



DIGGING UP THE TRUTH: THE LEGAL AND POLITICAL REALITIES OF THE ZIMPLATS SAGA

Disbelief in magic can force a poor soul into believing in government and business ~Tom Robbins¹

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Introduction

Mugabe's ZANU PF² party has presented the "economic empowerment" of Zimbabweans as its key policy component and the main theme around which it intends to campaign for the next elections.³ Although the indigenisation of Zimbabwe's economy is ostensibly a programme of an inclusive government, comprising both ZANU PF and the erstwhile opposition MDC⁴ formations, the MDCs and ZANU PF are sharply divided on how this programme should be implemented in practice.⁵

This division is an echo of a starker disjuncture between the actual legal framework establishing Zimbabwe's "indigenisation" policy⁶ and the framework which ZANU PF wishes to present and impose as being the legal regimen. ZANU PF's loss of its majority in parliament in 2008 and constitutional constraints prevent ZANU PF amending the legislation so as to align its desired legal regimen with the actual. It has thus, with remarkable success, instead sought to alter *the perceptions* of the actual legal regimen to accord with its policy objectives. This has been achieved through its absolute control over all electronic media in Zimbabwe and the state owned press in which all programmes and articles on the indigenisation of the economy are carefully managed; through its control of the Government Ministry tasked with the implementation of the programme; and through the complicity of the non-ZANU PF aligned media which seems to prefer the ZANU PF version of the legal regime as the more likely to sell copy.⁷ The result is that

¹*Even Cowgirls Get the Blues* (1976), p. 69

²Zimbabwe African National Union Patriotic Front.

³*Zanu PF Using Empowerment Law As Vote Catching Gimmick: Admits Kasukuwere* <http://www.thezimbabwean.co.uk/news/zimbabwe/57231/zanu-pf-using-empowerment-law.html>.

⁴Movement For Democratic Change. Following discredited elections in 2008, the MDC formations entered into an "Inclusive Government" with ZANU PF in February 2009 most usually referred to as the "Unity Government."

⁵ See for example *Ministers Snub Prime Minister's 'Cabinet'* The Herald 04.04.12; *MDC-T Slams Empowerment* The Herald 17.10.11 and *Policy Differences Widen Fissures in Inclusive Government* The Herald 05.04.12.

⁶ The policy would be more accurately described if it were referred to as a black economic empowerment policy as the definition of "indigenous" in the Act makes clear – see Derek Matyszak *Everything You Ever Wanted to Know (and then some) About Zimbabwe's Indigenisation and Economic Empowerment Legislation But (quite rightly) Were Too Afraid to Ask*. 2nd Ed. May 2011 available at www.kubatana.net. (Matyszak May 2011) at p3.

⁷ See for example *Time to Scrap Zim's Unity Deal and have a Supervised Election* <http://www.businessday.co.za> 17.03.10.

a succession of myths has come to be accepted as fact. Each myth has built upon the one preceding, so that addressing the last requires considerable unravelling.

The myths that this article addresses are as follows:

1. Zimbabwean law requires each “non-indigenous” company to dispose of 51% of “its” shares to black Zimbabweans; and
2. As part of this process, Zimbabwean law requires that all mining companies are obliged to ensure that 10% of this 51% comprises shares held by a Community Share Ownership Trust established and approved by Government for this purpose; and
3. Zimplats, after considerable pressure from Government has complied with these “legal” requirements.

Myth 1 – the disposal of a 51% shareholding.

The law relating to the indigenisation of mining in Zimbabwe is contained in three pieces of legislation: the Indigenisation and Economic Empowerment Act⁸, the Indigenisation and Economic Empowerment (General) Regulations as amended,⁹ and a General Notice.¹⁰

None of these laws contain any provisions which compel 51%, or any percentage of the shareholding of any “non-indigenous” company, to be transferred to indigenous Zimbabweans and which penalise any failure to do so. The actual effect of this legislation has been considered in some detail elsewhere, and only the most salient points will be repeated here.¹¹

The enabling Act, in section 3, stipulates its objective to be, through the Act itself or regulations, *an endeavour* to secure that at least 51% of the shares of every public company and any other business shall be owned by indigenous Zimbabweans. This endeavour is not, however, achieved by either the Act or Regulations. The briefest application of one’s mind will indicate why this is so.

The share capital of a company is not owned by the company itself - shareholders own the shares.¹² Accordingly, the stated “general objective” of the Regulations that every *business* “dispose of”¹³ “a controlling interest of not less than fifty-one *per centum* of the shares or

⁸ Chapter 14:33, passed by Zimbabwe’s Parliament in October 2007 and signed into law by the President in March 2008.

⁹ S.I. 21 of 2010 gazetted on the 29.01.10, with an effective date of 01.03.10. They have since been amended four times with effect from 14.05.10 by the Indigenisation and Economic Empowerment (General) (Amendment) Regulations, 2010 (No. 1), published in S.I. 95/2010; with effect from 25.06.10 by Amendment No. 2, published in S.I. 116/2010; with effect from 25.03.11 by Amendment No 3, S.I. 34/2011; with effect from 27.07.11 by Amendment No 4 by S.I. 84/2011. The General Regulations are characterised by extremely poor drafting – a position in many instances compounded rather than ameliorated by the amendments.

¹⁰ S.I. 114 of 2011 of 25.03.11.

¹¹ See generally Matyszak May 2011.

¹² Company directors, may on occasion have a mandate to allot shares in a company, though the quantum is generally limited.

¹³ The term “dispose of” was substituted for “cede” by S.I. 116/2010.

interests therein” to indigenous Zimbabweans is nonsensical. Businesses cannot dispose of that over which they do not have legal title. More logically, the law should thus be directed at the owners of the stock, the shareholders. However, it is impossible to see how this could be achieved for all businesses. Shares are often dispersed amongst thousands of shareholders and change hands on a daily basis through stock exchanges. Hence, for example, there is nothing to prevent the reversion of an “indigenous” company to a “non-indigenous” company through the onward sale of shares. The general objective may thus only be achieved by proscribing who may purchase and prescribing who must sell shares. The latter presents a further difficulty as to which shareholders should be compelled to part with their shares, and in what quantum or proportion, to achieve the 51% indigenous holding. What, to give another example, ought to happen where the equity of a company consists of two shareholders with a single share each?

To accommodate these problems, the drafter of the enabling Act sensibly restricted the ambit of the law so that it was to apply only to share transactions. Thus, the law placed proscriptions upon any merger or restructuring of the shareholding of two or more related or associated businesses;¹⁴ any acquisition by a person of a controlling interest in a business;¹⁵ any unbundling of a business or demerger of two or more businesses;¹⁶ and any relinquishment by a person of a controlling interest in a business,¹⁷ unless the transaction resulted in a prescribed shareholding for indigenous Zimbabweans as defined.¹⁸ In limiting the ambit of the Act in this way, its operation was practical and arguably logically achievable, though of questionable constitutionality.¹⁹

In making the Regulations, however, the Minister disregarded such limitations and attempted to apply the 51% shareholding requirement to all businesses, and not merely to the result of share transactions as provided by the Act.²⁰ The drafter of the Regulations was at a loss as to how to compel companies to dispose of that which they do not own - or how to compel the shareholders to dispose of their shares (or allow the issuance of further shares) to achieve the 51% indigenous holding. With the Minister unable to prescribe how a company was to achieve the desired objective, the Regulations shifted the burden to the company. The law thus demands that each company advise the Minister as to how the objective is to be achieved. This advice is to be given by the submission of “indigenisation plans”. The pro forma attached to the Regulations does not include an option where a company may state that it too is at a loss as to how to compel shareholders to dispose of or dilute shares to achieve the desired objective.

However, once a company submits an indigenisation plan, when the same is demanded by the Minister, and within the stipulated time limits, there is full compliance with the law.²¹ It matters not that the indigenisation plan may be wildly impractical so long as it is not knowingly dishonest.²² Thus several companies have submitted plans indicating that the intention is to take

¹⁴ Section 3(b)(i).

¹⁵ Section 3(b)(ii).

¹⁶ Section 3(c).

¹⁷ Section 3(d).

¹⁸ As per Section 2 of the Act.

¹⁹ Matyszak May 2011 p26 et seq.

²⁰ The view here is thus that the regulations are *ultra vires* the Act and thus invalid to that extent.

²¹ See Matyszak May 2011 p10 et seq.

²² Section 4(7) of the Regulations.

advantage of what Government presents as a bright economic future, obtain a public listing and ensure that sufficient of the subscribers to the initial share offering are indigenous Zimbabweans. Certainly the Minister may reject such quixotic plans and require the submission of a revised plan. But should the revised plan be likewise rejected, the law is silent as to what is to happen next. There are no legally prescribed penalties for a failure to have an indigenisation plan approved by the Minister.²³ The law also does not penalise a failure to implement an indigenisation plan or the alteration of such a plan.²⁴

Despite the extreme consternation caused by the publication of General Notice 114 of 2011 pertaining to mining enterprises, this statutory instrument did nothing to change the position outlined above.²⁵ The Indigenisation and Economic Empowerment (General) Regulations, 2010 S.I. 21 of 2010 are notable for numerous errors and general drafting incompetence. G.N. 114 of 2011 continues this trend, and once again one is left to guess at what the Notice seeks to accomplish. The media has guessed that the intention is that all non-indigenous mining companies must dispose of 51% of their shares to the National Indigenisation and Economic Empowerment Fund; a Sovereign Wealth Fund; the Zimbabwe Mining Development Corporation; or an Employee Share Ownership scheme. This guess work relies more upon pronouncements by ZANU PF officials reported in the press than the Notice itself. The Notice presents problems relating to interpretation and law in almost every sentence of its four paragraphs.

The Notice is headed “*Minimum Requirements for Indigenisation Implementation Plans Submitted by Non-indigenous Businesses in the Mining Sector*”, and claims to be published pursuant to section 5(4) and 5A of the Regulations.²⁶ In fact, neither of these sections authorise a Notice of this nature. What section 5(4) provides is that the Minister may gazette:

what lesser share than the minimum indigenisation and empowerment quota shall be the minimum lesser share that indigenous Zimbabweans may hold in a business operating in the sector or subsector in question.

The Minister must also gazette the weighting (as a percentage to count toward meeting the minimum indigenisation empowerment quota of businesses) to be accorded to economically

²³ This does not apply to the share transactions covered by the Act mentioned above. Such transactions are unlawful without Ministerial approval.

²⁴ The Ministry has established monitoring and implementation Committees, but these Committees have no legal power other than to ensure that indigenisation plans are submitted. This has not prevented “Compliance Officers” from making unlawful demands of companies and threatening reprisals if their demands are not met. Unable to cite any legislation to justify the demands or threat of penalties, letters from these Compliance Officers usually conclude with the threat that unless there is compliance “no further indulgence will be granted”.

²⁵ The following, relating to the General Notice, is extracted and summarised from Matyszak May 2011 p20 et seq.

²⁶ Usually a General Notice is published to attend to details which cannot be fixed by regulations as subject to variation. For example a general notice might indicate the name of a person appointed in terms of regulations to a particular post or set the price for a commodity. Thus the rubric of G.N. 114/2011 and the tenor of section 5 of the Regulations, in terms of which the Notice is purportedly published, would suggest that the Notice would simply set minimum indigenisation percentages. Instead the “Notice” takes the form of regulations and is referred to as such by NIEEB- see *Progress Report on the Indigenisation and Economic Empowerment Programme 2011* (2011 appears to refer to the date of composition rather than the year of review as the report refers to activities undertaken in 2010. The exact date of composition is not stated) p 8. (*NIEEB Progress Report*)

and socially desirable projects undertaken by the business. Section 5A establishes sectoral committees to advise the Minister on the issues outlined in section 5.

These two sections thus do not authorise the making of a law compelling the disposition of shares “to designated entities”, (section 3(1) of the Notice), nor a law setting out a method by which the value of such shares are calculated (section 3(2) of the Notice), nor a law requiring the submission of indigenisation plans (section 2 of the Notice).

The section also defines “designated entities” to mean the National Indigenisation and Economic Empowerment Fund; the Zimbabwe Mining Development Corporation; a putative statutory sovereign wealth fund; and an employee share ownership scheme. Only the last of these may qualify as an “indigenous Zimbabwean” as defined in the Act.²⁷ Institutions such as the ZMDC, whose shares are held by the Government, do not fall within this definition, and thus the disposal of shares to such entities is not part of the “endeavour” required by the Act, and thus is *ultra vires* its provisions. Although there have been statements in the press that most designated entities will simply warehouse shares pending subsequent disposal to indigenous Zimbabweans, such reported utterances do not bring about this result. In terms of the Notice, disposals remain as disposals to *designated entities* and not *indigenous Zimbabweans*.

Section 2 of the Notice then requires that non-indigenous mining businesses with a net asset value of above \$1 submit an “*indigenisation implementation plan complying with this Notice*”. It does not state with which part of the Notice compliance is required, but presumably cross references section 3(1).

Section 3(1) of the Notice provides that:

Every non-indigenous mining business shall achieve the minimum indigenisation and empowerment quota by the disposal, after approval of its indigenisation implementation plan by the Minister, of its shares or interests to designated entities...

The disposal is to take place after “*the approval of its indigenisation implementation plan*”.²⁸ The Notice and Regulations are silent as to what is to happen if no implementation plan has been approved. There is no valid definition of the minimum indigenisation and empowerment quota,²⁹ and only one of the designated entities is currently a lawful transferee. This disposal must take place within six months, though the failure to do so is not made an offence.³⁰

Section 3(2) of the Notice provides that any shares to be disposed of to a designated entity other than an employee shareholder scheme (the only entity to which a valid disposition could take place) shall be calculated on the basis of:

²⁷ See Matyszak May 2011 at p3 for a discussion of this definition. The definition is set out and discussed further below.

²⁸ For unknown reasons the word “provisional” has been omitted for purposes of the Notice.

²⁹ See Matyszak May 2011 at p14 et seq.

³⁰ The omission is peculiar considering that amending regulations published simultaneously with the General Notice sought to repair the failure to make certain violations of the Regulations an offence, so presumably avoiding these kinds of errors, rather than repeating them, was on the drafter’s mind.

[a] valuation agreed to between the Minister and the non-indigenous mining business concerned, which shall take into account the State's sovereign ownership of the mineral or minerals exploited or proposed to be exploited by the non-indigenous mining business concerned.

There is no indication as to what is to happen if no such agreement can be reached or the meaning to be accorded to the requirement of taking into account the State's sovereign ownership of the mineral concerned. The provision does suggest, though, that the recipient of the shares is the *State*, and not an *indigenous Zimbabwean*.

The Parliamentary Legal Committee issued an extremely adverse report on this General Notice. The report pointed out that the Notice contravened the right to freedom of association, the right to protection from compulsory deprivation of property, and was *ultra vires* the Regulations, as section 5 of the Regulations does not authorise such a Notice and the Regulations limit the requirement to submit an Indigenisation Plan to businesses with a net asset value of \$500 000 contrary to the \$1 of the Notice.³¹

Given the incoherence of this General Notice and the failure to penalise compliance, the provisions of the General Notice could be, and have been, ignored. The Minister responded by threatening dire but unspecified consequences should mining concerns fail to comply. The threats included the cancellation of "mining licences" which was promptly gainsaid by the Minister of Mines and is not provided for by statute.³² Since there are thus no legal penalties provided for failure to comply with the General Notice, the reaction of the Ministry as the 25th September, 2011 deadline approached was noted with some interest. The Ministry attempted stave off the embarrassment caused by the issuance of empty threats by claiming shortly after the passage of the deadline that mining concerns had "mostly complied".³³

However, the claim that companies had "mostly complied" was promptly forgotten when, after a period of tactful silence on this issue, the Ministry again sought to ratchet up the pressure on mining concerns – most notably and recently through the publication of an advertisement subscribed by the Minister in a local financial weekly paper, the *Financial Gazette*.³⁴ The advertisement stated that companies that have not complied with the General Notice:

should note that 51% of their shareholding is now deemed to be owned by the State and any business transacted in respect of this 51% shall have been transacted on behalf of the Government of Zimbabwe.....Companies are hereby advised that they are now dealing with assets of the State in respect to the 51% indigenised portion and any attempt to defraud the State will result in prosecution.

³¹ An adverse report by the PLC does not nullify a statutory instrument. The report is referred to the second tier of the Houses of Parliament, the Senate. The statutory instrument will stand if the Senate disagrees with the PLC and decides that it is constitutional. If the Senate agrees with the PLC, the responsible Minister has the right to ask the House of Assembly to resolve that the statutory instrument should not be repealed. If the House does not pass such a resolution within 21 sitting days after the Senate's decision, the President must repeal either the whole statutory instrument or the offending provision/s.

³² *Kasukuwere and Mporofu Clash Over Mine Licences* <http://www.thezimbabwemail.com> 14/09/11.

³³ *Miners Meet Zimbabwe Deadline on Ownership* - Minister <http://www.reuters.com> 29.09.11.

³⁴ April 5-12, 2012 p14.

From a legal perspective the pronouncement borders on the demented - a company's shareholding cannot accrue to the state by virtue of an advertisement in a newspaper; how companies were to determine which shares within the total shareholding (and held by whom) were deemed to comprise the 51% indigenised portion is not stated; and, for obvious reasons, the Minister was unable to indicate which section of which legal instrument would have been violated and which would give rise to the threatened prosecution.

The Minister ought to make law by way of publication of regulations in the Government Gazette rather than by way of an advertisement in the Financial Gazette. However, his intention was to nonetheless to set out the position he wished to see enforced. The enforcement is not to be, and cannot be, by legal means. Thus, the advertisement ominously concludes with the following:

The Government of Zimbabwe, through the Ministry of Youth Development, Indigenisation and Economic Empowerment, enjoins all Zimbabwean citizens, top management, middle management, technical support staff and the general workforce of the companies involved that they are now expected to defend the Zimbabwean 51% equity stake and also to uphold and execute the national interest in respect of the administration, trade and any other business transactions so as to ensure total indigenous economic empowerment

This is little less than a not-so-subtle incitement to engage in the sort of intimidation and violence which characterised the invasion of land in Zimbabwe from 2000 onwards, known colloquially as “jambanja”. The advertisement seeks to allow and encourage those engaging in the jambanja of companies to claim, however erroneously, the protection of “the law” as set out by the Minister. The effect on mining concerns can only be, as was undoubtedly intended, highly intimidatory.³⁵

Since the publication of this advertisement officials from the Ministry have specifically, directly and blatantly threatened businesses with jambanja unless their demands are met. One such demand is that each mine hands over a cash payment as “seed capital” to a CSOT.³⁶ Zimbabwean law defines extortion as being committed by any person who intentionally and successfully:

*exerts illegitimate pressure on another person with the purpose of extracting an advantage, whether for himself or herself or for some other person, and whether or not it is due to him or her, from that other person, or causing that other person loss...*³⁷

The fact that the extortion is committed by a government official does not exempt it from the provisions of the law. Companies yielding to pressure such as this have been expected to engage

³⁵ It is significant that the advertisement appeared in a financial weekly, most likely to be read by mining executives, rather than those who might engage in jambanjas.

³⁶ This was revealed in an interview with an affected business in April 2012 and the demand is contained in both the “minutes” of the meeting with the businesses concerned, as recorded by the Ministry and a subsequent letter by a Compliance Officer. Needless to say, there is no legislation to support this demand – see also *Defiant Miners Face Arrest: Kasukuwere* <http://www.radiovop.com> 25.03.12 where demands were made for cash from Gwanda miners against the threat of arrest.

³⁷ The Criminal Law (Codification and Reform) Act [Chapter 09:23] section 134(1).

in political theatre, the script for which is written by ZANU PF and obviously as part of its electoral campaign. An apparently essential prop for this theatre is a large cardboard cheque presented by ZANU PF officials to “the community” with much hoopla and which one observer described as reminiscent of nothing so much as the American game show “*The Price is Right*”.³⁸

Myth 2 – the establishment and disposal of 10% of equity to CSOTs

The indigenisation laws have been presented by the media as requiring each mining company to establish a Community Share Ownership Trust (CSOT) to which at least 10% of the company’s shareholding must be transferred.³⁹ The National Indigenisation and Economic Empowerment Board (NIEEB), established in terms of the Act,⁴⁰ includes the following in its 2011 “Progress Report”.⁴¹

*“The General Notice 114/2011 requires that all mining businesses achieve indigenisation by disposing 10% shares to a Community Share Ownership Trust”*⁴²

The General Notice in question, however, makes no mention of either the 10% (or any percentage) or CSOTs. Since it comprises only a definition section and two short substantive paragraphs it would be difficult to overlook this alleged stipulation if it existed. This leads to the conclusion that either the Board members have not, despite its brevity, read the General Notice; or that the progress report was not compiled by the Board; or that the Board is being disingenuous.

The proclaimed objective of CSOTs is that the community in the district of a mining operation reap some benefit from the exploitation of the natural resource in the area they inhabit.⁴³ The Ministry has indicated that it intends to co-ordinate the establishment of such Trusts. To this end it has established a cabinet “steering committee” chaired by the Minister of Youth Development, Indigenisation and Economic Empowerment;⁴⁴ has published an “Operational Framework for CSOTs; has stipulated that there will be one Trust per District;⁴⁵ has determined the composition of each Trust;⁴⁶ and has specified the signatories to accounts of each Trust.⁴⁷ This proposed

³⁸ Interview with the observer of such proceedings in Binga where Kasukuwere handed out cheques to fishing co-operatives (see *Kasukuwere Challenges Tsvangirai on Indigenisation* Newsday 16.04.12.).

³⁹ See for example *Communities in Mining Areas to Benefit Under Empowerment Programmes* The Herald 05.10.11 and *Zanu PF Succession Hots Up* <http://www.theindependent.co.zw/> 13.10.11.

⁴⁰ Section 7.

⁴¹ *NIEEB Progress Report* p11.

⁴² At p11. We are also told, on p29, that “demand for NIEEB products continues to sore” – a sentiment probably shared by most readers.

⁴³ *Operational Framework For Community Share Ownership Schemes (CSOTS) In Terms of the Indigenisation and Economic Empowerment Act [Chapter14:33]* (“*Operational Framework For CSOTS*”) Government of Zimbabwe (undated) paragraph 2.

⁴⁴ *Operational Framework For CSOTS* paragraph 4.

⁴⁵ *The Operational Framework For CSOTS* maintains that this is implied by Section 14(1)(b) of S.I. 21/2010 at paragraph 8.1.

⁴⁶ The composition, according to the Government is to be as follows: A Chief (Chairperson); the Rural District Council Chairperson (vice-chairperson); the CEO of the RDC (Secretary); other chiefs in the District; the District head of the Ministry of Youth Development, Indigenisation and Empowerment; the District Administrator;

composition of the Boards of Trustees and signatories to the Trust accounts would ensure that the CSOTs and the finances thereof will be firmly in the hands of individuals aligned to ZANU PF.

The Ministry rejects any indigenisation plan establishing a CSOT without its approval. This accords with the prognosis made elsewhere that regardless of the legislation, acceptance of indigenisation plans will depend largely upon ministerial approval of who is to benefit:

....the Regulations, give[s]the Minister a largely unfettered discretion to decide whether to approve or reject an indigenisation plan or to attach conditions to such a plan. This arrangement leaves the possibility of plans being accepted and rejected on the basis of “who” rather than “what” is proposed in the indigenisation plan. Rejection may be based upon the extent to which the terms of indigenisation are beneficial to the person identified as a partner rather than whether they meet the criteria set out in the Act or Regulations.....

By placing the procedure in the hands of the Minister rather than the Board⁴⁸, and by giving the Minister such a broad discretion, the legislation thus appears purposely designed to allow the Minister the possibility of compelling, against the threat of rejection of an indigenisation plan, the inclusion of selected individuals identified by the Minister in indigenisation plans, and the inclusion of such persons only on terms which the Minister deems sufficiently “beneficial”.⁴⁹

The Minister has clearly stated that he will not allow the government to be sidelined in the process of establishing CSOTs.⁵⁰

However, there is no law requiring companies to establish CSOTs, let alone one compelling companies to collaborate with the Ministry on the establishment of such trusts or to form them in accordance with the governmental framework. Such law as there is pertaining CSOTs is contained in an amendment⁵¹ to the general regulations, section 14B.

representative(s) of the business, a representative each of women, youth and the disabled; a lawyer; an accountant; and any other persons co-opted by the Trust for their expertise. There shall be not less than 7 and no more than 15 Trustees – *Operational Framework For CSOTS* paragraph 8.2. The majority of initial Trustees are all government appointees suggesting that the final Board of Trustees will comprise of mainly ZANU PF loyalists. It is worth noting that the appointment of all RDC CEOs is also subject to ministerial approval – section 66 of the Rural District Councils Act [Chapter 29:13].

⁴⁷ The Chairperson (a Chief); the Secretary (RDC CEO); the Assistant District Administrator (ADA); and one other authorised Trustee - *Operational Framework for CSOTS*. It is unclear why an “ADA” is listed as a signatory when it is the DA rather than an “ADA” who is listed as a Trustee.

⁴⁸ Established by Part III of the Act.

⁴⁹ Matyszak May 2011 p5.

⁵⁰ In response to questioning from the author at a SAPES seminar 22.03.12.

⁵¹ S.I. 116/2010.

Section 14B(2) provides:

*A community share ownership scheme or trust **that complies** with this section **may**⁵² be taken into consideration when assessing the extent to which a business has achieved or exceeded the minimum indigenisation and empowerment quota.*

Such a scheme or trust is referred to in the definition section of the Regulations⁵³ as a “qualifying scheme or trust”. Section 14B(4) makes it clear that it is entirely at the discretion of each business whether to establish a CSOT, providing:

*An owner of a business **wishing** to use the qualifying scheme or trust for the purpose of this section shall submit to the Minister Form IDG 04 together with a copy of the Deed of Trust of the qualifying scheme or trust*

The proviso to this subsection stipulates that in considering whether a community share ownership scheme or trust should be accepted as a qualifying scheme or trust, the Minister shall have regard to whether the scheme or trust provides that the monies accruing to the scheme or trust will be applied to the benefit of social projects and infrastructure in the community such as schools, hospitals, roads etc.

It is thus implicit from this proviso that the Regulations anticipate that the terms of the CSOT will not be determined by the Ministry. More importantly, in direct contradiction to the government’s proclaimed policy and “Operational Framework for CSOTs” in this regard, the Regulations also provide for the number of Trustees and manner in which the Trustees of each CSOT are to be determined. Section 14B(3)(a) thus provides that, in the case where the beneficiary community are the residents of a Rural District Council (RDC), the RDC shall have the right to appoint the trustee or trustees; section 14B(3)(b) provides that in the case where the beneficiary community are the residents of one or more wards of a RDC, the manner of appointment of the trustee or trustees shall be as agreed between the RDC concerned and the qualifying business; and section 14B(3)(c) provides that in the case where the beneficiary community are the members of a distinct community of persons as defined in a community share ownership scheme, the manner of appointment of the trustees shall be as set out in the Deed of Trust of the community share ownership scheme or trust concerned. Since it is implicit that the company determines the terms of the Trust, which it submits for approval as a qualifying trust, it is implicit that the company will determine the manner of appointment of the Trustee(s) by inserting the same into the Deed of Trust.

Section 14B(5) stipulates that the funds accruing to the Trusts, established by or in collaboration with an RDC, will be held in a separate account of the RDC and managed by the RDC. Where the Trust is established under subsection 3(c) the management of the funds must be as provided for in the relevant Trust Deed, presumably determined by the company. Accordingly, the government’s “Operational Framework for CSOTs” as to the establishment of Trust Accounts and the management of the funds therein contradicts the Regulations in this regard.

⁵² The implication that the power of the Minister is discretionary in this regard is immediately contradicted in subsection 3.

⁵³ Section 2 thereof.

Section 14B(4) also provides that the percentage of company shares⁵⁴ held by the Trustee or Trustees on behalf of the CSOT **shall**⁵⁵ be added towards the fulfilment of the minimum indigenisation and empowerment quota.

These provisions, in sum, are relevant and important for present purposes because Section 14B also clearly stipulates that any Trust, which is not established and managed in this manner, is not a qualifying trust. Any shares disposed of to a non-qualifying trust cannot, in terms of the Regulations,⁵⁶ be considered for the purposes of assessing a company's compliance with the minimum indigenisation quota.⁵⁷ Accordingly, if the CSOT established as part of the "Zimplats deal" does not meet the requirements of section 14B, the shares disposed of to the CSOT may not, as a matter of law, be considered as meeting any prescribed indigenisation quota.

Myth 3 - Zimplats has complied with the requirements of Myths 1 & 2.

Under the heading, *Locals Gain* (sic)⁵⁸ *US\$600m Zimplats Stake*, Zimbabwe's Herald newspaper reported:

*Zimbabwe Platinum Mines finally agreed to transfer 51 percent of its equity to indigenous investors on Tuesday in an empowerment deal that will see locals gaining US\$600 million in value from the mining giant. Through its South African parent firm, Implats, Zimplats agreed to shed 10 percent to local communities, 10 percent to workers and 31 percent to the National Indigenisation and Economic Empowerment Fund. This came out of long deliberations between Youth Development, Indigenisation and Empowerment Minister Saviour Kasukuwere, Implats chairman Dr Khotso Mokhele and chief executive Mr David Brown.*⁵⁹

The most obvious fallacy of the "Zimplats deal" is that an agreement has been reached with Zimplats itself. As noted above, the equity in question does not belong to Zimplats. The deal, such as it is, is thus with the 87% majority shareholder, Impala Platinum Holdings Ltd (Implats).⁶⁰ Thus, the article quoted above also reports that the deal was the result of "long

⁵⁴ The Regulations refer to "shares or interest". However, since a qualifying business can only be a company "or interest" is redundant.

⁵⁵ Thus contradicting the "may" of section 14B(2) – see above.

⁵⁶ Section 14B(2) cited above.

⁵⁷ What constitutes the "minimum indigenisation quota" is legally obscure, the term never having been properly defined – see Matyszak May 2011 at p16.

⁵⁸ The claim in the article was that this equity had already been received by "locals" who were now "several hundred times wealthier than a significant number of companies listed on the Zimbabwe Stock Exchange". Similar (though somewhat less extravagant) claims were made by other news houses – see *Editor's Memo: Zimplats Grab May be a Pyrrhic Victory* <http://www.theindependent.co.zw/16.03.12> and *Zimbabwe, Implats Agree on 51 pct Stake Transfer* <http://af.reuters.com/13.03.12>.

⁵⁹ The Herald 15.03.12.

⁶⁰ This was correctly stated to be so by the other news groups referred to in footnote 58 above. The remaining 13% of the equity is held by independent shareholders. Zimplats is registered as a company in Guernsey, British Isles, registration number 34014. It is also registered as a foreign company in Australia, number ARBN 083 463 058 and is listed on the Australian Stock Exchange with the code ZIM.

deliberations” with Implats executives, and not those of Zimplats, who are never mentioned.⁶¹ The Zimplats deal has been presented as a triumph for the Minister, Saviour Kasukuwere, being “*the biggest empowerment deal in the history of Zimbabwe*”,⁶² and expected to “*bring other mining companies to heel*” according to commentators.⁶³ The Herald article cited above also claimed that “*the Zimplats deal has set the tone for similar empowerment deals and other mining houses will take a leaf from this example*”. All appeared to have forgotten the not-long-past statements that these companies had supposedly already “mostly complied” with the indigenisation laws.

The joint press statement, on which the Herald report was based, made no mention of payment for the shares. However, the day after the press statement (14.03.12) Implats issued a “news release”:

The Government has agreed in principle that the plan presented is compliant with the law and is acceptable. No agreement was reached on timing nor valuation other than that the shares sales would be at appropriate value. The proposals made by Implats to the Government in this regard are:-

- 1. 10% of Zimplats will be issued to the Community Trust at the independent valuation previously submitted to the Government. Zimplats Holdings will provide an interest free loan to the Community Trust to fund the shares and the loan will be repaid from dividends. This stake would be non-contributory.*
- 2. 10% of Zimplats will be sold to an employee share ownership trust for the benefit of all full time employees of Zimplats. The shares will be sold at the same independent valuation and Zimplats Holdings will provide an interest-bearing loan to the Employee Trust to fund the purchase of the shares. The loan will be repaid from dividends and will be contributory or dilutive*

*It has also been agreed that Zimplats and the Government of Zimbabwe will explore fair value compensation in lieu of empowerment credits for the ground released under the agreement of 24 May 2006. It was proposed to Government that **on receipt of this compensation**, Zimplats Holdings will make available for sale to the National Indigenisation and Economic Empowerment Fund (NIEEF) a 31% fully contributory stake in Zimplats for cash at an independently determined fair value at the time (emphasis added).*

On the basis of this statement, there appear to be two components to the agreement: firstly, that the Zimbabwe government has found the indigenisation plan submitted by Zimplats to be “acceptable in principle”. In terms of this indigenisation plan, 20% of the shareholding will be disposed of and shared equally by a CSOT and employee shareholder scheme. Secondly, that Zimplats and the government of Zimbabwe will explore compensation for ground released to the

⁶¹ David Brown is the Chairman of Zimplats Holdings Ltd and CEO of Implats. The CEO of Zimplats Holdings Ltd is Alexander Mhembere.

⁶² The Herald *ibid* 15.03.12.

⁶³ See for example *Zimplats Cave-in Expected to Bring Other Firms to Heel* Mail & Guardian 15.03.12.

Government of Zimbabwe in 2006. Once compensation for this ground has been received, Zimplats will make 31% of the shares in Zimplats available for sale. It is not known, and the Implats news release does not make clear, whether the second component is part of the indigenisation plan or a separate understanding. The basis upon which Implats purports to bind Zimplats to this agreement and the means by which *Zimplats* can make shares available for sale are not specified. The phrasing of the Implats news release suggests that little regard was paid to the legal structuring and terminology which might address these concerns. Nonetheless, as Implats holds an absolute majority of shares in Zimplats, it certainly has the power to bring this agreement into fruition, regardless of the legal flaws in the wording of the agreement as presented.

However, the press statement of the 13th March 2012, and the subsequent news release suggest that the intention of the parties was never to conclude a binding legal contract, but rather to promote a mutually advantageous illusion through political smoke and mirrors. The notion that Kasukuwere has brought the industrial behemoth Zimplats into line has obvious political advantages for the Minister,⁶⁴ and apparent obeisance by “Zimplats”⁶⁵ relieves the political pressure on the company.⁶⁶ In a prior candid moment, Implats CEO David Brown recognised Kasukuwere’s need to indulge in political grandstanding over the Zimplats issue, maintaining: “*I think at the end of the day politicians will always indulge in populist rhetoric. I get that. I understand that’s their job mandate.*”⁶⁷ The extent to which the Zimplats deal is “political rhetoric” is acknowledged by both parties in their collective admission that “details” relating to the share transfers have yet to be worked out.⁶⁸

Yet the admission that the details pertaining to share transfers have still to be agreed suggests that the real position between the parties is one of discord rather than accord. The proposals relating to the share transfers will be examined in what follows.

a) 10% to a CSOT?

As with all components of the Zimplats deal, the details surrounding the CSOT are obscure. In this case, it has been rendered so by politicking. It is worth recalling that Zimplats has no legal obligation to form a CSOT.

i) Formation.

In October 2011, the ZANU PF controlled media, with much fanfare, announced that the Chegutu-Mhondoro-Ngezi-Zvimba Community Share Ownership Trust had been “launched” by President Mugabe. The Herald reported: “*Under the scheme, Zimplats gave 10 percent shareholding to the local community. It also offered US\$10 million to the local community to be*

⁶⁴ It is worth noting in this regard that after the joint press statement of the 13.03.12, the ZANU PF controlled Herald published a report on the 14.03.12 simply entitled *Zimplats Submits Fresh Indigenisation Plan* (fn 68 below). A second report, *Locals Gain S\$600m Zimplats Stake* (quoted in the text) on the same event appeared in the Herald of 15.03.12 with considerably more hyperbole in the both the title and substance.

⁶⁵ The quotation marks are inserted as the deal is with Implats, as stated above.

⁶⁶ *We recognise that there is obviously quite a lot of water to flow under this particular bridge and, effectively, what we are trying to do now is to take some of the heat out of the angle that the Government was coming from in terms of our non-compliance with the law and accusations that we were being disrespectful and we were not being good corporate citizens* – David Brown quoted in the Sunday Mail see fn 90.

⁶⁷ 2006 Empowerment Deal Binding: Zimplats NewZimbabwe 21.08.11.

⁶⁸ *Zimplats Submits Fresh Indigenisation Plan* The Herald 14.03.12.

disbursed over a three-year period.” The report⁶⁹ is preceded by a picture of Saviour Kasukuwere receiving a massive and photogenic cardboard “cheque” for \$10 million made out to the “Zimplats Community Share Ownership Trust”.⁷⁰ The reader is expected to ignore the contradictory fact that the payment is to be disbursed over three years and the “cheque” is a single payment of \$10 million.

Despite the “launch” of this Trust, all indications are that the Trust is yet to be formed – something suggested by the fact that, according to the report, even the name of the Trust appears still to be determined - the Trust launched being “Chegutu-Mhondoro-Ngezi-Zvimba Community Share Ownership Trust”, and the cheque made out to “Zimplats Community Share Ownership Trust”.⁷¹ The Zimplats Quarterly Report dated 30th September 2011 advises that work on the Deed for the “Zimplats Community Share Ownership Trust” is ongoing. Registration procedures would almost certainly not have been completed by 14th October, 2011 (the date of the launch) and the Quarterly Report to the 31st December, 2011, makes no mention in its section on indigenisation that the Trust has been established, as might be expected if that were the case. If a Sunday Mail press report of the 8th April, 2012, is accurate, the Trust Deed is still in a draft form.⁷²

This “launch” by Mugabe was preceded by an unseemly scramble by ZANU PF politicians and chiefs in the district,⁷³ who claimed to have formed variously titled Trusts,⁷⁴ and to be the Trustees who would hold the anticipated shares from Zimplats and manage the \$10 million. Press reports suggested that Government would have the final say over the choice and composition of the Trusts.⁷⁵

However, as noted above, where the beneficiary community are the members of a distinct community of persons, such as those in the area of Zimplats mining operations, the manner of appointment of the trustees, according to the Regulations, shall be as set out in the Deed of Trust established by the company concerned. The Sunday Mail report of the 8th April, referred to above, quotes several chiefs in the area complaining that the formation of the Trust is being driven by Zimplats and its lawyers - as the Regulations suggest is to be the case. Also, in accordance with the Regulations, the management of the funds of the Trust ought to be provided for by the Trust Deed itself.

With the Trust yet to be formed, there are no Trustees to hold on its behalf, either the first disbursement of the \$10 million (if that is still to happen – see immediately below) or the 10% equity.

⁶⁹*Mining Giant Gives Shares to Communities* The Herald 14.10.11.

⁷⁰ The drawer of the cheque cannot be discerned from the photograph.

⁷¹ It is of course possible that the intention is that Chegutu-Mhondoro-Ngezi-Zvimba Community Share Ownership Trust open an account in the name of the latter.

⁷²*Mhondoro Community Share Trust Chiefs Bitter* Sunday Mail 08.04.12.

⁷³*Zanu PF Chefs, Chief Fight Over Zimplats Shares* The Standard 24.09.11.

⁷⁴ The Royal Mhondoro-Ngezi Trust and Mhondoro Community Development Trust – see footnote immediately below.

⁷⁵*Chiefs to Rotate Mhondoro Ngezi Trust Chairmanship* The Sunday Mail 08.10.11.

ii) The \$10 million

Zimplats has expended a not-insignificant sum of money on social development projects in the areas of its mining over the years. The Zimplats Annual Report for 2010⁷⁶ indicates that \$10,58 million had been allocated for social development projects in the next few years. The promised \$10 million dollars to the CSOT is very probably the money allocated for these projects, and the only change will be in the manner and channel through which it is disbursed.

iii) The equity

The Implats news release indicates that Zimplats Holdings has agreed a vendor finance deal, whereby it will provide an interest free loan to the CSOT to fund the purchase of the issued shares, valued independently, and the loan will be repaid from dividends on those shares. Since no mention is made of the \$10 million grant to the CSOT in the Implats news release, or the report of the press conference, called after the Zimplats deal was reached, the question arises as to whether the interest free loan is to be instead of, or in addition to, the promised, but yet to be disbursed, \$10 million seed capital for the CSOT referred to above. If the loan is not in addition to the \$10 million promised, the share deal is to the disadvantage, not advantage of the community.

The loan for the purchase of the shares is to be re-paid from the dividends accruing on those shares. Zimplats is set to undertake several massive expansion projects.⁷⁷ It is thus unlikely to declare any dividends for some time. Once dividends do accrue, it is probable that Zimplats will take the position that all future developmental projects for the benefit of the community ought to be funded from the dividends accruing to the CSOT by virtue of its shareholding. The quantum payable as dividends is unlikely to exceed the amounts that were extended as grants for this purpose in the past. The shareholding granted to the CSOT will not, in this event, render the community any better off financially. Accordingly, channelling money for developmental projects through the CSOT in the form of dividends, rather than as grants, merely allows for some expedient public relations and politicking, and does nothing to advance empowerment.

Minister Kasukuwere has stated that the grant of shares can be used as collateral to raise further finance and the community could also benefit in this way from the shareholding. However, since dividends from the shares are to be used for the repayment of the loan for their purchase, presumably onward sale will be restricted in the short term. The Minister's statement does, however, highlight the fact that, without a general restriction as to who may purchase and who may sell shares, the 10% indigenisation through schemes such as this may be quickly reversed, either through onward selling or a call upon the collateral. In the event of such a reversal, over which a company may have had no control, it seems fatuous to hold the company in breach of the law for having less than 51% of its shares held by indigenous Zimbabweans, because part of that 51% shareholding has been sold onward to non-indigenous shareholders by the indigenous Zimbabweans to whom the shares were ceded initially as part of an indigenisation package.

It is also worth noting that, in most jurisdictions, it is unlawful for a public company to fund the purchase of its own shares (as is the case in the UK where Zimplats is registered^{78,79}). If the

⁷⁶ At p 14.

⁷⁷ *Zimplats 'committed to \$500m mine expansion'* Platinum Today 03.03.11.

⁷⁸ See Section 678 of the Companies Act 2006.

vendor financing is to take place in the direct manner indicated in the news release, it seems that the deal will need to be restructured so as not to fall foul of such a provision.

The Implats news release also curiously states that “10% of Zimplats will be *issued*” to the CSOT, while the shares accruing to the employee share ownership trust are to be *sold* by Implats. If there is to be a share issue diluting the holding of the current shareholders, this will require the authorisation of the existing shareholders.⁸⁰

The 10% shareholding for the CSOT is presently merely a proposal in Zimplats’ indigenisation plan. There is obviously much to be done before such a proposal can be implemented – and when it is, it does not appear that the proposal represents any greater largesse from Zimplats than that currently afforded by the company to the community. Certainly Zimplats will not be out of pocket.

b) 10% to a Employee Share Ownership Trust ESOT

The proposed ESOT is similar to the CSOT, with the significant differences that the shares are to be sold, and the loan advanced by Zimplats for this purpose is to be interest bearing. However, many of the comments made above relating to the CSOT apply in this regard. With expansion projects in the offing, the ESOT is not likely to receive dividends for some time, and, with the loan attracting interest, Zimplats may make, in its terms, a small profit from the arrangement. Once dividends do accrue, no doubt Zimplats will take any such disbursements into account during its wage negotiations.

The proposed manner in which the ESOT is to be structured is simplistic, and a far cry from the wide variety of arrangements of such vendor financed deals concluded under South Africa’s empowerment laws. The only common denominator of such deals is generally their complexity. For example, it is usual in South Africa that a bank finances the purchase of the shares which are held as collateral. The sale of shares is usually discounted so that the bank may be reasonably well assured of recovering the debt. Where a company incurs costs in the disposition of shares under an employee ownership scheme, in South Africa law expenses for the benefit of employees are tax deductible, so that in effect the State funds the scheme. The simplistic and direct vendor financing apparently proposed by Zimplats for its ESOT appears to contravene the provisions, referred to above, which prohibit a company from financing the purchase of its own shares.

Once again this ESOT is presently merely a proposal in Zimplats’ indigenisation plan and no steps appear to have been taken towards implementation.

c) The 31% transfer.

In terms of this component of the deal, “*Zimplats Holdings will make available for sale to the National Indigenisation and Economic Empowerment Fund (NIEEF) a 31% fully contributory stake in Zimplats for cash at an independently determined fair value at the time.*” Since Implats is the 87% majority shareholder in Zimplats Holdings, it is presumably Implats that will release

⁷⁹ In Zimbabwe a special resolution by members is required to authorise a company to fund the purchase of its own shares Section 73 of the Companies Act [Chapter 24:03].

⁸⁰ Section 551 of the Companies Act 2006.

the shares. Zimplats has no power to compel the 13% independent shareholders to dispose of any proportion of their shares.⁸¹

The key aspect to note here is that agreement to make the shares available for sale is subject to a condition precedent; that is, a condition which must be fulfilled before Implats has any obligation in this regard. The condition is that compensation, at “fair value” for the ground released under the agreement of 24 May 2006, must be received by Zimplats. The reference is to an agreement reached by Zimplats in 2006 before the Indigenisation Act was in force. In anticipation of such legislation, Zimplats agreed to release land over which it had mining rights back to the government. The estimated value of the land, based on the quantum of platinum group minerals present, is currently believed to be \$153 million.⁸² Zimplats also agreed to undertake several projects to the benefit of the community. In return, Zimplats was to receive “empowerment credits” which would presumably be sufficient to exempt it from, or gain deemed compliance with, the nascent legislation concerning resource nationalism. It is unclear whether any mining is taking place on the released land.⁸³ A Wikileaks cable (ref 08Harare495) states that no mining had taken place as at 2008, and that the land had been divided three ways, with Russian and Chinese companies taking a third each in exchange for arms deals and ZMDC retaining the remainder.

In 2008, Anglo Platinum entered into a similar deal, relinquishing claims on the Great Dyke to the Government of Zimbabwe. These concessions were promptly sold to a company controlled by controversial, and ZANU PF aligned businessman, Conrad “Billy” Rautenbach, in return for a \$100 million “loan” to ZANU PF. The company, CAMEC,⁸⁴ it seems sold the claims onward for a tidy profit. It is believed that the loan forming part of this transaction was used by ZANU PF as campaign funds for the election of March 2008.

None of the released land in either deal went to indigenous Zimbabweans,⁸⁵ or was intended to benefit indigenous Zimbabweans in any way. If the Zimbabwe Government’s true intentions are that the resources of Zimbabwe benefit the people of the country, then such intentions are the result of a recent damascene moment.

⁸¹The corporate structure is as follows: Independent shareholders hold 13% and Impala Platinum Holdings Limited hold 87% of the shares in Zimplats Holdings Limited. Zimplats Holding Limited owns 100% of the shares in both “Ngezi, Mhondoro and Selous Platinum Tenements” and Zimbabwe Platinum Mines (Pvt) Ltd. The latter company owns 100% of the shareholding in Ngezi Platinum Mine, Selous Metallurgical Complex and Hartley ore Reserves.

⁸²*Brown’s Tactics Cost Zimplats* The Herald 14.03.12.

⁸³In response to a query (from the author at a SAPES seminar 22.03.12) the Chair of the ZMDC, Godwills Masimirembwa said that the claim was being mined by ZMDC in a joint venture under Total. The details given tallied with those pertaining to the Anglo deal (now the Bokai platinum project) and the Chair either confused the two or Total is mining claims in both areas..

⁸⁴The Central African Mining and Exploration Company.

⁸⁵According to press reports, mining on the released land is currently being developed by a joint venture company, Total, comprising the Zimbabwe Mining Development Corporation (ZMDC) and Eurasian Natural Resources Corporation (ENRC). ZMDC is a 40% partner in this venture.

In the event, the Minister refused to implement the agreement of 2006 with Zimplats, claiming that the law did not allow this.⁸⁶ Although there appears to be an agreement that the Government of Zimbabwe will now pay for the land released by Zimplats in 2006 “in lieu” of “empowerment credits”, the Minister must be aware that the deal sets a condition precedent which may never be fulfilled.

Recently, an Air Zimbabwe aircraft was impounded at Gatwick Airport over debts owed by the airline in which the Government of Zimbabwe is the majority shareholder.⁸⁷ It took the Government of Zimbabwe almost a week to clear the debt of a mere \$1.2 million. Clearly the Government of Zimbabwe does not have \$153 million to pay for the release of land and will argue that the meaning to be accorded to “fair value” for the released land is not the market value. The Minister has repeatedly stated⁸⁸ that the mineral resources in Zimbabwe belong to Zimbabwe,⁸⁹ and that this must be taken into account in concluding any indigenisation deal with mining companies. The use of the term “fair value” rather than “market value” seems to deliberately leave this facet of the deal open ended, and to allow the accommodation of the view held by the Minister. In contrast, the sale of the subsequent 31% is to be at an “independently determined fair value”. The difference in wording is significant. As noted above, without receipt of some compensation for the land released in 2006, and this issue agreed, the offer of the 31% shareholding will not arise. Should it do so, the Zimbabwe Government is unlikely to find the means to pay for these shares, valued at between \$500 million and \$1 billion.⁹⁰ Without these matters settled, or even the possibility of a settlement in prospect, the Zimplats deal is no more than a chimera manufactured by the political needs of the Minister and Zimplats.⁹¹

There are two other aspects of this component of the deal which are worthy of consideration. Firstly, as noted above, the concept of empowerment credits through CSOTs was introduced by way of an amendment to the Regulations. It is clearly an attempt to respond to the criticism that the “indigenisation” process would only benefit an elite group of the politically connected.⁹² In deflecting this criticism, the Minister has been undeservedly successful. It seems to have gone unnoticed that the CSOTs are intended to receive a maximum 10% shareholding, while the lion’s share is still destined for distribution through the Ministry.

Secondly, there are legal difficulties relating to the transfer of shares to NIEEF. The Act declares⁹³ that “[t]here is hereby established a fund, to be known as the National Indigenisation and Economic Empowerment Fund”. The Fund is to consist of moneys acquired from a variety of sources – those appropriated by an Act of Parliament and those received by way of donations,

⁸⁶*Government Postpones Meeting On Zimplats* The Herald 08.03.12.

⁸⁷*Air Zimbabwe Plane Impounded In London* The Zimbabwean 12.12.11.

⁸⁸See for example *Sovereign Ownership to Determine Stake Value in Foreign Firms* The Herald 22.03.12.

⁸⁹In terms of section 2 of the Mines and Minerals Act [Chapter 21:05] they in fact vest in the President.

⁹⁰*Zimbabwe Needs Up to \$1bn Cash to Compensate Implats Fairly* Mining Weekly 16.03.12. This is the estimated fair value, the current market capitalisation tallies place the value at \$350 million. See also The Sunday Mail fn 91.

⁹¹Something noted belatedly by even the ZANU PF controlled press – see *Government Implats Show Down Looms* The Sunday Mail 31.03.12.

⁹²See for example *Govt Told to Focus on Luring Investors* <http://www.zimonline.co.za> 04.09.10.

⁹³Section 12(1).

loans or other financial assistance and levies.⁹⁴ It is to be administered by the Board.⁹⁵ The impression created by this section of the Act is thus that the Fund is thus merely a repository of money without legal persona. The Act refers to “monies in the Fund”, for example, rather than monies held by or belonging to the Fund.⁹⁶ Where other bodies are created by statute, there is generally a provision stating that the institution shall be a body corporate capable of suing and being sued.⁹⁷ If matters were not confused enough, section 13 of the Act creates a “Unit Trust Account of National Indigenisation and Economic Empowerment Fund (sic)”. The provisions governing the Unit Trust Account have been brought into operation by the revocation of The National Investment Trust of Zimbabwe.⁹⁸ The Second Schedule to the Act then stipulates that the former provisions of the revoked Trust will govern the Unit Trust Account, save that where there is a reference to the National Investment Trust, it is replaced by “the Unit Trust Account of the Fund”.⁹⁹ The NIEEB members substitute for the Trustees. The intention is that acquired shares become “deposited property” of the Trust and vest in the Board in the same manner that shares of a Trust would vest in the Trustees. Units in the Trust Account may be traded. All legal proceedings in relation to the Unit Trust Account must be instituted by or against the Board.¹⁰⁰

The Unit Trust Account is thus intended for all intents and purposes to be a Trust. The extent to which it is intended to be an “Account” of the NIEEF, as the Act describes, and its nexus to the NIEEF, is obscure.

The question then arises as to whom shares are to be transferred when an indigenisation deal, such as that reached with Zimplats, is concluded. If the NIEEF is a repository of money without legal persona, shares cannot be transferred to a bank account, as the Zimplats deal contemplates. The General Notice pertaining to mining discussed above also contemplates the disposal of shares to the NIEEF as a designated entity. However, since the Act provides that the NIEEF consists of monies, and not shares, it seems that the Act anticipates that shares acquired are in fact to be acquired by the Unit Trust Account, and presumably thus vest in the Board.

This is relevant in that not only may a transfer of shares to NIEEF be *ultra vires* the Act but, as noted above, it is questionable, when shares are held *sub nomine* the NIEEF or the Board, whether these shares may be deemed to be held by indigenous Zimbabweans as noted above. An indigenous Zimbabwean is defined as follows:

indigenous Zimbabwean” means any person who, before the 18th April, 1980, was disadvantaged by unfair discrimination on the grounds of his or her race, and any descendant of such person, and includes any company, association, syndicate or partnership of which indigenous Zimbabweans form the majority of the members or hold the controlling interest

⁹⁴Section 14.

⁹⁵ Section 15(1).

⁹⁶Paragraph 1 of the Third Schedule to the Act.

⁹⁷See for example section 3 of the Zimbabwe Mining Development Corporation Act [Chapter 21:08].

⁹⁸ Section 13(1).

⁹⁹Section 13(3)(a).

¹⁰⁰Part 3 paragraph 5 of the Second Schedule to the Act.

It is stretching the definition somewhat to suggest that the NIEEF and NIEEB are indigenous Zimbabweans. The same consideration applies to the yet-to-be-established Sovereign Wealth Fund proposed by Kasukuwere, and already referred in the General Notice to as a “designated entity” to which mining companies must cede shares. It is unclear how the functions of this fund will differ from those of the Unit Trust Account, though the Minister proposes that its operations be managed by a smaller Board than that of the NIEEF, and one which *he* will chair.¹⁰¹

In summary then, all that may be said of the Zimplats deal is that the company has complied with the law by submitting an indigenisation plan. That it has been accepted by government is politically useful, but not legally required. None of the other aspects of the deal are legally enforceable and many of its components are unlikely to be implemented in practice.

Conclusion

Minister Kasukuwere’s false statements as to the requirements of Zimbabwe’s indigenisation legislation have gone largely unchallenged by business, the media, and the MDC formations. As a result, Kasukuwere appears to have gained the impression that the rules which need to be and which are followed in this regard are determined by his *ipse dixit*, rather than the Act and the Regulations. The notice in the Financial Gazette weekly newspaper, referred to above, appears less demented when viewed in this light. The notion that the Minister can create rules through the mere publication of an advertisement in a newspaper has been allowed to gain some traction in the surrealism of present day Zimbabwe.

It is extremely telling that none have dared to gainsay Kasukuwere’s pronouncements on the “law”. It indicates that the political terrain is such that no company will risk being singled out and run the risk of reprisal. It also indicates that the legal system is such that companies have no confidence that they will be protected from these unlawful reprisals, or that the courts will implement the law provided for and allowed by Zimbabwe’s legislation and constitution. The absence of any protection by Zimbabwe’s juridical system during the violent land invasions after 2000 is an intimidating precedent informing responses of business to the manner in which government is implementing the indigenisation programme. Ministry officials have specifically threatened the jamba of companies refusing to comply with its directives - endorsed by the Minister’s advertisement in the Financial Gazette. In this milieu, any adherence to the rule of law by the Zimbabwean government appears coincidental or merely incidental – it is rule at the whim of the Minister. While many businesses have sought to navigate these choppy and shark invested waters by striking individual and surreptitious bargains with the Ministry, these deals have later been ignored by government when it has proved politically expedient to do so.

Although many businesses are likely to “take a leaf from the Zimplats example”(as the Herald puts it) and, rather than enter into deals of substance, create acceptable political holograms as a prevaricating tactic in the hope that a more favourable polity is imminent, the effect on Zimbabwe’s economy of the indigenisation policy is all too real and immediate. This policy,

¹⁰¹Discussion Paper by the Minister of Youth Development, Indigenisation and Empowerment, Honourable S. Kasukuwere (MP), on the Establishment of the Sovereign Wealth Fund (SWF) in Zimbabwe 11 August 2011 paragraph 20.

when combined with political uncertainty and a crippling power shortage, has caused foreign investors to shun Zimbabwe. The indigenisation laws have caused a massive flight of existing capital, with the mining index falling 22% shortly after the introduction of the Regulations.¹⁰² Zimplats stock alone reportedly shed \$86 million when the deal with government was announced.¹⁰³ One financial services group has suggested that a genuine deal with Zimplats for a 10% shareholding in an investor friendly environment would “*probably be worth the 50% they are demanding under an unfriendly investor environment.*”¹⁰⁴ The indigenisation laws have also severely inhibited the Foreign Direct Investment. Zimbabwe attracted only \$250m out of the \$55 billion of FDI which flowed into Africa during 2011, a paltry 0.46%.¹⁰⁵ FDI is generally recognised as essential to Zimbabwe’s economic recovery.¹⁰⁶

This debilitating policy has been conceived for the short term objective of helping an astoundingly rapacious and venal elite through the next electoral period without loss of political power. Impervious to the lessons of recent experience,¹⁰⁷ and with a gullibility which seems boundless, this elite is cheered on by a segment of the electorate which naively anticipates reaping the benefits of the policy as proclaimed by ZANU PF. In the absence of a concerted response by business, the media and the MDCs, ZANU PF’s key electoral tactic appears set to continue its tragic trajectory virtually unhindered. For all those involved the mining sector, the result will be to replace the unequal distribution of wealth with the equal distribution of misery.

19.04.12.

¹⁰² *Indigenisation Law Sends ZSE Tumbling* <http://www.zimonline.co.za> 16.03.10.

¹⁰³ *Zimplats Sheds 86 Million in Value* The Herald 07.04.12.

¹⁰⁴ Quotes in ‘*SA Woes Create Opportunity for Zim’s Platinum Mines*’ the Financial Gazette March 29-4 April.

¹⁰⁵ *FDI Inflows Subdued* – The Herald 21.03.12 quoting a report by Invictus Securities.

¹⁰⁶ See for example *First Quarter 2010 Treasury Bulletin January – March 2010* Government of Zimbabwe. Foreign Investment in power generation is seen as absolutely crucial as most other sectors of the economy rely on affordable and reliable electricity supplies.

¹⁰⁷ ZANU PF’s electoral slogan in the years after the land invasions of 2000 was “*Land is the Economy and the Economy is Land*”. The slogan had its echo in the white farmer’s slogan of the same period – “*No Farmers, No Future*”. The collapse of commercial agriculture did indeed result in the collapse of Zimbabwe’s economy. ZANU PF’s current slogan of “*Total Empowerment*”, referring to the Indigenisation Programme, is thus not without its irony. The word “Economy” is often mocking substituted for “Colony” in a further ZANU PF slogan - “*Zimbabwe Will Never Be a Colony Again*”.