

***Mining Law and Policy: A comparative analysis of South Africa  
and Zimbabwe's mining laws and policy regimes***

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**A research dissertation submitted to the Centre for Human Rights Law  
Faculty, University of Pretoria, Pretoria, in partial fulfillment of the  
requirements for the LLM in International Trade & Investment Law  
degree.**

**Pretoria, May 31, 2010**

## DECLARATION

**I declare that this research report is my own unaided work. It is being submitted for the LLM in International Trade and Investment Law degree at the University of Pretoria, Pretoria, South Africa. It has not been submitted before for any degree or examination in any other University.**

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**This 31<sup>st</sup> day of May of year 2010**

## ABSTRACT

South Africa and Zimbabwe are both well endowed with mineral resources. Both countries share a history of colonization by white settlers with Zimbabwe getting its independence in 1980, followed by South Africa in 1994. Like most countries in Sub-Saharan Africa, they rely on their natural resources for sustenance. In their case, the mining industry has therefore contributed significantly to their development.

This study has illustrated the different mineral legislation and regulatory mechanisms in place for managing this important sector. In addition, to its mining and mineral legislation, South Africa has developed the Mining Charter and its associated regulations, to regulate its mining industry. A comparative analysis of the mineral rights and tenure has been in the two jurisdictions has been made. Zimbabwe's mineral regime has been found to be lagging behind not only South Africa, but to most of the region's regimes. Issues of adhering to the rule of law and respecting international laws and covenants have been highlighted especially in the case of Zimbabwe.

Black economic empowerment programmes in the two countries were discussed, with Zimbabwe again coming short. Recommendations for Zimbabwe following South Africa's example were proffered. The same applies to environmental issues and sustainable development, Zimbabwe need to follow a more coherent path.

Harmonisation of mineral regimes within the SADC region was recommended. Further recommendations to achieve this goal were put forward.



## **DEDICATION**

**To my daughter, Fungai and son, Tongai  
You have been my inspiration. God bless you**

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<b>CONTENTS</b>	<b>Page</b>
<b>DECLARATION.....</b>	<b>3</b>
<b>ABSTRACT.....</b>	<b>4</b>
<b>DEDICATION.....</b>	<b>5</b>
<b>ACKNOWLEDGEMENTS .....</b>	<b>6</b>
<b>LIST OF ABBREVIATIONS .....</b>	<b>9-10</b>
<b>CHAPTER 1.....</b>	<b>10</b>
<b>1.0 BACKGROUND AND OBJECTIVES OF RESEARCH .....</b>	<b>11</b>
1.1 Introduction.....	11
1.2 Mineral Legislation Overview: South Africa.....	14
1.3 Significance of Mining Sector in Zimbabwe.....	14-16
1.4 Mineral Legislation Overview: Zimbabwe.....	16
1.5 The Aim, scope and contribution of study.....	16
1.6 The Methodology of the Study.....	17
1.7 Related Studies and Motivations.....	18-22
1.8.1. Limitations.....	22-23
1.9 Conclusion.....	23
<b>CHAPTER 2.....</b>	<b>23</b>
<b>2.0 Mineral Rights and Tenure Regimes.....</b>	<b>23</b>
2.0 Introduction.....	23-24
2.1 Legislation governing mineral and tenure rights in South Africa.....	24-25
2.1.1 Important Features of the MPRDA.....	25-26
2.2 Legislation governing mineral rights and tenure rights in Zimbabwe.....	26-28
2.3 Mining Titles.....	28
2.3.1 Prospecting Rights: Zimbabwe.....	28
2.3.2. Prospecting Rights South Africa.....	28-29
2.4 Prospecting Licence: Zimbabwe.....	29
2.5 Exclusive Prospecting Order.....	29
2.6 Authority to Prospect.....	30
2.7 Mining Lease: Zimbabwe.....	30-31
2.7.1 South Africa.....	31
2.8 Special Mining Lease.....	31
2.9 Preservation of Mining Rights.....	32



2.10 Security of Tenure.....	33-35
2.11 Conclusion.....	35
<b>CHAPTER 3.....</b>	<b>35</b>
<b>3.0 Black Economic Empowerment.....</b>	<b>35</b>
3.0 Introduction.....	35
3.1 BEE Overview: Zimbabwe.....	36-37
3.1.2 Compliance with International Law.....	37-40
3.1.3 Constitutionality and Regulatory Requirements.....	40-41
3.2 South Africa.....	41
3.2 Historical Context.....	42-44
3.2.1 The Evolution of Black Empowerment.....	44-47
3.3.1 South Africa.....	47
3.3.2 United States.....	47-48
3.3.3 Malaysia.....	48-49
3.4 The Current Context.....	49
3.5 Mining and BEE in South Africa.....	49-50
3.5.1 The Constitutional Ground for BEE.....	50-52
3.5.2 The Mining Industry Charter.....	52-54
3.5.3 Human Resource Development.....	55
3.5.4 Ownership.....	55
3.5.5 Beneficiation.....	56
3.5.6 Financing Mechanism.....	56
3.6 Conclusion.....	56
<b>CHAPTER 4.....</b>	<b>57</b>
<b>4.0 Legislation and Policies Governing Mining and Sustainable Development.....</b>	<b>57</b>
4.0 Introduction.....	57
4.1 South Africa.....	57
4.1.2 Constitution of the Republic of South Africa.....	58-59
4.1.3 MPRDA.....	59-60
4.1.4 The Minerals and Mining Policy for South Africa.....	60-61
4.1.5 Sustainable Development through Mining.....	61-62
4.1.6 The National Environment Management Act.....	62
4.1.7 Other Legislation pertaining to Environment Management.....	62-63
4.2 Zimbabwe.....	63
4.2.1 Zimbabwe Constitution and Environmental Legislation.....	63-64
4.2.2 Legal and Regulatory Framework.....	64
4.2.2 Mining Policies.....	64-67
4.3 Conclusion.....	67-68
<b>CHAPTER 5.....</b>	<b>68</b>
<b>5.0 A Case for Harmonising Mineral Law in SADC... ..</b>	<b>68</b>
5.0 Introduction.....	68-69



5.1 SADC Protocol on Mining .....	69-70
5.2 SADC Mining Strategy.....	70-71
5.3 Compliance with SADC Protocol on Mining and MSS.....	71-73
<b>CHAPTER 6.....</b>	<b>74</b>
<b>6.0 RECOMMENDATIONS.....</b>	<b>74</b>
6.0 Introduction.....	74
6.1 Recommendations on Mining Law and Policy, Mineral Rights and Tenure.....	74
6.2 Recommendations on BEE Policies.....	74-75
6.3 Recommendations on Environment and Sustainable Development.....	75-77
6.4 Recommendations on Harmonisation of Mineral Legislation in SADC.....	77
6.4.1 Harmonisation of Legislation and Policies.....	77
6.4.2 Promotion of Foreign and Indigenous Investment.....	77-78
6.4.3 Value Addition.....	78
6.4.4 Emerging Markets.....	78-79
6.4.5 Communication Strategy.....	79
6.4.6 Avoiding the Dutch Disease.....	79-80
6.5 Conclusion.....	80-81
<b>7.0 REFERENCES.....</b>	<b>81-85</b>
<b>8.0 BIBLIOGRAPHY.....</b>	<b>86-87</b>



## LIST OF ABBREVIATIONS

### Abbreviations

ANC	African National Congress
BEE	Black Economic Empowerment
BIT	Bilateral Investment Treaty
FDI	Foreign Direct Investment
DRC	Democratic Republic of Congo
EIA	Environment Import Act
GNU	Government of National Unity
GOZ	Government of Zimbabwe
GDP	Gross Domestic Profit
ICSID	Convention of the Settlement of International Disputes
IEEA	Indeginisation Economic Empowerment Act
IEER	Indeginisation Economic Empowerment Resolution
MSS	Mining Sector Strategy
MPRD	Mineral and Petroleum Resource Development Act
NEED	National Economic empowerment and Development
NEP	New Economic Plan
NEMA	National Environmental Management Act
NWA	National Water Act
OCF	Our Economic Future
PGM	Platinum Group of Metals
RBZ	Reserve Bank of Zimbabwe
RDP	Reconstruction and Development Programme
SADC	Southern Africa Development Countries
SDM	Sustainable Development through Mining
SMME	Small Medium and Micro Enterprises
TNC	Trans National Cooperation
USA	United States of America
USD	United States Dollar
UNCTAD	United Nations Conference on Trade and Development

## CHAPTER 1

### 1.0 Background and Objective of Research

This Chapter gives summary of the development of mining legislation and policy in South Africa and Zimbabwe. It is shown that the two countries are well endowed with mineral resources. The significance of the mining sector to the economies of the two countries is highlighted flagging the contribution made to the respective country's Growth National Product (GDP). A comparative analysis of the mineral rights and mining tenure regimes is given showing that although Zimbabwe has a progressive mineral law regime; it still lags behind that of South Africa and expectations of international norms and standards. Important features of the legislation are highlighted showing their significance to the mining industry and whether they give investor confidence.

#### Country profile: Zimbabwe



Population:	12.6 million
Urban Population:	36%
Major Ethnic and Linguistic Groups:	Shona - 82% Ndebele, other African tribes - 16%
Religions:	Syncretic - 50% Christian - 25% Traditional beliefs - 24% Muslim, other - 1%
Population Growth Rate:	0.83%
Life Expectancy:	39 years
Infant Mortality:	66 per 1,000 live births
Under Five Mortality:	123 per 1,000 live births
Maternal Mortality Rate:	700 per 100,000 live births
GNP Per Capita:	\$480
Percentage of Literate Adult Males:	94%
Percentage of Literate Adult Females:	87%

**Sources:** <http://www.care.org/careswork/countryprofiles/109.asp>

Accessed 31 May 2010

## Country Profile: South Africa



Population:	42.8 million
Urban Population:	57%
Major Ethnic and Linguistic Groups:	Black - 75% White - 14% Indian, other - 11%
Religions:	Christian - 68% Animist, traditional beliefs - 29% Muslim - 2% Hindu - 1%
Population Growth Rate:	0.01%
Life Expectancy:	46.6 years
Infant Mortality:	61 per 1,000 live births
Under Five Mortality:	71 per 1,000 live births
GNP Per Capita:	\$2,900
Percentage of Literate Adult Males:	87%

## **1.0 Introduction**

### **1.1 Significance of the mining sector in South Africa**

South Africa is one of the world's and Africa's most important mining countries in terms of the variety and quantity of minerals produced. It has the world's largest reserves of chrome, gold, vanadium, manganese and Platinum Group Metals (PGM's). South Africa is the leading producer for nearly all of Africa's metals and minerals production apart from diamonds (Botswana and the DRC), uranium (Niger), copper and cobalt (Zambia and the DRC) and phosphates (Morocco).<sup>1</sup>

The country's mineral industry can be broken down into five broad categories - Gold, PGM, Diamonds, Coal and Vanadium. Combined, these produced a sales revenue (2000) of ZAR51.6 billion (approx. US\$ 7.4 billion), representing 6.5% of the country's Gross Domestic Product (GDP). As a result of an increase in secondary and tertiary industries as well as a continuing decline in gold production, mining's contribution to South Africa's GDP has declined over the past 10 years (in 1991, mining's contribution to GDP was 8.4%) . However, this may be offset by an increase in the downstream or beneficiated minerals industry, identified by the Government as a growth sector in South Africa. Furthermore the price of gold has recently taken a peak.

### **1.2 Mineral Legislation Overview: South Africa**

Mining legislation in South Africa dates back to as far back as the late 1800s with the promulgation of the Mines, Works and Machinery Ordinance 54 of 1903. This culminated into the Minerals Act 50 of 1991 which replaced the Mining Rights Act 20 of 1967, as well as the Mines and Works Act 27 of 1956.

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<sup>1</sup> <http://www.mbendi.com/indy/ming/af/sa/p0005.htm>

There were certain specific changes from the Mines and Works Act of 1956, and some new concepts were introduced in the Minerals Act 1991.<sup>2</sup> The Minerals Act of 1991 was designed to simplify the granting and operation of mineral rights.

The Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) was accented to on the 3<sup>rd</sup> of October 2002 and came into operation on 1 may 2004 together with the MPRDA Regulations GN R 527 promulgated there under. Although the MPRDA repeals the Minerals Act 50 of 1991 in its entirety, a transitional period existed in terms of which the holder of a used or unused old order right is given an opportunity to comply with the provisions of the MPRDA.<sup>3</sup>

### **1.3 Significance of the mining sector in Zimbabwe**

The Republic of Zimbabwe, is a land-locked nation in Southern Africa (*See country profile above*) surrounded by Zambia to the north, Mozambique to the east, South Africa to the south, and Botswana to the west. The geology of Zimbabwe is richly endowed with mineral wealth and is known to have vast resources of over 40 different minerals almost as wide a range as produced in South Africa.<sup>4</sup> Of the 40 known metals and minerals that it is home to; gold, platinum and chrome form the principal endowments. The country's gold reserves are among the largest in Africa, while it hosts the second largest platinum reserves in the world.<sup>5</sup> The mining industry contributes about 4.5% of the GDP and employs about 5% of the workforce.<sup>6</sup> Significant kimberlites have recently been discovered in Marange located in the eastern part of Zimbabwe.

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<sup>2</sup> The Role of the Department of Minerals and Energy, GDACE Mining & Environmental Impact Guide, Chapter 11: The Role of the DME

<sup>3</sup> Ibid 2

<sup>4</sup> John Holloway & Associates, The mining Annual Journal Ltd 2000 Zimbabwe 1, Mining Annual Review 2000

<sup>5</sup> Zimbabwe Mining Report Q1 2010, <http://www.researchmarkets.com/reports/1204377>

<sup>6</sup> The Mineral Industry of Zimbabwe by Philip M. Mobbs: US Geological Survey Minerals Yearbook - 2005

The mining industry has contributed significantly to the development of the country. Most of the towns and cities in Zimbabwe owe their origins to mining activities (Svotwa, et al., 2001). The Reserve Bank of Zimbabwe (the country's central bank; RBZ) estimates that in 2004, the mining industry contributed over 38% of the nation's foreign currency earnings.<sup>7</sup> However the mineral sector is subject to uncertainty caused by Government policies and this is despite the formation of a Government of National Unity (GNU). The government's often violent land redistribution programme which began in 2000 quickly decimated the commercial farming sector, which had been the nation's major source of exports and foreign exchange. The pun from being a bread basket to being a basket case is often used in the public media as a result of the economic decline. By 2003, the value of mineral exports had surpassed that of agricultural goods.<sup>8</sup>

In the past, Zimbabwe was the world's third largest gold producer, after South Africa and Ghana, producing around 25 tones of gold each year. In recent years, however, lax regulations, failure to monitor mining activities, and illegal gold mining and smuggling have sharply cut output to around 6.75 tones.<sup>9</sup> However, industry experts believe that the country's gold sector could rise remarkably should there be political certainty in the country. For one, the country's infrastructure remains in reasonable shape when compared to other nations, such as Angola or the Democratic Republic of Congo (DRC), that have been ravaged by decades of civil war. In addition, there remains a well-skilled workforce in the country. Zimbabwe also has the world's second largest reserves of platinum after South Africa. PGMs have witnessed a sharp increase in output after recent developments of the **Mimosa** and the Ngezi platinum mines in the south and west, respectively.<sup>10</sup>

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<sup>7</sup> Zimbabwe Mining Report Q3 2009

<sup>8</sup> Ibid 5

<sup>9</sup> Zimbabwe Chamber of Mines

<sup>10</sup> Ibid 9

#### **1.4 Mineral legislation Overview: Zimbabwe**

The Mines and Minerals Act was enacted in 1961 and a number of amendments have been made since then. All minerals are vested in the President and one requires rights to work mineral deposits through an application to the Mining Commissioners.<sup>11</sup> Mining activity is open to both local and foreign individuals and companies.

Zimbabwe's general mining policy is to sustain development of the country's mineral resources and create employment opportunities. There is no prioritization of minerals for exploration and development. Environmental issues in mineral exploitation are given due attention at project inception and development stages.

#### **1:5 The aim, scope and contribution of the study**

The focus of the thesis is on the comparative study of mineral legislation, policy and regulatory regimes of South Africa and Zimbabwe and how flexible they are in promoting and encouraging sustainable development and foreign direct investment (FDI) into the respective countries. The principle objective of this comparison is to find good practices and shared experiences of these two African countries. In addition, this thesis comments any bad examples observed that the analysed countries should respectively avoid or resolve. Furthermore references will be made to other countries with advanced systems and legislation guiding the mining industry.

Below are listed objectives to be achieved by this research:

- to compare mineral rights and tenure regimes in Zimbabwe and South Africa and recommend any necessary adjustments that will improve their competitiveness.
- to identify the black empowerment policies or indigenization policies within the mineral sectors in Zimbabwe and South Africa and the need to have a coherent

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<sup>11</sup> Zimbabwe Mines & Minerals Act 1996 (Revised Edition), Chapter 21:05, Mines and Minerals Amendment Bill, 2007



indigenization and mining code or mineral policy. Issues pertaining to expropriation and the rule of law are discussed in the context of international law.

- to clarify the importance of environmental laws on sustainable development and mining to the Zimbabwean and South African economies and how the problems and challenges facing the sector are given due attention by the responsible authorities.
- to look at the compatibility of mining laws and policies in SADC with the SADC Protocol on Mining and how these could be adjusted to suit the overall regional agenda. Factors aligned to the promotion of foreign direct investment (FDI) are highlighted.
- Recommendations pertaining to the afore mentioned objectives are proffered.

## **1.6 The Methodology of the Study**

The research overall is qualitative and descriptive, supported by various pieces of legislation and policy documents and lessons learnt from other jurisdictions. Thus a comparative analysis of these policy and regulatory systems is proffered in an attempt to meet the thesis objectives.

The first phase looks at the various legislative and policy impact study of South Africa and Zimbabwe frameworks. Zimbabwe's legal and policy regime although not properly documented compares favourably with that of South Africa and the region. Nevertheless the country is still lagging behind its neighbours, especially in view of its perceived political risk and legal uncertainties. This uncertainty relating to the rule of law is given due attention.

The second phase attempts a comparative analysis of empowerment legislation and regulation and why due care and regard need to be given to avoid investor fatigue and capital flight.

A descriptive analysis on the harmonization of mining legislation and regulation, and compliance with the SADC Protocol is proffered. It is expected that this harmonization will lead to an increase in FDI to the SADC region as it improves the investment regulatory environment.

### **1.7 Related Studies and Motivations**

The performance of the Zimbabwean economy has impacted negatively on all its sectors, and mining is no exception. Given its high mineral potential, the country has not lived up to its level of attracting foreign direct investment in the sector. The sector is faced with the following challenges and problems: decline in mineral production, negative growth, decline in the flow of new investment, reduction in the GDP contribution from the sector, employment creation, underutilization of capacity, and most seriously, loss in competitiveness.

Otto (1998) in his paper entitled “Mining Policy, Legislation and Regulation” clarifies the importance of having a stand-alone mineral policy document as opposed to interpreting policy from diverse sources of information. Such a policy document is a useful regulatory tool that serves two important functions both to the investor and the government.

Elizabeth Bastida, Thomas Walde, and Janeth Warden-Fernandez (eds.), *International Comparative Mineral Law and Policy: Trends and Prospects* (The Hague: Kluwer Law International, 2004). This book, a mining compendium is a compilation of more than sixty papers. The book reflects a range of approaches and experiences in mineral-rich countries on mineral law and policy. The book is divided into three chapters but it is the articles in chapter one that is relevant to my research work. The various authors discuss the past and current trends in legal regimes applicable to the exploration and exploitation of mineral from both international and comparative perspectives. It was clear from the articles in this chapter that there is a growing consensus that foreign direct investment in mining activities is attracted by a competitive legal and investment framework.

Otto James and Cordes John, *The Regulation of Mineral Enterprises: A Global Perspective on Economics, Law and Policy* (Westminster, Colorado: Rocky Mountain Mineral Law Foundation, 2002): This book explores a broad range of issues that affect the mining industry globally. It covers topics such as mining policy, mineral taxation and environment and sustainable development. The discussion of the increasing importance of a mining code as a central source of regulation in chapter three is what makes the book relevant to my thesis project. The author in this chapter focuses on the trends in national mining regulation system in developed, developing and transitional economies. Of particular relevance is the framework of questions that should often be considered in analyzing a mining law from exploration and development to mining and mine closure.

### **Articles and Journals**

Elizabeth Bastida, “A Review of the Concept of Security of Tenure: Issues and Challenges”, 2001, *Journal of Energy and Natural Resources Law*, Volume 19, No. 1.

This article discusses security of tenure as a key criterion that any Investor will consider before deciding to invest in a foreign mining project. The author reviews the various interpretations that have been given the concept over the years. The author contends that the implementation of the concept by some Latin American countries contributed immensely in helping to attract foreign direct investment to their mining sector. The author further argues that the increasing concerns for stricter environmental regulation, sustainable development and the social impacts of mining pose serious challenges to the concept. The article therefore calls for the need to balance these challenges with the concept in order not to undermine the competitiveness of the mining industry in the countries faced with these challenges.

Elizabeth Bastida et al., “Mining Investment and Policy Development: Argentina, Chile and Peru”, *CEPMLP Internet Journal*, Volume 16, Article 10.

This article provides an overview of the law and policy developments that have taken place in the mining industry of Chile, Peru and Argentina within the last two decades. Like the article by John Williams, the authors also discuss the Latin American Mining Law Model and highlighted the historical reasons behind the model. Unlike John Williams, the article concludes by analyzing the challenges that these countries are likely to face in the changing context of mineral sector governance within the concept of sustainable development.

John P. Williams, “The Latin American Mining law Model”, in Elizabeth Bastida, Thomas Walde and Janeth Warden-Fernandez (eds.), *International and Comparative Mineral Law and Policy: Trends and Propects* (The Hague: Kluwer law International, 2005) 741-757.

The author of the article describes the so-called “Latin American Mining Law Model” Which he defines as the distillation of the key features of the legal and regulatory framework for minerals exploration and mining in such countries as Chile, Peru, Mexico, Bolivia among others. The author delves into some major features of the model and admits that although the model has not been enthusiastically embraced worldwide, it inspired changes that made the mining laws of many mineral-rich countries more responsive to the needs of the mining industry globally.

Robert Pritchard, “Safeguards for Foreign Investment in Mining”, in Elizabeth Bastida, Thomas Walde and Janeth Warden-Fernandez (eds.), *International and Comparative Mineral Law and Policy: Trends and Propects* (The Hague: Kluwer law International, 2005) 73-97.

This article contends that private investment in mining especially by multinationals depends on a competitive legal and investment framework of the host country. Pritchard is of the view that the most adverse fears of foreign investors is the change of the legal regime in favour of the host country especially after the investor has initially been encouraged by the host state to commit its capital.

The author therefore discusses the key legal safeguards which multinationals in particular generally look for before investing their funds in a mining activity in any country. These include legal and fiscal guarantees as well as international arbitration mechanisms to enforce the performance of these guarantees.

Thomas Walde, “Investment Policies and Investment promotion in Mining Industries”  
(1991) 6 ICSID/Foreign Investment Law Journal, 1 (Spring) 94-113

This journal discusses stability of contract terms as key criterion to be considered by investors before a decision is made as to whether to invest in a mining project in any country. The author emphasized this is very essential for most long term investments in mining in order for the investor as well as his sponsors to be assured that the expected benefits of the investment will be realized. The author further argues that the stability of the investment terms and conditions covers not just the proprietary rights and title but extends to taxation, import and export regulations and foreign exchange regulations among others.

Vilhena, F.C., Main Issues for Formulating Mining Policies Towards Attracting Foreign Investment, in *The Mining Industry: Old Threats and New Challenges*, CEPMLP, University of Dundee Annual Mining Seminar, 10-14 June 2002.

One major issue that any legal framework for mining should address is how to resolve conflicts between mining and other land uses. These conflicts may cover such issues as when exploration and mining activities will prevail over other uses of the land and the rights of way and to easements over third parties’ land. Vilhena makes it clear that if a country is to attract and sustain investment in the mining sector, then its mining law must define the rights of landowners and other occupiers, ensure that investors in the mining industry recognize these rights in negotiating land access and creates an effective and practical mechanism to enforce such provisions in the law. This paper is particularly useful in the area of land access and compensation which is one of the key features that will form the basis of my comparison of Ghana’s new mining law to the Latin American Mining law Model.

### **1.8.1 Limitations**

The research is aimed at highlighting the disparities of mining legislation and policy of Zimbabwe and South Africa. However yearning gaps with regard to other legislation like tax, royalties and beneficiation has not been considered as this was beyond the scope of this thesis. This presents an opportunity for further research into these areas.

Mining law being a very specialized field, an attempt to study this field without adequate supervision presented challenges.

### **1.9 Conclusion**

Mining plays a very significant role in South Africa and Zimbabwe given the rich mineral endowments of the two countries. Its contribution to the fiscus was acknowledged as well as the decline in mineral production in the two countries, particularly Zimbabwe. The evolution of mining laws and policies in South Africa and Zimbabwe was highlighted and is important in addressing the challenged bedeviling this industry

## **CHAPTER 2**

### **2.0 Mineral Rights and Tenure Regimes**

#### **2.0. Introduction**

Mining law comprises the study of the general legal framework applicable to mineral development, covering not only aspects of mineral tenure but also the fiscal terms, the investment regime, environmental and social requirements, and health and safety

regulations.<sup>12</sup> Ownership of mineral rights (more appropriately “mineral interest”) is an estate in real property. It is the right of the owner to exploit, mine, and/or produce any or all of the minerals lying below the surface of the property.<sup>13</sup> The five elements of a mineral interest are:

1. the right to execute any conveyances of mineral rights
2. the right to receive bonus consideration
3. the right to use the surface as is reasonably necessary to access minerals
4. the right to receive delay rentals and
5. the right to receive royalty

The owner of a mineral interest may separately convey any or all of the above listed interests.<sup>14</sup>

Tenure has been defined, as conditions on which property is held; tenant’s rights, duties etc.<sup>15</sup> Mineral tenure regimes deal with the legal problems and terms related to ownership and the acquisition, holding or transfer and termination of rights by private individuals, entitling the holder to conduct exploration and exploitation of minerals. Mineral tenure regimes often entail a legal distinction between land and subsoil rights, with the state usually owning or controlling minerals in the subsoil.

## **2.1 Legislation governing mineral and tenure rights in South Africa**

Until 30 April 2004, the right to prospect for and to mine was primarily regulated by the Minerals Act, No. 50 of 1991 (‘the Minerals Act’).<sup>16</sup> The Minerals Act vested the right to mine a particular mineral in the holder of the mineral rights in respect of the relevant mineral in relation to the land in question. Mineral rights constituted an element of ownership of land.

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<sup>12</sup> Mineral Tenure Regimes in the Context of Evolving Governance Frameworks: A case study of selected Latin American countries by Ana Elizabeth Bastida, Centre for Energy, Petroleum, & Mineral Law & Policy, University of Dundee, Scotland

<sup>13</sup> Wikipedia

<sup>14</sup> Ibid 13

<sup>15</sup> Chambers Concise Dictionary, New Edition

<sup>16</sup>

Regulation of South Africa's mineral and petroleum industry changed fundamentally from 1 May 2004, the date on which the Mineral and Petroleum Resources Development Act, No. 28 of 2002 ('the MPRDA')<sup>17</sup> came into operation. The commencement of the MPRDA radically transformed the law governing rights to mineral resources in South Africa and has caused a significant increase in the transactions in this sector (fig ) The new legislation creates a "use it or lose it" principle that was absent from South Africa's minerals dispensation. The industry has seen a huge upsurge in foreign companies seeking a foothold in the lucrative South African mining sector as well as the number of black Economic Empowerment companies given an opportunity to acquire a stake in the wealth of South Africa's natural resources.(fig) The MPRDA endorsed the view that South Africa's mineral and petroleum resources belong to the nation, and accordingly established the State as the custodian of South Africa's mineral resources., through the Minister of Minerals and Energy.<sup>18</sup> The State therefore has the power to grant, control, administer, the MPRDA Act extinguished private ownership of mineral rights and replaced it with a system of State grants of the right to prospect and mine. South Africa's mineral (and petroleum) resources were placed under the State's custodianship.

### **2.1.1 Important Features of the MPRDA**

A key element of the MPRD Act is the change from a legal framework within which mineral rights formed an inherent element of immovable property, which encompassed the right to prospect and mine (subject to regulation by the State), to a system where the State will grant the right to prospect and mine.

Another important feature of the MPRD pertains to the issue of minerals ownership. The Act attributed to the State the ownership of minerals in the subsoil.<sup>19</sup> In terms of Section 2(a), the Act recognises the state's right to exercise sovereignty over, *inter alia*, all mineral resources. In this sense, mineral resources are considered to be the

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<sup>17</sup> Government Gazette, Republic of South Africa, Vol. 448 Cape Town, 10 October 2002 No. 23922

<sup>18</sup> MPRDA, s

<sup>19</sup> MPRDA, s3 (2) (a) and (b).



‘common heritage of all people of South Africa whereby the State is custodian thereof...’<sup>20</sup> Unlike its predecessor which was based on privately owned mining rights, the Act confers the state with the authority to issue licences to private operators to access and mine these resources.<sup>21</sup> Although mineral rights are vested in and controlled by the state, non-minerals are nonetheless vested in the landowner.<sup>22</sup> Under the MPRDA, mineral rights are considered limited real rights,<sup>23</sup> the allocation of which is determined through an administrative system. Such system is however qualified by various provisions restricting the exercise of administrative discretion within a framework of reasonableness and procedural fairness.<sup>24</sup> To this end, limitations of the administered system are reflected under the MPRDA (as in Sections 13-36) by reference to stipulated objective criteria in the granting of such rights.<sup>25</sup> The MPRDA also affects changes to mineral rights as recognised under the common law. The right to use of the surface by mineral rights holders seems now to derive from statutory provisions rather than common law principles.<sup>26</sup> Section 4 of the Act explicitly provides that MPRDA provisions shall prevail in the event of conflict with common law principles.

## 2.2 Legislation governing mineral and tenure rights in Zimbabwe

In Zimbabwe, all mining activities come under the Mines and Minerals Act (Chapter 21:05 (1996), amendments, and associated regulations (hereinafter MMA). The Ministry of Mines is responsible for the mining sector. This law is considered to be liberal and one of the most rational pieces of legislation in Africa (John Lee 2004). In addition to the Environmental Act, Mining, Management and Safety Regulations and Explosives

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<sup>20</sup> Ibid 17

<sup>21</sup> Walde, T., Mining Law Reform in South Africa: Draft comment, Vol 12-2 article, Online Journal CPMLP (2002) <http://www.dundee.ac.uk/cpmlp/journal/html/vol12-2.html> - last visited 25/02/2010

<sup>22</sup> Dale, M., *Comparative International & African Mining Law as Applied in the Formation of the New South African Mineral Development Legislation* in International and Comparative Mineral Law and Policy, 827 (Bastida, E., Walde, T., and Warden-Fernandez, J., ed., The Hague: The Kluwer Law International, 2005) [hereinafter, Dale III]

<sup>23</sup> MPRDA, s. 5(1).

<sup>24</sup> Cawood, F. T., *New South African Mineral and Petroleum Resources Development Act: Shaping a New investment Environment to Reflect a Diverse Society*, vol. 22 JENRL 130, 131 and 132 (2004).

<sup>25</sup> Dale 111, 833

<sup>26</sup> MPRD, s.5 (3)

Regulations (1989), other legislation involving environmental issues include the following Acts:

- *The Hazardous Substances and Articles Control Act, 1972*, administered by the Ministry of Health also deals with the use and control of hazardous substances on mines.
- *The Mining (Health and Sanitation) Regulations, 1977* administered by the same Ministry makes provisions for adequate hygiene in and around mines.
- *The Mining (Alluvial Gold) (Public streams) Regulations, 1991* deals with small scale gold panning and places restrictions on the miner and the minimum distance he/she can work from a river-bank.
- *The Water Act (1976)* makes provision for the prevention of water pollution and the preservation of water resources and is controlled by the Ministry of Lands, Agriculture and Water Development.
- *The Natural Resources Amendment Act (1975)* deals generally with the conservation of natural resources and is administered by the Natural Resources Board.
- *The Atmospheric Pollution Prevention Act (1971)* is the responsibility of the Ministry of Health and is concerned with the prevention and control of air pollution by gases, dust, fumes, and smoke.
- *The Forest Act (1949)* is designed to protect forests and trees and is controlled by the Forestry Commission.
- *The Parks and Wildlife Act (1975)* is administered by the Department of National Parks and Wildlife and deals with the preservation of plants and animals, including specially protected animals and indigenous plants.
- *The National Museums and Monuments Act (1972)* provides for the protection of sites of historic or cultural interest.

Zimbabwe does not have a comprehensive mineral policy despite its heavy dependency on the minerals industry since colonial rule. Although policy thrusts are attempted within the Act, a real drafted policy document, addressing salient issues mapping the direction

of the mineral development, is long overdue. Such policies will facilitate marketing of the country as they will stipulate the intent, the long-term strategy, and goals in the development of the sector.

## **2.3 Mining Titles**

### **2.3.1 Prospecting Rights: Zimbabwe**

Under sections 63-70 MMA, mineral prospecting in the country is open to anyone, although one has to be registered as an approved prospector. This registration is valid for five years and also renewable for the same period of time.

### **2.3.2 Prospecting Rights: South Africa**

The Minister must grant a prospecting right if the applicant has access to financial resources and has the technical ability to conduct the proposed prospecting operation optimally in accordance with the prospecting works programme, the prospecting will not result in unacceptable pollution, ecological degradation or damage to the environment, the applicant has the ability to comply with the Mine Health and Safety Act and if the applicant is not in contravention of any relevant provision of the MPRDA.<sup>27</sup>

The Minister must refuse to grant an application for a prospecting right if all the requirements of Section 17(1) are not met, if the grant will result in an exclusionary act, prevent fair competition or result in concentration of the mineral resource in question under the control of the applicant. The Minister may request the applicant to give effect to the Black Economic Empowerment ('BEE') objective set out in Section 2(d) MPRDA.

The MPRD Act stipulates that the prospecting right, when granted, is subject to the MPRD Act, any other relevant law, and the terms and conditions stipulated in the said right, and that:

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<sup>27</sup> Section 17 (1) MPRDA

- a prospecting right is valid for the period specified in the right, which period may not exceed five years.
- a mining right is valid for a period specified in the right, which period may not exceed 30 years.

The aforesaid are maximum periods. The period for which the right will be granted must be justified by the prospecting-or mining works programme submitted in support of the application.

## **2.4 Prospecting Licence:**

### **Zimbabwe**

This is granted for the sole purpose of searching and prospecting for any mineral. The discovered areas of potential exploration interests can then be pegged into blocks, thereby constituting a claim in the eventual discovery of any deposit. The licence allows for drilling and excavation and exclusivity after giving a prospecting notice.<sup>28</sup> These rights are valid for two years and renewable at the discretion of the Minister.<sup>29</sup> These rights can not be transferred, mortgaged or disposed under any circumstances.

## **2.5 Exclusive Prospecting Order (EPO)**

Despite the word *prospecting*, this permit is granted to carry out detailed exploration work for any mineral. The licence confers the exclusive right to prospect for specified minerals in any defined area in Zimbabwe. These rights can be granted up to six years. The particular requirements that should accompany the application include:

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<sup>28</sup> Sections 20,26,Parts VI, VIII,IX and XIX of the Mines and Minerals Act

<sup>29</sup> Mbendi – Zimbabwe: Mining, [www.mbendi.co.za/indy/af/zi/p0005.htm](http://www.mbendi.co.za/indy/af/zi/p0005.htm)

- Program of prospecting operations
- Surface rental charge of 2c/ hectare / month
- Limitations on the aerial extent but these can be waived depending on
- Financial and operational capacity
- Geographic location
- Need for geological mapping, geophysical and geochemical investigations of the area, especially in remote areas.

These exploration rights can be transferred, mortgaged or disposed with the permission of the Minister.

## **2.6 Authority to Prospect**

This authority is granted to allow prospecting on reserved ground. The prospecting licence and EPO include the right to drill and excavate under certain conditions.<sup>30</sup> It was enacted to utilise or harness the most efficient use of a resource, be it agricultural or mining, in an area in the best interest of the country.

## **2.7 Mining Lease**

### **Zimbabwe**

This lease is gives the holder the exclusive right to mine the minerals detailed in its application and other minerals discovered after notifying the mining authority of such discovery. It is transferable subject to approval by the Mining Affairs Board. The requirements are very basic and include:

- Particulars of mineral being mined
- Sketch plan showing position and aerial extent
- Financial status of the applicant to meet dues, for example rentals
- Mining operations should be on a substantial scale

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<sup>30</sup> Article 41 (5) and Part VI of the Mines and Minerals Act

Any breach is punishable by cancellation or penalties. The mining lease does not require a detailed evaluation of the project because it also tries to cater for small scale operators. There are no strict requirements of a technical and economic plan as well as an Environmental Impact Assessment (EIA). The validity is not clearly specified, but it is approximately 20 years.

### **2.7.1 South Africa**

Section 23(1) of the MPRDA provides that the Minister must grant a mining right if the mineral can be mined optimally in accordance with the mining work programme, the applicant has access to financial resources and has the technical ability to conduct the proposed mining operation optimally, the financing plan is compatible with the intending mining operation and the duration thereof, the mining will not result in unacceptable pollution, ecological degradation or damage to the environment, the applicant has provided financially for the prescribed social and labour plan, if the applicant has the ability to comply with the Mine Health and Safety Act, if the applicant is not in contravention of any relevant provisions of the MPRD Act and that the grant of such right will further the objects set out in Section 2(d)(BEE) and (f) (Social Development) in accordance with the Charter and the prescribed social and labour plan.

### **2.8 Special Mining Lease**

This mining right is granted to investment wholly or mainly in foreign currency, that is FDI in excess of US\$100 million. In short, this is earmarked for large mining projects as deemed by the Board. The requirements are quite detailed and exclusive.

These requirements are as follows:

- Feasibility study
- Financing plan
- Marketing plan
- Proposals of efficient economic exploitation and treatment of ore

- Economic evaluation of proposed mine plus detailed forecast of capital investment, operating cost, and projected revenue and profits. These include DCF valuation.
- Detailed mineral resource and reserve estimate reporting distinguishing between probable and proven reserves.
- Environmental impact assessment carried out
- Any insurance details of liability arising from mining operations and damage to the environment
- Extent of use of local goods and services for the development and operation of the mine
- Manpower requirements, that is the number of expatriate staff and any training for locals

It is valid for 25 years and renewable for periods not exceeding 10 years. The Special Mining Lease is more detailed than the Mining Lease because it tries to provide a policy concept of the mining sector.

South African legislation does not provide for special mining leases.

## **2.9 Preservation of Mining Rights**

The above mining rights can be reserved through three broad categories and inspection certificates are issued on these bases:

- Minimum work requirement
- Through production output
- Through capital expenditure incurred

There is also the possibility to obtain “protection certificates” for certain deposits, which determines that a protected block shall not, during the period of protection, be liable to forfeiture for any failure to take out an inspection certificate.<sup>31</sup>

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<sup>31</sup> Section 217 of the Mines and Minerals Act

All mineral rights are vested in the State through the President of Zimbabwe.<sup>32</sup> These rights are immediately transferred to private holders upon registration of a claim. Once these rights are transferred, it is up to the holder to commence mining operations, dispose of the claims or just hold onto the rights indefinitely. The current Mines and Minerals Act has no specific provision for titleholders to inform or seek permission from the Government or Ministry of Mines to dispose of claims.

In order to ensure that the country remains competitive for foreign direct investment, there is need to have clear and unambiguous legislation which gives investors a basis to plan and make concrete decisions and commitments on their future investments in Zimbabwe.

## **2.10 Security of tenure**

Legal certainty and the exploitation rights are the prime requisite of any investor. Thus mining legislation should ensure that once a mineral right is granted, the right can not be suspended or revoked except on specified grounds that are clearly set out in law. Furthermore the law should provide reasonable assurances guaranteeing the continuity of the operations over the life of the project.

According to Omalu and Zamora (1998), the first phase of security of tenure is that there should be reasonable legal entitlement for extraction rights after successful completion of the exploration phase. They argue that exploration risk should only be assumed if there is a reasonably safe expectation of obtaining subsequent mining rights. The situation is complicated by the fact that the Government has a legitimate interest in safeguarding public interests. For instance, the rational use of mineral resources, environmental and social protection, integration of a mining project into economic development and land use

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<sup>32</sup> S2 of MMA



planning.<sup>33</sup> In the case of Zimbabwe mining rights can be cancelled if the mining authority considers that the miner “is using wasteful mining methods or metallurgical processes”, and/or has “failed within a reasonable period after commencing mining operations, to declare any output from his mining location” or others.

The question of security of tenure in national mineral policy frameworks should address the link from an exploration right to a mining right. Companies will hesitate to invest in costly exploration unless there is reasonable assurance that if they discover a deposit, they will be able to mine it. Companies expect a reasonable level of government oversight and the need to first comply with legitimate government requirements (such as submission of an environmental impact assessment) before being granted the right to mine. The policy should clearly state the government’s position on security of tenure during the transition from exploration to mining.

The second phase of security of tenure involves the certainty of rights obtained and conditions under which the rights obtained - in the exploration and the mining stages - may be revoked or lost, transferred to an eligible third party and mortgaged to raise funds or for other legitimate purposes. This also deals with the element of discretion in the implementation of the mining law. For a mining regime to be successful in attracting foreign investment, it must be designed to minimise corruption and processing time by eliminating or minimizing discretion.<sup>34</sup> In the situations where there is decision-making either by an administrative body or a judicial body, the law has to provide for transparency and accountability.<sup>35</sup> In Bolivia, Chile and Peru, the mining concessions are real property rights which are mortgageable and decision making is the domain of a judicial body. In South Africa and Zimbabwe, mining concessions are not real property rights but they can be pledged as security and are transferable.

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<sup>33</sup> M K Omalu and A Zamora: Key Issues in mining Policy: A brief comparative survey as a background study on reform of mining law, Heinonline, 17 J. Energy Nat. Resources L. 27 1999

<sup>34</sup> Id 2

<sup>35</sup> Id 28

## **2.11 Conclusion**

A mutually acceptable mineral investment regime has to strike the necessary balance through law, regulation or contractual undertaking. The balance should be struck between a company's legitimate expectation and its desire to avoid bureaucratic intervention on the one hand, and on the other hand, a country's reasonable concern over the impact of a large scale mining operation.<sup>36</sup> In South Africa and Zimbabwe, a prospecting concession entitles the holder to first priority for a grant of an exploration concession for the discovered minerals. The concession holder is guaranteed the ability to maintain a concession indefinitely, provided that he complies with non-discretionary statutory obligations.

## **CHAPTER 3**

### **3.0 Black Economic Empowerment**

#### **3.0 Introduction**

The issue of Black Economic Empowerment (BEE) has featured prominently in recent years in South Africa and Zimbabwe. Having achieved political independence, these countries were confronted with the monumental challenges of transforming a colonial economy that was controlled by a white settler minority and transnational corporations (TNCs) based in Europe or the USA. The legacies of a long history of racialised capitalism in South Africa and Zimbabwe are clearly visible. In the absence of socialist policies of redistribution and nationalization of productive assets, these independent states had to look at other measures of ensuring a more equitable distribution of wealth and ownership over productive resources.

This Chapter highlights some of the critical issues that these two countries have to confront to ensure that the benefits of Black Economic Empowerment will not be limited

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<sup>36</sup> Id 28

to small business elites but also become meaningful for the underprivileged; does not result in expropriation and discourage foreign direct investment (FDI) or result in capital flight.

### 3.1 BEE Overview: Zimbabwe

In 2008, the Zimbabwe Government gazetted the Indigenisation and Economic Empowerment Act 2007, (Chapter 14:33) (IEEA).<sup>37</sup> This was followed by the Indigenisation and Economic Empowerment (General) Regulations, 2010 (IEER), Gazetted on the 29<sup>th</sup> January, 2010, with an effective date of 1<sup>st</sup> March 2010<sup>38</sup>, have generated heated debate. The furore which accompanied the publication of these Regulations lies, in part, in the extremely tenuous political, ideological and economic justifications for such a policy. These pieces of legislation requires identified businesses and public companies (including mining companies) with an asset value of or above \$500,000 (United States Dollars (USD)) to (must), within 5 years, “...cede a controlling interest of not less than 51% of shares or interests therein to indigenous Zimbabweans” unless a lesser share, in order to achieve other socially or economically desirable objectives, a lesser share of indigenization or a longer period within which to achieve the indigenization is justified.<sup>39</sup>

An “indigenous Zimbabwean” is defined in the enabling Act, IEEA (Chapter 14:33) as:

*Any person who, before 18<sup>th</sup> April, 1980<sup>40</sup> was disadvantaged by unfair discrimination on the grounds of his or her race, any descendant of such person, and includes any company, association, syndicate or partnership of which indigenous Zimbabweans form the majority of members or hold the controlling interest.<sup>41</sup>*

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<sup>37</sup> IEEA 14 of 2007. [www.indigenisation.gov.zw/indigenisationact.pdf](http://www.indigenisation.gov.zw/indigenisationact.pdf)

<sup>38</sup> Statutory Instrument 21 of 2010 (S.I. 21 of 2010), Section 1(2) of the Regulations.

<sup>39</sup> Section 3 (a) S. I. 21 of 2010

<sup>40</sup> The date of Zimbabwe’s independence

<sup>41</sup> Section 2(1). The Act was first gazetted as a Bill in June 2007 and passed through Parliament in October, a few months ahead of the general elections in which ZANU PF lost its majority in parliament. There is little doubt that such a bill would not be passed by the current parliament where the two MDC factions have majority seats.

### 3.1.2 Compliance with International Law

The United Nations Conference on Trade and Development (UNCTAD) considers taking of property as lawful as long as it fulfils three basic criteria: it must be for a public purpose, be non-discriminatory and give rise to the payment of compensation.<sup>42</sup> It appears the IEER might be lacking in this regard.

Zimbabwe's attitude towards indigenization, it may be argued, is discriminatory in terms of race as it focuses on firms held, predominantly, by non-indigenous investors.<sup>43</sup> In *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe ('Campbell')*,<sup>44</sup> a majority of the Southern African development Community (SADC) Tribunal, in its first substantive decision, held when examining Zimbabwe's land reform policy, that:

*'Since the effects of the implementation of Amendment 17 will be felt by the Zimbabwean white farmers only, we consider it, although Amendment 17 does not explicitly refer to white farmers, as we have indicated above, its implementation affects white farmers only and consequently constitutes indirect discrimination or de facto or substantive inequality.'*

In the same vein, following Zimbabwe's formalization of the expropriation of foreign-owned farmland through the Land Acquisition Act,<sup>45</sup> the Convention of the Settlement of Investment Disputes (the ICSID Convention) tribunal found that Zimbabwe's policy of state sponsored land invasions violated the 'just compensation' provisions of the Netherlands–Zimbabwe Bilateral Investment Treaty (BIT). The tribunal similarly

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<sup>42</sup> World Investment Report 2003, FDI Policies for Development: National and International Perspective, United Nations Conference on Trade and Development (UNCTAD)

<sup>43</sup> Tony Leon, Creeping Expropriation of Mining Investments: An African Perspective; *Journal of Energy & Natural Resources Law*: Vol 27 No4 2009

<sup>44</sup> *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe (2/2007) (2008)*, Southern Africa Development Community (SADC) Tribunal Windhoek, Namibia, ([www.saflii.org/sa/cases/SADCT/2008/2.pdf](http://www.saflii.org/sa/cases/SADCT/2008/2.pdf)).

<sup>45</sup> *Bernardus Henricus Funnekotter and others v Zimbabwe*, ICSID Case No ARB/05/6, Award, dated April 15, 2009, at para. 97 (Zimbabwe conceding that "Land Acquisition Act and the Constitution of Zimbabwe...is tantamount to expropriation") ("hereinafter Funnekotter").

rejected Zimbabwe's plea of necessity that there should be a discount from fair market value in the case of large-scale nationalizations for public policy reasons.<sup>46</sup>

Investors faced with IEER requirements may have treaty rights similar to those at issue in the *Funnekotter* arbitration. UNCTAD reports that, as of June 1, 2009, Zimbabwe has similar investment protection treaties in force with the People's Republic of China, Denmark, Germany and Switzerland.<sup>47</sup> These treaties protect investors who are nationals of the signatory countries against expropriation, as well as unfair or discriminatory treatment.<sup>48</sup> They further provide investors with recourse to international arbitration against Zimbabwe to claim for violations of those rights.

IEER still leaves open the possibility of reducing the quota of required local ownership for mining investments.<sup>49</sup> The Zimbabwe Chamber of Mines (ZCM) is in the process of negotiating lower quotas for the mining industry.<sup>50</sup> They proposed a compromise in the government's drive to force foreign firms to give 51 percent stakes to locals, saying 15 percent local shareholding for mines was enough.<sup>51</sup> ZCM posit that to make up equity regard should be given to social responsibility programmes like building of schools, hospitals, roads and all developments which take place around mining communities.

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<sup>46</sup> Ibid 42

<sup>47</sup> UNCTAD, Zimbabwe, Total Number of Bilateral Investment Treaties Concluded, 1 June 2009, available at [http://www.unctad.org/sections/dite\\_pcbp/docs/bits\\_zimbabwe.pdf](http://www.unctad.org/sections/dite_pcbp/docs/bits_zimbabwe.pdf)

<sup>48</sup> See, e.g. Agreement between the Government of the Republic of China and the Government of the Republic of Zimbabwe on the Encouragement and reciprocal protection of Investments of May 21, 1996, Arts. 3,4 (hereinafter "PRC-Zimbabwe BIT"); Agreement between the Government of the Kingdom of Denmark and the Government of the Republic of Zimbabwe concerning the Promotion and Reciprocal Protection of Investments of October 25, 1996, Art. 3,5 (hereinafter "Denmark-Zimbabwe BIT"); Agreement between the Government of Zimbabwe and the Federal republic of Germany concerning the Encouragement and reciprocal Protection of Investments of September 29, 1995, Arts. 2,3,4 (hereinafter "Germany-Zimbabwe BIT"); Agreement between Swiss Confederation and the Republic of Zimbabwe concerning the Promotion and Reciprocal Protection of Investments of August 15, 1996, Arts. 4,6 (hereinafter "Switzerland-Zimbabwe BIT").

<sup>49</sup> MacDonald Dzirutwe, Zim releases shock foreign ownership rules, Moneyweb News report, dated February 10, 2010, available at <http://www.talkzimbabwe.com/news/117/ARTICLE/6030/2010-02-16.html>.

<sup>50</sup> Golden Sibanda, High Expectations as Chamber of Mines meet, The Herald, Zimbabwe, May 27, 2010, accessed at [www.theherald.co.zw](http://www.theherald.co.zw)

<sup>51</sup> Zimbabwe miners offer compromise on local ownership law, accessed at [http://www.zimbabwesituation.com/may20\\_2010.html](http://www.zimbabwesituation.com/may20_2010.html)

In any event, even a lower quota would require nationalization of a likely significant shareholding in the Zimbabwean mining operations of foreign mining companies.

Zimbabwe's pressure on the mining industry is perceived as consistent with a broader, global pattern of nationalization of mining investments. A well known example of such a program is the Venezuelan migration of mining interests, moving foreign held equity in mining ventures into joint venture companies with the Venezuelan government.<sup>52</sup> Several investment arbitrations against the Venezuelan government concerning mining investments are currently pending.<sup>53</sup> The foregoing occurrences indicate a pattern of increasing pressure from host governments on natural resource investments. This is a reminder of the need for careful political risk planning.

The most widely debated legal risk for mining investors, and the risk of most newsworthiness, is the risk of expropriation. However, legal risks are by no means confined to that; the most pervasive legal risk is the risk of adverse change of law. This is the reason for the widespread use of the so-called "change of law" clause in financing documents, under which bankers require borrowers to indemnify them against the financial consequences of changes in law or other government requirements.<sup>54</sup> The Fraser Island case in Australia, *Murphyores v Commonwealth of Australia (1976) 136 CLR*, serves to remind investors of the risk of failing to fully appreciate the seriousness of these concerns.<sup>55</sup>

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<sup>52</sup> See, e.g. Venezuela targets migration of mining firms to joint ventures, CONAPRI News Report, dated October 4, 2007, available at <http://www.conapri.org/english/articleDetailIV.asp?articleid=29474&CategoryId2=15048>.

<sup>53</sup> See, e.g., Vanessa Ventures Ltd. v Bolivarian Republic of Venezuela, (ICSID Case No. ARB(AF)/04/6); Gold Reserve Inc. v Bolivarian Republic of Venezuela (ICSID Case No. ARB(AF)/09/1).

<sup>54</sup> Elizabeth Bastida et al, Safeguards for Foreign Investment in Mining, International Comparative Mineral Law & Policy, Kluwer Law International, The Hague, 2005.

<sup>55</sup> Ibid 46

### 3.1.3 Constitutionality and Regulatory Requirements

While there is a presumption that a gazetted Act is valid, all legislation passed by Parliament must receive presidential assent before becoming law.<sup>56</sup> When a Bill is passed to the President for assent, such assent must be given or “withheld” within 21 days. If the assent is withheld, and the Bill is returned to Parliament it does not become law unless a motion to this effect is approved within six months by two-thirds of the members of the House of Assembly. The IEEA was passed by Parliament in October 2007, but Presidential assent was only given on the 15<sup>th</sup> January, 2008 well outside the 21 day period.<sup>57</sup> The Act must be registered with the High Court as soon as possible after assent.<sup>58</sup> It should then appear in the next publication of the Government Gazette.<sup>59</sup> It did not, being gazetted as law only on 7<sup>th</sup> March, 2008.

It is not open to the President to give assent after the 21 day period, as any executive action in violation of the Constitution is void and the IEEA is invalid on this basis, but again this is subject to the interpretations of the courts. It should be noted that all legislation emanating from Parliament must comply with the tenets of the Constitution. If it does not, then in terms of Section 3 of the Constitution<sup>60</sup>, the Supreme Court can strike down the law as being unconstitutional. In the circumstances it can be argued that the President of Zimbabwe acted unprocedurally and ultra vires to his powers under the constitution.

Alternatively the Regulations must conform to the enabling Act. The IEEA, in Section 3, indicates that its purpose is an “endeavour” to ensure that “fifty one per centum of the shares of every public company and any other business shall be owned by indigenous

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<sup>56</sup> Section 51 (1) of the Constitution of Zimbabwe (As Amended on 29 February 2009)

<sup>57</sup> Eric Block, Death Sentence for Economy, *The Zimbabwe Independent*, Thursday, 18 February 2010 accessed at <http://www.theindependent.co.zw/opinion/25391-death-sentence-for-economy.html>

<sup>58</sup> Section 53 of the Constitution of Zimbabwe

<sup>59</sup> While the Act must be registered in the High Court as soon as possible after assent, there do not appear to be any time limits indicating when the Act must appear in the Gazette. An Act does not, come into operation unless so gazetted.

<sup>60</sup> Supreme law, “This Constitution is the supreme law of Zimbabwe and if any law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void.”

Zimbabweans'', as defined. Section 3, as read with section 4, then particularizes specific business dealings which will not be approved and may not be concluded unless the law pertaining to the 51% requirement has been met. The most remarkable aspect of these sections is that they contain no provisions for the implementation of the law pertaining to the 51% requirement.

The cancellation of African Consolidated Resources' mining license around the publication of the IEER does not bode well for investors.<sup>61</sup> This appears to violate the provisions of the Declaration of Rights in Zimbabwe's Constitution, namely:

1. the protection of freedom from discrimination (section 23);
2. the protection of freedom of association (section 21); and
3. the proscription against compulsory acquisition of property (section 16).

It can not be therefore, overemphasized that without the rule of law and a market-oriented legal system a market economy just does not operate efficiently and this increases the costs and risks of investment, not only in mining but in all sectors.

## **3.2 South Africa**

### **3.2 Historical Context**

The history of the apartheid state can be described as institutionalised disempowerment of the black population. Black South Africans were discriminated against in employment, skills development, in ownership and control of business as well as in access to basic social and physical infrastructures.<sup>62</sup> They were legally barred from any political participation. The oppression was extreme, and in many cases basic human rights were denied. One of the most important aims of the apartheid legacy was to suppress black entrepreneurship in order to defend and support the interests of white

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<sup>61</sup> Govt cancels ACRs diamond licence, Zimbabwe Guardian News Report, dated February 16, 2010, available at <http://www.talkzimbabwe.com/news/117/ARTICLE/6030/2010-02-16.html>.

<sup>62</sup> Naledi, draft document – The evolution of ‘‘Black Economic Empowerment’’ in South Africa: From the lenses of business, the tripartite alliance, community groups, and the apartheid and post-apartheid governments (1985 – 1999), Omano Emma Edigheji, 2000, p 15



economy. The *Groups Areas Act* decided where black people were allowed to live and the *Influx Control Act* denied them the right to move freely around the country. Blacks were regarded as temporary residents in the ‘white urban areas’, with the only purpose to provide labour for white industry and commerce. The *Native (Urban Areas) Consolidation Act* of 1945 only allowed small businesses, selling the daily essentials of living, to operate in the urban black townships. The authorities controlled the allocation of all business sites in the area.<sup>63</sup>

In 1963 black businesses were further limited by the ‘one-man business’ policy that was introduced. This policy hindered black people to run more than one business and prevented them from forming partnerships with the objective of initiating larger business ventures. The 1963 legislation also blocked the establishment of black controlled financial institutions, wholesale businesses and manufacturing industries in white areas. A decree in the legislation stating that local authorities, not blacks, were to erect all buildings necessary for business activities, gave the authorities further control over black business.

Another policy designed to protect white business and limit black entrepreneurship was the ‘job reservation’. The job reservation created a white monopoly by restricting blacks, until 1979, from jobs in certain skilled trades and from holding positions above a certain level. The technical and managerial skills necessary to operate businesses was severely constrained in the black population.<sup>64</sup>

The Bantu Education system introduced in 1953, this deliberately underdeveloped the capacity of blacks and prepared them for lives of subordination. Science and Maths were practically excluded from the Bantu Education. The black universities were structured to mainly produce social scientists, teachers and lawyers. A number of professions, especially in the natural sciences, were closed to black people and the vast majority was

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<sup>63</sup> Abelueki Consulting, draft document – Towards an Economic Empowerment Strategy in South Africa, 2000, pg 6

<sup>64</sup> Id 63

denied the opportunity of higher education.<sup>65</sup> The *Land Act* of 1913 prohibited blacks from purchasing land outside the ‘native areas’. The land allocation to the rural population was disproportionately low. This affected black people in many ways. It did not only curtail development of the farming sector, it excluded them from the financial market by denying them the means to provide sound security for loans.<sup>66</sup>

The effect of the apartheid politics was disastrous for black business and for the human capital essential to self-fulfillment, social development and economic advancement in a modern society. In 1996 these figures were facts; - Whites, 13 percent of the population, held 80 percent of the professional positions and 93 percent of management positions in private business. Less than 7 percent of South African Ph.D. holders were black. Very few black South Africans had higher education in Business, Finance, Engineering and the sciences, as they needed a special government permit to attend white universities where these skills were taught. In 1996 adult literacy in South Africa was about 73 percent, but 80 percent of the black people were unable to read beyond the fifth grade level.<sup>67</sup>

South Africa has one of the most unequal distributions of income in the world. This is caused by the extremely low levels of black participation in the economy. In 1994, a black person’s income was 13 percent of a white person’s income. A Coloured person’s income amounted to 27 percent and an Indian income to 40 percent of a white person’s income.<sup>68</sup> For many black South Africans the only difference in their existence today, compared to the era of apartheid, is that their legal status has improved.

Though the apartheid system has been abolished in South Africa, race and colour still determine the economic and social structure of the society. In his nation address in 2000, President Thabo Mbeki described the status thus: “...South Africa is two nations in one - one white, affluent and privileged and the other black and disadvantaged.”<sup>69</sup> The

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<sup>65</sup> The impact of black economic empowerment initiatives, Accountancy and Finance Update, 1997

<sup>66</sup> Id 63

<sup>67</sup> Ford, Christopher A., Challenges and Dilemmas of racial and Ethnic Identity in American and Post-Apartheid South African Affirmative Action, UCLA Law Review, Vol. 43, August 1996, No. 6 pg 1973

<sup>68</sup> Women lose out in Africa’s richest nation, The Star, 31 October 2000

<sup>69</sup> A long way towards combating racism, Enterprise, October 2000

previous race ideology, the President pointed out, has led to that distribution of wealth, income, intellectual resources, land and opportunity for personal advancement are skewed in favour of whites in South Africa. He summarised by stating that the aim of the whole system was that whites should always remain the dominant group and the black majority the dominated.<sup>70</sup>

### **3.2.1 The Evolution of Black Economic Empowerment**

For many, there is a considerable lack of clarity as to what the concept of black economic empowerment really is. Different people and constituencies define it in different ways and assign it different meaning. The definition also varies over time. Black economic empowerment (BEE), Affirmative Action, National Economic Empowerment and Development (NEED) are different terms used from the late 1980's and onwards to describe mainly the same thing.

In the late 1980's, white business regarded black economic empowerment as a mechanism to create a black middle class with interests in the economy. The initial thought was that by partly re-arranging the racial composition of the ownership structure of the economy, the market economy and political stability would be ensured. Corporate social responsibility programmes and black advancement initiatives were introduced to achieve black economic empowerment. The creation of a small influential black business class was part of the goal. Blacks were to gain access in the formal economy as long as the underlying structures of the economy were left intact.<sup>71</sup> At this time black people were mostly put in middle management positions without any managerial responsibility.<sup>72</sup> The black people that did have managerial responsibility were mainly taken in for business strategy. This was when for example black people were needed to give the company insight into black peoples' consumption needs and habits.

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<sup>70</sup> Ibid 69

<sup>71</sup> Ibid 62

<sup>72</sup> Ibid 65

The first democratic elections in 1994, when the African National Congress (ANC), came to power, was a political turning point. Corporate South Africa responded by appointing black non-executive directors and by selling businesses to black empowerment groups. Financial institutions provided funding to so-called Special Purpose Vehicles (SPVs), which enabled black people without capital to go into business.<sup>73</sup> At this point, black economic empowerment was largely a function of the white businesses' efforts to change themselves.<sup>74</sup> Political correctness became very important in corporate South Africa.

Black economic empowerment was met with suspicion from the black community in the late 1980's, as they feared that it would only create a black middle class without fundamentally transforming the oppressive political system and give full political rights to all. It was not until in the early 1990's that ANC converted to the concept of black economic empowerment. The ANC's position has thereafter been characterized by concepts such as de-racialisation and democratisation of the economy and economic emancipation of the black majority.<sup>75</sup> After the 1994 elections, the ANC-led Government of National Unity (GNU) was focused on reconstruction and reconciliation. Emphasis was put on economic inclusivity, aimed at broadening the economic base of South Africa.

This was done by promoting small, medium and micro enterprises (SMMEs) and through the Reconstruction and Development Programme (RDP). Black economic empowerment was on the government's agenda from the very beginning, although not as strongly as it is today.<sup>76</sup> Black economic empowerment of today can be described as a process aimed at redressing the imbalances in the ownership and control of South Africa's economic resources by increasing black participation at all levels of the economy. This shall be done by job creation, poverty alleviation, specific measures to empower black women, education, skills transfer and management development, meaningful ownership and access to finance to conduct business.<sup>77</sup>

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<sup>73</sup> TIPS Annual Forum, "Growth and Investment in South Africa" accessed at [www.tips.org.za/events/proceedings/bee.html](http://www.tips.org.za/events/proceedings/bee.html)

<sup>74</sup> Empowerment companies no longer there for the picking, Business Day, 9 May 2000

<sup>75</sup> Ibid 62

<sup>76</sup> BusinessMap, Empowerment 2000-New Directions, 2000, (BusinessMap 2000), pg49

<sup>77</sup> Ibid 69

Over the years, the government has expanded the parameters of its empowerment objectives in business to include training, affirmative action, and affirmative procurement and equity ownership. The empowerment requirements vary between different state departments, agencies and governments on local, provincial or national level. Several government departments have for example articulated their own policies for empowerment. Subsequently, it is difficult to determine what aspects of empowerment that are most relevant in doing business with these public entities.<sup>78</sup>

Black economic empowerment can also be seen as a way to deepen the economy and stimulate growth in the country by releasing the economic potential of the black population.<sup>79</sup>

Under President Thabo Mbeki's leadership work has been put in to create a more coherent, over-reaching approach towards black economic empowerment. The speed to enforce change in the South African society has been picked up and empowerment is becoming a vital part in most of the government's policies. The government is now increasingly using both legislative leverage and its buying power to promote black economic empowerment.<sup>80</sup> The sectors most affected by empowerment are broadcasting, gaming, fishing, IT and telecommunications, construction, transport, energy, mining, asset management in the financial services sector, municipal services (including water and sewage provision), education, health care and the defence industry.<sup>81</sup> These sectors contributed to the GDP with 38.5 percent in 1998.<sup>82</sup>

### **3.3 Empowerment Comparisons**

Black economic empowerment is not a unique phenomenon. Various forms of affirmative action have, and are, taking place around the world. In Malaysia, a programme similar to the one in South Africa was launched in 1969. South Africa has learned a lot from their

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<sup>78</sup> Ibid 76

<sup>79</sup> Ibid 69

<sup>80</sup> BusinessMap, Empowerment Guidelines

<sup>81</sup> Ibid 80

<sup>82</sup> Ibid 80

experiences. Likewise, Malaysia is a country where affirmative action targets a majority of the population. Affirmative action is also used to achieve gender equity in several countries.

South Africa's history makes it unique from other nations where affirmative action has or is taking place. In South Africa the majority, approximately 87 percent, of the population has been disadvantaged and is now subject to affirmative action. The gravity of suppression is also making South Africa unique in that the empowerment process has to be very extensive.<sup>83</sup>

### **3.3.1 South Africa**

Empowerment has successfully taken place in South Africa before. Starting in 1948, the Afrikaners<sup>84</sup> were subject to economic empowerment. However, the Afrikaners began their process of economic empowerment from a far better position than blacks did in 1994. The Afrikaners were on average relatively more educated than the average black in South Africa and they had the advantage of a major capital base in the form of land. The labour market was also substantially different from today, with focus on manual labour force.

### **3.3.2 United States**

In the early 1970's, shortly after the Civil Rights movement, there was a conscious decision by the government in the United States to create a class of black capitalists. The government was proactive in trying to create equal opportunities for blacks in employment, education, housing and business. To facilitate black business development special government structures were set up for the delivery of loans, grants, and technical assistance to black entrepreneurs. In government procurement policies special preferences were granted to black-owned businesses. The efforts in the United States had

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<sup>83</sup> Ibid 80

<sup>84</sup> Africaners, also known as Boers, descend from the Dutch settlers in mid 1600

a material effect; from 1972 to 1992 the number of black owned businesses grew from 188,000 to 621,000. The situation in the United States was significantly different from the one in South Africa today. Empowerment in the United States was focused on a minority group, just as the Afrikaners' empowerment in South Africa was, whereas the now ongoing empowerment in South Africa has the majority of the population as its target. Another difference is the economy; the fiscal resources of South Africa cannot be measured against the much greater ones of the United States at the time.

The United States also had a number of good black universities that produced a well-educated black managerial and entrepreneurial class. The economic position of blacks and whites in the United States still, after some 30 years of various initiatives, remains unequal. Affirmative action is now stigmatized as reverse racism. What South Africa can learn from this is that measures beyond affirmative action are needed and that various efforts are required to make real empowerment progress.

### **3.3.3 Malaysia**

Given the population and income statistics, Malaysia is the most relevant example for South Africa. In 1969, the Malaysian government launched the New Economic Plan (NEP), which aimed to eliminate poverty and promote greater economic equality between the different racial groups. Specifically the Bumiputra (indigenous groups, principally Malays) were empowered through expanded educational opportunities, employment quotas and incentives for corporate restructuring.<sup>85</sup> If a non-Malay company wanted to bid for government contracts, for example, or if they wanted to go public, they had to restructure the company and 30% of their stocks were to be sold to Bumiputras at a discount. In order to promote the growth of an industrial and commercial Bumiputra community the government also used the allocation of contracts, quotas and licenses. The NEP worked very well in Malaysia for the Bumiputras, which previously were the

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<sup>85</sup> Walde T., Mining Law Reform in South Africa, Internet Journal, Vol. 12: Article 2

disadvantaged group. In 1970 the Bumiputras' share of corporate equity ownership was 2.4%. Twenty years later this had risen to 20.3%.<sup>86</sup> The criticism against the NEP is that the Malay elite is seen to have benefited disproportionately, and the Chinese and Indians, the more successful ethnic minorities, feel the playing field is stacked unreasonably against them. At the same time Malaysians, from all ethnic groups, acknowledge that the empowerment focus in the NEP has helped the country to avoid racial turmoil.

### **3.4 The Current Context**

The empowerment initiatives described above have all worked well. Nevertheless, the prevailing conditions in South Africa today are substantially different. Globalisation, driven by technological change and economic liberalisation, has reduced a state's ability to dictate change in the world of today. The state is much less powerful in relation to private business or social interests than ever before. This is especially problematic given the scale of the challenge, to empower South Africa's 38.1 million black people. Not only the fact that it is the majority of the country's population who needs to be empowered makes it problematic, the relative starting points are more unfavourable than the other empowerment groups experienced.

### **3.5 Mining and BEE in South Africa**

As a major employer and one of the major industries in South Africa, mining has been the focus of the South African government's Black Empowerment initiative with the introduction of the MPRDA and the Broad-Based Socio-Economic Charter for the South African Mining Industry. According to Section 1 of the Broad-Based Black Economic Act (BBBEE),<sup>87</sup> BBBEE means:

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<sup>86</sup> Dunnigan et al; 'Black Economic Empowerment-difficulties and opportunities in making right the wrongs of the past' accessed at <http://faculty.insead.edu/dutt/emde/projects/Sept-Oct05/Group-D.pdf>

<sup>87</sup> Act 53 of 2003



*The economic empowerment of all black people including women, workers, youth, people with disabilities and living in rural areas through diverse but integrated socio-economic Strategies.*<sup>88</sup>

The Broad-Based Black Economic Empowerment Act (No. 53 of 2003) establishes a legislative framework for the promotion of BBBEE provides for the gazetting of transformation charters and empowers the Minister of Trade and Industry to issue codes of good practice. The term black is used interchangeably with Historically Disadvantaged South Africans (HDSAs). BEE as the term implies, is a policy to enhance the participation of black people in the South African economy. This is consistent with the Freedom Charter of the African National Congress (ANC)<sup>89</sup>, a document that makes special mention of the mining industry. According to the Freedom Charter:

*The national wealth of our country, the heritage of South Africans, shall be restored to the people; the mineral wealth beneath the soil...shall be transferred to the ownership of the people as a whole.*<sup>90</sup>

### **3.5.1 The Constitutional Ground for BEE**

In South Africa's new constitution, Constitution of the Republic of South Africa, equality is defined as one of the cornerstones of the democracy in the country. At the same time, the constitution provides for affirmative action measures to be taken. This can be seen as incompatible. However, according to the framers of the constitution, affirmative action shall not be viewed as derogation from the right to equality; rather it shall be viewed as a means to achieve equality and as part of the right to equality.<sup>91</sup> The Constitution of the Republic of South Africa was adopted in May 1996 and entered into effect in February

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<sup>88</sup> [www.dti.gov.za/bee/codes/3\\_20code000.pdf](http://www.dti.gov.za/bee/codes/3_20code000.pdf)

<sup>89</sup> The Freedom Charter was signed on 26 June 1955 at Kliptown and had been the main document that formed the basis of the ANC struggle against apartheid. See the Freedom Charter [www.anc.org.za/ancdocs/history/charter.html](http://www.anc.org.za/ancdocs/history/charter.html)

<sup>90</sup> Ibid 64

<sup>91</sup> Madala, T.H. Affirmative Action-A South African Perspective, SMU Law Review, Vol. 52, No. 4, Fall 1999, pg 1542

1997. The beginning of the preamble of the Constitution reads as follows: “We, the people of South Africa, Recognize the injustices of our past; Honour those who have suffered for justice and freedom in our land; Respect those who have worked to build and develop our country; and believe that South Africa belongs to all who live in it, united in our diversity.” The preamble continues by stating that the Constitution has been adopted by the people so as to “... [h]eal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;” and to “[i]mprove the quality of life of all citizens and free the potential of each person...” The Constitution is declared in the explanatory memorandum to “... represent the collective wisdom of the South African people...”

The equality section of the Bill of Rights in the Constitution makes a specific provision for the implementation of affirmative action programmes. After having stated that “[e]veryone is equal before the law and has the right to equal protection and benefit of the law ...”<sup>92</sup> it continues with “[e]quality includes the full and equal enjoyment of all rights and freedoms. To promote the achievements of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken.”<sup>93</sup> Through this the Constitution authorises measures to be taken which are designed to promote the achievement of equality.

Affirmative action is also sanctioned in the Constitution’s chapter on Public Administration, as it states that “*Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.*”<sup>94</sup> (emphasis added). By stating that the administration must be broadly representative of the South African people, it is indirectly stating that affirmative action shall take place. This is further emphasised by the fairness criteria and the explicit wording that the need to redress the imbalances of the past shall be taken into account in employment and personnel management practices in the public administration.

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<sup>92</sup> Constitution of the Republic of South Africa, Chapter 2 section 9 (1)

<sup>93</sup> Constitution of the Republic of South Africa, Chapter 2 section 9 (2)

<sup>94</sup> Constitution of the republic of South Africa, Chapter 10 section 195 (1) i

In the Equality section discrimination is prohibited. No one, including the state, may “unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.”<sup>95</sup>

This protection against unfair discrimination is modified in that discrimination on one or more of the grounds listed “... is unfair unless it is established that the discrimination is fair.”<sup>96</sup> This means that although the criteria listed in terms of nondiscrimination in the Constitution are far more inclusive than in many modern nations, discrimination on fair grounds is in principle permissible.<sup>97</sup>

Thus, the question of the legality of affirmative action in South Africa is answered. Yet, certain questions remain, such as to what degree either law or private-sector programmes may be undertaken without conflicting with the Constitution’s core principle of equality. The requirement that discrimination shall be formally determined to be “fair” in order to be permissible may mean that no affirmative action programme in South Africa will be Constitutional without receiving a fairly explicit judicial imprimatur. Therefore, the contours of South African affirmative action jurisprudence may not become clear for some time.<sup>98</sup>

### **3.5.2 The Mining Industry Charter**

The Black Economic Empowerment Charters are written according to industry: Mining, Maritime, Transport and Service, Information and Communications Technologies, Agriculture, Forwarding and Clearing, Tourism, Finance, and Petroleum and Liquid Fuels. Each Charter specifies targets for the involvement of disadvantaged individuals.

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<sup>95</sup> Constitution of the Republic of South Africa, Chapter 2 section 9 (3-4)

<sup>96</sup> Constitution of the Republic of South Africa, Chapter 2 section 9 (5)

<sup>97</sup> Tummula, Krishna K, Policy Preference: Lessons from India, United States and South Africa, Public Administration Review, Nov/Dec 99

<sup>98</sup> Ford, Challenges and Dilemmas of Racial and Ethnic Identity, p1968f

The Mining Charter was adopted in October 2002. It was created by virtue of Section 100 (2) (a) of the MPRDA, which provides for a Broad-Based Socio-Economic Empowerment Charter that will set the framework, targets and timetable for effecting the entry of historically disadvantaged South Africans into the mining industry. After the creation of the Mining Charter, the Department of Trade and Industry introduced its Code of Good Practice.<sup>99</sup> The development of the Code of Good Practice (the Code) for the minerals industry in South Africa is also a requirement provided for in the MPRDA.<sup>100</sup>

The Code does not replace the key legislation and laws relating to the minerals and the petroleum industry but serves as a statement of present policy providing an overview and confirmation of the existing mineral and mining policy that is in place. The applicability and the enforcement of this Code cannot be divorced from the Mining Charter and the key legislation in relation to the measurement of the socio-economic transformation in the mining industry. The Code can be amended by the Minister of Minerals and Energy when there is a change in mining policy and legislation.

The charter was adopted on the back of the empowerment objectives contained in the new Mineral and Petroleum Resources Development Act. This basic legislation governing the minerals sector, the MPRDA does make provision for certain BEE initiatives. As per section 2, the objects of the MPRDA include:

d) substantially and meaningfully expand opportunities for historically disadvantaged persons, including women, to enter the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral...resource;

(e) promote economic growth and mineral...resources development in the republic;

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<sup>99</sup> Codes of Good Practice for the South African Mining Industry, No. 3216, Government Gazette, April 2009

<sup>100</sup> Section 100 (1) (b)

(f) promote employment and advance the social and economic welfare of all South Africans',<sup>101</sup>

The conversion of existing mineral rights held by mining companies into the new order rights established in terms of the Mineral and Petroleum Resources Development Act has been made contingent upon the attainment of the 5-year targets set out in the scorecard which forms part of the charter (Appendix ...). The Mining Charter scorecard is designed to assist in evaluating applications for the conversion of all “old order mining rights” into new order mining rights. Any company or individual with mining or prospecting rights has five years from 1 May 2004 to 1 May 2009 to convert their mining rights under the Minerals Development Act (other periods applied for unused rights and prospecting rights). When applying for a converted right, a scorecard approach is adopted by the Department of Minerals and Energy.

The objectives of the Mining Charter are similar to those of the MPRDA, although it is more specific in that it indicates the strategy for the mining industry and indicates strategies for the implementation of the objectives of the MPRDA.<sup>102</sup> The stated intention of the charter is to undertake the transfer of 15% of the assets of the South African mining industry to HDSAs by 2007 and to increase this to 26% by 2013. The Charter identifies the key role that historically disadvantaged South Africans will play in the industry. It identifies seven areas, referred to as pillars that need particular attention. These pillars are human resource development, employment equity, migrant labour, mine community and rural development, housing and living conditions, procurement, beneficiation and ownership.<sup>103</sup>

The approach of the charter in assessing compliance is flexible in that under-achievement in one area may be set-off against over-compliance in another area. A company does not

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<sup>101</sup> MPRDA (Act 28 of 2002)

<sup>102</sup> S.V. Rungan et al, Incorporating BEE into the new mineral law framework for the South African mining industry, *The Journal of the South African Institute of Mining and Metallurgy*, Vol. 105, November 2005, pg 739

<sup>103</sup> Jonathan Faurie, Are Mining Charter and Codes of Good Practice bedfellows? *Mining Weekly* accessed on 26/03/2010 at [www.miningweekly.com/print-version/are-mining-charter-and-codes-of-good-practice-bedfellows-2009-08-07](http://www.miningweekly.com/print-version/are-mining-charter-and-codes-of-good-practice-bedfellows-2009-08-07)

have to score full marks on all aspects of the scorecard. If, for instance, a company has not complied with a standard set in one category, it can “break even” if it has complied extensively in the other categories. If the company has not complied in an individual category, it has to give reasons for such non-compliance and state the steps that are to be taken in order to comply.

In terms of the charter, mining companies are expected to have reached a target of 40% black representation at management level by 2007. In addition, the charter requires the mining industry to increase the participation of women in mining to 10%, to improve mineworkers’ housing and nutrition and to allow miners the chance to be literate and numerate and to co-operate in the development of mining and rural areas.

### **3.5.3 Human resource development**

Article 4.1 of the Mining Charter makes provision for skills development. Education would not only increase the skills base of existing employees, it would create a workforce that is already empowered when they enter the industry.<sup>104</sup> Given the legacy of systematic labour market discrimination and inferior education, accelerated skills and advanced professional skill development is also important.

### **3.5.4 Ownership**

One of the most contentious features of the Mining Charter is Article 4.7 where the mining companies have agreed to transfer 26 per cent ownership to HDSAs within 10 years.<sup>105</sup> Article 4.1.2 provides that the sale of interests in a mining company would be on a “willing seller-willing buyer basis, at fair market value, where the mining companies are not at risk.

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<sup>104</sup> Ibid 75

<sup>105</sup> Ibid 75

### **3.5.5 Beneficiation**

Article 4.8 of the Mining Charter requires mining companies to engage in local beneficiation activities, specifically beyond mining and processing.

### **3.5.6 Financing Mechanism**

Article 4.12 provides that the industry ‘agree to assist HDSA companies in securing finance to fund participation in an amount of R100 billion within the first 5 years’.<sup>106</sup>

### **3.6. Conclusion**

Historical distortions resulting from colonialism and apartheid policies relegated black people to the margins of society. Having gained political independence black governments have tried to tip the scales of this economic inequality by formulating empowerment laws and policies to address this disparity. This has not gone down well with the previous people who enjoyed benefits under the old order. Criticism was also coming from the owners of capital who viewed this economic empowerment as some form of creeping expropriation.

It appears that South Africa’s well thought out BEE policies managed to assuage the fears of this constituency. Quite the opposite to what happened to Zimbabwe’s land reform programme, which has relegated the nation from being the Southern African bread basket to a basket case. This by all means needs to be avoided during the belated empowerment endeavours currently in motion. From the foregoing it is apparent that Zimbabwe is still lagging well behind in its legislative and policy formulation regarding empowerment compared to its neighbour. South Africa presents well thought out formulas which are a lesson not only to Zimbabwe but the greater international community.

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<sup>106</sup> Ibid 75

## CHAPTER 4

### 4.0 Legislation and Policies Governing Mining and Sustainable Development

#### 4.0. Introduction

This Chapter aims at giving an insight into legislation and policies governing sustainable development in the mining industries of South Africa and Zimbabwe.

Mining by nature is inherently unsustainable in that the life of the mine is limited and will eventually come to a close. However, its sustainability can be ensured by the linkages (downstream, upstream and side stream) it forms with other sectors of the economy. Sustainable development as defined by the World Commission on Environment and Development (WCED)<sup>107</sup> is “development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs”. However, this widely used definition focuses on intergenerational equity and a further expansion of the standard definition was made during the 2002 World Summit on Sustainable Development, using the three pillars of sustainable development: economic, social, and environmental. The Johannesburg Declaration created “a collective responsibility to advance and strengthen the interdependent and mutually reinforcing pillars of sustainable development at local, national, regional and global levels.”

During the colonial era in Africa, the mining sector was used to develop the economies of western nations with no attention to the sustainable development of the sector. This has not changed much in the post-colonial era. Although the benefits of mining to national economies are evident, local costs (environmental and social impacts) associated with mining, especially to local communities, are not being adequately compensated for.

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<sup>107</sup> Brundtland Report – Our Common future (WCED, 1987)



## 4.1 South Africa

For most of its history, the mining industry in South Africa has not been subjected to comprehensive environmental regulation. In recent years, however, this has changed significantly and the industry is now required to comply with a complex web of mining and environmental policy and legislation. This chapter outlines the most relevant legislation and policy documents that govern sustainable mining in South Africa.

### 4.1.2 Constitution of the Republic of South Africa

The lynchpin for sustainable mining is arguably section 24 of the Constitution of the Republic of South Africa (Constitution). Section 24(a) proclaims the right of everyone ‘to an environment that is not harmful to their health or well-being.’ Section 24(b) states that everyone has the right ‘to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development’.

In two recent decisions,<sup>108</sup> the Constitutional Court provided guidance on the meaning of ‘ecologically sustainable development’, thereby informing on the nature of the state’s obligations in terms of the right. Firstly, the court stated that sustainable development requires recognition of the inexorable links between socio-economic development and the environment: Development cannot subsist on a deteriorating environmental base – unlimited development is detrimental to the environment and the destruction of the environment is detrimental to development.<sup>109</sup> All decision- and law-making processes therefore need to integrate economics and ecology – not just to protect the environment,

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<sup>108</sup> In *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* 2007 (6) SA 4 (CC) (Fuel Retailers Case) and *MEC: Department of Agriculture, Conservation and Environment and Another v HTF Developers (Pty) Ltd* (2007) ZACC 25 (HTF Developers case), respectively

<sup>109</sup> Fuel Retailers case paragraph 44

but to protect and promote future development as well.<sup>110</sup> Secondly, sustainable development requires the provision for all of an adequate livelihood base and equitable access to adequate resources, including future generations. The court stated:

‘The importance of the protection of the environment cannot be gainsaid. Its protection is vital to the enjoyment of the other rights contained in the Bill of Rights; indeed it is vital to life itself. It must therefore be protected for the benefit of the present and future generations. The present generation holds the earth in trust for the next generation. This trusteeship position carries with it the responsibility to look after the environment’<sup>111</sup>

The court also affirmed the precautionary approach to environmental management<sup>112</sup> and held this to be especially important when considering the cumulative impacts of a development on the environment and socio-economic conditions.<sup>113</sup> The right to environment intersects with a number of other substantive and procedural constitutional human rights. Thus, depending on the context, protection of the right to environment would tend to lead to protection of the right of access to sufficient food and water<sup>114</sup> as well as the right of access to housing,<sup>115</sup> and vice versa. The right of the child to basic nutrition, shelter, basic health care services and social services also intersects positively with the environmental right.<sup>116</sup> The procedural rights of access to information,<sup>117</sup> just administrative action<sup>118</sup> and access to the courts<sup>119</sup> support protection of the right to environment by facilitating greater public participation in environmental governance and decision making.

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<sup>110</sup> Ibid HTF Developers paragraph 60

<sup>111</sup> Fuel Retailers, paragraph 102; HTF Developers paragraph 28

<sup>112</sup> The precautionary principle, as articulated in the National Environmental Management Act 107 of 1998, holds that a risk-averse and cautious approach should be applied, which takes into account the limits of current knowledge about the consequences of decisions and actions.

<sup>113</sup> Fuel Retailers paras 98-9

<sup>114</sup> Section 27 (1) (b) Constitution

<sup>115</sup> Section 26 (1) Constitution

<sup>116</sup> Section 28 (1) (c) Constitution

<sup>117</sup> Section 32 (1) Constitution

<sup>118</sup> Section 33 (1) Constitution which guarantees the right to administrative action that is lawful, reasonable, and procedurally fair and section 33 (2) which states that everyone whose rights have been adversely affected has the right to be given written reasons.

<sup>119</sup> Section 34 Constitution

### 4.1.3 MPRDA

The rights of access to information and just administrative action are particularly pertinent in regard to the process of granting prospecting and mining rights.

### 4.1.4 The Minerals and Mining Policy for South Africa

There are no shortages of policy and legal frameworks for sustainable mining in South Africa. The Minerals and Mining Policy for South Africa, 1998 devoted an entire chapter to the topic of environmental management. This policy affirmed that the State, as custodian of the nation's natural resources, will ensure that development of South Africa's mineral resources takes place within a framework of sustainable development and in accordance with national environmental policy; norms and standards.<sup>120</sup> To this end, 10 principles on sustainable mining were adopted.<sup>121</sup>

These included adoption of the precautionary approach as well as the polluter pays principle; insistence that a consistent standard of environmental impact management would be adopted, irrespective of the scale of mining concerned; equitable and effective consultation with interested and affected parties, including provision for a right to appeal all decision-making; compliance with, and taking into account of the local development objectives, spatial development planning and integrated development plans of the municipalities in which mining operations occur; and the building of capacity to effectively implement environmental management measures and monitor occurrences of pollution, amongst others.

As discussed in Chapter 1, the MPRDA<sup>122</sup> is now the primary statute regulating prospecting and mining in South Africa. Amongst its objectives is the requirement that

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<sup>120</sup> Para 4.2 Minerals and Mining Policy for South Africa (October 1998)

<sup>121</sup> Ibid 13, para 4.4

<sup>122</sup> Published as GNR 527 GG 26275 of 23 April 2004. The MPRDA was recently amended by the Mineral and Petroleum Resources Development Amendment Act 49 of 2008 (MPRDA Amendment), although this Act – while it has been assented to by the President – has not yet commenced. The most significant change effected by the MPRDA Amendment is to facilitate the transfer of the approval of mining-related

holders of mining rights contribute to the socio-economic development of the areas in which they are operating.<sup>123</sup> These objectives have since been translated into a comprehensive policy framework for promoting BBBEE in the mining sector, which includes mine community and rural development.<sup>124</sup>

Furthermore, the MPRDA strongly emphasized the need to give effect to the environmental right by ensuring that mineral resources are developed in an orderly and ecologically sustainable manner.<sup>125</sup>

#### **4.1.5 Sustainable Development through Mining**

In 2005, the (then) Department of Minerals and Energy initiated a Sustainable Development through Mining (SDM) programme. The vision underlying this programme is to ensure that by 2015 the South African minerals sector is contributing optimally to sustainable development. The key strategic objectives of the SDM programme were recently formulated for discussion.<sup>126</sup> They include the objectives: That value extraction from South Africa's minerals sector benefits vulnerable groups; that the minerals sector moves toward sustainable end states, internalizes negative costs and associated consequences and fully aligns the cumulative and life-cycle aspects of the sector with sustainable development principles; and that fundamental human rights are upheld.

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environmental authorizations from the Department of Mineral Resources to the department of Water and Environmental Affairs. The MPRDA is supplemented by the MPRDA Regulations which include a chapter on pollution control and waste management.

<sup>123</sup> Section 2 (c) – (f) and (i)

<sup>124</sup> In particular, the Broad Based Socio-Economic Charter for the South African Mining Industry. The objectives articulated in the Empowerment Charter were further developed in the Codes of Good Practice for the South African Minerals Industry (April 2009- GN 446 GG 32167 of 29 April 2009). As regards mine community and rural development, the scorecard published in the Codes of Good Practice, indicates this element will be assessed with reference to the following: (1) Whether the mining company contributed in the formulation of integrated development plans, and whether the mining company is co-operating with government in the implementation of these plans, both in the areas in which mining takes place and major labour sending areas; and (2) whether the mining company has made an effort to engage the local mine community and major labour sending area communities.

<sup>125</sup> See the Preamble and sections 2 (h) and 3 (3) MPRDA

<sup>126</sup> Department of Minerals and Energy, A Strategic Framework for Implementing Sustainable Development in the South African Minerals Sector: Towards Developing Sustainable Policy and Meeting Commitments Discussion Document (2<sup>nd</sup> draft) (August 2009).

The Mine Health and Safety Act 29 of 1996, whilst primarily targeted at ensuring the health and safety of employees at mines, also contains a few provisions relating to the health and safety of non-employees. It therefore forms part and parcel of determining whether the right to an environment not harmful to health and well-being has been violated.

#### **4.1.6 The National Environment Management Act**

Mining policy and legislation states that national environmental norms are applicable to the mining sector. The National Environmental Management Act 107 of 1998 (NEMA) defines the national approach to environmental management and contains a variety of innovative regulatory mechanisms aimed at sustainable development of renewable and non-renewable resources. The regulatory mechanisms in the NEMA include a comprehensive list of national environmental principles; environmental impact assessment (EIA) of activities having a substantial detrimental impact on the environment;<sup>127</sup> and establishment of a statutory duty of care in regard to environmental degradation and pollution.

#### **4.1.7 Other Legislation pertaining to Environment Management**

While prospecting and mining activities can pollute all environmental media, water resources are arguably impacted most severely. For this reason, the National Water Act 36 of 1998 (NWA) which provides for the integrated management of all aspects of water resources in South Africa is very important. There are many other policy and legislative instruments that are applicable to balancing mining against other present and future uses of resources with a view to ensuring sustainability. These include policy and legislation pertaining to agriculture,<sup>128</sup> conservation and biodiversity,<sup>129</sup> waste management,<sup>130</sup> food

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<sup>127</sup> R385 – 387 GG 28753 of 21 April 2006. The EIA process is threshed out in the NEMA EIA regulations. The NEMA was recently amended to incorporate mining into the EIA framework – see the National Environmental Management Amendment Act 62 of 2008. The Amendment Act commenced on 1 May 2009 (GN 27 GG 32156 of 24 April 2009), but the provisions relating to mining only enter into force upon the commencement of Act 49 of 2008.

<sup>128</sup> For instance, the Conservation of Agricultural Resources Act 43 of 1983; the White Paper on Agriculture, 1995; the Administration Manual for State Agriculture Land, 2001; the Draft Sustainable

security;<sup>131</sup> land reform;<sup>132</sup> land use planning;<sup>133</sup> the protection of heritage resources;<sup>134</sup> and tourism,<sup>135</sup> amongst others. For the purposes of this report, however, which aims only at an understanding of the core policy and legislation applicable to sustainable mining, they are not considered.

## 4.2 Zimbabwe

Although Zimbabwe has implemented national environmental policies and legislation, they are often seen as ineffective due to lack of adequate staff, expertise and resources to implement and enforce them. A wide new range of environmental laws has been put in place in order to achieve their National Environmental Action Plan. There are over 18 pieces of legislation (see below) governing the management of natural resources and environmental protection, and administered by at least 7 different government ministries. Unfortunately, attempts to implement effective environmental measures are ensued in duplication and fragmentation of authority and responsibilities. As a result, environmental issues relating to mining in general have been dealt with in several fragmented (and often conflicting) pieces of legislation. It is hoped that the Environmental Management Act, 2002 will resolve many of these problems arising from conflicting legislations.

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Utilisation of Agricultural Resource Bill, 2003; and the Policy on Agriculture in Sustainable Development (Discussion Document, 8<sup>th</sup> draft).

<sup>129</sup> Including the Biodiversity Act 10 of 2004; the Protected Areas Act 57 of 2003; and the Mpumalanga Nature Conservation Act, 1999.

<sup>130</sup> Including the Waste Act 59 of 2008 and the National Waste Management Strategy.

<sup>131</sup> Particularly, the Integrated Food Security Strategy for South Africa, 2002.

<sup>132</sup> For instance, the Restitution of Land rights Act of 1994 and the policy on Land redistribution for Agricultural Development, 2001.

<sup>133</sup> Including the White Paper on spatial Planning and Land Use Management Bill and relevant Integrated Development Plans

<sup>134</sup> Particularly the National Heritage Resources Act 25 of 1999.

<sup>135</sup> Including the policy on the development and Promotion of Tourism, 1996.

## 4.2.1 Zimbabwe Constitution and Environmental Legislation

The current constitution of Zimbabwe (As Amended at 29 February 2009) has no specific clause that provides for the protection of the environment,<sup>136</sup> nor did the Natural Resources Act (1941, Chapter 20:13 now repealed) directly cover Environmental Impact Assessments (EIAs). Consequently EIAs were not a legal requirement in Zimbabwe,<sup>137</sup> and in recognition of this shortcoming, the Government of Zimbabwe (GoZ) published an EIA Policy in 1997 and associated guidelines. This policy was intended to complement any future EIAs and the promulgation of environmental management legislation.

## 4.2.2 Legal and Regulatory Framework

### 4.2.2. Mining Policies

To date the main focus on environmental management in Zimbabwe has been on developing an effective and efficient legal and administrative framework to facilitate management of natural resources.<sup>138</sup> The National Conservation Strategy (NCS) of 1987 was the first policy document to incorporate the concept of sustainability into development and environmental management. The NCS has established an Interministerial Committee on Environment. Zimbabwe's Second Five Year Development Plan (1991-95) provides that environmental impact assessment (EIA) should be undertaken for major development projects. An Environmental Impact Assessment Policy (1997) was put in place to govern EIAs.<sup>139</sup>

This policy formed the foundation for a law reform process which resulted in the Environmental Management Act, 2002 (Chapter 20:27),<sup>140</sup> and subsequently has

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<sup>136</sup> Constitution of the Republic of Zimbabwe

<sup>137</sup> Southern African Institute for Environmental Assessment 2003. *Environment Impact Assessment in Southern Africa*, Windhoek, pg 352

<sup>138</sup> Id 137

<sup>139</sup> Id 137

<sup>140</sup> Government of Zimbabwe 2002. *Environmental Management Act (Chapter 20:27)* Government Printers, Harare

produced a draft National Environmental Policy (2003).<sup>141</sup> This was developed with the purpose of complimenting and enhancing the Environmental Management Act and other complimentary acts pertaining to environmental protection and management and sustainable development.

However, section 4 of the Environmental Management Act (EMA), (Chapter 20:27), 2002, affords every citizen of Zimbabwe the following environmental rights:

- The right to live in a clean environment that is not harmful to their health;
- Access to environmental information;
- The right to protect the environment for the benefit of present and future generations; and
- The right to participate in the implementation of legislation and policies that prevent pollution, environmental degradation and sustainable management and use of natural resources, while promoting justifiable economic and social development.

The major policy regulating mining activities is the Mines and Minerals Act, chapter 21:05 1996 edition together with its subsequent amendments. This all too powerful piece of legislation was designed to promote development of the mining sector with minimal restrictions. This Act is administered by the Ministry of Mines through the Mining Affairs Board. This Board must consult with the Natural Resources Board before issuing a licence and should in principle ensure that any negative environmental impacts are mitigated and enough resources are budgeted for eventual reclamation and rehabilitation.

The Act however, covers only a limited range of environmental issues once a mining permit has been issued. The main criteria for issuing a permit are technical and financial competence. By ignoring specific issues on environment, the Act has left room for abuse, leading to indiscriminate dumping of waste material, erosion, siltation and other ills.

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<sup>141</sup> Government of Zimbabwe, 2003, National Environmental Policy, Second Draft, Prepared by the Ministry of Environment and Tourism. For Discussion and Consultative Purposes Only.



Several regulations have been enacted in support of the Mines and Minerals Act. Most important of these include:

- The Mining (Health and Sanitation) Regulations, 1977 which regulate for the provision of adequate health and sanitation facilities on a mine. This regulation is rarely applied on small-scale mines because these facilities are non-existent and there is no small-scale miner who has been legally charged for failure to provide the facilities to their employees.
- The Mining (Management and Safety) Regulations, 1990 which seek to control health and safety in and about mining operations. The regulations cover management and responsibility in mines, surface protection, and protection in working places, ventilation, gases and dust and examinations in several certificates of competency. They also cover certain ILO Conventions, including Convention No. 45, which prohibits women from working underground. Compliance with these regulations demands a certain level of technical competence on the part of mine management, and the availability of adequate resources to supply the safety clothing and equipment to employees. None of the current formal small-scale mines comply with at least 20% of the requirements of these regulations for the reasons cited above.
- The Mining (Alluvial Gold) (Public Streams) Regulations, 1991 – which seek to control the small-scale gold panning activities in the country. The regulations empower local councils (RDCs) to issue permits, monitor and control gold panning in designated areas. The regulations also require that mining will take place only in the riverbed, and not closer than 3m to either bank. Undercutting is prohibited, as are excavations deeper than 1.5m. All mined out areas must be backfilled and the gold sold to the Reserve Bank or its agents.

In 2007, several Statutory Instruments (SI) were passed in terms of section 140 of the EMA (Chapter 20:27). These regulations are significant in that they operationalise the Act in the sectors which they cover. They provide for the specific procedures to be followed in complying with the provisions of the Act. More importantly, they incorporate

the modern principles of environmental management such as polluter pays, public participation, preventive principle, environmental rights and so on.<sup>142</sup>

Other sectoral laws relevant to mining include:

- Water Act (1998);
- Natural Resources Act (1996);
- Parks and Wildlife Act, (1998);
- Forestry Act (1996);
- Hazardous Substances and Articles Act (1972);
- Atmospheric Pollution Prevention Act (1971);
- Water (Effluent and Waste Water Standards) Regulations (1977) set effluent standards for discharges into water catchment areas;
- Explosives Act (1972);
- Communal Land Forest Produce Act (1998);
- Public Health Act (1996)

### **4.3 Conclusion**

Previous mining companies used to pay scant regard to sustainable means of mining. Profits were spirited abroad with putting much back into the communities where minerals would have been extracted from, let alone the environmental degradation left behind. Indigenous communities were left to pick the pieces sometimes with very devastating consequences because of the dangers left behind. For example water pollution and damage to their agricultural land

Natural resources are finite resources by their very nature. The importance of developing sustainable means of using these resources has therefore taken great prominence. Local communities and national governments have accordingly paid regard to their use and

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<sup>142</sup> Zimbabwe Environmental Law Association website accessed at [www.zela.org/site/newsletter.asp](http://www.zela.org/site/newsletter.asp)

means of extraction. Issues to do with the environment have come to fore as well as the issue of benefiting local communities.

South Africa has again taken the lead in this regard. A plethora of environmental laws have been put in place to ensure local communities benefit and the environment is well looked after in a sustainable manner. Still more needs to be done. The case of Zimbabwe is sad as has become to be expected. Although on paper it has some of the well written pieces of legislation, decades of impunity has resulted in the neglect of environment regulation. The cutting of trees on farms which used to be the envy of the world, gold panning on river banks, veld fires have all taken a toll on the environment. Authorities need to take a stance before the situation spirals out of control. Legislation needs to be updated and strengthened and duplication of environment control needs to be avoided.

## CHAPTER 5

### 5.0 A Case for Harmonising Minerals Law in SADC

#### 5.0 Introduction

The Southern African Development Community's (SADC's)<sup>143</sup> regional economic integration agenda includes a macroeconomic convergence programme, intended to achieve and maintain macroeconomic stability in the region. According to the treaty establishing the SADC, one of the means of realizing this vision is to achieve sustainable utilisation of mineral resources and effective protection of the environment. This is in line with the fact that the mining sector already plays an important role in the overall economic development in terms of generating foreign exchange and the creation of

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<sup>143</sup> Angola, Botswana, the Democratic Republic of Congo (DRC), Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia, and Zimbabwe.

employment.<sup>144</sup> Mining in SADC remains a predominant industry as it contributes about 60% to the total foreign exchange earnings, 10% to total GDP though in some member States it goes up to 50% and about 5% to direct formal employment.<sup>145</sup> SADC is also an important player on the international mineral market with shares between 11% and 45% of the world supply of eight major commodities which includes chromite, cobalt, diamond, gold, manganese, copper, platinum and uranium and has considerable potential in the dimension stone sector and other industrial minerals. In addition SADC possesses some of the world's richest deposits for a number of minerals.

SADC member states are aligning their mining legislation with each other in a bid to attract investment and boost economic growth in the mineral rich southern African region. The SADC harmonisation of mining laws framework has been in place since 2006 and seeks to align mining policies, mineral processing and value addition policies, research and development and policies on small scale mining enterprises.<sup>146</sup> The harmonisation project is aimed at ensuring that mining policies of member states are knitted in a way to facilitate investment and ensure common standards in the region's mining sector as reflected in its strategy and protocol on mining.<sup>147</sup>

### **5.1 SADC Protocol on Mining**

The SADC Protocol on Mining was adopted in 1997 to promote the interdependence and integration of mining policies for the accelerated development and growth of the Mining Sector in the SADC Region. The Protocol outlines a number of key areas in which the Member States of SADC agree to collaborate. These include; information sharing, enhancing technological capacity, the promotion of private sector and small scale mining, environmental protection and occupational health and safety.

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<sup>144</sup> C.J Chanda, Mining Investment Promotion in the SADC Region, UNCTAD

<sup>145</sup> Ibid 144

<sup>146</sup> [http://www.southerntimesafrica.com/article.php?title=SADC\\_harmonising\\_mining\\_laws&id=3431](http://www.southerntimesafrica.com/article.php?title=SADC_harmonising_mining_laws&id=3431)

<sup>147</sup> SADC 1997 Protocol on Mining, [www.sadc.org](http://www.sadc.org)

One of the key principles underlying the SADC Protocol on Mining is the recognition that a thriving Mining Sector can contribute to economic development, alleviation of poverty, and the improvement of the standard and quality of living throughout the region.

To achieve this, the Protocol has the following objectives:

- participation and the promotion of economic empowerment for the historically disadvantaged through the mining sector.
- Investments in training and capacity building, including in the area of occupational health, are seen as an important cornerstone in attaining the objectives of the SADC protocol on Mining.
- to foster economic integration of the region
- to promote investment into development of the mining sector
- to integrate mining into the economies of the region
- to maximize benefits from mining
- to promote sustainable and environmentally friendly mining industry; and
- to compile and disseminate information relevant to the mining sector

## **5.2 SADC Mining Sector Strategy**

The major thrust of the 1992-1996 Mining Sector Strategy (MSS) and Programme was to attract investment into the region. During this period, member States took bold measures to create a conducive environment for private sector investment.

The 1997-2001 Mining Sector strategy was approved by the Council of Ministers at their meeting held in Blantyre, Malawi in September 1997. The objectives and strategies were based on experiences gained during the implementation of the 1992-1996 strategy. The strategy has taken cognizance of the changing political and economic situation in member States, which include democratisation process, liberalisation of the economies, embracing the private sector as the prime-mover of the production process and the dawn of peace in the region. The 1997-2001 Mining Sector Strategy also takes into account the fact that

the SADC Mining Industry is highly integrated into the World economy and thus the region should endeavour to remain competitive by way of encouraging member States to adopt progressive economic policies. This document highlighted the following strategies to be adopted:

- Information dissemination on the investment climate and business opportunities available in the region
- Strengthening National/Regional institutions involved in mineral and development
- Encouraging downstream processing of minerals
- Compiling data on potential mining projects
- Identifying potential commodities for exploration
- Encouraging publications on geological information
- Reducing the adverse environmental impact of mining
- Ensuring training and sustainability of human resources.

### **5.3 Compliance with the SADC Protocol on Mining and SADC MSS**

During the past decade, a number of countries made efforts to reform their policies and the regulatory environment, aimed at encouraging private sector participation, attracting new capital investments, technology and skills and stimulating exploration. In addition, the global technological advances and cost competitiveness in minerals production developments, the globalization of finance and investment and the global competition for investment resources, led to most countries choosing more liberal policies.

For example, Botswana's Parliament passed a new Mines and Minerals Act after an extensive period of consultation and study of more modern legislation operation in other countries. The aim of the new legislation, coupled with revisions to taxation policy, is to provide an economic environment which is favourable for investment in the minerals industry of the country, and which allows companies to be globally competitive.

South Africa, on the other hand, has recently amended the MPRDA to give to align it with environmental legislation and the Royalty Act to align its tax regime with international best practice. It should be noted that with the MPRDA much debate has been made about security of tenure of mineral rights and property, and some of these issues are still under discussion (for example the nationalization debate instigated by the firebrand ANC youth League President). Objections from the Chamber of Mines have been founded on the fear that possible expropriation of mineral rights by the State, or the imposition of penalties and levies, could in fact discourage investment, because of increased hurdle rates and higher risk, as perceived by the potential investor.

Nevertheless, agreement was reached between the Government and the Chamber of Mines, investors have been reassured by the Minister of Mines with regard to security of tenure. The parties further agreed to promote black empowerment, and illustrated this commitment through the establishment of Black Empowerment Fund to support small mining companies, and help finance acquisitions.<sup>148</sup>

Proposals for a revised and consolidated fiscal framework for mining in Zimbabwe are still under review. The proposals aim to ensure that the mining investment regime in Zimbabwe maintains its competitiveness for mining capital and that Government gets a share of mine-life profits. At their 71<sup>st</sup> Annual Conference in Victoria Falls, the Zimbabwe Chamber of Mines was reassured by the President of Zimbabwe that no expropriation of mines will be carried out as a result of the introduction of BEE Regulations.

However, current developments in the country in terms of political and economic instability, and a slide into severe recession do not bode well for the successful implementation of these policies, and the attracting of foreign capital.

The Department of Mines and Energy in Namibia launched its strategic plan for the Minerals industry, for 1999-2003. The plan builds on the foundations laid since

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<sup>148</sup> Financial Times, 21 May 2010

independence, which concentrated on establishing a self sufficient energy sector, and encouraging investment in the minerals industry.

The plan is based on the following objectives:

- To promote investment in the minerals and energy sectors
- To ensure the sustainable contribution of resources to the socio-economic development of Namibia
- To create a conducive environment for the mineral and energy sectors
- To regulate and monitor the exploration and exploitation of mineral and energy resources
- To minimise the impact of exploitation of mineral and energy resources on the environment
- To provide a professional and customer focussed service. Specifically, the plan aims to stimulate growth in the mining sector by 2-3% in real terms per year, through:
  1. Creating an enabling environment that will be competitive and conducive to promoting investment
  2. Promoting the development of a vibrant and sustainable small mining sector
  3. Ensuring that mineral resources are exploited in a safe, responsible and sustainable manner
  4. Promoting the integration of the mining with other sectors.

Namibia recognises through this plan, the need to attract foreign investment, in a competitive market. The plan recognises the potential for investment in Africa, and wishes to ensure that its legal, fiscal and economic environment is conducive to attracting its fair share of this investment. To this end, the Government is increasing its expenditure significantly, to support private and foreign investment.<sup>149</sup>

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<sup>149</sup> World Bank 2005



## **Chapter 6**

### **6.0 Recommendations**

#### **6.0 Introduction**

South Africa and Zimbabwe have both tremendously benefited from their mineral resources. Most of the towns and cities in these countries owe their origin to mining activities. South Africa and Zimbabwe have made improvements in creating a vibrant and a diversified mineral sector. However, these improvements have not been sufficient to secure a sustainable sector that is socially and economically integrated into the long-term development aspirations of its peoples.

#### **6.1 Recommendations on Mining law and Policy, Mineral Rights and Tenure**

Property rights should be clearly defined and enforced. A compensation clause should always be embedded in the property rights. Importantly, Government should not inappropriately nationalize or expropriate investments. Nationalization should only be done for public purposes, under due process of law, on a non-discriminatory basis and against prompt, adequate and effective compensation.

The Government has signed BIPPA's with a number of countries which aim to ensure that the sacrosanct nature of private property and property rights is observed across all sectors of the economy, in conformity with the best standards and international agreements. Given the centrality on protection of investment capital in economic growth, the Government should champion the respect for BIPPA's and other strategic agreements with regional and international business partners in order to promote further investment.

## **6.2 Recommendations on Black Empowerment Policies**

While it is a noble idea to ensure that the indigenous people benefit from the exploitation of minerals, this should be done in a manner which should not retard growth of the sector. Considering the capital intensive nature and risk involved in mining development, there is need to review the proposed minimum shareholding to be reserved for the Government and/or indigenous investors. Other consideration such as investment in infrastructural development and social responsibilities should also come into play in determining the equity levels.

- government should define what it is trying to achieve through the BEE policy. It should stipulate what success will look like and it should set terms for business about when success will be declared and the policy reach its conclusion (for business as a whole and as individual entities).

## **6.3 Recommendations on Environment and Sustainable Development**

The development, exploitation and utilisation of natural resources in today's environment requires the involvement, collaboration, and the establishment of partnerships between stakeholders including governments, the private sector, bilateral and multilateral development agencies, local communities, NGOs and other partners. The extent of activities described reflects, to a certain degree, these new developmental relationships and dynamics.

Mining can be an environmentally disruptive activity, and can dislocate traditional lifestyles. Mining can also foster development in certain areas. Therefore, mining companies need to improve their image by collectively acting in a sound environmental and social manner. They need to remain open to scrutiny by delivering as much information related to the project as possible during the life-time of the project. They also need to remain open and flexible to the responses from other stakeholders during the life-time of the project, without compromising their own economic viability. By being

accountable and transparent with their performance, they will be seen acting as good corporate citizens.

Although the purpose of mining companies is to generate profit for their shareholders, dealing with social issues in mineral development projects, and integrating the concept of sustainable development in their performance may be seen, in the short term as a distortion of the market. But, on the contrary, this new behaviour not only minimizes the risk for the industry in the short term, but potentially increases its viability in the long term.

Governments also need to adopt new strategies. Central governments need to allow local governments to actively participate in issues related to the mineral projects they host, and protect their share in the future revenues. Highly centralized governments need to empower local governments, and let them channel and protect the interests of their constituencies. Effective distribution of benefits, including rents, originating from mineral development projects, and an equitable allocation of the costs incurred in mineral developments are of paramount importance to satisfy the needs and concerns at local, regional and national levels. Central and local governments also need to develop and build their own capacities to actively participate with the other main stakeholders in the design and implementation of mineral development projects and satisfy the needs of their constituencies.

A key issue is to identify economic opportunities for local communities outside of mining, and to use some of the rent from the mine to develop an economic base to support local communities after the mine has closed. There are three factors of major importance. First, whatever economic opportunity is identified, it needs to be subject to local consultation and public participation throughout the design and implementation stages to gain long term acceptance. Second, to guarantee certain levels of success in the long run, local communities need to build capacity to manage their own affairs. They require education, training in access to information and communication technology, negotiation skills and interpretation of technical information to effectively participate in

public consultation processes. Third, within this process, there is a need for the positive and active role of NGOs. Their presence and active participation encourages transparency and accountability by the other two main stakeholders, mining companies and governments.

#### **6.4 Recommendation on the Harmonisation of Mineral Legislation in SADC**

SADC has the responsibility of converting the regional mineral heritage into wealth by facilitating investment into the mining sector. If SADC has to succeed in its efforts, it has to address the following:

##### **6.4.1 Harmonisation of Legislation and Policies**

A uniform Southern African approach to attracting international foreign direct investment that learned from the practices of other major mining jurisdictions should be promoted between members of SADC. The cost of doing business should be reduced and the region needs to ensure a common legal framework that protects property rights and acknowledges the relationship between risk and reward in exploration and mining. A step by step approach to harmonization between SADC countries is recommended.

A “One Stop Shop” SADC regional website that targets international and indigenous mining investors should be created and kept functional.

##### **6.4.2 Promotion of Foreign and Indigenous Investment**

The most balanced approach to developing mining activity would be to attract international capital and investment while ensuring that indigenous investors also benefit from and/or participate in major mining ventures. To this end transparency and security of investment for investors should be accompanied by respect for the environment and the sustainability of local communities.

To improve the investment climate, Africa has recognised that it should:

- Create an enabling policy environment;
- Promote good governance, peace and stability;
- Train human resources;
- Provide reliable supporting infrastructure;
- Improve the capacity for technology acquisition and innovation;
- Increase the capacity to mobilise financial resources; and
- Promote of public-private partnerships.

#### **6.4.3 Value Addition**

Governments should encourage the establishment of downstream metal processing and manufacturing and support industries, where economically appropriate, that can add value to local mined production and create local employment. These initiatives should be market-driven, based on the comparative advantage of each country and accompanied by enabling legislation. Free movement of materials through the SADC region would aid this aim as would focus on improving infrastructure. Both these actions would improve the general investment climate which in itself would encourage investment in sustainable value addition in mining and across other sectors.

#### **6.4.4 Emerging Markets**

Southern Africa should approach the opportunity offered by the emergence of Asia as both potential investors and major future markets for their metals by further developing commercial contacts with Asian countries. Countries such as China and India should be invited to share the risks of developing minerals projects through forming strategic partnerships. SADC countries should ensure that their infrastructural capacity is attractive to Asian investors. Increased cooperation with international agencies such as the Study Groups is recommended as a way of improving market intelligence on Asia.

Stringent measures must be made to develop the technical and business capacity of local project promoters and local consultants, as an active local junior mining sector can be a means of attracting international players.

#### **6.4.5 Communications Strategy**

It is in the interest of Southern African countries to work with the media to improve transparency in the mining sector. It is evident that the continuous negative image by the mainstream international press instigates seriously against direct foreign investment. This has to be urgently and continuously be countered by the SADC member states. SADC should be better equipped to attract foreign direct investment and communicate their national approaches to mining investment policy. Transparency at all levels is vital in governments (such as the license applications process) and in industry (such as shareholding structure). It is recommended that there should be communication and interaction with local communities, regularly updated national mining websites.

#### **6.4.6 Avoiding the Dutch Disease**

Dutch disease is name applied to the phenomenon experienced by countries which have a rich endowment of minerals, the result of which is that the economy of the country becomes heavily reliant upon the revenues received from mineral sales, at the expense of the growth of other industries.

Frequently, large government revenues are realized, raised either through direct involvement or ownership, or through mineral rents, and these revenues then become expended on non-value creating activities, such as social spending or military spending. The fact that this revenue is not reinvested into creating a viable manufacturing sector, or downstream beneficiation industry, results in a booming minerals sector (which is unsustainable because it is based on a wasting asset) coexisting with a lagging or shrinking manufacturing sector.

In this case revenues generated in the economy, which flow to the State, are spent on non traded goods and services, as opposed to those being invested in those sectors which would diversify the economy, and ensure its sustainability. Such a situation existed in South Africa, during the periods of isolation, when in 1979/80, military spending accounted for 16% of government spending, at a time when taxation from mining was at a high rate, reaching a record 28.48% of government tax revenue in 1981 (van Blerk). Currently, such a risk exists in war torn countries, where the issue of conflict diamonds is indicative of the desire by countries to use mineral wealth to fuel military or political action, or to use it as a rationale for occupancy of neighbouring territories. Clearly, such action reduces the long term ability of mineral endowment to contribute to sustainable economic success.

If the minerals industry is to contribute its full potential to the sustainable development of a globally competitive SADC minerals industry, regional policies and practices must have some degree of common direction and purpose, so that multinational companies can continue to support the industry, through direct investment, and through the establishment of joint ventures with Governments, local entrepreneurs and the small mining sector.

## **6.5 Conclusion**

The ultimate aim of this research process was to understand state of mineral rights and tenure in South Africa and Zimbabwe. The mineral rights and tenure systems in South Africa have been shown to more advanced than those of Zimbabwe. Zimbabwe has more to learn from the South African system of mineral law and policy. The same applies for the black empowerment, environment management and sustainable. Zimbabwe's laws are too fragmented with no one authority in particular being in charge.

The performance of any economy relies upon investment in the various sectors of the country. In developing countries like Zimbabwe, investment opportunities are mainly in the primary industries, particularly the extractive industry (mining) and agriculture. One of the main drivers of investment is a sound and clear policy on property rights. Respect

of property rights attracts and promotes private sector investment which is the engine for economic growth. In order to attract investment, Zimbabwe should continue to uphold the sanctity of property rights. Both domestic and foreign investors find comfort in internationally acclaimed property rights. This brings about confidence in the country's policies and security to investment.

The establishment of property rights and the subsequent enforcement of these rights is key to attracting investment, promoting economic growth and development, as well as improving the living standards of people. It is against this background that the Government of Zimbabwe should honour the provisions of all existing BIPPAs which have been signed with other countries.

Zimbabwe, being a signatory to various international treaties and conventions like MIGA, ICSID and the United Nations Convention on International Trade Law, should continue to observe compliance with such arrangements. Furthermore, the judiciary system should be further resourced adequately to ensure speedy resolution of investment disputes. The upholding of property rights leads to increased investments by the private sector both domestic and foreign. The private sector is the engine of economic growth in various countries as it results in the development of the economy.

## **7.0 REFERENCES**

**The Role of the Department of Minerals and Energy, GDACE Mining & Environmental Impact Guide, Chapter 11: The Role of the DME**

**John Holloway & Associates, The mining Annual Journal Ltd 2000  
Zimbabwe 1, Mining Annual Review 2000**

**Zimbabwe Mining Report Q1 2010,**  
<http://www.researchmarkets.com/reports/1204377>

**The Mineral Industry of Zimbabwe by Philip M. Mobbs: US Geological  
Survey Minerals Yearbook – 2005**

**Zimbabwe Mining Report Q3 2009**



Zimbabwe Chamber of Mines

**Mineral Tenure Regimes in the Context of Evolving Governance Frameworks: A case study of selected Latin American countries** by Ana Elizabeth Bastida, Centre for Energy, Petroleum, & Mineral Law & Policy, University of Dundee, Scotland

Wikipedia

Chambers Concise Dictionary, New Edition

Government Gazette, Republic of South Africa, Vol. 448 Cape Town, 10 October 2002 No. 23922

**Walde, T.**, Mining Law Reform in South Africa: Draft comment, Vol 12-2 article, Online Journal CPMLP (2002) <http://www.dundee.ac.uk/cpmlp/journal/html/vol12-2.html> - last visited 25/02/2010

**Dale, M.**, *Comparative International & African Mining Law as Applied in the Formation of the New South African Mineral Development Legislation* in International and Comparative Mineral Law and Policy, 827 (Bastida, E., Walde, T., and Warden-Fernandez, J., ed., The Hague: The Kluwer Law International, 2005)

**Cawood, F. T.**, *New South African Mineral and Petroleum Resources Development Act: Shaping a New investment Environment to Reflect a Diverse Society*, vol. 22 JENRL 130, 131 and 132 (2004).

**Mbendi** – Zimbabwe: Mining, [www.mbendi.co.za/indy/af/zi/p0005.htm](http://www.mbendi.co.za/indy/af/zi/p0005.htm)

**M K Omalu and A Zamora**: Key Issues in mining Policy: A brief comparative survey as a background study on reform of mining law, Heinonline, 17 J. Energy Nat. Resources L. 27 1999

IEEA 14 of 2007. [www.indigenisation.gov.zw/indigenisationact.pdf](http://www.indigenisation.gov.zw/indigenisationact.pdf)

**Statutory Instrument 21 of 2010** (S.I. 21 of 2010), Section 1(2) of the Regulations.

**World Investment Report 2003**, FDI Policies for Development: National and International Perspective, United Nations Conference on Trade and Development (UNCTAD)

**Tony Leon**, Creeping Expropriation of Mining Investments: An African Perspective; Journal of Energy & Natural Resources Law: Vol 27 No4 2009

**Bernardus Henricus Funnekotter and others v Zimbabwe**, ICSID Case No ARB/05/6, Award, dated April 15, 2009, at para. 97 (Zimbabwe conceding that “Land

Acquisition Act and the Constitution of Zimbabwe...is tantamount to expropriation’’) (‘‘hereinafter Funnekotter’’).

**UNCTAD**, Zimbabwe, Total Number of Bilateral Investment Treaties Concluded, 1 June 2009, available at [http://www.unctad.org/sections/dite\\_pcbb?docs/bits\\_zimbabwe.pdf](http://www.unctad.org/sections/dite_pcbb?docs/bits_zimbabwe.pdf)

**MacDonald Dzirutwe**, Zim releases shock foreign ownership rules, Moneyweb News report, dated February 10, 2010, available at <http://www.talkzimbabwe.com/news/117/ARTICLE/6030/2010-02-16.html>.

**Golden Sibanda**, High Expectations as Chamber of Mines meet, The Herald, Zimbabwe, May 27, 2010, accessed at [www.theherald.co.zw](http://www.theherald.co.zw)

**Zimbabwe miners offer compromise on local ownership law**, accessed at [http://www.zimbabwesituation.com/may20\\_2010.html](http://www.zimbabwesituation.com/may20_2010.html)

CONAPRI News Report, dated October 4, 2007, available at <http://www.conapri.org/english/articleDetailIV.asp?articleid=29474&CategoryId2=15048>.

**Elizabeth Bastida et al**, Safeguards for Foreign Investment in Mining, International Comparative Mineral Law & Policy, Kluwer Law International, The Hague, 2005.

**Eric Block**, Death Sentence for Economy, The Zimbabwe Independent, Thursday, 18 February 2010 accessed at <http://www.theindependent.co.zw/opinion/25391-death-sentence-for-economy.html>

**Supreme law**, ‘‘This Constitution is the supreme law of Zimbabwe and if any law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void.’’

**Naledi**, draft document – The evolution of ‘‘Black Economic Empowerment’’ in South Africa: From the lenses of business, the tripartite alliance, community groups, and the apartheid and post-apartheid governments (1985 – 1999), Omano Emma Edigheji, 2000, p 15

**Abelueki Consulting, draft document** – Towards an Economic Empowerment Strategy in South Africa, 2000, pg 6

**The impact of black economic empowerment initiatives**, Accountancy and Finance Update, 1997

**Ford, Christopher A.**, Challenges and Dilemmas of racial and Ethnic Identity in American and Post-Apartheid South African Affirmative Action, UCLA Law Review, Vol. 43, August 1996, No. 6 pg 1973

**Women lose out in Africa's richest nation**, The Star, 31 October 2000

**A long way towards combating racism**, Enterprise, October 2000

**TIPS Annual Forum**, "Growth and Investment in South Africa" accessed at [www.tips.org.za/events/proceedings/bee.html](http://www.tips.org.za/events/proceedings/bee.html)

**Empowerment companies no longer there for the picking**, Business Day, 9 May 2000

**BusinessMap**, Empowerment 2000-New Directions, 2000, (BusinessMap 2000), pg49

**BusinessMap**, Empowerment Guidelines

**Walde T.**, Mining Law Reform in South Africa, Internet Journal, Vol. 12: Article 2

**Dunnigan et al**; "Black Economic Empowerment-difficulties and opportunities in making right the wrongs of the past" accessed at <http://faculty.insead.edu/dutt/emde/projects/Sept-Oct05/Group-D.pdf>

[www.dti.gov.za/bee/codes/3\\_20code000.pdf](http://www.dti.gov.za/bee/codes/3_20code000.pdf)

The ANC Freedom Charter was signed on 26 June 1955 at Kliptown and had been the main document that formed the basis of the ANC struggle against apartheid. See the Freedom Charter [www.anc.org.za/ancdocs/history/charter.html](http://www.anc.org.za/ancdocs/history/charter.html)

**Madala, T.H.** Affirmative Action-A South African Perspective, SMU Law Review, Vol. 52, No. 4, Fall 1999, pg 1542

**Constitution of the Republic of South Africa**, Chapter 2 section 9 (5)

**Tummula, Krishna K**, Policy Preference: Lessons from India, United States and South Africa, Public Administration Review, Nov/Dec 99

**Ford**, Challenges and Dilemmas of Racial and Ethnic Identity, p1968f

**S.V. Rungan et al**, Incorporating BEE into the new mineral law framework for the South African mining industry, The Journal of the South African Institute of Mining and Metallurgy, Vol. 105, November 2005, pg 739

**Jonathan Faurie**, **Are Mining Charter and Codes of Good Practice bedfellows?** Mining Weekly accessed on 26/03/2010 at [www.miningweekly.com/print-version/are-mining-charter-and-codes-of-good-practice-bedfellows-2009-08-07](http://www.miningweekly.com/print-version/are-mining-charter-and-codes-of-good-practice-bedfellows-2009-08-07)

**Brundtland Report** – Our Common future (WCED, 1987)

See the Preamble and sections 2 (h) and 3 (3) MPRDA

**Department of Minerals and Energy**, A Strategic Framework for Implementing Sustainable Development in the South African Minerals Sector: Towards Developing Sustainable Policy and Meeting Commitments Discussion Document (2<sup>nd</sup> draft) (August 2009).

Constitution of the Republic of Zimbabwe

**Southern African Institute for Environmental Assessment 2003**. Environment Impact Assessment in Southern Africa, Windhoek, pg 352

**Government of Zimbabwe 2002**. Environmental Management Act (Chapter 20:27) Government Printers, Harare

**Government of Zimbabwe, 2003**, National Environmental Policy, Second Draft, Prepared by the Ministry of Environment and Tourism. For Discussion and Consultative Purposes Only.

**C.J Chanda**, Mining Investment Promotion in the SADC Region, UNCTAD

**Financial Times**, 21 May 2010

#### **OTHER INTERNET SITES**

<http://www.mbendi.com/indy/ming/af/sa/p0005.htm>

[http://www.southerntimesafrica.com/article.php?title=SADC\\_harmonising\\_mining\\_laws&id=343](http://www.southerntimesafrica.com/article.php?title=SADC_harmonising_mining_laws&id=343)

*Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe (2/2007) (2008)*, Southern Africa Development Community (SADC) Tribunal Windhoek, Namibia, ([www.saflii.org/sa/cases/SADCT/2008/2.pdf](http://www.saflii.org/sa/cases/SADCT/2008/2.pdf)).

## 8. BIBLIOGRAPHY

**Zimbabwe Mines & Minerals Act 1996** (Revised Edition), Chapter 21:05, Mines and Minerals Amendment Bill, 2007

**SADC 1997 Protocol on Mining**, [www.sadc.org](http://www.sadc.org)

**Zimbabwe Environmental Law Association** website accessed at [www.zela.org/site/newsletter.asp](http://www.zela.org/site/newsletter.asp)

**Codes of Good Practice for the South African Mining Industry**, No. 3216, Government Gazette, April 2009

**Govt cancels ACRs diamond licence**, Zimbabwe Guardian News Report, dated February 16, 2010, available at <http://www.talkzimbabwe.com/news/117/ARTICLE/6030/2010-02-16.html>.

## ARTICLES AND JOURNALS

Elizabeth Bastilda, Thomas Walde, Janeth Warden-Fernandez (eds), *International Comparative Mineral Law and Policy: Trends and Prospects* (The Hague: Kluwer Law International, 2004).

Otto James and Cordes John, *The Regulation of Mineral Enterprises: A global Perspective on Economics Law and Policy* (Westminister, Colorado: Rock Mountain Mineral :aw Foundation, 2002)

Elizabeth Bastilda, “A Review of the Concept of Security of Tenure: Issues and Challenges”, 2001, *Journal of Energy and natural resources Law*, Volume 19, Number 1.

Elizabeth Bastilda et al., “Mining Investment and Policy Development: Argentina, Chile and Peru”, *CEPMLP International Journal*, Volume 16, Article 10.

John P. Williams, “The Latin American Mining law Model”, in Elizabeth Bastilda, Thomas Walde, Janeth Warden-Fernandez (eds), *International Comparative Mineral Law and Policy: Trends and Prospects* (The Hague: Kluwer Law International, 2005) 741-757

Robert Pritchard, “Safe for Foreign Investment in Mining”, in Elizabeth Bastilda, Thomas Walde, Janeth Warden-Fernandez (eds), *International Comparative Mineral Law and Policy: Trends and Prospects* (The Hague: Kluwer Law International, 2005) 73-97

Thomas Walde, “Investment Policies and Investment Promotion in Mining Industries” (1991) 6 *ICSID/Foreign Investment Law Journal*, 1 (Spring) 94-113

The World Bank industry and Mining Division- Industry and Energy Department, World Bank Technical paper No. 345: *A Mining Strategy for Latin America and the Caribbean* (Washington D.C.: The World Bank, 1996).

Fraser Institute, *Annual Survey of Mining Companies*, 2005 / 2006, Online:  
<<http://www.fraserinstitute.ca/admin/books/files/>>

Vilhena, F.C., *Main issues for Formulating Mining Policies Towards Attracting Foreign investment*, in the Mining Industry: Old Treats and New Challenges, CEPMLP, University of Dundee Annual Mining Seminar, 10-14 June 2002