

Consolidation of Diamond Mines in Zimbabwe: Implications, Comments and Options

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ACRONYMS

CSR	Corporate Social Responsibility
EIA	Environmental Impact Assessment
EMA	Environmental Management Agency
DMC	Diamond Mining Corporation
EITI	Extractive Industries Transparency Initiative
FATF	Financial Action Task Force
FDI	Foreign Direct Investment
JWP	Joint Work Plan
KP	Kimberly Process
KPCS	Kimberly Process Certification Scheme
LMR	Limpopo Mining Resources
MMCZ	Minerals Marketing Corporation of Zimbabwe
PAYE	Pay As You Earn
VAT	Value Added Tax
WGDE	Working Group of Diamond Experts
WDC	World Diamond Council
ZELA	Zimbabwe Environmental Law Association
ZIMASSET	Zimbabwe Agenda for Sustainable Socio Economic Transformation
ZIMRA	Zimbabwe Revenue Authority
ZIMSTAT	Zimbabwe Statistics
ZMDC	Zimbabwe Mining Development Corporation
ZMRTI	Zimbabwe Mining Revenue Transparency Initiative

EXECUTIVE SUMMARY AND KEY RECOMMENDATIONS

This paper presents comments, ideas and options on the rational, process and structure of the proposed consolidation of diamond mining companies in Zimbabwe. The Ministry of Mines and Minerals Development has proposed to amalgamate all diamond mining companies operating in Zimbabwe to form one super-big company that can efficiently control, explore and mine alluvial and kimberlite diamonds in country. This potentially long process has not yet been subjected to thorough public scrutiny, neither has there been any public consultation. It is still early days.

Therefore, this paper is one of the first extensive and detailed analysis of the proposed process. The objective is to raise critical questions, make comments and where possible provide key options or recommendations that may help government, mining companies and civil society to take appropriate measures and actions that can trigger economic growth and community benefits from diamonds. It is a necessity to empower civil society with credible information to give traction to any efforts of holding government and mining companies accountable for their actions or inactions. Clearly, the topic and process is complex, hence it merits a multi-disciplinary thematic approach. Consequently the analysis is done from a legal, economic, social, political, human rights and administrative perspective.

The Zimbabwe Environmental Law Association (ZELA) is undertaking this analysis under its new programme of work called Responsible Investments and Business Programme. The programme objective is to provide government, investors and mining companies with useful legal intelligence and information that may help shape and drive responsible investments in the mining sector. Responsible investments are transparent, respect human rights, free of corrupt practices, and respect and promote environmental standards, community development and worker's rights.

ZELA views this first step as an inflection point in its work- it raises questions and provides possible answers and options. ZELA fully acknowledges that the risks of waiting for government and corporates to make mistakes and then make noise after the fact are too great. Therefore, this is the right time to engage government and to provide options and recommendations before the ink dries. This paper will be shared with government, diamond mining companies, parliament, civil society, community groups, investors and international partners.

A synopsis of government position on the process is most apposite at this point. The proposal is that all diamond mining companies will be consolidated into one and shareholding will be allocated according to fair value of each company's assets and liabilities. The proposed company will be called the Zimbabwe Consolidated Diamond Mining Company. This does not sound new. Consolidation of diamond mining companies has been done before, ironically in Kimberley-South Africa when several diamond mining companies were amalgamated into De Beers Consolidated Mines at the behest of Cecil John Rhodes. The history of diamond mining always has a way of repeating itself.

However, in Zimbabwe, the reasons for the proposed consolidation are not too many, but are fundamentally important. These can be summarized as including; promoting transparency and accountability in the diamond sector, improving monitoring of the diamond supply pipeline and unlocking and pooling together capital and assets for financing exploration for the often elusive kimberlite pipes. The overarching point is to improve the contribution of diamonds to the fiscus. This perhaps stemming from public pressure and the nascent fiscal stress afflicting government have cornered the Ministry of Mines and Mining Development to come up with a silver bullet or magical formula to make diamonds work for the people. Therefore, Government insists it will maintain its shareholding at 50% in the consolidate company. The existing companies that are targeted include those operating in Marange namely Mbada Diamonds, Marange Resources, Jinan, Diamond Mining Corporation (DMC), Anjin Investments, Gye Nyame, Marange Resources (government owned), Kusena Diamonds, Nan Jiang Africa Resources (in Bikita), DTZ OZGEO

(in Chimanimani) as well as Murowa Diamonds in Zvishavane and possibly the assets at River Ranch in Beitbridge (which was liquidated in 2012).

In terms of content and structure, this paper consists of different sections based on analysis of key issues that should be considered by government in driving the consolidation process. Immediately after identification and analysis of an issue, recommendations or key options are provided. Below is a summary of some of the issues and recommendations or key options identified in this paper that should be considered by government and mining companies before, during and after consolidation.

From the outset the paper gives a general overview and background on diamond mining. It then goes on to define what consolidation means. In this paper it is defined as the unification of two or more corporations by dissolution of existing ones and creation of a single new corporation. However, the legal term which denotes consolidation as provided for in the law-the Companies Act in Zimbabwe, is amalgamation. Therefore, in this paper the words consolidation and amalgamation are used interchangeably. As will be stated, the laws that primarily regulate amalgamation, mergers and absorption of companies are the Companies Act and the Competition Act. In terms of the law amalgamation of companies must be sanctioned by the courts, while the Competition and Tariffs Commission also assesses mergers to check if they do not result in restrictive business practices such as creation of monopolies. These laws should be closely analysed and complied with by government and the mining companies in the process of consolidation.

On the question of whether the companies should be consolidated or not, this paper recommends that on a balance of all relevant issues, the Marange based diamond mining companies should be consolidated to form one company. It also recommends that Murowa diamonds should be excluded from the consolidation process since it is operating profitably, complies with most statutory obligations and has already done exploration that lead to discovery of three kimberlite pipes in Zvishavane. The paper also identifies valuation of assets and liabilities of companies as a critical step in the consolidation process. It goes on to encourage government to find independent auditors that can help in assessing the assets and liabilities of the companies to prevent over-valuation of assets and under-valuation of liabilities. It also recommends assessment of unfulfilled community social investment promises made by diamond mining companies as part of liabilities. These social investments may relate to relocation projects, donations to community share ownership scheme, community infrastructure projects and environmental costs of polluting rivers.

Negotiation and drafting of shareholders agreements or other mining contracts will also be critical during the consolidation process. This paper cautions government to be vigilant and bring together a diverse team of experts to negotiate with the companies. The team can include financial and investment experts, tax experts, lawyers, social experts and mining or geological experts. The paper therefore, recommends the inclusion of contractual provisions that promote fair and equitable distribution of benefits from the investment. The agreements should include significant state benefits from dividends, royalties, resource depletion fees and procurement of local goods, services and employment of locals. Extensive and wide tax exemptions and remissions that may deprive the state of revenues should not be included. However, specific, narrow and time bound tax exemptions or incentives may be granted for purposes of triggering investment in exploration for kimberlite diamonds in Marange or other areas.

The role and legal mandate of the Zimbabwe Mining Development Corporation (ZMDC) is also extensively covered in this paper. ZMDC or its subsidiary Marange Resources are likely to play a crucial role in the consolidation process. ZMDC is the investment arm of government in mining. Consequently, the paper recommends that ZMDC must act professionally, promote efficiency and comply with the Constitutional principles on public accountability, integrity, openness as well as conducting business on sound commercial lines in pursuing state interests in the consolidation process. Proper due diligence assessments should be undertaken on all potential investors in the consolidated company. On the other hand, government through the Ministry of Mines should audit diamond mining companies and assess existing shareholder's or mining agreements to identify weaknesses that should be avoided in the new

partnerships. If an audit has already been done, the findings should be made public.

Another equally important issue covered in this paper is identification and inclusion of new investors in the consolidated company. In this case, the paper recommends that government should assess different options that include reserving shares for investors with capital and expertise to finance exploration. Government can either reduce its shareholding or negotiate to reduce the shareholding of mining companies based on their assets and liabilities. A limited number of shares, for example between 5% -15% can be reserved for other investors. If the company is listed on the stock exchange Government/ZMDC may have to reduce its shareholding to 35% to comply with Stock Exchange shareholding thresholds. The remaining 15% can then be reserved for other investors or the Zimbabwean public. However, if government still wants to maintain its 50% in the listed company, an option can be giving the 15% to state entities such as the proposed Zimbabwe Sovereign Wealth Fund or the Indigenisation and Economic Empowerment Fund. Listing on the Zimbabwe Stock Exchange is one of the key recommendations in this paper. Listing may help to change the culture at ZMDC to achieve quick results and possibly enable the company to attract finance from banks and other financial institutions. Listed companies are normally bound by standards that include publication of performance results, compliance with sustainability reporting systems, human rights, environmental management standards, corporate social responsibility and corporate governance systems.

Generally, this paper also recommends and provides options for the consolidated company or ZMDC to take steps to promote transparency and accountability in its operations. Some of the options suggested include voluntary public disclosure of names of investors or beneficial owners/shareholders, mining contracts, production levels and revenues in a disaggregated manner. The consolidated company can also take additional voluntary steps such as spearheading stakeholder interest for the resuscitation and implementation of the Zimbabwe Mining Revenue Transparency Initiative (ZMRTI) and encouraging government to join the Extractive Industries Transparency Initiative (EITI). These initiatives are important for public disclosure of mining revenues and payments made by mining and received by government.

Most importantly, government should ensure that the systems and procedures to be adopted by the consolidated company for diamond exploration and mining comply with Kimberley Process Certification Scheme (KPCS) minimum requirements. The suggested steps include carrying out a quick survey or assessment of the implications of consolidation on KPCS compliance, draft a workplan for compliance by the new company, licence the new company to explore and mine diamonds and work closely with civil society and industry through a national level tripartite information sharing platform. However, urgent action should revolve around securing all operational or non-operational mines to prevent illegal mining, smuggling, leakages and illicit trade of rough diamonds during the consolidation process. In addition, government is supposed to report to the KPCS of the consolidation process through the KPCS Annual reports.

The paper also states that the rights of workers must be protected. Legislation for protection of workers' rights in cases of transfer of companies exists. In keeping with the law, it is suggested that current employees must have their employment contracts maintained by the consolidated company under the same terms and conditions or better. However, in the event that contracts are terminated, workers should receive fair retrenchment packages and benefits. If possible all outstanding wages for employees of affected companies must be paid before the amalgamation to avoid further prejudice to the employees and if not the consolidated company should take over the burden/liability of paying outstanding salaries or benefits. Workers must be constantly consulted and informed about the consolidation process and their fate.

Community rights and human rights general are also covered in this paper. The paper recommends that liabilities of the current companies should include unfulfilled promises made to relocated families by the companies such as construction of irrigation schemes, schools, clinics, provision of electricity and other income generating projects as per the business plans and Environmental Impact Assessment Reports submitted to government. More importantly, relocated families should be given title deeds over the land

and houses they are staying in at Arda Transau. The consolidated company must also take measures to implement the business and human rights concept which calls for adoption of measures to respect and protect the rights of people by business and government.

On environmental compliance, the paper states that the law does not permit the transfer of Environmental Impact Assessment (EIA) Certificates without the authority of the Environmental Management Agency (EMA). The recommendation is that EMA should not authorise the transfer of the EIA certificates issued to the current diamond mining companies to the proposed consolidated company. This is because most of the EIAs were not properly done as they did not capture essential environmental, social and cultural impacts. In any case many of the mining companies were not complying with their stated EIA commitments. Therefore, the consolidated company should be required to carry out new EIAs for all the mine sites.

Stakeholder participation and consultation in the consolidation process was also identified as key in this paper. It is suggested that the Ministry of Mines or ZMDC must embark on extensive public consultations to get the views of communities, civil society, the mining industry and other government departments. This will enrich negotiations and the whole process to reflect national economic and social needs.

1.0

INTRODUCTION

This paper examines government's intentions to consolidate all diamond mining companies operating in Zimbabwe. Government believes that consolidation will promote transparency and accountability, easy monitoring and pooling of resources for exploration. The proposal is to come up with what will be called the Zimbabwe Consolidated Diamond Mining Company. In light of this, this paper analyses some of the key issues that should be considered by government prior to, during and after the consolidation process. The analysis is then followed by a set of key options or recommendations that can possibly help government to establish a profitable, accountable and socially responsible diamond mining company. The first part of the paper presents the historical background to diamond mining, economic contribution of the sector, a definition of consolidation and the reasons why the diamond mining companies are being consolidated. The main component of this paper presents a multiplicity of issues that should be considered by government, mining companies and civil society in negotiating and implementing the consolidation process. There are several issues that are analysed such as the applicable legal framework on amalgamation and mergers, valuation of diamond mining companies, negotiation of shareholders agreements and other contracts that may be signed by government with investors and how government can attract responsible investors. Additional issues include an analysis of state participation in mining, the benefits of listing the company on the Zimbabwe Stock Exchange, the indigenisation and economic empowerment programme, environmental compliance, community rights and the rights of workers. The paper concludes by presenting additional critical success factors that should be considered by government in pursuing the consolidation of diamond mining companies.

2.0

BACKGROUND AND HISTORICAL ASPECTS



The world over, mining company consolidation, amalgamation or mergers are common. Laws exist for regulating these processes. The history of diamond mining in Southern Africa itself gives testimony to this as history seems to repeat itself. For example, in the 1880's the diamond mines at Kimberley in South Africa had more than 1 000 companies and individuals holding diamond mining claims and workings.¹ The many companies were formed during the diamond rush in Kimberley which led the people to dig deep into the earth resulting in the formation of the Big Hole in Kimberley. However, as mining started to require deep and underground mining in search of kimberlites, the profits started to go down and work began to plummet. This was mainly due to a combination of factors such as exhaustion of diamonds near the surface, falling ground in the mine pits and lack of advanced tools and equipment to work on developing underground mines. The result was that the smaller companies folded and individual miners disappeared. Many fell into debt and left. Amidst the chaos, Cecil John Rhodes and Barney Barnato, both diamond business rivals had a shared idea of consolidating the diamond mines and make them profitable and establish a monopoly.² The battle royal between these two resulted in the consolidation of De Beers and other companies into De Beers Consolidated Mines. After this, most fortune seekers and opportunists disappeared. The history of the diamond sector has always been of great wealth and power, deceit and corruption. The same script is being written in Marange where a diamond rush happened in 2006-2009, with reports indicating that over 15 000 diggers, dealers and traders having invaded the area³. The army and police were then deployed to remove the informal miners and dealers from the diamond fields, resulting in cases of human rights violations. In Marange, multiple companies were then formed and licenced to explore and mine for alluvial diamonds. The official number of companies that were formed stands at 8 companies but Rera diamonds has been overshadowed and reference is only made to 7. The companies themselves soon ran into problems and this forms part of the discussion in this paper on consolidation of diamond mining companies into the Zimbabwe Consolidated Diamond Mining Company.

One of the reasons for engagement of many companies to mine for diamonds in Marange was for purposes of securing the vast and mostly alluvial diamond fields pursuant to the 2009 Kimberley Process Certification Scheme (KPCS) Administrative Decision on Marange. The Swakopmund Administrative Decision included a Joint Work Plan (JWP) adopted by Zimbabwe and the Kimberley Process which recommended engagement of investors. The decision was adopted in Namibia in June 2009⁴. The decision was based on the findings of KPCS Review Missions to Zimbabwe in 2009 that found Zimbabwe to be non-compliant with KP minimum requirements. In particular, the decision of the KPCS was that Zimbabwe should adopt measures to curb illegal digging, illicit flow of diamonds from Marange, smuggling and leakages so as to comply with KPCS minimum standards. Zimbabwe was therefore required to take action to curb illegal digging in the vast alluvial fields in Marange.

1 Meredith Martin (2007), *Diamonds, Gold and War; The Making of South Africa*

2 Ibid

3 See generally, Partnership Africa Canada; *Diamonds and Clubs* (June 2010), the Militarised Control of Diamonds and Power in Zimbabwe and Global Witness (2010), *Return of the Blood Diamond, the Deadly Race to Control Zimbabwe's new found Diamond wealth*

4 KPCS Administrative Decision on Marange, Swakopmund-Namibia June 2009.

This was to be done by the Ministry of Mines and Mining Development and the Zimbabwe Mining Development Corporation (ZMDC). These entities were tasked to identify resource areas in Marange (*areas where diamonds were to be found within an area of more than 70 000 hectares*). Diamond resource areas were to be subdivided and demarcated into manageable areas for mining and exploration. ZMDC and Ministry of Mines were also required to identify and engage potential investors and enter into Joint Venture agreements with mining companies. These actions were to be done by April 3, 2010 nearly a year after the adoption of the JWP. These actions were necessitated by the vast nature of the alluvial diamonds fields.

With this background the response by the Government of Zimbabwe between 2009 –2012 was to enter into multiple Joint Venture Agreements with investors to secure the vast alluvial diamond fields. It appeared government was desperate to comply with the KP minimum requirements and this resulted in the granting of many licences. Between 2009 and 2012 more than nine companies were registered or at least were operating in Marange or other areas outside Marange such as Bikita and Chimanimani. These companies were Mbada Diamonds, Marange Resources, Jinan, Diamond Mining Corporation (DMC), Anjin Investments, Kusena Diamond, Gye Nyame, Marange Resources and Kusena Diamonds. The other two are Nan Jiang Africa Resources in Bikita, although it has closed and DTZ OZGEO in Chimanimani. However, the other two diamond mining companies in other parts of the country namely Murowa Diamonds in Zvishavane and River Ranch in Beitbridge were not part of the mess in Marange, although some reports indicated a link between Marange diamonds and River Ranch diamonds through mixing at some point.

While the intention of the KP was to ensure that Zimbabwe effectively control the vast alluvial diamond fields from illegal mining, smuggling and leakages, it also provided an opportunity for signing of opaque and secretive mining contracts. From the beginning the ownership structures of some of the companies were not very clear and this raised a lot of questions on whether correct and transparent tender procedures were followed. Politicians took advantage of the situation and promised to give everyone a licence. Take the example of the former Minister of Mines and Mining Development, Obert Mpofu who on several occasions indicated that if for example the Zimbabwe Prisons Services and other groups apply for diamond mining licences he would give them.⁵ This indicated a free for all approach. The statements by Mpofu were diametrically different from policy recommendations from the Ministry of Finance in its 2010 National Budget which warned against the “issuance of multiple licences” in Marange.⁶ Therefore, policy disharmony also fermented the proliferation of numerous players in Marange and in the process giving room for opacity to go unchecked. Another example of shady players that were granted diamond mining licences was the cancellation of a licence granted to Canadile Pvt Ltd. Canadile lost its licence after government discovered that it had misrepresented its financial status to get the licence.⁷ Its assets and operations were later taken over by Marange Resources representing government. Moreso, the contracts signed by government with the mining companies were devoid of economic rationale. This is so because the contribution by government’s other joint venture partners had no relationship whatsoever with the value diamond rights they were acquiring. Worse still ZMDC in some instances failed to verify the fair value of contributions that were made in kind (goods and services). Also the payment of disposed government’s 40% stake in Anjin by ZMDC was not paid for. There was general lack of transparency and accountability in these deals which might have fueled corruption, underhand dealings and political maneuvering.

2.1 Government position and reasons behind Consolidation

Through media and public statements the Ministry of Mines and Mining Development and Ministry of Finance confirmed that all diamond mining companies in Zimbabwe will be consolidated into one company.

5 Alan Martin and Bernard Taylor (November 2012) Reap What You Sow: Greed and Corruption in Zimbabwe’s Marange Diamond Fields; Partnership Africa Canada

6 Ministry of Finance, National Budget Statement 2010

7 Parliament of Zimbabwe, Portfolio Committee on Mines and Energy, ‘First Report of the Portfolio Committee on Mines and Energy on Diamond Mining (with special reference to Marange Diamond Fields), 2009-2013’ (June 2013).

However, these statements have not yet been supported by any publicly circulated official policy document. For example, the Minister of Mines and Mining Development informed the Dubai Diamond Conference and other Stakeholder meetings that government will move forward with the consolidation process.⁸ In addition, the Minister of Finance stated that diamond mining companies will be consolidated in his 2015 National Budget Statement.⁹ The media has also reported extensively on the proposed consolidation.¹⁰ Whether the media and public statements made by government officials will result in consolidation of the mines remains to be seen. However, the proposal by the Ministry of Mines and Mining Development is that all diamond mining companies will be collapsed into one entity that will be called the Zimbabwe Consolidated Diamond Mining Company. During a presentation at the Dubai Diamond Conference the Minister stated that all diamond companies in Zimbabwe will become part of one big company that will mine and explore for diamonds. In the consolidated company Government will hold 50% shareholding while the other 50% will be shared amongst the amalgamated companies based on the valuation of their assets and liabilities¹¹. Recapitalisation of diamond mining operations in Zimbabwe will also be a focus for government under the proposed consolidation for purposes of supporting exploration for kimberlites in Marange and in other areas around Zimbabwe. The Minister of Mines also intimated that Government may even consider transferring some shares to international investors.

There are several reasons being given by government to justify the consolidation of companies. It has been widely reported that the planned consolidation is aimed at rescuing the industry since the diamond mining companies have been struggling to operate after allegedly exhausting alluvial diamonds in all resource areas they were allocated.¹² Some reports also indicate that the companies do not want to invest in underground mining for kimberlitic diamonds which is more expensive and requires modern equipment and financial resources. This has compelled government to find ways of triggering investment in exploration hence the proposal to form a consolidated company that can ride on economies of scale and invest in exploration projects.

At some point the mining companies asked for more resource areas to mine alluvial diamonds, but the requests were turned down by government. However, the reasons for the inclusion of Murowa diamonds in the proposed consolidation have not been clearly articulated, since Murowa has already done exploration work in Zvishavane. Sadly, many of the mining companies in Marange were formed as get rich quick outfits or wild-cat miners that were not interested in expensive ventures like kimberlite mining, but were interested in scooping the surface/alluvial diamonds, make quick money and ran away. The situation on the ground is that some companies have since stopped operations and were never viable from the outset. An example is Nan-Jiang Africa Resources in Bikita which built an imposing set of buildings and acquired expensive equipment which is rotting in the savanna bushes near Devuli Ranch in Bikita. The company only operated for a few months and stopped. That is the reason why the historical script and experience in the Kimberley diamond mines in South Africa is very instructive since it portrays the difficulties often faced by small get rich quick diamond mining companies that end up folding.

In addition to the above, the other reasons for the proposed consolidation range from the need to promote transparency and accountability in the production, transportation, marketing and export of diamonds. Diamond mining companies have been fleecing the country. Some have reportedly not been paying taxes and dividends.¹³ Further, Government also views the proposed consolidation as an opportunity to streamline administration and monitoring across the whole value chain of diamond mining (production to marketing) to improve transparency and accountability. The belief is that consolidation will assist in

8 The statements were made during the Dubai Diamond Conference on the 21st of April 2015 in Dubai.

9 Ministry of Finance, 2015 National Budget Statement

10 The Sunday Mail, 12 April 2015

11 Address by Walter Chidhakwa, Minister of Mines and Mining Development on the 20th of April 2015 during the Dubai Diamond Conference in Dubai. The Minister also informed participants during a Strategic Planning Meeting held on the 16th of February 2015 for the Ministry of Mines that diamond mining companies will be consolidated.

12 The Financial Gazette (7 November 2013) "Marange Diamonds running out"

13 See generally Ministry of Finance (19 December, 2013) The 2014 National Budget Statement and Ministry of Finance, 2011 Mid-Year Fiscal Policy Review Statement

plugging diamond leakages worsened by vulnerabilities associated with having too many operators in the field.

From the above, what is clear is that these public pronouncements have caused a lot of anxiety, excitement and panic in the diamond mining industry, society, amongst mine workers and some of the investors in Marange.

While a lot of people are anxious about the consolidation process, the process might take longer and could be expensive considering the levels of negotiations, valuation and associated process of incorporating the company.

2.3 Economic Contribution of Diamonds

An analysis of the economic contribution of diamonds to the national fiscus is important so as to demonstrate that so far the diamonds in Marange have not yet sparked. This is perhaps one of the reasons why the Ministry of Mines is under public pressure to do something. According to the 2013 Kimberley Process Certification Scheme annual diamond statistics, so far Zimbabwe has exported close to 40.373 million diamond carats worth \$1.961 billion from 2009 to 2013¹⁴. Generally, mining sector contribution to total exports earnings averages 51% from 2009-2014 and amounts to \$10.505 billion¹⁵. The share of diamonds to total mineral exports earnings averages 16% from 2009-2014 which amounts to \$1.835 billion¹⁶. In terms of the law, Government is entitled to tax revenue in the form of royalties (15%), depletion fees (2.5%), marketing fees (0.875%) and all of which are deductible from the fair diamond market values¹⁷. Other tax revenue also accruable is in form of income tax, Value Added Tax (VAT) on shareholders' income and Pay As You Earn (PAYE). Further, government is supposed to have a share of profits through dividends stemming from its equity participation in Marange diamond mines. The treasury has had fiscal challenges stemming from underperformance of diamond dividends. In 2012, the nation suffered fiscal stress when the budgeted \$600 million diamond dividend failed to materialise¹⁸. Further, the budgeted \$61 million dividend in 2013 was not realized and no provision for diamond dividends was made in 2015.

Table 1: ZMDC Fiscal Contribution 2010-2012

	2010	2011	2012	Total
Revenue	120,000,000.00	279,600,000.00	307,400,000.00	707,000,000.00
Profit before Tax	120,193,972.00	126,955,771.00	90,075,868.00	337,225,611.00
Tax	19,601,679.00	16,787,065.00	10,985,302.00	47,374,046.00
Dividend	61,932,750.00	72,686,628.00	19,300,000.00	153,919,378.00

Source: 2010 -2012 ZMDC audited annual reports

It can be seen from table 1 that ZMDC paid a total of \$153,919,378 between 2010 and 2012. This shows that state equity participation has huge potential in highly profitable mining projects to significantly recoup residual income after taxes in form of dividends.

14 Kimberly Process rough diamond statistics, public statistics area and available here: <https://kimberleyprocessstatistics.org/>

15 2015 RBZ monetary policy statement

16 There is a mismatch of export receipts between KP and Zimstat sources. From 2009-2013 diamond exports were \$1.961 billion (KP) which is more than \$1.835 billion recorded by Zimstat despite including 2014 diamond exports. This threatens reliability of data when 2 independent sources fail to corroborate each other. This means there is need for a single point of truth in government on diamond production and export statistics.

17 See generally the Income Tax Act, Mines and Minerals Act and Minerals Marketing Corporation Act

18 2013 National budget statement, out of \$563 million recorded diamond exports in October, only \$43 million had been received by the treasury- a far cry from the budgeted \$600 million

3.0

WHAT IS CONSOLIDATION? THE LEGAL FRAMEWORK AND RATIONAL

In the corporate sector, consolidation is defined as the unification of two or more corporations by dissolution of existing ones and creation of a single new corporation¹⁹. It is a legal process that is regulated by laws on amalgamation. In addition, laws that regulate mergers of companies may also apply. The new company resulting from the consolidation or amalgamation takes over all the rights, privileges and powers previously held by the consolidated companies. This means title to assets and property passes on to the new company and the new company also assumes liabilities for all debts and obligations. In essence, the new corporation may issue shares or pay fair consideration to the shareholders of the previous companies.

3.1 The Legal framework and Recommendations

Legal definition of amalgamation

The law that regulates registration and operations of companies in Zimbabwe, the Companies Act does not include the use of the word “consolidation”. The word used in the Act is “amalgamation” which also means bringing together two or more companies. In this case, there is no acquisition of one or more companies by another but coalescence of companies into one. The amalgamation of companies is primarily governed by the Companies Act (Chapter 24:03). In particular Section 193 provides that the amalgamation of companies should be sanctioned by the court on application by the members of the company or the company itself. In terms of the Companies Act an amalgamation of companies can happen in different ways. Firstly, the assets of two or more companies can become vested in one of the companies. In situations where a single company acquires all the assets and assumes all the liabilities of the companies to be merged, and the existence of those companies is terminated by their dissolution (whether preceded by liquidation or not), the transaction is known as absorption. Secondly, amalgamation can also happen when a new company is formed to take over the assets of two or more existing companies. This situation squarely applies to the proposed consolidation of diamond mining companies. Thirdly, amalgamation can also happen when companies combine under one group of companies with one of the companies becoming the holding company. The other company or companies retain their identities but become subsidiaries of the new holding company.

Section 193 provides that in making an order for the amalgamation of companies, the court order may provide for the following; the transfer to the transferee company of the whole or any part of the undertaking and of the property or liabilities of any transferor company; the allotting or appropriation by the transferee company of any shares, debentures, policies or other like interests in that company; the dissolution, without winding up of any transferor company; the provisions to be made for any persons who, within such time and in such manner as the court directs, dissent from the compromise or arrangement and such incidental matters as are necessary to ensure that the reconstruction or amalgamation shall be fully and effectively carried out.

There are various legal issues that should be noted from the above position. It is important to point

¹⁹ <http://www.merriam-webster.com/dictionary/consolidation>, accessed 20 April 2015

out that the proposal to consolidate diamond mining companies is an amalgamation of companies to form a new company that will take over the assets of the mining companies. This also means that the existing diamond mining companies will face dissolution. This is what is contemplated in Section 193. It means government wants to amalgamate companies although the government officials are using the word consolidation.

Further, the agreement creating the amalgamation of companies must make provision for handling of the liabilities of the individual companies. This includes liabilities to creditors and employees including the contracts of the employees. What is also important to mention is that the courts, in this case the High Court, is responsible for sanctioning or rather approving the amalgamation/consolidation process. An application should be made to the court by members of the company. In this case Government is a member of the companies since it holds 50% shareholding in most of the diamond mining companies operating in Marange-except in Murowa, River Ranch and DTZ-ORZGEO where it has no shares.

What the above legal position implies is that government (Marange Resources or the Zimbabwe Mining Development Corporation) as one of the shareholders or even any one of the investors in the existing diamond mining companies can approach the Courts for an order to sanction the consolidation/amalgamation. If these legal processes are skipped some of the shareholders may object to the process and this will result in protracted legal disputes.

3.1.1 Application of the Competition Act-creation of monopoly

The other legal angle that is important for government to be aware of is that the amalgamation of the companies may result in a merger as defined in the Competition Act (Chapter 14:23). The Competition Act provides for the prevention and control of restrictive practices, the regulation of mergers, the prevention and control of monopoly situations and the prohibition of unfair trade practices. The Act defines a merger as the direct or indirect acquisition or establishment of a controlling interest by one or more persons in the whole or part of the business of a competitor, supplier, customer or other person whether that controlling interest is achieved as a result of the purchase or lease of the shares or assets of a competitor, supplier, customer or other person or through amalgamation or combination with a competitor, supplier, customer or other person.²⁰ The important part to this section which government should closely look at is on the *“amalgamation or combination with a competitor, supplier, customer or other person”*. While the companies operating in Marange have government as a common shareholder, it is possible that the companies may have been competing or this section may capture what is proposed under the *“other person”* provision to make the proposed consolidation a monopoly. Further, Murowa diamonds and DTZ ORZGEO may be viewed as competitors. Therefore, if one big company is formed this may result in a monopoly in Zimbabwe. This means the amalgamation of the companies may result in a monopoly situation which is part of restrictive practices that are not permitted in the Competition Act. In this case, the Competition and Tariff Commission established in terms of the Competition Act may make orders to prohibit a restrictive practice if it is satisfied that the maintenance of the practice is not in the public interest. It is also important for government to note that the amalgamation of the companies is a notifiable merger in terms of Section 34A of the Competition Act. The threshold for notifiable mergers is US\$1 200 000.00 of the value of the company in respect of combined annual turnover and assets.

However, what is also vital to consider is that there is no law which empowers Government to force companies to merge or amalgamate, unless if it is making the proposal as a shareholder in the diamond mining companies through ZMDC or Marange Resources. Government may have to negotiate with the companies and convince them to amalgamate. Government has leverage in the negotiations in that it grants mining licences in terms of the Mines and Minerals Act. It may also withdraw such licences. However, the possible negative implications of threatening investors with withdrawal of mining rights may work negatively against investments if not handled properly.

²⁰ Section 2 of the Competition Act (Chapter 14:28)

3.2 Restatement of reasons for and against consolidation

In many cases consolidation of companies or mergers are a result of a multiplicity of factors such as the takeover of failing companies, increasing operational costs and general economic instability. Some of the advantages of consolidating companies may include, but are not limited to improving operational efficiency, profitability, better management or technical skills to bear on underused assets, access to capital, produce economies of scale, improve quality, and increase output.²¹

Consolidation of businesses may also help to bring about transparency and accountability, eliminate leakages and adoption of uniform systems that can enhance monitoring by government entities. In Zimbabwe, pooling of resources by diamond mining companies to enable them to carry out exploration work is one of the reasons being used by government to justify consolidation. Alluvial diamonds in Marange are alleged to have been depleted and the players did not set aside funds for conglomerate or kimberlite mining. Only Mbada diamond has been linked with efforts to explore for kimberlites. Therefore, government believes that combining diamond mining companies operating in Marange and those in other parts of the country like Murowa and River Ranch will result in pooling together of assets and capital for venturing into the capital intensive process of exploration and mining for kimberlite diamonds.

However, if not handled properly consolidation may result in more failures of the new business entity or company. At least theoretically, consolidation can be a useful tool for solving problems, but consolidation may not be the answer for all problems and challenges.²² Therefore, there are several disadvantages that should be considered by government before embarking on consolidation. Firstly, the consolidation process might end up being very expensive since it involves restructuring of businesses. Since some companies are consolidated due to operational failures, they may bring a lot of liabilities and debts that may create problems for the new entity. Consolidation may also result in job losses through retrenchment of workers. It may also cause cost and benefit inequities and that the management goals of the companies involved may differ causing conflict and tension.²³

There are many people in Zimbabwe, including civil society and community groups, who have already expressed themselves against consolidation of diamond mining companies. Some civil society groups have recommended that Government should stop all diamond mining activities and institute an independent Commission of Inquiry to establish what went wrong in Marange. One of the most controversial suggestions is that the country will lose absolutely nothing by keeping diamonds in the ground.²⁴

Other commentators believe that consolidation will not solve the opaqueness of diamond mining in Zimbabwe.²⁵ They argue that the business model which perpetuates government participation through acquisition of 50% shareholding in the proposed super company will not result in any results given the track record of failure associated with government owned companies. Also the involvement of government in this supersized structure may result in inefficiencies that may scuttle tax revenue flows from possible project delays.

This position is based on the fact that ZMDC as a major shareholder in some of the targeted diamond mining companies has been failing to steer the companies to meaningfully contribute to national economic development. In addition, ZMDC has failed in other projects in the mining sector such as Jena Gold Mine,

21 See generally, Cognizant (NASDAQ: CTSI) (2014) Enterprise Consolidation: A Transformational Approach; <http://www.cognizant.com/InsightsWhitepapers/Enterprise-Consolidation-A-Transformational-Approach.pdf>

22 Paige S. Manning, Alan Barefield and Jonathan Mays ()Consolidation Issues: Pros, Cons, Options and Perceptions, Mississippi State University Extension Service http://msucares.com/water/pubs/consolidation_issues.pdf ; accessed 21 April 2015

23 Ibid

24 Centre for Natural Resources Governance (CNRG) and Chiadzwa Community Development Trust (CCDT) (14 April 2015) Statement on the Proposed Marange Diamond Firms Merger

25 Brian Sedze (11 April 2015) "Fresh start not consolidation the panacea to diamond mining challenges in Chiadzwa" <http://www.newzimbabwe.com/opinion-21804-Chiadzwa+rot+Fresh+start,+not+consolidation/opinion.aspx>

Elvington Gold Mine and Kamatavi among others. However, one important point made by some commentators is that there are a plethora of issues the Ministry of Mines and generally government has to address first before consolidation happens such as passing a new Mines and Minerals Act and other sector-specific investment and economic empowerment policies.²⁶

26 Ibid

4.0

FACTORS TO CONSIDER IN CONSOLIDATING COMPANIES AND RECOMMENDATIONS



This section purposefully identifies and analyses some of the practical, policy, legal and institutional issues and factors that should be seriously considered by Government and all prospective shareholders of the proposed Zimbabwe Consolidated Diamond Mining Company in implementing the consolidation process. Immediately after identification of issues and analysis, a set of options and recommendations that may be taken into account is included. However, the options and recommendations presented in this section are not exhaustive. There are simply a lot of intricacies and aspects that should be taken into account in dealing with such a legally complicated and delicate process like amalgamation/consolidation of companies. It is not an easy task. Government and the shareholders should take time to learn all relevant issues to be considered in this process.

In order to give context and structure to the options and recommendations, each specific theme/issue identified in this section will be underpinned by a short analysis of key concerns or current problems related to the issue. Then a set of options or recommendations will be suggested.

However, in general terms, there is a wide range of issues that are identified and should be taken into account during the consolidation process. Such issues include; nature of amalgamation/consolidation, which companies should be consolidated, protection of shareholder rights and interests, valuation of assets, enhancing institutional efficiency and profitability, liabilities and obligations of existing companies, the rights of workers, protection and respect of community rights and compliance with the Kimberley Process Certification Scheme (KPCS) minimum requirements among others.

Government and the prospective shareholders are encouraged to consider these issues as they are key in promoting an open and transparent consolidation process.

4.1 Whether to Consolidate or Not?

As stated in previous sections there are different reasons being advanced to justify the consolidation of diamond mining companies. Some of the factors include improving monitoring of the diamond mining sector, improved management, enhancing economies of scale to help reduce costs and increase mineral production and efficiency. In that respect, it has also been argued that consolidation may result in bringing in new capital and access to technologies that will result in exploration for kimberlite diamonds by the proposed Zimbabwe Consolidated Diamond Mining Company. However, others have argued that consolidation will not change anything so long fundamental questions on political and economic reforms are not addressed and state participation in diamond mining is stopped.

Despite the existence of economic, institutional and political problems that may hinder the work of the consolidated company, once it is established, there is need to look at the brighter side of things and remain hopeful that government's intentions will result in improved contribution of the diamond sector to national economic development as well as community development. Therefore, on a balance of all relevant issues, this paper will generally recommend that government should go ahead with the consolidation process, but only for some of the companies and not all. The suggestion in this paper is that government should stick to its initial intentions of consolidating only all alluvial diamond mining.

Therefore only the following diamond mining companies should be consolidated; Marange Resources, Kusena, Jinan, Gye Nyame, Anjin, Mbada, Diamond Mining Company (DMC), DTZ ORZGEO in Chimanimani and Nan Jiang Africa Resources in Bikita. However, this has to be done after taking into account some of the recommendations contained in this paper.

4.2 The Question of Murowa Diamonds and River Ranch

Government officials have already indicated that the intention is to consolidate all diamond mining companies in the country to form a super big company called the Zimbabwe Consolidated Diamond Mining Company. This means Murowa diamonds, River Ranch and DTZ ORZGEO in which government has no shareholding will also transfer their assets and liabilities to the big company. Murowa Diamonds Private Limited is one of the diamond mining companies operating in Zimbabwe. In terms of ownership, the company is owned by Rio Tinto plc which holds about 78% shareholding with the remaining 22% interest owned by Riozim Limited, an independent Zimbabwean owned and listed company.²⁷ Murowa Diamond Mine is an open pit mining operation located near Zvishavane and it produces around 400,000 carats per annum of large, predominantly white, gem-quality diamonds.²⁸ Since 2004 over one million carats have been produced and sold with 10 per cent of Murowa Diamonds' production reserved for the local Zimbabwe cutting and polishing industry.²⁹

Murowa conducted exploration for diamonds through Rio Tinto in the 1990s. The exploration activities resulted in the discovery of three diamond-bearing kimberlite pipes in the Murowa area. Murowa reports that two of the kimberlite pipes namely K1 and K2 can be mined profitably.³⁰

This profile of Murowa places it in a different class with the other diamonds mines that started operating in Marange or surrounding areas such as Chimanimani, Bikita and Buhera between 2009 -2012. In Marange the mining companies started to operate on a trial basis of mining and exploration and not the other way round. Many of them have not invested money into exploration except Mbada diamonds which has belatedly done so.

In addition, Rio Zim which is a shareholder in Murowa is listed on the Zimbabwe Stock Exchange, while Rio Tinto is listed on the Australian Stock Exchange. Murowa has also been providing information to the public through annuals reports and creation of a website to indicate its performance. Only Mbada diamonds made a very timid, but essential effort to disclose information when it twice flighted newspaper adverts showing the distribution of \$593million and \$1 billion revenue mark in 2012 and 2014 respectively since it started operating in 2009.³¹ ZMDC which is a shareholder in most of the companies only produced an annual report for 2012 and since then nothing has come from the state owned company on its performance.³²

River Ranch is another diamond mine in Zimbabwe, although the company is not operational. Due to operational challenges, debts and failure to recapitalize, River Ranch was liquidated in 2012. At one point the mine was linked to the late Army-General Solomon Mujuru and his family.³³ The liquidation process was reportedly initiated by Rani Investments LCC which allegedly has a controlling stake in Limpopo Mining Resources (LMR)³⁴. The company whose assets at the time of the liquidation were worth \$5,6 million owed creditors over \$21 million with the biggest creditor being Rani Investments.³⁵ The mine is estimated to have

27 <http://www.riotinto.com/diamondsandminerals/about-murowa-10621.aspx>

28 <http://www.riotinto.com/diamondsandminerals/murowa-5393.aspx>

29 Ibid

30 http://www.riozim.co.zw/?page_id=233

31 Newsday, 18 March 2014, Daily News, 18 March 2014 and The Herald, 18 March 2014

32 Zimbabwe Mining Development Corporation, Annual Report 2012

33 Partnership Africa Canada, (June 2010); Diamonds and Clubs, the Militarised Control of Diamonds and Power in Zimbabwe

34 Source (July 10, 2014), No takers for River Ranch diamond mine two years after liquidation; <http://source.co.zw/2014/07/no-takers-for-river-ranch-diamond-mine-two-years-after-liquidation/>

35 Ibid

ore reserves totaling 9,8 million tonnes estimated to be worth \$162 million. Between 2009 and 2011, the company registered an accumulated loss of \$6,5 million which is attributed to undercapitalisation. However, indications are that the company has been failing to attract any new investors. LMR owns 80 percent of River Ranch its subsidiaries, Cornerstone Investments Limited and Sedna (Proprietary) Limited with a 40 percent shareholding while Khupukile Resources owns the remaining 20 percent.³⁶ Reports also indicate that some investors have been visiting the mine, but so far no investor has taken up the mine. However, with talk of consolidation of diamond mining in Zimbabwe, it is possible investors will be hesitant to invest in the mine without clarity of government intentions on River Ranch.

4.2.1 Recommendations on Murowa and River Ranch

In terms of scope it will be unwise to include for consolidation a company such as Murowa which is fully operational, profitable, socially responsible and compliant with all statutory obligations in terms of payment of mining taxes. The company has also invested in exploration, with three known kimberlite pipes.

As it stands, the proposed consolidation may give an unfair new lease of life to struggling companies operating in Marange by getting shareholding in Murowa diamonds through the back door. This may rattle investors and increase the unattractiveness of Zimbabwe as a mining destination. Further, inclusion of Murowa may destroy the international brand the company has built and bring inefficiency associated with state owned companies such as ZMDC. Such sudden policy changes are not necessary especially at a time when Zimbabwe is lowly ranked at number 106 out of 112 countries on the attractiveness of mining policy to investors by the Fraser Institute's survey of mining companies 2013.³⁷ Mining is a capital intensive venture. Given the liquidity crunch prevailing in the domestic market, attracting Foreign Direct Investment (FDI) is critical to unlock the value of mineral assets to achieve the stated goals of the Zimbabwe Agenda for Sustainable Socio Economic Transformation (ZimAsset 2013-2018).

Apart from Murowa, given the status of River Ranch, it may be unwise again for government to propose to consolidate the Marange based companies with River Ranch given the problems at the mine, especially the huge debt to some creditors. Government should work toward attracting independent investors to run River Ranch without any government involvement through ZMDC.

The above approach, can at least cushion Murowa and River Ranch to operate independently and break monopoly by the proposed Zimbabwe Consolidated Diamond Mining Company. This may as well promote competitiveness in the diamond sector, which can lead to improved efficiency and profitability by all diamond mining companies in Zimbabwe as they seek to outdo each other. Adequate consultations involving government, Murowa Diamonds and the creditors or liquidators of River Ranch must be pursued for the parties involved to negotiate their diverse interests.

4.3 Valuation of the Mines for Shareholding allocation

Consolidation of companies will result in combining the assets and liabilities of the companies that are being consolidated or amalgamated. In this case valuation and assessment of assets and liabilities of each company is important in order to determine shareholding allocation and structure. In any case that might involve transfer of shares to new players this is important for assessing the value of shares for fair compensation for any company that may not be interested in the consolidation process. Hence, businesses are normally valued for different purposes such as their purchase, sale, listing on the stock market or for calculation of tax.³⁸ Valuation is therefore used to estimate the economic value of an owner's interest in a business. There are three broad approaches that are often used

³⁶ Op cit

³⁷ Fraser Institute Survey of Mining Companies, 2013; <http://www.fraserinstitute.org/research-news/display.aspx?id=20902>

³⁸ See generally Ken Garrett (2012), Business Valuations, ACCA; http://www.accaglobal.com/content/dam/acca/global/PDF-students/2012s/sa_feb12_f9_valuationsv2.pdf

for purposes of share valuation namely the asset-based approach, the income based approach and the cash-flow based approach.³⁹ According to standard practice, the income based approach determine value by calculating the net present value of the benefit stream generated by the business (discounted cash flow) while the asset-based approaches determine value by adding the sum of the parts of the business (net asset value) and the market based approach determine value by comparing the subject company to other companies in the same industry, of the same size, and/or within the same region⁴⁰.

4.3.1 Recommendations and Options

In order to determine the value of assets and liabilities of each of the diamond mining companies operating in Marange, a business valuation process should be undertaken using a combination of approaches. This is important for purposes of determining the shareholding of each of the existing investors in the proposed Zimbabwe Consolidated Diamond Mining Company. Most importantly, the valuation process should be closely monitored and audited. Reputable and independent audit firms must be engaged to drive the whole process and not leave the process to the companies subject to the consolidation process.

Close monitoring and auditing will be vital so as to detect or avoid cases of over-valuation of the assets and possibly under-valuation of liabilities by the diamond mining companies. Some of the possible liabilities that may be under-valued which government has to be alive to include tax obligations of the companies to the Zimbabwe Revenue Authority (ZIMRA). These may include payment of royalty payments, special dividends to government and other tax heads and levies payable. In addition, there is need to assess liabilities of the companies such as wages for workers and retrenchment benefits where applicable. Commitments made by diamond mining companies during the operational tenure to communities and other stakeholders such as relocation related promises such as provision of the irrigation schemes, water, income generating projects and construction of schools among others should also be assessed as liabilities where a value can be determined. This is because diamond mining companies had indicated and pledged to relocated families and government. The companies had indicated that funds were set aside to cover all relocation related costs. This information is contained in some of the Shareholder's Agreements signed with Marange Resources which included a budget dedicated for relocation purposes. Some companies had set aside more than \$3 million each for relocation purposes.⁴¹ The question is whether the relocation process was completed as envisaged, at what cost and how much money is needed to finish the process in all relocation areas at Arda Transau. Relocation is just one of the issues to look at.

Further, Government has to be very careful in allowing corporate social responsibility activities that may be claimed by the diamond mining companies as part of the value the companies brought to communities and the whole nation.

The valuation of assets should be based on what was brought by the diamond mining companies such as mining equipment and buildings among other assets.

In the valuation process the companies should not be allowed to include the potential or known diamond resources that are on the claims they hold. This is an asset of the Government since government has used that as its 50% shareholding in most of the diamond mining companies through ZMDC or Marange Resources which holds the Special Grants in Marange.

³⁹ http://en.wikipedia.org/wiki/Business_valuation, accessed 20 April 2015

⁴⁰ Ibid

⁴¹ Zimbabwe Environmental Law Association (9 March 2010) Analysis of Memorandum of Agreement and Shareholders Agreement entered into between Marange Resources (Pvt) Ltd and Grandwell Holdings Limited on Chiadzwa Diamond Mining Concession.

4.4 New Shareholders' Agreements and Mining Contracts

The consolidation process also offers Government an opportunity to possibly enter into new Shareholders' Agreements and mining contracts with foreign and local investors for exploration and mining of diamonds in Marange. But this has to be done after considering the rights of the existing shareholders. Shareholders Agreements and mining contracts form part of legal documents that commit agreeing parties to certain rights and duties. Based on an analysis of some of the existing Shareholders Agreements signed by Marange Resources with investors in Marange, there are some pitfalls that Government should avoid. The Shareholding Agreements were less favourable to the country.

For example, an analysis of the Memorandum of Agreement and Shareholders Agreement entered into between Marange Resources (Pvt) Ltd and Grandwell Holdings Limited on Chiadzwa diamond mining concession indicates a number of shortcomings that were inherent in the agreements.⁴² The Shareholders Agreement and mining contract were signed on the 21st of July 2010 and 13th of August 2010. The agreements included the rights and duties of the parties in relation to marketing and selling of diamonds, distribution of management fees, payment of resource depletion fee and profits as dividends, a business plan and relocation plan. Most of these aspects were not in favour of national economic interests as contemplated by Section 23 of the Zimbabwe Mining Development Corporation Act (Chapter 21:08). The law imposes a duty on ZMDC to ensure that all mining proposals and projects are carefully reviewed in line with government economic policy and national interest. The same observation was made by the Parliamentary Committee on Mines and Energy, led by the late Chindori-Chininga who was the Chairman of the Committee.⁴³

Just as an example, one of the contentious issues included in the Shareholders Agreement with Grandwell was the granting of the power and exclusive rights to market and sale diamonds and other materials from the Chiadzwa concession rights to Grandwell Holdings. This was an outrageously irresponsible position by the Ministry of Mines and Mining Development, ZMDC and MMCZ which gives authority for sale and marketing of minerals.

The problem with granting exclusive marketing rights of diamonds to a foreign investor is that this can be abused by the mining company through under-valuation of diamonds, transfer pricing and tax evasion. These ills are happening in the diamond sector as cautioned by the Financial Action Task Force (FATF) in its report on money laundering and financing of terrorism from the sale of rough diamonds.⁴⁴ Dubai has already been cited as the destination of most of the diamonds and other minerals. According to Partnership Africa Canada, Dubai has allegedly been undervaluing Zimbabwean diamonds.⁴⁵ What is important for government to do is to rely on the new tender or auction system in Zimbabwe. But there is need to make sure that the system is not manipulated through corruption and underhand dealings that can lead to undervaluation of diamonds. The consolidated company should have a clear system of marketing diamonds that is agreed with the Minerals Marketing Corporation (MMCZ) since it has the sole responsibility of marketing all minerals in Zimbabwe⁴⁶.

Other aspects that government should look at very closely in the Shareholders Agreement or mining contract is allocation and distribution of management fees and resource depletion fees. In some of the existing Shareholders Agreements payment of a flat rate of 5% of the turnover of the joint venture company to foreign investors for management services is included. Further, the agreements also include

42 Ibid

43 Parliament of Zimbabwe, Portfolio Committee on Mines and Energy, 'First Report of the Portfolio Committee on Mines and Energy on Diamond Mining (with special reference to Marange Diamond Fields), 2009-2013' (June 2013).

44 Financial Action Task Force (FATF) and Egmont Group of Financial Intelligence Units (2013), Money Laundering and Terrorist Financing through Trade in Diamonds

45 Alan Martin and Bernard Taylor (2014). All that Glitters is Not Gold: Dubai, Congo and the illicit trade of Conflict Minerals. Partnership Africa Canada

46 Section 20 (a), (b), (d) of the Minerals Marketing Corporation of Zimbabwe provides that the Corporation shall act as the sole marketing and selling agent for all minerals and to investigate marketing conditions whether inside or outside the country.

payment of 5% to Marange Resources as a “Resource Depletion Fee”. The important thing is to assess if the depletion fee and management fees can be equated. Equating management fees to resource depletion fees may be fundamentally flawed, unjust and not in the best interest of the country.

4.4.1 Recommendations and Options

From the above analysis, it is important that government through ZMDC, MMCZ and the Ministry of Mines pay close attention to the issue of marketing and sale of diamonds. Government should not grant these rights to investors unless if they have a good track record, traceable systems for valuation of diamonds and government is likely to get fair value for diamonds. Therefore, exclusive marketing and selling rights should be granted in exceptional circumstances. What this means is that MMCZ should pursue innovative ways of marketing and selling diamonds such as the current auction or tender system that can unlock fair value for the diamonds to be produced by the proposed Consolidated company. These measures may help to curb under-valuation of diamonds.

In addition, government should ensure that depletion fees and management fees should not be equated as this may amount to under-valuation of the diamond resource as what was the case with the contracts that were signed by current diamond mining companies with foreign investors. Government should not repeat the same mistake. The management structure of the proposed consolidated company is very important and should be based on the need to attract the best talent Zimbabwe has to serve the national interest in the diamond mining sector. In structuring the management arrangements, government should be very strong and ensure that it negotiates carefully.

Generally, ZMDC and Ministry of Mines should ensure that all the Shareholders’ Agreements and mining contracts to be entered into with any foreign or local diamond mining companies are negotiated with the objective of advancing national economic interests as contemplated in the Zimbabwe Mining Development Act.

There are many basic issues that the Shareholders Agreement or mining contract should contain. Examples include clear and beneficial provisions on fiscal aspects for example payment of royalties, resource depletion fees, payment of dividends, local authority levies and other mining taxes prescribed by legislation. In addition, operational and production requirements, environmental, social, community, infrastructural and worker safety and health obligations must be included. Other issues include local procurement of local goods and services, employment of locals and compensation for relocated families and resettlement. These duties and obligations are either imposed on the mining company or government. Some of these will be analysed in greater detail in the next section.

On procurement of local goods, services and employment, Government must make sure that the mining agreements are clear on the need to procure locally and employ from the communities or other parts of the country if the services and expertise is available locally. Only if goods, services and expertise are not locally available should it be sourced from foreign countries. However, efficient management of the cost curve is a critical success factor in any business venture and mining is not exclusive. Hence local content development can only work when there is adequate support for local enterprise development. Further sunset clauses must be included to avoid rewarding incompetence of local industry. The habit of the Chinese of bringing in unskilled labourers from China as what was happening at Anjin Investments should be stopped.

4.5 Mining Rights: The ZMDC Special Grant

The rights to minerals in Zimbabwe is vested in the President in terms of the Mines and Minerals Act (Chapter 21:05). The Act states that the dominium in and the right of searching and mining for and disposing of all minerals is vested in the President.⁴⁷ However, mining rights can be acquired through

⁴⁷ Section 2 of the Mines and Minerals Act (Chapter 21:05)

an application for a licence depending on the rights or mineral being applied for. In 2006, Government granted the Zimbabwe Mining Development Corporation (ZMDC) 4 Special Grants in the Marange diamond fields namely SG 4718, SG 4719, SG 4720 and SG 4765, although this was not without controversy as government had cancelled the mining rights that had been granted to ACR. ZMDC represents government as its investment arm in the diamond mining sector. However, ZMDC in turn formed a special investment vehicle in the diamond sector in the form of Marange Resources. Therefore, ZMDC through its subsidiary, Marange Resources has been using these special grants as its investments in the Joint venture agreements that were entered into with investors. In many of the Joint Ventures ZMDC on behalf of government acquired 50% shareholding, except in Anjin where its shareholding is stated as 10%.⁴⁸

Another important issue to consider is that with government proposing to hold 50% in the consolidated company, its involvement in the proposed diamond mining company may impact negatively on optimal generation of revenues from diamonds. This is because there is greater likelihood that the state will bring its inefficiencies as evidenced by the well documented history of productivity and profitability challenges facing many state owned enterprises including ZMDC. However, from an analysis of the legal framework and practice, it is evident that ZMDC will play a significant role in driving the consolidation process. This is because of two main reasons. Firstly, the Zimbabwe Mining Development Corporation Act grants ZMDC powers and duties that places it at the centre of promoting mining investments in the national interest and in line with government economic plans. Section 20 of the Act states that ZMDC has the following functions and duties; investing in the mining industry on behalf of the State, plan, co-ordinate and implement mining development projects, engage in prospecting, exploration, mining and mineral beneficiation programmes and to review the general economic conditions and prospects of the mining industry and in particular investment schemes. In addition, ZMDC is responsible for advising the Minister on all matters connected with corporate investments in the mining industry and make recommendations for the proper co-ordination of all investment programmes.

4.5.1 Recommendations and Options

Given the fact that government does not have any money to invest in the consolidated company, it should continue using the Special Grant held by ZMDC as its investment in the proposed Zimbabwe Consolidated Diamond Mining Company. However, the problem is that these resources have not been valued through a comprehensive exploration programme for government to fully understand the estimated value and quantities of the diamond reserves in Marange. Negotiating contracts based on speculative figures of the quantity and quality of diamonds in Marange does not make business sense. Therefore, exploration is key as suggested by government.

The legal mandate of ZMDC as defined earlier means that it will play a leading role in the establishment of the consolidated company. In any case, ZMDC is already a shareholder in the diamond mining companies operating in Marange, holding 50% in most of the companies. It is expected that ZMDC will negotiate with the other shareholders to pass the resolution for the consolidation of the diamond mining companies. In addition, ZMDC will most likely advise the Minister on how the consolidation process should be implemented. Therefore, what is important is for ZMDC to pursue the issue of consolidation in a manner that can enhance greater revenue generation from the diamonds. ZMDC should stop all the practices and ways of doing things that have made parastatals and public bodies unattractive to investors. In advising the Minister on investments related to the consolidation, ZMDC should act professionally, promote efficiency and comply with the Constitutional principles on public accountability, integrity, openness and financial probity. In fact the Corporation is required in terms of the law to conduct its business on sound commercial lines. It will be foolhardy on the part of ZMDC to bring to the consolidated company a culture of failure to deliver and inefficiency.

⁴⁸ Zimbabwe Mining Development Corporation, 2012 Annual Report

The Board members for the consolidated company as well as for ZMDC as an institution should be chosen based on merit and proven record of managing successful businesses and not on political affiliation as was the case with previous Boards of ZMDC. The culture of state owned companies that are failing should never be transferred to the Zimbabwe Consolidated Diamond Mining company. In fact, some of the mining companies that ZMDC was operating such as Mhangura (copper mining) and Kamativi (tin mining) collapsed while others such as Sabi Gold, Elvington Gold, Jena Gold Mines and Sandawana are struggling and being run unprofessionally.

In terms of negotiations, ZMDC or the Ministry of Finance should avoid the mistakes that happened in 2008 -2011 when ZMDC was involved in the selection of investors and failed to carry out proper due diligence on prospective investors. This led to the granting of mining rights to companies like Canadile that did not have the financial resources to invest in diamond production. Canadile lost its licence after government realized that it had misrepresented facts and that a proper due diligence process was not conducted by ZMDC.⁴⁹ The consolidation process also offers an opportunity for ZMDC to reassess its partners who will become shareholders in the Consolidated company.

Generally, in negotiating with other shareholders ZMDC should ensure that the Shareholders Agreement or mining contract that will be entered into advance national economic interests. In particular ZMDC should espouse the following concepts to be included in the new arrangement; access to information, transparency and accountability in respect of revenue and contracts, respect of workers' and community rights, environmental rights, fair distribution of management responsibilities, transparent marketing of minerals and compliance with national laws by the consolidated diamond mining company. Domestic resource mobilization is very important and ZMDC should be at the forefront of promoting it.

Another important issue to consider is instituting an audit of how the current companies have been operating. Apart from operational aspects, the audit can focus on assessing the shortcomings and positive aspects of the existing shareholding agreements and memorandums of agreement that were signed with diamond mining companies. However, if an audit has already been commissioned by the Ministry of Mines as reported, the results should inform the negotiations with the diamond mining companies.⁵⁰ The audit report should also be made public or at least presented to parliament by the Minister of Mines. This process can help to build public confidence on the process and also promote transparency and accountability. The consolidation process should be informed by the results of the audit.

4.6 Opportunity to attract new and responsible investors

The proposal to consolidate diamond mining companies also offers an opportunity for government to attract other investors who may contribute or bring more capital to the proposed company than relying on the current asset portfolio of existing companies. Already the assets are not adequate since the companies are struggling and have not been investing in exploration and other projects. Some have not been paying workers as well as special dividends and royalties.

4.6.1 Recommendations and Options

Reserving shares for other investors: There are several options that can be followed in trying to attract new shareholders to invest in the proposed consolidated company. Government can negotiate with the current companies based on their asset and liabilities and agree to issue a limited number of shares to the companies and reserve other shares to be given to new investors. An option worth considering can be reserving between 10% -15% of the shares to international, regional or local investors. All investors whether from Asia, America, Europe or other African countries should be equally considered without any discrimination. What is important is to attract people with the technology, finance and expertise

⁴⁹ Parliament of Zimbabwe, Portfolio Committee on Mines and Energy, 'First Report of the Portfolio Committee on Mines and Energy on Diamond Mining (with special reference to Marange Diamond Fields), 2009-2013' (June 2013)

⁵⁰ The Herald, 14 May 2014 "Government Orders Diamond Firm Audit"

on geological surveys, marketing, and mining. It is time to give attract companies that can enable the country to unlock fair value from the diamonds. Most importantly companies with experience on mining conglomerates or kimberlite diamonds should be considered favourably.

The proposed consolidation process also presents an opportunity for government to abandon opportunists who were only interested in cheap mining activities of alluvial diamonds without a long term vision and plan for long term mining and community development. There is need to look beyond opportunistic and wild-cat companies that are interested in making a quick buck and ran away.

Different players or investors can also be offered opportunities that exist along the diamond supply chain associated with the formation of the consolidated company. This may start from exploration, mining, transportation, marketing and export or more importantly value addition (beneficiation). It is time to attract companies that are committed to transparent and accountable systems of production, marketing and export of diamonds. The world has many of those companies.

Long term investors can be given some shares in the consolidated company and their investment should be secure. In this case, security of tenure and respect of property rights as provided for in the new Constitution is critical. New investors should be assured of the security of their investment in Zimbabwe. There is need for a paradigm shift, at least politically on this. It is important to play smart politics that does not stifle investment.

Reducing Government shareholding: As will be pointed out in another section, the other option to attract new investors with capital may entail listing of the company on the Zimbabwe Stock Exchange. This may mean government through ZMDC or Marange Resources have to reduce its shareholding in the consolidated company to comply with the Zimbabwe Stock Exchange threshold of shareholding by any one investor. Any one investor is not allowed to hold more than 35% shareholding in any one listed company. This means the other 15% of shares can be freed and offered to the public, especially Zimbabweans (as part of indigenisation). Alternatively, government can use other investment arms such as the Zimbabwe Sovereign Wealth Fund or the Indigenisation and Economic Empowerment Fund to take the 15% or divide those shares amongst other state entities. This will still achieve the same goal of ensuring 50% state ownership of the diamond mining companies as will be elaborated later.

Terminating contracts and compensation for some companies: Before implementing the consolidation process, Government should also consider terminating, at least following set legal procedures, the contracts or shareholders agreements signed with some of the diamond mining companies in Marange. This option can help to get rid of companies that have not been paying taxes and those that have been involved in under-valuation of diamonds and smuggling diamonds from Marange. The audit results of the diamond mining companies in Marange can help to identify those companies or shareholders. Once those are identified, they can then be compensated for their assets and investments. A lot of the liabilities they have will also be sued to reduce the compensation levels. However, this option may require a lot of thinking, planning and resource allocation because of the potential for law suits. However, the money that can be brought in by new investors can be used to pay off the debt.

4.7 Taxes Obligations and other Liabilities

Mining taxation is one major source of revenue for the state in Zimbabwe. Mining taxes are paid in terms of the Income Tax Act and the Mines and Minerals Act. There are different tax heads that mining companies should pay and these include royalties, corporate tax, dividends where the state has shares in the company and other administrative fees paid to various government departments. The Zimbabwe Revenue Authority (ZIMRA) has the legal mandate to collect tax in Zimbabwe, although this power can be delegated to other entities by ZIMRA.

However, mining companies or other investors can be exempted from paying certain taxes mainly for

purposes of attracting more investments. Tax exemptions are sometimes viewed as detrimental to domestic resource mobilization as they may deprive a country of revenue for minerals.⁵¹ Some of the tax exemptions are included in shareholders or mining agreements that are signed while others are granted in terms of mining or tax legislation. In Zimbabwe the Mines and Minerals Act and the Income Tax Act provide for tax exemptions such as capital allowances and remissions. Remissions on payment of royalties for example may be granted by the President in terms of Section 254 of the Mines and Minerals Act. In this case the President has power to remit, in whole or in part, the royalty payable on any mineral for such a period as he may determine whenever he deems it expedient to do so as an inducement to the commencement or continuation of mining operations, the processing or refining within Zimbabwe of minerals or the development of any export market. In addition, the fifth Schedule to Section 15 (2) (f) of the Income Tax Act provides for allowances and deductions in respect of income from mining operations and this includes capital allowances. Most companies will be exempted when they procure capital equipment and build infrastructure during the development stage of the mine. In this case capital redemption allowance is calculated from all capital goods that are purchased or constructed (in the case of buildings i.e. schools, dams, clinics etc.) and are first used for the purpose of mining operations. However, tax holidays and exemptions and other hidden subsidies granted to companies in secretive agreements deprive governments and their citizens of significant tax revenues.

On transfer of ownership, reconstruction or merger of companies, the Income Tax Act also makes provision for the recovery of tax in Section 77 by ZIMRA. For example if a company or person who is supposed to pay tax transfers any assets for purposes of avoiding paying taxes the company that receives the assets will be responsible for paying the tax. There are many companies in Marange that have not been paying royalties and other taxes. This means when the assets are transferred to the consolidated diamond mining company, the new company will be responsible to pay the tax. Further, any tax payer is required by the Commissioner to furnish him information on his shareholding and dividends received.⁵²

4.7.1 Recommendations and Options

Tax remissions/exemptions for exploration: The new Shareholders Agreements or mining agreements that will be signed by government with the diamond mining companies for the constitution and operationalization of the Consolidated Diamond mining company should not include harmful tax exemptions and remissions that may skew mineral benefits in favour of investors at the expense of the fiscus. The powers to grant tax exemptions and remissions vested in the Minister of Mines and Mining Development as well as the President should be exercised sparingly. However, in order to provide scope for investment by the new consolidated company or other partners/shareholders that may be invited to invest for purposes of exploring for kimberlitic diamonds in Marange or other areas, it may be advisable for government to grant tax remissions or exemptions that are very specific and do not result in any financial disadvantage to the state. Such exemptions may encourage investors to invest in exploration for kimberlite diamonds since exploration is being viewed by government as one of the reasons why consolidation is critical. In addition, any tax exemptions that may be granted should be clearly communicated to ZIMRA, Ministry of Finance and other stakeholders such as Parliament to ensure transparency and accountability.

Assessing history of tax compliance: Given the fact that some of the diamond mining companies in Marange have allegedly not been paying taxes, it is vital to ensure that ZIMRA is fully involved in assessing the history of tax compliance of all the diamond mining companies to ensure that where possible they are paid or the tax obligations will be used to reduce shareholding of those companies in the consolidated company. Alternatively, the outstanding tax payments can be paid by the consolidated companies since it may take over the liabilities of the existing companies. Any outstanding dividends should also be paid to government. The consolidated company can pay the taxes after reducing the shareholding of those

51 See generally Zimbabwe Environmental Law Association (2012), An Outline of the Mining Taxation Regime in Zimbabwe

52 Section 41(1)

companies. ZIMRA should also closely assess the fiscal arrangements or provisions of the Shareholders agreement or mining contracts to make sure they comply with mining taxation legislation.

4.8 Potential Legal disputes

The field of company amalgamation, consolidation, mergers and reconstruction is often replete with legal contestations and battles. The proposed consolidation can prove to be a legal mine field for government if not handled properly. Government through ZMDC and Marange Resources signed shareholding agreements and other mining agreements with investors to form all the Joint Venture companies operating in Marange and some measure of respect should be given to the legal rights and obligations contained in those agreements in pursuing the consolidation process. The contracts have various terms and conditions that may include termination clauses and transfer of shares among others that should be observed. Government may not find it easy to deal with the contractual provisions in some of the agreements.

However, if government is serious about bringing sanity in the diamond fields and to ensure that the country benefits no legal battle, that is unavoidable, will be too big to fight especially in dealing with companies that have been fleecing the country of potential revenues.

4.8.1 Recommendations and Options

Composition of Negotiation team: In order to avoid long drawn disputes with investors and to get the best deal out of the process, Government should first and foremost identify a strong team of negotiators and experts that will lead the negotiations and valuation of assets on behalf of government. This team should be multi-disciplinary and diverse. It is time to bring in the best brains the country has. These may include legal experts, financial experts, tax experts, asset evaluators, investment and marketing experts, mining experts and most importantly social experts among others. The team can then advise ZMDC or the Ministry of Mines and Mining Development on how best to structure the consolidation process and more importantly the shareholding arrangements based on the companies' assets and all financial and social liabilities. This group should also be able to consult widely with other stakeholders who may have intimate knowledge of certain aspects that may not be within the knowledge scope of the group members. Most importantly, the team should include a fresh crop of people who have not been tainted by the current problems in the sector or those who were brought into the equation by the former Minister of Mines and Mining Development, Obert Mpofu.

Analysis of Existing Contracts: The negotiation team should be able to look closely at all existing shareholders agreements and contracts entered into with the diamond mining companies and assess all the potential risks and benefits to government. Government should be careful in negotiations and ensure that legal disputes that may affect production and marketing of diamonds are avoided. The team should also look at the legal implications of the consolidation process and in particular seek to avoid contravention of national or where applicable international corporate law provisions and instruments. This will enable government to avoid legal disputes that may affect the operations of the consolidated company.

Using mining rights ownership as leverage during negotiations: While the state should comply with all laws and contractual obligations, it should not fail to use its control and ownership rights over all minerals and in particular diamonds as contemplated in the Mines and Minerals Act as leverage during negotiations. Government has the power to withdraw those rights. However, government should do this in a persuasive manner, so that new investors are not scared to invest. Nevertheless, given the difficulties government has been facing with the diamond mining companies in Marange, there may be need for a more aggressive approach if need be.

4.9 State participation in diamond mining

State participation in the diamond mining sector through joint venture arrangements with private investors is a well-established practice in some major diamond producing countries in Southern Africa. The list includes Botswana, Namibia, Russia and Angola among others. In Botswana and Namibia state companies entered into partnerships with investors for exploration and mining and have formed Debswana and Namdeb respectively⁵³. In Botswana and Namibia the partnerships are between the Namibian Government and De Beers and the Government of Botswana and De Beers.

There are different success factors attributed to these joint ventures in Namibia and Botswana such as less political interference in the operations of the companies, efficient use and management of resources, innovative investment decisions (in Botswana for example where Debswana is establishing a rough diamond sorting facility in Botswana), use of revenues for the benefit of all citizens, transparency and accountability underpinned by listing on the stock exchange.

The world over, state participation in the mining sector has been pursued for various purposes, but in many cases it is for purposes of enhancing domestic resource mobilization, to capture a larger share of the rents from mining, to support budget deficits and sometimes for ideological reasons such as socialist approaches based on the need to provide cheaper basic services to citizens. In Zimbabwe the state increased its participation in mining to limit the influence of private mining companies in the 1980s through the establishment of ZMDC and MMCZ in 1982. These state entities were meant to spearhead state commercial interests in mining, investment and marketing of minerals. ZMDC and MMCZ are required to conduct business on sound commercial lines, declare dividends and pay royalties and other statutory financial obligations. However, the historical problem is that ZMDC for a period of 20 years since its establishment had not been paying dividends until 2010 when Parliament raised the issue.⁵⁴ Further, like many state owned companies ZMDC has been failing to make significant profits over the years. It took over some mines such as Mhangura (copper mining) and Kamativi (tin mining) and these have collapsed while others such as Sabi Gold, Jena Gold Mines, Elvington Gold Mine and Sandawana are either struggling or not operational. ZMDC at times views itself as responsible for creating and maintaining jobs and not making a profit for the nation.⁵⁵ Unprofessional conduct was also evident in 2009 when the corporation failed to carry out a proper due diligence assessment in the selection of investors to partner it in the Joint Ventures diamond mining companies in Marange. Investigations by the Parliamentary Committee on Mines and Energy established that the due diligence done by ZMDC was not thorough.⁵⁶ One of the companies called Canadile had misrepresented its financial status and capacity to invest in diamond mining in its application. This was not detected by ZMDC during the due diligence. ZMDC has also been dogged by allegations of corruption against its officers and seniors managers.⁵⁷ Some of the cases are still pending in the courts.

4.9.1 Recommendations and Options

ZMDC/Marange Resources should be run on a sound commercial basis:

In order to effectively, efficiently and transparently carry out its legal mandate, ZMDC/Marange Resources should be run on a sound commercial basis. This is because the corporation will be important in driving the consolidation process. The corporation should avoid bringing into the proposed Zimbabwe Consolidated Diamond Mining Company unprofessional conduct, corruption and inefficiency since it will be the major shareholder and might use its majority shareholding for pursuing commercially inefficient

53 See generally, http://www.namdeb.com/about_org_profile.php; <http://www.debswana.com/Pages/Welcome.aspx>

54 Parliamentary Committee on Mines and Energy, Oral Evidence from ZMDC on diamond mining operations in Marange (8 February 2010)

55 Ibid

56 Parliament of Zimbabwe, Portfolio Committee on Mines and Energy, 'First Report of the Portfolio Committee on Mines and Energy on Diamond Mining (with special reference to Marange Diamond Fields), 2009-2013' (June 2013)

57 Daily News (Feb 20, 2013), Kurotwi charges puzzling: Ex-ZMDC boss

systems. Narrow political interests that often dog state owned companies or companies in which the state has majority shareholding should be avoided at all cost in the consolidated company. The Board members to be appointed by ZMDC to represent its interests in the consolidated company should be professional people who have distinguished themselves in the mining sector or other relevant fields such as business and investments. Political appointees should have no place in the Zimbabwe Consolidated Diamond Mining Company. ZMDC should be able to attract the many hard working Zimbabweans who are running profitable mines in other countries around the world.

ZMDC/Marange Resources Annual Reports: In order to ensure accountability and transparency within the consolidated company, ZMDC should ensure that it timeously produces annual reports since it is a state entity that is required by the law to do so.⁵⁸ The annual reports are a photograph of the financial position and operational modalities of any entity. In addition, compliance with the Public Finance Management Act (Chapter 22:19) will be critical. The Act seeks to promote transparency, accountability and sound management of revenues, expenditure, assets and liabilities of government and public entities.⁵⁹ All public entities are required to establish and maintain effective, efficient and transparent systems of financial risk management and internal controls. Public entities are also expected to prevent irregular expenditure as well as what is termed in the Act as “fruitless and wasteful expenditure”, losses resulting from criminal conduct and expenditure not complying with the operational policies of the public entity. The Audit Office Act (Chapter 22:18) is also critical and should be complied with by ZMDC. The Act provides for auditing and examination of public entities by the Comptroller and Auditor-General on behalf of Parliament. These legal requirements may help ZMDC or Marange Resources in pursuing state interests in the consolidated diamond mining company.

Other success factors: In order for ZMDC to successfully represent government interest through its 50% shareholding in the consolidated company, it should seek to embrace transparency and accountability in its affairs, make efficient use and management of resources, pursue innovative investment decisions and ensure the payment of special dividends, royalties and other payments.

4.10 Listing on the Zimbabwe Stock Exchange

The listing of a company on the Stock Exchange is another well-established practice in the corporate sector. There are many companies involved in diamond mining that are listed on different stock exchanges around the world. One example is Alrosa in Russia which is an open joint-stock company. The shareholders in Alrosa include the Russian government, municipal districts and other legal entities and individuals.⁶⁰ In Botswana, Botswana Diamonds plc is another diamond mining company that is listed on both the Botswana Stock Exchange and the London Stock Exchange. Even Endiama in Angola was reportedly considering listing on the Toronto or London Stock Exchange.⁶¹ Rio Tinto in Australia and with shareholding in Murowa diamonds in Zimbabwe is listed on the Australian Stock Exchange, while Rio Zim the Zimbabwean partner in Murowa is listed on the Zimbabwe Stock Exchange.

Companies that are listed on the stock exchange have stringent requirements to publicly release their financial and operational performance results quarterly, semi-annually and annually. These disclosures are intended to provide stakeholders including investors, potential investors, government and the public with sufficient information to cater for inclusive stakeholder interests and legitimate expectations.⁶² Apart from financial information, the companies may disclose mineral reserves and ore estimates,

58 Section 21 of the Zimbabwe Mining Development Corporation Act (Chapter 21:08) as read with Section 49 of the Public Finance Management Act

59 Section 3 of the Public Finance Management Act

60 <http://en.wikipedia.org/wiki/ALROSA>

61 http://www.macauhub.com.mo/en/2007/02/12/2534/Angola's_Endiama_considers_listing_on_Toronto_or_London_stock_exchanges

62 Erin Smith and Peter Rosenblum (2011) Government and Citizen Oversight of Mining, Enforcing the Rules, Revenue Watch Institute, Appendix 3

production numbers and costs, exploration results, payments to governments, contract and mining rights information as well as environmental and social obligations.⁶³

4.10.1 Recommendations and Options

Listing to attract capital: Given the proposal to establish a big company that will control most of the diamond mines and hold a big portfolio of assets, it is proposed that the proposed Zimbabwe Consolidated Diamond Mining Company once established should immediately work towards listing on the Zimbabwe Stock Exchange. This will be best way to attract capital from the public and other investors. Such capital will be vitally important for pursuing exploration projects by the company for kimberlite diamonds and purchase of modern mining equipment. According to some diamond experts, the nature and characteristics of the diamonds in Marange is such that they are easy to break if the ore is not properly crushed.⁶⁴ This means the Marange mines require investment in modern equipment and technology that can make it easy to extract the conglomerate or kimberlite diamonds without breaking them.

Once a company is listed opportunities for finance may open especially from international or regional financial institutions (such as traditional banks or export/import credit banks) that are always looking at investment opportunities in Africa's resources. However, a company has to demonstrate commitment to transparency, respect of community rights, environmental standards and corporate governance.

Listing to promote transparency and accountability:

Listing of the consolidated company on the stock exchange may also act as a trigger for transparency and accountability and good corporate governance. It may bring professionalism in management and stakeholder engagement by the company. The consolidated company will be required by the Stock Exchange rules to publish its performance results since it will become a publicly listed company. The financial results and operations of the consolidated diamond mining company will be published in newspapers and its performance will be known by citizens. What goes to government will also be known. This will eliminate speculation of what exactly goes to government as royalties, dividends, corporate tax and other administrative fees. If government is serious about transparency and accountability, listing is the way to go.

In addition, listing can also entail adoption of internationally accepted standards of reporting such as sustainability reporting which includes reporting on environmental management, human rights, social responsibility and corporate governance. These are now important values embraced in some stock exchanges (Johannesburg, Australia, Canada etc) and the Zimbabwe Stock Exchange is undergoing reforms to play catch up. The diamond mining companies that are operating in Marange do not embrace the inclusive stakeholder approach and disregard interests and legitimate expectations of communities by failing to pay particular attention to environmental standards as some (Anjin, DMC and Marange Resources) have been polluting Save River and Odzi River.

Reducing or re-allocate Government shareholding through listing: The listing of the proposed consolidated company on the Zimbabwe Stock Exchange entails that Government may have to reduce its shareholding in the proposed company in order to comply with the stock exchange rules on shareholding thresholds by any particular investors in a listed company. The maximum number of shares any single investor may hold is 35% in one listed company. However, with Government's intention of holding 50% of all the shares in the consolidated company, possibly through ZMDC or its subsidiary-Marange Resources this may mean reducing shareholding in the new company in order to comply with Stock Exchange rules. The options for government include offering the 15% shareholding to the general public-Zimbabweans to promote indigenisation or offering the shares to other foreign investors who can bring in additional capital. In this case either local investors or foreign investors can get the reserved 15%. A combination of

63 Ibid

64 Interview with a diamond expert in the Working Group of Diamond Experts (WGDE), November 2014.

this approach can also work, in that foreign investors can get for example 10% while local investors can get the other 5% or vice versa. Foreign investors may bring in capital, expertise and management skills that may not be locally available. Alrosa in Russia for example has raised capital through selling some of its shares to different entities and this resulted in raising capital for the company.

There is another option that can also be pursued by government to maintain its majority shareholding using different state entities at the level of 50% in the proposed consolidated company. This can be achieved through allocation of 15% or less of the shares to other state owned entities such as the Sovereign Wealth Fund or the Indigenisation and Economic Empowerment Fund. These two entities were established in terms of the law and are eligible to receive funds from the mining sector.⁶⁵ These two Funds were partly established with the objective of receiving funding from the mining sector.

Lastly, listing on the Zimbabwe Stock Exchange can be a starting point and the Consolidated diamond company can later list at any other international stock exchanges in good time.

4.11 Investment in exploration

The relevance of geological exploration for development of any mining project cannot be over-emphasised. However, the situation was different in Marange where mining started for purposes of “mining for exploration” without the benefit of comprehensive geological data on the quantities of diamonds in Marange.

The contracts allowed mining companies to mine and explore for diamonds at the same time. It was a mine and explore approach and many of the companies did not invest in exploration except Mbada diamonds which made some timid attempts. The mining companies and government officials initially relied on illegal miners to find diamond deposits. They were following the footsteps and trails of illegal miners.⁶⁶ However, government officials have been making statements about the need to establish a Minerals Exploration Company to spearhead exploration and to pass a law on Exploration.⁶⁷ All came to nothing. The discussions on exploration led to the resuscitation of the Zimbabwe Mining Promotion Corporation.

What this all means is that Government negotiated all the mining contracts and Joint Venture agreements in Marange without the benefit of geological data.

At least in terms of quality, according to the KPCS Working Group of Diamond Experts (WGDE) Marange diamonds consist of approximately 10% gem and near-gem quality diamonds and 90% industrial diamonds.⁶⁸ Other public officials have been speculating that Zimbabwe has potential to produce between 25% -30% of world diamond production.⁶⁹ These figures are not backed by geological surveys. Such speculative figures have led a lot of people to be disappointed when the mining companies started to claim that the alluvial diamonds were finished after only operating for not more than four years. The situation in Marange is in sharp contrast to Murowa where 3 known kimberlite pipes were discovered through investment in exploration by Rio Tinto.⁷⁰

65 However, the Sovereign Wealth Fund is not yet operational since the Sovereign Wealth Act has not yet been operationalised

66 Mutuso Dhliwayo and Shamiso Mtisi (2012) Towards the Development of a Diamond Act in Zimbabwe: Analysis of the Legal and Policy Framework on Diamonds and Zimbabwe's Compliance with the Kimberley Process Certification Scheme (KPCS) Minimum Requirements; Zimbabwe Environmental Law Association

67 Ibid

68 KPCS Working Group of Diamond Experts

69 The Herald, (3 November 2011) Zimbabwe does not need De Beers.

70 <http://www.riotinto.com/diamondsandminerals/about-murowa-10621.aspx>

4.11.1 Recommendations and Options

Investment in exploration: Immediately after incorporation, the proposed consolidated company should embark on extensive exploration of diamonds in Marange with the objective of trying to find the kimberlite pipes and other alluvial diamonds resource areas. This can be done either by attracting new investors or shareholders with the technical expertise, finance and equipment that can help in geological exploration. Exploration is very capital intensive and time consuming. It needs dedicated long term investors and not get-rich quick outfits like some who got licences in Marange. Exploration for kimberlite diamonds may then guarantee the future of the consolidated company in terms of possible long term investment plans and quality of diamonds, than relying on alluvial diamonds that have already been proven to have a short-term mine life span.

4.12 Indigenisation and Economic Empowerment

Compliance with the indigenisation and empowerment programme by the proposed diamond mining company will also be important. Government passed legislation which provides for the disposal of at least 51% shareholding in any business including mining companies to indigenous Zimbabweans. It is however curious that currently government holds 50% shareholding in most of the diamond mining companies. This is clearly below the 51% required by the indigenisation law. In March 2011 government published General Notice 114 which prescribes the minimum requirements for indigenisation implementation plans for mining companies.⁷¹ Many mining companies have already submitted indigenization plans to indicate their plans to dispose shares to designated entities. Designated entities include; the national Indigenisation and Economic Empowerment Fund, ZMDC, or any company incorporated by ZMDC, a statutory Sovereign Wealth Fund, or an employee share ownership scheme, a management share ownership scheme or a community share ownership scheme or trust. Mining companies have also been encouraged to dispose 10% of their shares to Community Share Ownership Schemes. This position has resulted in some companies donating funds to community share ownership schemes.⁷² The objective is to make sure that mining companies give back something to the community to support community infrastructure or social services such as schools, hospitals, boreholes, bridges and water sources⁷³.

However, while other mining companies around the country have been making efforts to donate funds to community trusts, the mining companies in Marange allegedly misled government and made empty promises that they were going to donate funds to the Marange-Zimunya Community Share Ownership Scheme.⁷⁴ To date the Trust has only received \$400 thousand out of the promised \$50 million. This is a liability the companies have to the community that the companies may carry over into the consolidated company.

4.12.1 Recommendations and Options

Contribution to Community Share Ownership Scheme: In assessing the liabilities of the diamond mining companies for purposes of share allocation, there is need to capture the unfulfilled commitment by the companies to provide funding to the scheme as a liability. This should be used to reduce shareholding in the company. Once the shareholding is reduced, the consolidated company should then take over the liability and provide the funding to the Marange-Zimunya Community Share Ownership Scheme to implement community projects. The Shareholders Agreement or subsequent agreements signed should include clear obligations by the consolidated company to contribute to the Community Share Ownership Scheme.

71 This was done in terms of Indigenisation and Economic Empowerment (General) Regulations SI 21 of 2010.

72 Examples include the Zvishavane Community Share Ownership Scheme supported by Mimosa Mines, the Mhondoro-Ngezi Community Share Ownership Scheme being supported by ZIMPLATS, Tongogara Share Ownership Scheme being supported by Unki Mine run by Anglo-American among others.

73 Indigenisation and Economic Empowerment (General) Regulations SI 21 of 2010

74 Parliament of Zimbabwe, Portfolio Committee on Mines and Energy, 'First Report of the Portfolio Committee on Mines and Energy on Diamond Mining (with special reference to Marange Diamond Fields), 2009-2013' (June 2013).

Community Development Agreements and CSR: However, nothing should limit the Consolidated diamond mining company or the shareholders from including in the agreements other innovative methods and commitments of contributing to community development such as signing of Community Development Agreements with the community or carrying out other Corporate Social Responsibility or investment projects.

4.13 Transparency and accountability

The proposed consolidation process also offers an opportunity for government and the proposed consolidated diamond mining company (at least through ZMDC and Marange Resources) to provide members of the public with relevant information on its operations, names of investors or beneficial owners/shareholders, nature of mining contracts, diamond production levels, revenues generated and generally how revenue is being distributed. These are important elements that the public would want to know about. However, many shareholder agreements and mining contracts signed by government with mining companies contain confidentiality clauses that stifle access to information. This is despite the fact that the Constitution requires state institutions and agencies to be bound by principles of good governance, transparency, justice, openness, accountability and responsiveness. The state is also required to adopt and implement policies and legislation to develop efficiency, competence, accountability, transparency, personal integrity and financial probity in government at every level and in every public institution.⁷⁵ Appointments to public offices must be made primarily on the basis of merit and measures must be taken to expose, combat and eradicate all forms of corruption and abuse of power by those holding public offices.

Given the history of secrecy, corruption and lack of transparency and accountability in Marange, it is important for the proposed consolidated company under the leadership of ZMDC or Marange Resources as well as government to open up. Mining companies in Marange have not been adequately consulting people who are affected by their operations. While there were efforts to promote disclosure of mining revenues and contracts by government and mining companies through the launch of the Zimbabwe Mining Revenue Transparency Initiative (ZMRTI) which was a domestic version of the Extractive Industries Transparency Initiative (EITI) the initiative was not supported by diamond mining companies operating in Marange and the former Minister of Mines and Mining Development, Obert Mpofu. ZMRTI is currently in limbo. The purpose of ZMRTI was to ensure that revenues and payments made by the mining companies and received by government are published for the benefit of citizens. What also remains a curious point are the different statistics held by different government entities on the levels of diamond production, exports and revenues realised from Marange. Different government agencies such as ZIMSTAT, ZIMRA and Ministry of Finance have different sets of statistics and information, which is also different from information found on the Kimberley Process website⁷⁶. This means there is no single point of truth in government on diamond statistics.

4.13.1 Recommendations and Options

Disclosure of shareholders and beneficial owners: The agreements that may be signed by government and shareholders as well as the consolidated company with any other investors should include extensive provisions on public disclosure of the beneficial owners or shareholders of the companies. This is an opportunity for the public to know the full identify of all the people or entities that eventually get financial benefits from the current companies and the proposed consolidated diamond mining company. This will work perfectly if the company is listed. This will ensure accountability. The time for anonymous foreign and local shareholders is over. Shareholders and in particular beneficial owners of companies should be accountable to the people since they will be making decisions that result in exploitation of natural

⁷⁵ Constitution of Zimbabwe

⁷⁶ Mukasiri Sibanda and Gilbert Makore (2013) 'Tracking the Trends' An Assessment of Diamond Mining Sector Tax Contributions to Treasury with Particular Reference to Marange Diamond Fields, Zimbabwe Environmental Law Association (ZELA)

resources that belong to the people and that may negatively impact on livelihoods and human rights. This information can be made available on a dedicated website or other communication methods. It should also be easy for members of the public to access such information from the Registrar of Companies offices. The records should not be concealed or pulled off.

Disclosure of contracts and revenues: Further, mining contracts, including the shareholders agreement that may be signed should also be made publicly available. This can be a voluntary step by the company or a law that promotes disclosure can be passed. This law can be in the form of an Act of Parliament to incorporate the Zimbabwe Consolidated Diamond Mining Company. This will enable the public to fully understand the rights and duties of the parties and to assess if the state has negotiated contracts that benefit the country or not. The people will also get to know the financial, environmental, social and operational obligations of the mining company or shareholders in the consolidated company.

In addition to contracts, the consolidation process also offers an opportunity for renewed efforts to promote the disclosure of revenues from the diamond mining sector by government and the company. Many people would want to know the funds being invested, what is being produced and the revenues being realized and how it is being distributed.

Consolidated company should spearhead ZMRTI and EITI implementation: It is suggested that the consolidated diamond mining company should from the inception include in its operational systems and policies a plan for leading and championing the implementation of the Zimbabwe Mining Revenue Transparency Initiative (ZMRTI) for public disclosure of mining revenues and payments made by mining and received by government. This may later lead government to join the Extractive Industries Transparency Initiative (EITI) which is an international initiative that seeks to promote disclosure of mining revenues and payments by mining companies and government. These initiatives may help fight corruption and promote access to information for the citizens to hold government and mining companies to account in the generation and use of revenues. Openness ensures that people in public offices act in the interest of the public as their actions will be under public scrutiny. In fact, the consolidated company can start with a pilot disclosure project by publicly and widely disclosing information on diamond production, exports, payments to government and all social investments on a website, annual report, newspapers or other social media platforms. This is what Mbada attempted to do when it published its financial distribution chart celebrating four years of operating in Marange. This will be the right step to demonstrate to other mining companies the need to be transparent and accountable.

Ultimately, the above steps may help to build a public profile and brand for the consolidated company. This may in the end enable the company to attract international and regional financial support from international financial institutions and other investor countries. Even locals will have confidence to deal with the consolidated company.

Confidentiality clauses: The shareholders agreements or any other mining contracts that will be signed should not contain expansive and wide confidentiality clauses that may stifle access to information that is not of any commercial/proprietary value. It should be a clause of these contracts that only information of a commercial value should be protected or not shared with third parties without the consent of the other parties. This will facilitate access to information for the general public on human rights impacts, environmental impacts, quantities of diamonds produced and revenues generated among other categories of information, despite the fact that some of these issues should be disclosed in terms of sector specific laws. Confidentiality clauses should also not be interpreted widely.

Annual reports: The consolidated company should also proactively publish information on its operations and performance to promote transparency and accountability. Such information can be contained in annual reports. This can also be achieved through listing of the company on the Zimbabwe Stock Exchange or later another international stock exchange which requires all listed companies to publish

their financial and operational results annually. Information about the operations and performance of the consolidated diamond mining company will then be published in newspapers and websites that circulate widely. This will enhance transparency.

Single Point of Truth: It will also be important for the consolidated company to take steps to generate, store and disseminate information on its operations and performance especially statistics on diamond production, contracts, export levels, local procurement and employment levels, revenues realised and tax payments to government. The information should be shared with members of the public and other government departments. Sharing of information with government departments will ensure that there is a single source of reliable information. This will curb the current confusion that exists in government where different government agencies hold different statistics on the same issue such as exports of diamonds.

4.14 Compliance with Kimberley Process Requirements

Zimbabwe is a member of the Kimberley Process Certification Scheme (KPCS). The KPCS is an international scheme that was established in 2003 to eliminate trade in conflict diamonds used by rebel movements to finance conflicts aimed at undermining legitimate governments.⁷⁷ From 2009-2012 Zimbabwe had a hard time with the KPCS after cases of smuggling, illegal trade, illegal mining and human rights violations were reported in Marange.⁷⁸ Due to these problems, the KPCS imposed a trade embargo on the trade of diamonds from Marange. However, the embargo was lifted in 2012 after the country had made significant progress in complying with KPCS minimum requirements⁷⁹. The KPCS minimum requirements include the need for participants to put in place internal control measures such as ensuring that all rough diamond shipments

are accompanied by a KP Certificate, formulation of laws to regulate trade, licencing of miners, dealers and transporters as well as collection of statistics and data among other requirements.

4.14.1 Recommendations and Options

Since the consolidated company will be involved in diamond mining and exploration activities it is important that all its systems and processes will be compliant with KPCS requirements. Government has a duty to ensure this happens through the office of the KP Focal Point and the export authority.⁸⁰ There are several important steps that should be adopted by government to enhance compliance with KPCS requirements before and after the consolidation process.

Assess implications of consolidation on KPCS compliance: The first step government and ZMDC or even the consolidated company should take is to carry out a quick assessment of the implications of the consolidation of diamond mining companies on compliance with KPCS minimum requirements. This will enable government to fully address all areas of potential non-compliance as the consolidation process moves on. A work plan can be worked out to ensure compliance with KPCS requirements by government or the consolidated company. Civil society and other players can help in this process through provision of information and analysis of systems.

77 Section 1 of the Kimberly Process Certification Scheme Core Document. The KPCS was created to fight against the devastating impacts of conflicts Angola, Democratic Republic of the Congo, Liberia and Sierra Leone which resulted in gross human rights violations that undermined peace, safety and security of people. However, the definition leaves out conflicts or situations of violence committed by state actors such as a state's armed forces or private security guards contracted by mining companies against populations that live in diamond rich areas or artisanal and informal miners who are not licenced.

78 Note that the KPCS was created to fight against the devastating impacts of conflicts Angola, Democratic Republic of the Congo, Liberia and Sierra Leone which resulted in gross human rights violations that undermined peace, safety and security of people. However, the definition leaves out conflicts or situations of violence committed by state actors such as a state's armed forces or private security guards contracted by mining companies against populations that live in diamond rich areas or artisanal and informal miners who are not licenced.

79 KPCS, (30 November 2012) Final Communiqué from the Kimberley Process Plenary Meeting

80 MMCZ has been designated as the export authority in Zimbabwe

Securing mining areas: Secondly, what is also of paramount importance is provision of security at all diamond mining sites before, during and after the consolidation process. All mining areas should be adequately secured and provided with adequate security measures to curb any cases of illicit digging or smuggling of diamonds. Workers should be thoroughly screened to prevent theft of diamonds and other assets as they may be tempted given the uncertainty around continued employment with the consolidated company. Some reports have already emerged of increasing cases of theft of diamonds and leakages as both workers and even seniors managers are not clear on the implications of consolidation⁸¹. State security and the Minerals Unit department should play a key role in securing the diamond fields and monitoring what is happening at the mine sites. The closed mines are major risk areas and should be monitored closely. In particular, it is the role of the Zimbabwe Republic Police to provide security and the police officers must take reasonable steps to provide security and this should not result in violation of the rights of local villagers. To curb theft by the police officers themselves, those who are deployed should be given financial or other incentives that may deter them from trying to get rich as well. Close monitoring of security systems and operations by the police deployed in Marange will be vital. The military should not be involved since this may result in human rights violations. Additional security systems or equipment should be deployed to all mine sites. All security systems as certified by the KPCS monitors and sometimes by government monitors should also be assessed for compliance at all mine sites during the consolidation process.

KPCS Annual Report: In addition to the above measures government is supposed to report to the KPCS about the consolidation process and the affected companies. This can be done through annual reports. Annual reports by participants normally include information related to national level compliance with decisions of the KPCS, institutional framework, legal framework, import and export regime, statistics of production and exports and any comments. Therefore, developments in Marange related to consolidation should be included in the annual report to be submitted to the KPCS by government.

Additional initial steps to comply with KPCS requirements: In order to expedite and enhance compliance with KPCS standards, government should ensure that the consolidated company is fully registered as a miner and exploration/prospecting company as required in Section IV and Annex II of the KP Core document⁸². An Act of Parliament should also be adopted to regulate the diamond sector than relying on regulations as is the current case where government is relying on the Precious Stones Trade Act which does not include all relevant provisions to curb leakages.⁸³ Law reforms are necessary to ensure continued compliance with the KPCS requirements. The KPCS requires that participants should amend or enact appropriate laws or regulations to implement and enforce the Certification Scheme and to maintain dissuasive and proportional penalties for transgressions. This is stated in Section IV of the KPCS Core Document. In addition, the consolidated company should assist government to collect and maintain relevant official production, import and export data in accordance with Section IV as read with Section V of the KP Core document.

The consolidated company should as well seek to affiliate itself with other diamond industry players such as the World Diamond Council (WDC) and participate in implementing the principles of industry self-regulation (or system of warranties adopted by the WDC) as recommended by the KPCS. The system of warranties entails verification by independent auditors of individual companies to help facilitate the full traceability of rough diamond transactions by government authorities. The system is supposed to include internal penalties set by industry.

KPCS Review Visit: While the government may feel uncomfortable to invite a KP Review visit, after the consolidation process, depending on when this will be finalized, it may be crucial to do so. This will enable other participants and observers to give feedback to Zimbabwe on its mine consolidation process.

81 <http://www.thezimbabwean.co/news/zimbabwe-news/71862/fresh-wave-of-diamond-looting.html>

82 Annex II on Recommendations as provided for in Section IV, paragraph (f), of the KPCS Core Document

83 Mutuso Dhliwayo and Shamiso Mtisi (2012) Towards the Development of a Diamond Act in Zimbabwe: Analysis of the Legal and Policy Framework on Diamonds and Zimbabwe's Compliance with the Kimberley Process Certification Scheme (KPCS) Minimum Requirements; Zimbabwe Environmental Law Association

Zimbabwe should not be afraid of this process as it can help the country to improve its systems and enhance continued compliance. Some countries in the KPCS might learn a lot as well from Zimbabwe. In KPCS practice, each country is supposed to invite the KPCS for regular monitoring. This is normally, through practice after a period of 3 years. Therefore, 2016 can be a good time for the KPCS to visit Zimbabwe since the last visit was in 2010, while the KPCS Monitors were last in Zimbabwe in 2012.

KPCS Tripartite arrangement: The consolidated company as well as government should also spearhead and take lead in trying to promote national level replication of the tripartite nature of the KPCS. The KPCS is a tripartite arrangement that includes government, mining industry and civil society. Therefore, it will be vital for the consolidated company, government and civil society to come together and share ideas and form a national level multi-stakeholder platform for sharing information on the country's compliance with KPCS minimum requirements. Visits to the mine site can be done by the group to assess progress during the consolidation process. This will be in line with the 2012 KPCS Communiqué adopted in Washington DC which recognised the need for the Zimbabwean government to continue providing scope for civil society and government to collaborate and monitor the situation in Marange. This was recognised as a best practice which should be continued.

4.15 Report to Parliament

Before the company is incorporated, the Minister of Mines and Mining Development should also inform parliament about the plans of the Ministry. This can be done to the Portfolio Committee on Mines and Energy. A report of the consolidation process can be presented to Parliament since the Minister has a duty to do so in cases involving ZMDC.⁸⁴ The important thing will be to present a report on ZMDC operations in relation to the consolidation process and shareholding.

4.16 Stakeholder Participation and Consultation

The consolidation process of diamond mining companies should be underpinned by stakeholder engagement and consultation. All relevant stakeholders should be consulted through public meetings organised by the Ministry of Mines and Mining Development or ZMDC. This will be an important step to ensure that government receives ideas and face questions from the public and other stakeholders that may help to adequately shape and structure the consolidated company. Other private sector operators, investors, international players and business associations should be consulted. Civil society and community groups should also be consulted and participate in meetings and consultation forums. Other government departments and Ministries should also be consulted and informed about the process.

4.17 Rights of workers

The working conditions at most of the diamond mining companies operating in Marange have always been poor. Some of the problems include discrimination during recruitment, poor health and safety standards, low wages, discrimination and abuse, unfair dismissals and hostility towards trade unionism among others.⁸⁵ This has resulted in unending strikes by workers at most of the diamond mines. Anjin which is partly owned by the Chinese has witnessed most of the crippling strikes and industrial action. Despite these problems, at the moment many workers are not aware of the implications of the consolidation process on their employment status. At other companies, some workers have already been retrenched after government announced plans to consolidate the diamond mining companies. Anjin for example retrenched workers, while Mbada diamonds is entangled in a fight with workers over outstanding salary payments. Many workers are not sure whether they will be retrenched and in the event of retrenchment whether they will receive any retrenchment benefits. This situation has caused anxiety amongst workers.

⁸⁴ Section 21(3) of the Zimbabwe Mining Development Corporation Act (Chapter 21:08)

⁸⁵ Shamiso Mtisi, Cosmas Sunguro and Veronica Zano (2015) "No Strings Attached", The Plight of Workers at Chinese Controlled Mines in Zimbabwe: The Case of Anjin Diamond Mine, (unpublished)

Retrenchment of workers in the event of amalgamation of companies is regulated by the Labour Act (Chapter 28:01). The Labour Act defines the fundamental rights of employees. Section 16 states that *“whenever any undertaking in which any persons are employed is alienated or transferred in any way whatsoever, the employment of such persons shall, unless otherwise lawfully terminated, be deemed to be transferred to the transferee of the undertaking on terms and conditions which are not less favourable than those which applied immediately before the transfer, and the continuity of employment of such employees shall be deemed not to have been interrupted.”* However, the contracts of employees can be terminated by the company employing the employee. This may entail retrenchment of the employees and the payment of such terminal benefits as provided for by law. If the contracts are terminated on notice in terms of section 12 of the Labour Act, then the employees would be financially worse off as the terminal benefits would be insignificant.

What the above legal position entails is that since the diamond mining companies will be consolidated to form one company, the new company may continue to employ the workers. If they are employed by the consolidated company, they have to be employed on terms and conditions that are not less favourable than those which they enjoyed under the individual consolidated companies. However, the current diamond mining companies may terminate the contracts of the employees legally. Once this is done, the employees are entitled to be paid their terminal benefits.

In retrenchment cases, the other important legal positions to be considered on workers’ rights are in Sections 12C and 12D. Workers are supposed to be given written notice of intention to retrench in terms of Section 12C (1). Further, every employer shall ensure that, at the earliest possible opportunity, his employees are kept informed of and consulted in regard to any major changes in production, programmes, organisation or technology that are likely to entail the retrenchment of any group of 5 or more employees in a 6-month period. This is in terms of Section 12D (1). These provisions are critical for all the diamond mining companies to comply with.

4.17.1 Recommendations

The following recommendations are vital for the current diamond mining companies to follow and consider, while it is also important for the proposed consolidated diamond mining company to comply with them;

All current employees at the diamond mining companies must have their employment contracts maintained by the proposed consolidated company so that they do not lose jobs.

Where employment contracts are to be terminated for operational reasons, fair retrenchment packages and benefits must be paid. The payment of retrenchment packages for such employees must be guaranteed in writing to avoid termination on notice.

If possible all outstanding wages for employees of affected companies must be paid before the amalgamation to avoid further prejudice to the employees. If this is not possible they must be taken as a liability to be transferred to the new company

The other option is for the new company to take over the labour liabilities of the current companies, if they are not settled before consolidation.

The diamond mining companies and government officials must make an effort to constantly consult and inform workers about the consolidation process and their fate.

4.18 Community Obligations

Over the last 3-5 years some of the mining companies operating in Marange started community projects, while others failed to implement the projects they had promised to communities and government. For

example the companies had pledged to contribute funds towards the community share ownership scheme. However, as explained earlier in this paper this was not done. Other companies had promised to provide irrigation schemes, schools, electricity and income generating projects to relocated families at Arda Transau and in many cases some of the promises were not met. Some of the commitments are contained in the shareholders agreements and business plans submitted to government as well as in Environmental Impact Assessment Reports submitted to the Environmental Management Agency.

In addition, the relocated families are not clear on security of tenure or title over the houses which they received from the diamond mining companies. This is because they have not been given any title deeds to show that they now own the houses which are clearly in a peri-urban zone and might end up being part of Mutare city where property rights and ownership of houses matters. The fear is that the houses might be taken back by the mining companies or government. Some community members are also clamouring for monetary compensation. These issues among others constitute the obligations of the mining companies that should be inherited by the consolidated mining company or in the interim addressed by the mining companies.

4.18.1 Recommendations and Options

Relocated families: The consolidated company should ensure that relocated families have access to water, irrigation schemes, schools, clinics and electricity as promised. More importantly, the consolidated company should ensure that relocated families are given title deeds over the houses which they are living in at Arda Transau. Further, the relocated families should also be awarded monetary compensation.

Review agreements and EIA reports: Since some of the commitments made by the diamond mining companies are contained in the shareholders agreements and business plans submitted to government as well as in Environmental Impact Assessment Reports these should be reviewed to identify commitments made by the diamond mining companies to the community. Once the commitments are identified, these should be considered as liabilities that can be used to reduce shareholding of the companies in the consolidated company.

Business and Human Rights: The consolidated company will also be encouraged to adopt and implement the concept of business and human rights as prescribed in the UN Guiding Principles on Business and Human Rights. The company will have a duty to respect the rights of communities. In addition, it will be important for the company to take measures to carry out a due diligence assessment of the potential impact of their operations on human rights. Mining has led to the violation of the environmental, economic, social and cultural rights of communities in Marange and these should be avoided by the consolidated company. Many of the companies were involved in setting dogs on community members by private security guards and state security agents, restrictions on freedom of movement and assembly as well as pollution of rivers leading to violation of environmental rights.

4.19 Environmental compliance

The diamond mining companies in Marange have been causing environmental degradation and have been violating the environmental, economic, social and cultural rights of communities through pollution of Save River and Odzi River.⁸⁶ This is despite the fact that the companies had belatedly undertaken Environmental Impact Assessments (EIA). While the quality of the EIA reports was not satisfactory, the companies failed as well to implement the commitments they made in their EIA reports such as taking measures to recycle water and to curb pollution of rivers.

The Environmental Management Act (Chapter 20:27) is the applicable piece of legislation on environmental matters. Section 98 provides for the carrying out of EIAs, while Section 103 states that an EIA Certificate which is issued by the Environmental Management Agency (EMA) is not transferable

⁸⁶ Zimbabwe Environmental Law Association (ZELA) (2012), Scientific Assessment of the Quality of Water in Save and Odzi Rivers

without the approval of the Director-General of the Environmental Management Agency (EMA). In particular, that section states that “A developer to whom a certificate has been issued in terms of [section one hundred](#) shall not assign, cede or otherwise transfer the certificate to any other person without the prior approval of the Director-General”. This means that the Director-General of EMA has to approve the transfer of an EIA certificate to another entity. It is an offence to transfer a certificate without the authority of the EMA. This also applies to a situation where a consolidation of companies happens. In this case, the consolidated diamond mining company falls within the ambit of this section.

4.19.1 Recommendations

Environmental rehabilitation: The consolidated diamond mining company should take measures to adopt the liabilities of the diamond mining companies to rehabilitate the environment, curb pollution of rivers and finds ways of providing clean water to communities that live along Save and Odzi Rivers whose access to clean water has been affected and livelihoods impacted negatively.

Prohibit Transfer of Environmental Impact Assessment Certificate: The Director-General of EMA should not authorize the transfer of the current EIA Certificates held by the diamond mining companies to the proposed Zimbabwe Consolidated Diamond Mining Company. This is because some of the current EIA reports were not properly done and do not adequately capture all the environmental, social and cultural impacts of diamond mining operations.⁸⁷ Further, the diamond mining companies have not been complying with some of the commitments in those EIA reports. EMA has on several occasions faced resistance from the diamond mining companies which indicates that another EIA process is required for all the environmental impacts to be identified and later corrected. Therefore, the consolidated company should be required and compelled by EMA to carry out fresh environmental impact assessments. This will give an opportunity for the company to start afresh and address the concerns of communities. The process should be underpinned by community consultations as prescribed by the law. EMA should also closely monitor the process, while community monitors can also independently monitor the process.

87 Shamiso Mtisi (2015) Assessment of Mining Sector Environmental Impact Assessment Reports (EIA) in Zimbabwe

5.0

CONCLUSIONS AND OTHER POSSIBLE SUCCESS FACTORS

This paper has attempted to lay bare some of the critical issues and options that should be considered by government in pursuing the consolidation of diamond mining companies in Zimbabwe. The main thrust of government should be to make diamonds benefit the people of Zimbabwe. The recommendations and options are included in the various sections of the paper to make it easy for readers to link the different sections with particular recommendations and options provided.

However, in order for the consolidation process to be successful and fully implemented, there are additional critical success factors that should be considered. These are as follows;

5.1 Legislation to Incorporate the Zimbabwe Consolidated Diamond Mining Company

Government should consider the importance of passing a special piece of legislation to incorporate the Zimbabwe Consolidated Diamond Mining Company. This will be in keeping with the need to ensure that the company exists as a legal entity with clearly defined duties and obligations. The Act should clearly state the functions of the company, requirement for stock exchange listing, measures for promoting transparency and accountability through disclosure of contracts, payments and production level, submission of reports to parliament, contribution to sovereign wealth fund and payment of special dividends as contemplated in the ZMDC Act and the Sovereign Wealth Fund Act.

5.2 Interim Measures to curb criminality and leakages

As stated earlier in this paper, one of the most important steps for the consolidated company and government to take is to continue ensuring compliance with the Kimberley Process Certification Scheme. In the interim all the diamond mining sites should be closely monitored and secured. Those that are operational should be monitored while those that have ceased operations should be guarded and assets secured. This will curb theft, illegality and criminality. The companies may be stripped of assets by some of the opportunistic investors in Marange.

5.3 Politics and the economy

Finally, politicians in Zimbabwe and some government officials are encouraged to be smart enough to try and engage in smart politics that relies on making economic decisions that are not heavily influenced by political ideology that deter investments and capital inflows. Every investor matters whether from other African countries, Asia, the Americas, Europe or locals. It is now time for politicians to play economic-based politics that benefit the country. The mining sector should move forward and transform the economy. The consolidated company can only be successful if there is no political interference and if the economy recovers after making good political decisions that trigger economic development. The mining sector will definitely thrive if politicians realise this.

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