 'concession'. There are no substantive technical</td>
<td>6. seen, and not what I believe is their own work.</td>
</tr>
<tr>
<td>7. reports, either submitted in the past or in the recent</td>
<td>7. Q. And you know fully well, Mr Marshall, that this is</td>
</tr>
<tr>
<td>8. submitted documents that show advanced exploration work</td>
<td>8. an entirely fair and objective review of the</td>
</tr>
<tr>
<td>9. done in any of the five 'concessions'. The reports on</td>
<td>9. deficiencies of your application, which we've seen by</td>
</tr>
<tr>
<td>10. exploration works in Rutsiro and Nemba (submitted in the</td>
<td>10. looking at the application ourselves; correct?</td>
</tr>
<tr>
<td>11. past) and the 'Nemba Project' provided in the current</td>
<td>11. A. No, absolutely not. I would say that this is a well</td>
</tr>
<tr>
<td>12. documents are all of a reconnaissance nature. There has</td>
<td>12. prepared and well documented effort to be able to</td>
</tr>
<tr>
<td>13. never been any exploration report (past and recent) on</td>
<td>13. substantiate a decision they've already made.</td>
</tr>
<tr>
<td>14. Mara, Giciye or Sebeya 'concessions'.&quot;</td>
<td>14. Q. And you're aware, aren't you, that Mr Imena's further</td>
</tr>
<tr>
<td>15. And that's all a fair summary, isn't it?</td>
<td>15. refusal of your application in May came after further</td>
</tr>
<tr>
<td>16. A. No, of course not. It's slanderous, and it begs the</td>
<td>16. consideration of the material, both by the reviewing</td>
</tr>
<tr>
<td>17. question if they're so confident about our lack of</td>
<td>17. team and by Dr Biryabarema, and a negative</td>
</tr>
<tr>
<td>18. having performed in any respect, why didn't they give us</td>
<td>18. recommendation; yes?</td>
</tr>
<tr>
<td>19. the office back?</td>
<td>19. A. If you tell me that's the case. These documents I have</td>
</tr>
<tr>
<td>20. Q. And if you go to his recommendations.</td>
<td>20. not seen until this litigation, this arbitration.</td>
</tr>
<tr>
<td>21. A. Or perhaps they knew that there was nothing left in the</td>
<td>21. Q. Can you go to --</td>
</tr>
<tr>
<td>22. office.</td>
<td>22. A. All this is new, and that's highly unusual in a country</td>
</tr>
<tr>
<td>23. Q. In his recommendations he says:</td>
<td>23. like Rwanda where everything is done on a consultative</td>
</tr>
<tr>
<td>24. &quot;There is no basis for MINIRENA to grant a mining</td>
<td>24. basis.</td>
</tr>
<tr>
<td>25. licence to NRD (Rwanda) for the five 'concessions'.</td>
<td>25. Q. Can you go to R-079. This is a statement of seizure of</td>
</tr>
</tbody>
</table>

---

Page 269

Page 270

Page 271

Page 272

71 (Pages 269 to 272)
19:28
1 a car, done by Mr Bosco, and you can see it's done at
2 the request of the Rwanda Revenue Authority; do you see
3 that? Second line.
4 A. I had understood that the process from the Rwanda
5 Revenue Authority is if they have some claim against you
6 they give you notice. So, you know, until this process,
7 I was never aware that that was even possible.
8 Q. You knew, didn't you, that you had unpaid debts to the
9 Revenue and, indeed, they were seizing your assets; yes?
10 A. Definitely not. 100%. Not 99%, 100%. We had been told
11 that all our accounts were frozen until such time
12 a determination had been made about who was the owner.
13 That's why we also couldn't get a tax certificate.
14 Q. And, as I said earlier, the reason you couldn't get the
15 tax certificate is because you had unpaid debts and this
16 is just another example of how that it so.
17 A. I put it to you that in fact what you've been doing all
18 day long is trying to say what I say is the truth and
19 you say is a lie, and it's simply unreasonable. It's,
20 in fact, slanderous.
21 Q. Let's go to another document. We're going to go to the
22 RDB minute at C-101.
23 A. Certainly there was never any notice to us. If there
24 was ever a notice from the RRA to anybody, it didn't
25 come to us.

Page 273

MR HILL: Mr President --
THE PRESIDENT: Mr Hill, it's 7.30.
MR HILL: Exactly, Mr President. I haven't finished, as you
can see. I know this is obviously eating into my time
with other witnesses. I think I will be less than
an hour, I think, I hope considerably less than an hour,
but less than an hour with Mr Marshall tomorrow morning,
and I know it's on my head and that we've got a chess
clock and it takes away my time with other witnesses.
I'm close, but not -- I hoped to finish today but
I haven't managed to.
THE PRESIDENT: Very well. We'll adjourn until midday
tomorrow.
(7.30 pm)
(The hearing adjourned until 12 noon the following day)

Page 274
Bay View Group LLC and The Spalena Company LLC -v- Republic of Rwanda

Day 3 -- Hearing on Jurisdiction and the Merits

ICSID Case No. ARB/18/21

Wednesday, 23 June 2021
Bay View Group LLC and The Spalena Company LLC -v- Republic of Rwanda
Day 3 -- Hearing on Jurisdiction and the Merits
ICSID Case No. ARB/18/21
Wednesday, 23 June 2021

Page 2

Anne-Marie Stallard
for Trevor McGowan

As amended by the Parties
Day 3 – Hearing on Jurisdiction and the Merits ICSI D Case No. ARB/18/21 Wednesday, 23 June 2021

Bay View Group LLC and The Spalena Company LLC – v- Republic of Rwanda

Page 3

Anne-Marie Stallard
for Trevor McGowan

As amended by the Parties
Bay View Group LLC and The Spalena Company LLC -v- Republic of Rwanda
Day 3 -- Hearing on Jurisdiction and the Merits  ICSID Case No. ARB/18/21  Wednesday, 23 June 2021

Page 4

Anne-Marie Stallard

As amended

by the Parties
Bay View Group LLC and The Spalena Company LLC -v- Republic of Rwanda
Day 3 -- Hearing on Jurisdiction and the Merits  ICSID Case No. ARB/18/21  Wednesday, 23 June 2021

Anne-Marie Stallard
for Trevor McGowan

As amended by the Parties
Day 3 -- Hearing on Jurisdiction and the Merits  ICSI D Case No. ARB/18/21 Wednesday, 23 June 2021

Anne-Marie Stallard

As amended by the Parties
Bay View Group LLC and The Spalena Company LLC -v- Republic of Rwanda  
Day 3 -- Hearing on Jurisdiction and the Merits  
ICSID Case No. ARB/18/21  
Wednesday, 23 June 2021
Bay View Group LLC and The Spalena Company LLC -v- Republic of Rwanda
Day 3 -- Hearing on Jurisdiction and the Merits  ICSID Case No. ARB/18/21  Wednesday, 23 June 2021

...
Bay View Group LLC and The Spalena Company LLC -v- Republic of Rwanda

Day 3 -- Hearing on Jurisdiction and the Merits  ICSI Case No. ARB/18/21

Wednesday, 23 June 2021

Page 11

Anne-Marie Stallard

for Trevor McGowan
Day 3 -- Hearing on Jurisdiction and the Merits  
ICSID Case No. ARB/18/21  
Wednesday, 23 June 2021

Bay View Group LLC and The Spalena Company LLC -v- Republic of Rwanda

Page 12

Anne-Marie Stallard  
for Trevor McGowan

As amended by the Parties
Bay View Group LLC and The Spalena Company LLC -v- Republic of Rwanda

Day 3 -- Hearing on Jurisdiction and the Merits | ICSID Case No. ARB/18/21 | Wednesday, 23 June 2021

Anne-Marie Stallard
for Trevor McGowan

Page 16

As amended by the Parties
Day 3 -- Hearing on Jurisdiction and the Merits  ICSI D Case No. ARB/18/21 Wednesday, 23 June 2021

Bay View Group LLC and The Spalena Company LLC -v- Republic of Rwanda

Page 17

As amended by the Parties
Bay View Group LLC and The Spalena Company LLC -v- Republic of Rwanda
Day 3 -- Hearing on Jurisdiction and the Merits ICSID Case No. ARB/18/21
Wednesday, 23 June 2021

Anne-Marie Stallard for Trevor McGowan

Page 18

As amended

Anne-Marie Stallard

rectify

rectified

records

referring

refuses

remains

regarding

Bay View Group LLC and The Spalena Company LLC -v- Republic of Rwanda

Anne-Marie Stallard

Bay View Group LLC and The Spalena Company LLC -v- Republic of Rwanda

Page 18

Anne-Marie Stallard

rectify

rectified

records

referring

refuses

remains

regarding

Bay View Group LLC and The Spalena Company LLC -v- Republic of Rwanda

Anne-Marie Stallard

Bay View Group LLC and The Spalena Company LLC -v- Republic of Rwanda

Page 18

Anne-Marie Stallard

rectify

rectified

records

referring

refuses

remains

regarding

Bay View Group LLC and The Spalena Company LLC -v- Republic of Rwanda

Anne-Marie Stallard

Bay View Group LLC and The Spalena Company LLC -v- Republic of Rwanda

Page 18

Anne-Marie Stallard

rectify

rectified

records

referring

refuses

remains

regarding

Bay View Group LLC and The Spalena Company LLC -v- Republic of Rwanda

Anne-Marie Stallard

Bay View Group LLC and The Spalena Company LLC -v- Republic of Rwanda

Page 18

Anne-Marie Stallard

rectify

rectified

records

referring

refuses

remains

regarding

Bay View Group LLC and The Spalena Company LLC -v- Republic of Rwanda

Anne-Marie Stallard

Bay View Group LLC and The Spalena Company LLC -v- Republic of Rwanda

Page 18

Anne-Marie Stallard

rectify

rectified

records

referring

refuses

remains

regarding

Bay View Group LLC and The Spalena Company LLC -v- Republic of Rwanda

Anne-Marie Stallard

Bay View Group LLC and The Spalena Company LLC -v- Republic of Rwanda

Page 18

Anne-Marie Stallard

rectify

rectified

records

referring

refuses

remains

regarding

Bay View Group LLC and The Spalena Company LLC -v- Republic of Rwanda

Anne-Marie Stallard

Bay View Group LLC and The Spalena Company LLC -v- Republic of Rwanda

Page 18

Anne-Marie Stallard

rectify

rectified

records

referring

refuses

remains

regarding

Bay View Group LLC and The Spalena Company LLC -v- Republic of Rwanda

Anne-Marie Stallard

Bay View Group LLC and The Spalena Company LLC -v- Republic of Rwanda

Page 18

Anne-Marie Stallard

rectify

rectified

records

referring

refuses

remains

regarding

Bay View Group LLC and The Spalena Company LLC -v- Republic of Rwanda

Anne-Marie Stallard

Bay View Group LLC and The Spalena Company LLC -v- Republic of Rwanda

Page 18

Anne-Marie Stallard
Bay View Group LLC and The Spalena Company LLC -v- Republic of Rwanda

Day 3 -- Hearing on Jurisdiction and the Merits  
ICSID Case No. ARB/18/21

Wednesday, 23 June 2021

Page 19

Anna-Marie Stallard
for Trevor McGowan

As amended by the Parties
Bay View Group LLC and The Spalena Company LLC -v- Republic of Rwanda
Day 3 -- Hearing on Jurisdiction and the Merits  ICSID Case No. ARB/18/21 Wednesday, 23 June 2021

Anne-Marie Stallard for Trevor McGowan

as amended by the Parties
Day 3 -- Hearing on Jurisdiction and the Merits  
ICSID Case No. ARB/18/21  
Wednesday, 23 June 2021

Page 21

Anne-Marie Stallard for Trevor McGowan

As amended by the Parties
Day 3 -- Hearing on Jurisdiction and the Merits  
ICSID Case No. ARB/18/21  
Wednesday, 23 June 2021

Bay View Group LLC and The Spalena Company LLC -v- Republic of Rwanda

Page 22
Bay View Group LLC and The Spalena Company LLC -v- Republic of Rwanda
Day 3 -- Hearing on Jurisdiction and the Merits  ICSI Case No. ARB/18/21
Wednesday, 23 June 2021

uncontested 2.9
uncontested 3:17
under 1:1 5:10 19:3
54:20 58:5,9 59:14
73:15 74:12 90:9
116:14 116:15
116:1 117:21
122:13 133:11
134:10 134:11
143:8 147:25 151:2
163:10 165:19
167:25 175:23
183:3 184:17
193:25 202:21
210:21 211:20
217:9 234:12
237:10 238:9
247:18 248:7,4
136:3 136:22
underneath 54:24
218:9 234:15
244:10
understand 2:10 4:4 11:1
5:7 13:7 17:5,9
28:15 43:14 66:2
83:7 87:11 9:17
93:11 112:22 114:8
134:16 136:26
140:17 141:13 14:22
167:11 161:14,18
166:10 168:17
169:9 176:19,25
200:18 137:16
228:19 242:13
251:4,6 255:22
253:22 262:9
265:23
underground 4:3
9:18 41:4 62:14
67:21 98:4 122:5
141:18 145:19
182:7 195:13
211:24 222:24
134:21 understood
17:15
34:25 66:16 81:12
87:2 128:19 139:2
141:6 143:15
151:17 218:18
226:5 234:25
256:24 253:2
273:4
undertaking 72:19
undervalue 39:8
undiplomatic 122:24
undue 102:9
 unfair 24:13 56:2
87:23 97:12 92:12
97:14 140:14 141:12
143:5 192:1
206:18 212:3,9
240:12 250:10
unfairly 257:10
unfairly 125:18
unfortunately 6:13
133:8
uncontested 2.9
uncontested 3:17
under 1:1 5:10 19:3
54:20 58:5,9 59:14
73:15 74:12 90:9
116:14 116:15
116:1 117:21
122:13 133:11
134:10 134:11
143:8 147:25 151:2
163:10 165:19
167:25 175:23
183:3 184:17
193:25 202:21
210:21 211:20
217:9 234:12
237:10 238:9
247:18 248:7,4
136:3 136:22
underneath 54:24
218:9 234:15
244:10
understand 2:10 4:4 11:1
5:7 13:7 17:5,9
28:15 43:14 66:2
83:7 87:11 9:17
93:11 112:22 114:8
134:16 136:26
140:17 141:13 14:22
167:11 161:14,18
166:10 168:17
169:9 176:19,25
200:18 137:16
228:19 242:13
251:4,6 255:22
253:22 262:9
265:23
underground 4:3
9:18 41:4 62:14
67:21 98:4 122:5
141:18 145:19
182:7 195:13
211:24 222:24
134:21 understood
17:15
34:25 66:16 81:12
87:2 128:19 139:2
141:6 143:15
151:17 218:18
226:5 234:25
256:24 253:2
273:4
undertaking 72:19
undervalue 39:8
undiplomatic 122:24
undue 102:9
 unfair 24:13 56:2
87:23 97:12 92:12
97:14 140:14 141:12
143:5 192:1
206:18 212:3,9
240:12 250:10
unfairly 257:10
unfairly 125:18
unfortunately 6:13
133:8
uncontested 2.9
uncontested 3:17
under 1:1 5:10 19:3
54:20 58:5,9 59:14
73:15 74:12 90:9
116:14 116:15
116:1 117:21
122:13 133:11
134:10 134:11
143:8 147:25 151:2
163:10 165:19
167:25 175:23
183:3 184:17
193:25 202:21
210:21 211:20
217:9 234:12
237:10 238:9
247:18 248:7,4
136:3 136:22
underneath 54:24
218:9 234:15
244:10
understand 2:10 4:4 11:1
5:7 13:7 17:5,9
28:15 43:14 66:2
83:7 87:11 9:17
93:11 112:22 114:8
134:16 136:26
140:17 141:13 14:22
167:11 161:14,18
166:10 168:17
169:9 176:19,25
200:18 137:16
228:19 242:13
251:4,6 255:22
253:22 262:9
265:23
underground 4:3
9:18 41:4 62:14
67:21 98:4 122:5
141:18 145:19
182:7 195:13
211:24 222:24
134:21 understood
17:15
34:25 66:16 81:12
87:2 128:19 139:2
141:6 143:15
151:17 218:18
226:5 234:25
256:24 253:2
273:4
undertaking 72:19
undervalue 39:8
undiplomatic 122:24
undue 102:9
 unfair 24:13 56:2
87:23 97:12 92:12
97:14 140:14 141:12
143:5 192:1
206:18 212:3,9
240:12 250:10
unfairly 257:10
unfairly 125:18
unfortunately 6:13
133:8
Bay View Group LLC and The Spalena Company LLC -v- Republic of Rwanda
Day 3 -- Hearing on Jurisdiction and the Merits  ICSI Case No. ARB/18/21

Wednesday, 23 June 2021

Page 24

Anne-Marie Stallard
for Trevor McGowan

As amended by the Parties
Bay View Group LLC and The Spalena Company LLC -v- Republic of Rwanda  
Day 3 -- Hearing on Jurisdiction and the Merits  
ICSID Case No. ARB/18/21  
Wednesday, 23 June 2021

| 34 | 31:11,12 210:3 |
| 35 | 22:23,24 67:11 |
| 74:21 | 183:1,10,14 |
| 211:9 |
| 36 | 63:25 |
| 360 | 214:12 |
| 360-degree | 214:22 |
| 38 | 103:3 105:7 106:2 |
| 110:19,20 |
| 382,000 | 204:3 |
| 39 | 56:12 115:8,11 |

| 4 | 4 2:6,6 7:14,16,21 |
| 50:8 | 125:6 202:8 |
| 230:3,6 238:12 |
| 250:20 |

| 4th | 84:6 |
| 4.17 | 143:22 |
| 4.20 | 143:21 |
| 4.9 | 189:14 |
| 40 | 63:17 161:20,21 |
| 187:4,8 259:7 |
| 47 | 124:2 |

| 5 | 3:4,5 7:22 25:19 |
| 53:10,25 54:4 |
| 136:11 137:3 |
| 139:22 203:4,19 |
| 205:13,13 219:6 |
| 249:5 250:20 267:6 |

| 5th | 245:10 |
| 5,000 | 263:4 |
| 5.52 | 213:10 |
| 50 | 47:20 |

| 6 | 51:17 52:2 53:25 |
| 54:6 68:13 202:5 |
| 202:7 242:3 |
| 60th | 17:22 68:8 |
| 6.07 | 213:12 |

| 6.46 | 2:18 |
| 60 | 161:8 |

| 601,836 | 151:12 |

| 7 | 201:3 202:21 |
| 7th | 17:23 |
| 7.30 | 274:2,14 |
| 71 | 188:25 189:4 195:6 |
| 74 | 3:6 |

| 750kg | 26:3 |

| 8 | 200:20 224:21 247:1 |
| 247:5,11,16,19 |
| 83 | 10:19,22 |
| 85 | 10:23 |
| 88 | 190:5 191:1 253:2 |

| 9 | 51:18 93:25 94:2 |
| 225:1 243:8 |
| 9,00 | 101:19 |