



THE MINES AND MINERALS AMENDMENT BILL

ITS PROMISES AND PITFALLS

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Law Association (ZELA)

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ACRONYMS

MMAB	Mines and Minerals Amendment Bill
MMA	Mines and Mineral Act
csos	Civil Society Organisations
ZMASSET	Zimbabwe Agenda for Sustainable Socio Economic Transformation
ZELA	Zimbabwe Environmental Law Association
SHRF	Safety Health and Rehabilitation Fund
EITI	Extractive Industries Transparency Initiative
PGMs	Platinum Group Metals
CBOs	Community Based Organisations
EESCR	Environmental, Economic, Social and Cultural Rights
JVPs	Joint Venture Partnerships
ZMDC	Zimbabwe Mining Development Corporation
ZCDMC	Zimbabwe Consolidated Diamond Mining Company
MAB	Mining Affairs Board
EPO	Exclusive Prospecting Order
FDI	Foreign Direct Investment
MSG	Multistakeholder Group
NGOs	Non-Governmental Organisations
MSI	Multistakeholder Initiatives
ZMRA	Zimbabwe Revenue Authority
EIA	Environmental Impact Assessment
SSM	Small Scale Miners
LSM	Large Scale Miners
ERF	Environmental Rehabilitation Fund
SGs	Special Grants
EEL	Exclusive Exploration License
ZSE	Zimbabwe Stock Exchange

Alternative Investment Market

LSE	London Stock Exchange
ESG	Environmental, Social and Governance
FTLRP	Fast Track Land Reform Programme
RDCs	Rural District Councils
CCDT	Chiadzwa Community Development Trust

Executive Summary

In November 2016, ZELA commissioned a research into current legal developments in Zimbabwe's mining sector, particularly centered on developments in the legislative framework. The focus of the research is thus pivoted on the fact that the Government of Zimbabwe is in the process of reforming the Mines and Minerals Act through the Mines and Minerals Amendment Bill (MMAB). Although the research is based on the 2016

version of the Bill, it does not ignore the fact that reforming of the Mines and Minerals Act began in earnest in 2007, but have not seen the light of day. The reforms acknowledge that the Mines and Minerals Act of 1961 is an outdated legislation and its overhaul is long overdue.

Further, the current legislative developments have to be understood in the context of the increasing importance of the mining sector to Zimbabwe's economy. The importance of the sector has increased over the years as the contribution of the other sectors of the economy like agriculture, industry and manufacturing and tourism to the Gross Domestic Product (GDP) has dwindled. This importance is reflected in a number of national policy documents that include the Zimbabwe Agenda for Sustainable Socio-Economic Transformation (ZDvfasSET). However, the potential of the mining sector to contribute to economic development is affected by a number of problems. These include but are not limited to lack of transparency and accountability in the whole mining value chain, poor negotiations of contracts which results in skewed contracts that fail to unlock maximum value to the country and communities, lack of value addition and beneficiation, poor management of generated revenue, non-recognition of critical stakeholders like Civil Society Organisations (CSOs) and Community Based Organisations (CBOs) and violation of communities' Environmental, Economic, Social and Cultural Rights (EESCR).

This research has been entirely qualitative and non-empirical. It is essentially based on desktop analysis of the MMAB, and a descriptive account of the context in which those provisions have to be understood. Accordingly, there is legislative analysis of the MMAB and documentary review of official national and regional policy papers. Importantly, the research is enriched by the wide-scale experience of the researcher gained from a practical appreciation of issues at hand. Thus, the legislative analysis is grounded into reality and practical developments observed by the researcher through years of research, activism, advocacy and participation in extractive sector activities.

The major position of the Zimbabwe Environmental Law Association (ZELA), which is also shared by other important stakeholders, is that the problems in the mining sector are too many and too serious to be addressed by a mere legislative amendment alone. This view is sustained despite the fact that, apart from its weaknesses, the MMAB also has some very progressive provisions.

The progressive provisions include the "use it or lose it policy" which is operationalized in the MMAB through a number of ways and is aimed at discouraging the hoarding of claims for speculative purposes by mining comings and also the introduction of the first in first served principle, which promotes Foreign Direct Investment (FDI). The designation of strategic minerals and the establishment of a mining cadastre and improved access to information are also very good provisions. The introduction of a Safety, Health and Rehabilitation Fund (SHRF) for environmental rehabilitation and strict liability for directors of mining companies for environmental damage and degradation is also very progressive. Furthermore, holders of mining title or right are required to list on the Zimbabwe Stock Exchange and this improves Environment, Social and Governance issues. Mining companies are also required to value add and beneficiate their minerals in Zimbabwe and this is very important in terms of promoting linkages.

Despite these progressive provisions, the MMAB has a number of **weaknesses**. These include the failure to reform the MMA based on the AMV which is a blue print on how African countries can develop based on their vast and **significant** mineral resource base. The Mining Affairs Board, a very important policy and decision-making body in mineral resource governance marginalizes other important stakeholders like CBOs, CSOs, traditional leaders and other important Ministries and Government Departments like the Environmental Management Agency (EMA) and the Zimbabwe Revenue Authority (ZINfRA). It also proposes to undertake massive "environmental friendly" riverbed mining by the Government of Zimbabwe either on its own or in Joint Venture Partnerships (JVPs). The question is whether riverbed mining can ever be friendly and there is concern that the Government will be a player and regulator and its ability to hold itself accountable is doubtful.

The B,NAB also proposes to oust the role of the Environmental Management Agency (EMA) in setting standards for riverbed mining and assign this to the Ministry of Mines and Mining Development (MMMD) while the role of EMA will only be to monitor. The MMAB also fail to recognize and regularize the operations of artisanal miners despite their vast contribution to economic development especially in the gold mining sector. It also fails to provide for the concept of Free, Prior and Informed Consent (FPIC) and Local Content Development (LCD). While it provides for compensation, its weakness is that fair, adequate and prompt compensation are not prerequisites before communities are involuntary displaced and relocated. It also fails to provide for Human Rights Impact

Assessments (HRIAs), which are stronger than Environmental Impact Assessments (EIAs). Furthermore, the MMAB does not make any provisions for a model-mining contract that can be used as a template in the negotiations of contracts so as to unlock value to the country. It also fails to create single licencing authority and this results in too many players and bureaucracy thereby opening opportunities for corruption.

Based on the analysis of the provisions of the Mines and Minerals Amendment Bill, the research makes recommendations that should be taken into account by the Government of Zimbabwe as it moves to finalise the MMAB and also in the development of a new and comprehensive Mines and Minerals Act should the Government decide to go that route in the future. The recommendations relate to various aspects. Legislative reforms and a new and comprehensive Mines and Minerals Act must be prioritized, and most importantly, must be based on the Africa Mining Vision. The law must have specific provisions on access to information and be clear on the payment of fair, adequate and prompt compensation before communities are involuntary displaced and relocated. There should be participation by all stakeholders in the Mining Affairs Board, meaning it has to be more inclusive than presently proposed. Considerations should be made to expanding and relaxing locus standi in courts, and the law should specifically grant recognition and regulation of artisanal miners. Specific provisions on Local Content Development and compulsory auctioning of known mineral resources must be considered. These aspects and various others identified in this research should be comprehensively considered in order to confront the major ills bedeviling the mining sector and undermining its potential to significantly drive Zimbabwe's economy.

1. ¹Introduction

Since 2007, the Government of Zimbabwe has made various attempts to amend the mining regulatory regime, targeting the major mineral law, namely the Mines and Minerals Act. These efforts have not seen a final product as yet, and to date the

Government of Zimbabwe is still in the process of reforming the Mines and Minerals Act.

¹The latest efforts have led to the formulation of the Mines and Minerals Amendment Bill (MMAB). ²The efforts at amending the Mines and Minerals Act (MMA), which is the primary piece of legislation that regulates the exploitation and management of mineral resources in Zimbabwe are welcome, and indeed, overdue. However various concerns remains as to whether an amendment will be a panacea to the ills bedeviling the mining sector in Zimbabwe.

The MMA is a very old piece of legislation that was enacted in 1961 during the colonial era. Despite several piecemeal amendments since its enactment, it has essentially retained its focus or orientation on mineral resource extraction for export rather than sustainable development. ³Consequently, this has become its biggest criticism. It is not anchored on the principles of sustainable development and ignores various developments in the mining sector. The various criticisms are not misplaced, for instance, the concept of sustainable development was still unknown when the IvWIA was enacted, only becoming more popular by being reflected at the international level through the Stockholm Declaration on the United Nations Conference on the Human Environment ⁴, the Brundtland Report⁵, The United Nations Conference on Environment and Development⁶, the Johannesburg World

¹ Chapter 21:05.

² The Mines and Minerals Amendment Bill, H.B 19, 2015 was gazetted on the of August 2016. The Ministry of Mines and Mining Development also presented the Bill to Parliamentarians on the 21st and 22nd of March, 2016 at Rainbow Towers Hotel.

³ T. Murombo ¹ Law and indigenization of mineral resources in Zimbabwe: Any equity for local communities? (2010) Vol. 10 SAPL 569. See also J Tsabora. The Legal and Economic Framework for Natural Resources-Related Statutory Funds in Zimbabwe (2016) 27.

⁴ United Nations Doc. A/CONF .48/14/Rev .1 (1973) 3.

⁵ Our Common Future (1987).

⁶ United Nations Doc (1992).

Summit on Sustainable Development ⁷, the Right to Development ⁸, Millennium Development Goals ⁹¹⁰ and their successor the Sustainable Development Goals. ¹⁰ The concept of sustainable development reconciles environmental protection and economic development needs. It is essentially based on a number of principles that promotes the good stewardship of natural resources, including the principles of transparency, accountability, public participation, polluter pays principle, precautionary principle, integrated decision making and equity among others.

1.1 The Road to Reform

It must be pointed out that calls for comprehensive reforms of the MMA have been going on for a very long time especially from Civil Society Organisations (CSOs). The Government of Zimbabwe drafted the first MMAB in 2007 ¹² and the second MMAB in 2010. The MMAB has therefore been a permanent feature on Parliament's legislative agenda since 2007 without being finalized. ¹³ However, after these fits and starts, there appears to be evidence that the MMAB will be enacted into law or at least that there are serious efforts to do so in the very near future, possibly in 2017. ¹⁴

⁷ United Nations (2002).

⁸ United Nations General Assembly Resolution 41/128 (1986).

⁹ United Nations General Assembly (2000).

¹⁰ United Nations General Assembly (2015).

¹¹ JC Dernabach 'Sustainable development as a framework for national governance' (1998) Number 1 Case Western Reserve Law Library 3.

¹² Mines and Minerals Amendment Bill H.B. 14, (2007).

¹³ In his speech during the opening of the Eights Parliament in 2009, the President of the Republic of Zimbabwe indicated that the Mines and Minerals Amendment was one of the items on the legislative agenda.

¹⁴ Evidence of this seriousness include the Gazetting of the Mines and Minerals Amendment Bill, the outreach by the Parliamentary Portfolio Committee on Mines and Energy and the meeting held by the Ministry of Mines and Mining development with the Parliamentary Portfolio Committee on Mines and Energy. From the -19 of September 2016. Member of the Portfolio Committee on Mines and Energy went out on outreach tours to gather stakeholders' views on the draft Mines and Minerals Amendment Bill from the 1 of September 2016.

The proposed reforms of the MMA through the MMAB is prima facie, an acknowledgement by the Government of Zimbabwe that the current legal framework is inadequate to fully unleash the potential of the mining sector to contribute effectively to economic development. The mining sector has evolved to become the most important sector that can contribute to economic recovery, stabilization and eventual growth over the past two decades.¹⁵ The importance of the mining sector in economic development has been thrust to the forefront as a result of the significant decline of other sectors that used to contribute significantly to economic development. These include agriculture, manufacturing and tourism. The critical role of the mining sector is reflected in a number of policy documents that include budgetary statements and fiscal reviews.¹⁶ This view is adequately captured in Zimbabwe's new economic blue print, the Zimbabwe Agenda for Sustainable Socio- Economic Transformation (ZMASSET).¹⁷ The objective of ZMASSET is to achieve sustainable development and social equity. These will be achieved through indigenization, economic empowerment, and employment creation, which will be largely propelled by the judicious exploitation of the country's abundant human and natural resources.¹⁸ While the country indeed does have numerous natural resources, it is mainly the exploitation of mineral resources that the country's economic hopes are mainly hinged on. The presence of mineral resources only signifies a comparative advantage.¹⁸ It is the way in which the country exploits these mineral resources and deploys the resource rents that determines its ability to turn the comparative advantage into competitive advantage.²⁰ To a large extent, Zimbabwe can be argued to have failed to turn its comparative advantage

¹⁵ Government of Zimbabwe. Zimbabwe Mining Revenue Transparency Initiative Concept Paper (2011) 3.

¹⁶ Minister of Finance and Economic Development. The 2016 Mid-year Fiscal Policy Review Statement (2016). See also Government of Zimbabwe. Zimbabwean Medium Term Plan 2011-2015 (2011) and Ministry of Finance and Economic Planning. The 2011 Mid-year Fiscal Policy Review Statement (2011)

¹⁷ Government of Zimbabwe 2013-2018. This is a results based policy and it is based on 4 clusters namely Food Security and Nutrition, Social Services and Poverty Eradication, Infrastructure Development and Utilities and Value Addition and Beneficiation. ¹⁸ Ibid, 7.

¹⁸ Africa Union. Africa Mining Vision (2009) 5-6.

²⁰ Ibid.

into competitive advantage especially when one looks at Zimbabwe's position on the Human Development Index.¹⁹

While there are a number of factors that may be contributing to Zimbabwe's failure to leverage on its mineral resources to effectively contribute to economic development, a poor regulatory framework in the form of weak laws and policies as codified through the main regulatory framework, the MMA is mainly regarded as the Achilles heel. The African Mining vision adequately captures and summaries the curse of poor laws and policies in mineral resources governance when it states:

"Overall, the key strategy in optimizing a resource endowment is around the resource regulatory regime, which directly determines the relative division of the spoils and indirectly influences the deepening of the sector through down and upward linkages to the local, national and regional economies."

It must be pointed out from the outset that with the many problems affecting Zimbabwe's mining sector, the Zimbabwe Environmental Law Association (ZELA) is of the view that these cannot be cured only through an amendment of the primary mining law, as proposed by the MMAB. Indeed, one of the reasons that have resulted in the delays of finalizing the MMAB Bill since its first proposal in 2007 was the realization that an Amendment was not going to do justice in curing the ills in the mining sector. The Cabinet Committee on Legislation argued then that the proposed amendments were so many and significant that it made a lot of sense to come up with a new MMA. This thinking is reflected in the Draft Minerals Policy,²³ whose main objective is the overhauling of the current Mines and Minerals Act and introduction of a completely new Mines and Minerals Act.²⁴

It therefore seems that the Government realizes that the IvWIA does not require any more 'plastic surgery' for the mining regulatory regime to be fixed, but that this can only be achieved through the introduction of a new and comprehensive Mines and Minerals Act

¹⁹ The Human Development Index is a tool that is used to measure in a summary a country's average achievements in key dimensions of human development. It measures three key dimensions namely a long and healthy life, being knowledgeable and a decent standard of living. Zimbabwe is ranked a lowly 155 out of 188 countries on the 2015 Human Development Index.

altogether. ZELA was convinced then and remains so today, that a new Mines and Minerals Act is the way to go to ensure that the mining sector fulfills its potential as a driver of economic growth. Reform of the MMA through the MMAB will achieve limited results as the Mines and Minerals Act's fundamental flaws will only be addressed not thorough piecemeal but comprehensive reforms.

²² African Union (n 19 above) 15. See also Precept 3 of the Natural Resources Charter ((2010).

²³ Government of Zimbabwe. Draft Minerals Policy (2012).4, 9,10 and 12. ²⁴ Ibid, and 12.

Despite ZELA's misgivings of the proposed reforms through the MMAB, the proposed amendments have both positive and negative implications on the governance of the mining sector. The amendments relates to various issues that includes the institution of the 'use it or lose it' in substitution of the 'pay it or lose it' policy , institution of the cadastre system, Safety, Health and Rehabilitation Fund (SHRF), transparency and accountability, governance of the mining sector though the Mining Affairs Board, gender and children's rights, indigenisation and value addition, conflict resolution approach between farmers and miners, fiscal provisions, localization of shareholders for corporate holders of mining title, mineral beneficiation and value addition and the designation of strategic minerals and local content among others.

This research has four main objectives. The first objective is to give an overview of the gaps and shortcomings of the current MMA with regards to mineral resources governance. This objective will give or form the basis or justification for the proposed reforms of the MMA through the MMAB. It looks at the weaknesses or the mischief that the proposed amendment is meant to cure or address.

The second objective is to analyse the progressive aspects introduced by some provisions of the MMAB. These progressive provisions of the MMAB are what are referred to as the promises of the MMAB. The progressiveness of these provisions will be brought out by benchmarking them against international and regional best practices that are reflected in the Africa Mining Vision, the Extractive Industries Transparency Initiative (EITI), United Nations Guiding Principles on Business and Human Rights and the Natural Resources

Charter. The Constitution of Zimbabwe²⁰, which has some very progressive provisions on natural resources governance, will also be used in assessing these provisions. The Constitution is the supreme law of the country²⁶ and statutes like the MMA have to be aligned so as to be consistent with it. As such, the provisions of the MMAB should be in conformity with the Constitution.

The third objective of the research is to critically examine the weaknesses of some of the provisions of the Nft'IAB with regards to mineral resources governance. These constitutes what are called the pitfalls of the MMAB. These will be primarily measured against international and regional best practices like the EITI, Africa Mining Vision and the United Nations Guiding Principles on Business and Human Rights and Basic Principles and Guidelines on Development Based Evictions and Displacement²¹. However, apart from these, the provisions will also be measured against mining legislation within the region and the continent. Kenya recently adopted a Mining Act²² while Zambia also adopted a Mines and Minerals Development Act in 2015.²³ South Africa and Sierra Leone have relatively progressive and comprehensive mining legislation that can also provide best standards to look up to. South Africa has the Mineral and Petroleum Development Act²⁴ while Sierra Leone has the Mines and Minerals Act of 2009. The objective of doing a comparative analysis is to help the Government of Zimbabwe to learn lessons from other jurisdictions and best practices as it tries to reform the MMA through the b,,fflA. There is no need to reinvent the wheel, as the problems that Zimbabwe is facing in its mineral sector governance are not unique to it. These are problems that other countries have grappled with or are grappling with and there maybe some very valuable lessons on how they have addressed them or are addressing them.

The fourth objective is to make recommendations that should be included in the on going reforms through the MMAB and in any future reforms through a comprehensive reform of the MMA.

²⁰ Constitution of Zimbabwe Amendment (No.20) Act 2013.

²⁶ Ibid, section 2(1).

²¹ United Nations. Annex I of the Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living. A/HRC 4/8.

²² The Mining Act [No 12 of 2016].

²³ Mines and Minerals Development Act [No. 11 of 2015].

²⁴ Act No .28 of 2002.

2. Rationale for the Mines and Minerals Amendment Bill

Zimbabwe is a mineral resources rich country. Mining or the extractive sector is a key economic sector in Zimbabwe based on Zimbabwe's diverse and significant mineral resource base. Zimbabwe is estimated to have about 66 base and industrial deposits of which only 40 are currently being exploited.²⁵ Zimbabwe has the largest second reserves of Platinum Group Metals (PGMs) and chrome in the world²⁶ and significant reserves in gold and diamonds. The importance of the mining sector as a significant contributor to economic development has become more evident in the last two decades due to a number of factors. These include the significant decline of other sectors of the economy that used to provide meaningful contribution to the GDP like agriculture, industry and tourism.²⁷ The importance of the mining sector to national economic development is ~~further~~ reflected in a number of policy documents. These include budgetary statements, fiscal statements and Zimbabwe's economic blue print ZMASSET. A recent survey of the mining sector shows the contribution of the mining sector as 9.0 to GDP and 5()% to national exports.²⁹

For the mining sector to perform optimally, there are six leading principles that should guide it, among various others.²⁸ For Zimbabwe, the most important principles and approaches include:

- a) Comprehensive Legal and Policy Framework
- b) Transparency, Governance, Institutions and Systems
- c) Progressive Fiscal Frameworks and Appropriate Revenue Management
- d) Strategic Land Use Planning
- e) Mining-Related Investment Attraction Strategies

²⁵ Zimbabwe Geological Survey (1990).

²⁶ Parliament of Zimbabwe. Parliamentary Portfolio Committee Report on Chrome Mining sector in Zimbabwe (2013) 5.

²⁷ J Tsabora 'A report on the Legal and Economic Framework for Natural Resources related Statutory

Funds in Zimbabwe' Zimbabwe Environmental Law Association (2016) 10.²⁹

Nutimes Innovations. Mining Survey Report (2015) 7.

²⁸ Mining Forum. Building a sustainable mining sector –The Western Australia Experience. Presentation at the Australian Embassy (2016).

f) Inclusive Stakeholder Engagement

These principles are not mutually exclusive, but compliment each other in the regulation of the mining sector to ensure that it performs optimally. As already noted, the fact that the Government of Zimbabwe is undertaking reforms of the mining sector through the MMAB is evidence that there is a realization that the mining sector, despite its vast potential, is not performing optimally. There are a number of factors that explains this failure by the mining sector to perform optimally to fulfill its potential and these are mainly evident through the MMA. The weaknesses in the MMA in promoting mineral resource governance been well canvassed by a number of organisations and writers.²⁹The objective here is therefore not to discuss the problems in detail but just to highlight them in order to lay a basis for their discussion and analysis under objectives 2, 3 and recommendations.

2.1 Major Problems in Zimbabwe's Mining Sector

The problems in Zimbabwe's mining sector which are reflected in the NTN'IA, include but are not limited to lack of transparency and accountability in the whole mining value chain, poor negotiations of contracts which results in skewed contracts that fail to unlock maximum value to the country and communities, lack of value addition and beneficiation, poor management of generated revenue, non recognition of critical stakeholders like Civil Society Organisations (CSOs) and Community Based Organisations (CBOs) and violation of communities' Environmental, Economic, Social and Cultural Rights (EESCR)³⁷. An additional problem is the failure by the MMA to recognize artisanal miners despite their substantial contribution to livelihoods and economic development in Zimbabwe, especially in the gold sector. This is despite the fact that the Africa Mining Vision is calling for the recognition of artisanal miners.

The lack of transparency and accountability in the mining sector and thereby a serious indictment of the MMA was highlighted when President Robert Mugabe made claims in March 2016 with specific reference to the Marange Diamond Fields. He stated that the country had lost "USD\$ 15 billion" through theft, incorrect financial reporting systems,

²⁹ M Dhiwayo A Review of Zimbabwe's Draft Minerals Policy. Transforming Comparative Advantage to Competitive Advantage (2014) 5. See also Revenue Watch Institute. The 2013 Resource Governance Index. A Measure of Transparency and Accountability in the Oil, Gas and Mining Sector (2013). ³⁷Dhiwayo (n 36 above) 5.

falsification of financial records, false declarations, among other criminal initiatives by (mostly) foreign mining companies.³⁰³¹ While the claims by the President cannot be verified, they are very serious and telling for a number of reasons. Firstly, the mining activities in the Chiadzwa Diamond fields were conducted through Joint Venture Partnerships (JVPs) between private mining companies and the Government through its mining arm, the Zimbabwe Mining Development Corporation (ZMDC). Secondly, the claims by the President are indicative of serious problems in the mining sector, and constitute acknowledgement at the highest official and government level. The figure may actually be a tip of the iceberg. Consequently, in order to confront some of the problems, government moved for the consolidation of diamond mining companies in the Marange Diamond Fields through establishing the Zimbabwe Consolidated Diamond Company (ZCDC).³⁹

The President's admission and revelations are nothing new. Serious allegations damning to mining sector transparency had been made previously by Mr Tendai Biti, the former Minister of Finance and Economic Development in the Government of National Unity³²³³ the Parliamentary Portfolio Committee on Mines and Energy 41, the Office of Auditor General Report³⁴ and various CSOs.³⁵

Another big problem that is holding back Zimbabwe's potential to benefit from its significant and diverse mineral resource base are poorly negotiated contracts. As already noted, the fact that Zimbabwe has a significant and diverse mineral resource base only signifies a comparative advantage. Contracts are one of the major determinants of turning

³⁰ Tsabora (n 33 above) 28. See also the President, 'Miners robbed us,' Herald 4 March 2016.

³¹ Mtisi, S. Consolidation of Diamond Mines in Zimbabwe. Implications, Comments and Options (2015) 1314.

³² Ministry of Finance and Economic Development. The Mid-year Fiscal Policy Review Statement (2011) 30-32.

³³ Parliament of Zimbabwe. First Report of the Portfolio Committee on Mines and Energy on Diamond Mining (with special reference to Marange Diamond Fields) 2009-2013 (2013) 11-13.

³⁴ Report of the Auditor General for the Financial Year Ended December 31. Narrative Report on Appropriation Accounts and Miscellaneous Funds (2014).

³⁵ Revenue Watch Institute. The 2013 Resource Governance Index. A Measure of Transparency and Accountability in the Oil, Gas and Mining Sector (2013) describes Zimbabwe's mining regime as lacking mechanisms to promote public accountability in the mining sector.

comparative advantage into competitive advantage. The importance of contracts is aptly captured by Cotula when he notes:

"Investment contracts are crucial to define the terms of an investment project and constitute a key instrument of governance. They determine the distribution of risks, costs and benefits of the project. They shape the extent to which investment provides public revenues and creates income-generating opportunities. Through employment and linkages with the local economy. Contracts also shape the balance between these economic considerations and the other pillars of sustainable development namely social and environmental aspects. If well designed and implemented, contracts can maximize the contribution of natural resources investment to sustainable development but badly drafted or executed contracts may impose unfavourable terms on the host country often for long periods of time, sow the seeds of disputes and undermine the pursuit of policy goals like poverty reduction and environmental sustainability. "³⁶

The Africa Mining Vision is equally clear that contract negotiation capacity is critical if mining is to contribute effectively to economic development.⁴⁵

A macrocosm of the problems affecting the mining sector makes the justification for the ongoing reforms of the mining sector through the N'MAB. Without these reforms, the full potential of the mining sector will not be realized. While there are many principles that are critical for the full realization of the potential of the mining sector, a comprehensive legal and policy framework is perhaps the most important principle and the Government of Zimbabwe should be applauded for realizing this albeit lately. With this overview of the well-known problems in the mining sector and a brief description of some of them, the research now moves on to analyses the provisions of the MMAB.

3. Analysis of the 'Promises and Pitfalls ' of the Mines and Mineral Amendment Bill

³⁶ L Cotula. Investment Contracts and Sustainable Development. How to make contracts fairer and more sustainable natural resource investments (2010) 3. ⁴⁵ African Union (n 19 above) 17. ³⁹ Section 21 (2).

The 2015 is a progression of the of 2007 and 2010. The 2015 MMAB has a number of progressive provisions that augur well for mineral resources governance, and if implemented in good faith, can enhance the contribution of mining sector to economic development.

3.1 'From Pay It or Lose It' to 'Use it or Lose It'

The MN'IAB proposes to institute a "use it or lose it" policy with regards to exclusive prospecting licenses. It provides that every exclusive prospecting licence shall be valid for a period of twelve months.³⁹ This is a very good provision that will help to minimize the hoarding and holding of mining claims for speculative purposes by mining companies, as is the case under the current MMA. Currently, mining companies are allowed to hold claims and titles that they are not working on and may have no intention to work on by simply paying insignificant annual fees. The failure by mining companies to work on their claims is depriving the country of timely and significant amounts of revenue that can contribute to economic development. The import of this provision in the MMAB is that those mining companies that are holding to claims and titles without working on them run the risk of losing those claims they are not working or using. This will result in more ground being opened up for mining activities and the generation of revenue.

To operationalise the " use it or lose it policy" the MMAB requires a programme of work to be submitted by the licensee to the Mining Affairs Board (MAB) for approval. ³⁷This is required every six months and will be reviewed by the MAB to determine if the licensee is abiding by the terms and conditions of the work programme. If the programme of works submitted by the licensee does not satisfy the MAB, it has the powers to either suspend the licence until the payment of prescribed fine or may revoke or cancel the licence. ³⁸ This provision is likely to discourage speculative activities, which are very rampant in the mining sector and ensure that those that hold exclusive exploration licences are serious

³⁷ Section 101 (1).

³⁸ Section 101 (5) (a)(b).

⁴² Section 23(1)(2).

about mining. This also helps to curb corrupt activities and result in the efficient extraction of mineral resources.

The 'use it or lose it' policy is further buttressed by the provision that criminalises the sale or transfer of exclusive prospecting licence. It states that "no person shall sell, cede, assign or transfer and exclusive prospecting licence to any other person and any sale, cession, or transfer shall be void and the parties shall be guilty of an offence and liable to a fine or imprisonment or both."⁴² Section 100 is also in line with the use it or lose it policy by prohibiting the sale, transfer, cession and assignment of exclusive exploration licence. It provides that:

'The rights and obligations granted under an exclusive exploration licence shall be personal to the licence, who may not, except with the Minister's written consent given in terms of subsection (2), sell, cede, assign or transfer any of those rights to any other person subject to the payment of a prescribed fee'.

Selling, transfer, cession and assignment of an exclusive prospecting licence can only be done with the permission of the Minister on the recommendation of the MAB. It is hoped that these provisions, which are all aimed at operationalizing the use it or lose it policy, will be able to curb speculative activities in the mining sector and ensure that those who hold licences are serious about working the mining area. The penalties which include revoking of the licence by the Minister and the paying of a fine which is equivalent to the value of the transaction seems to be deterrent enough to curb speculative activities.³⁹

Another progressive provision in the NTN'TAB is the stipulation that applications for mining licences are to be dealt with on a first come first serve basis also known in practice as 'first in first assessed.'⁴⁰ This provision is very important in promoting investments without delays and also helps to address investment inhibitors like corruption and speculation. This is likely to promote and contribute towards the ease of doing business in Zimbabwe, which has been negatively affected by corruption and speculation. The first in first served basis is very important in those instances where the quality and quantity of the mineral resources is not known. However, in those instances where geological survey has been done and the government is aware of the quality and quantity of the mineral resource,

³⁹ Section 100 (3).

⁴⁰ Section 19.

then competitive bidding is the way to go to ensure that mining rights are competitively awarded thereby ensuring maximum benefits to the country. Competitive bidding is in line with section 391 H of the Bill that calls for the auctioning of mining rights whenever there is need and it is in the interests of the nation. This is also in line with the Constitution of Zimbabwe, which calls for competitiveness in the concession of minerals and other rights.

⁴¹ The African Mining Vision also calls for competitive auctioning of prospective resource blocks. ⁴⁶ This is also in line with the Precept 3 of the Natural Resources Charter. Competitive auctioning is an effective method of achieving fair value. However, for competitive auctioning to be affective, the government should invest in geological survey since it is practically impossible to conduct competitive auctioning in the absence of geological data.

The Government of Zimbabwe has long complained that some mining companies have carried out mining activities under the disguise of exploration. De-Beers Ltd is one such company that has been accused of carrying out mining activities in the Chiadzwa Diamond Fields from 1991-2006 under its Exclusive Prospecting Order (EPO) under the pretext that it was prospecting. The Government of Zimbabwe alleges that De Beers looted over 100 000 tonnes of ore during its 15 years stay in Marange. ⁴² While these allegations have never been legally proven, this shows the potential of illicit financial flows in the mining sector. The Bill curbs this loophole by prohibiting the holder of an exclusive prospecting licence to remove or dispose of minerals, mineral oil, nuclear energy mineral or natural gas he or she would have discovered within the area specified in the licence, except for the bona fide purpose of determining its nature and this can only be done with written permission from the Cadastre Registrar. ⁴⁸ The penalty for allegedly carrying out mining under the disguise of exploration is a fine not exceeding level 12 or imprisonment for a period not exceeding two years or both a fine and an imprisonment.⁴³ This is a deterrent penalty that should discourage illicit financial flows in the mining sector under the disguise of exploration.

⁴¹ Section 315 of the Constitution of Zimbabwe. ⁴⁶

African Union (n 19 above) 16.

⁴² <https://www.newsday.co.zw/2012/11/14/mpofu-accuses-de-beers/>. ⁴⁸

Section 27 (1).

⁴³ Section 27(5).

⁵⁰ Section 5.

3.2 Designation of Minerals

Another progressive provision is the designation of strategic minerals.⁵⁰ The MMAB defines strategic minerals as minerals that 'are declared or designated as strategic in terms of this section on account of their importance to the economic, social, industrial and security development of the country'. A more conventional definition of strategic of critical minerals is 'minerals for which the risk of disruption in supply is relatively high and for which supply disruptions will be associated with large economic disruptions'.⁴⁴ Critical or strategic minerals are minerals designated mainly by developed economies that are heavily dependent on raw materials from emerging markets or economies to power and sustain their economic growth. Political instability in these emerging economies poses a great threat to the supply chain. The MMAB designates coking coal, natural gas or coal bed methane, iron ore, manganese, antimony, tungsten, rare earth elements, lithium, tantalite, uranium, iron ore and natural graphite to name just but a few. The designation of minerals as strategic minerals is not unique to Zimbabwe. This is a global trend as countries strive to retain a competitive edge over their rivals economically, militarily and technologically.⁴⁵ The United States of America for example, have the National Strategic and Critical Minerals Production Act of 2015. The designation of strategic minerals by developing countries is also increasingly becoming a feature⁴⁶ as these play a critical role as feed stocks into other sectors of the economy that includes manufacturing, agriculture, infrastructure and the generation of power.

While the designation of strategic minerals is good, the problem is that the MMAB goes further to state that special and unique conditions will apply to their exploration, ownership, exploitation and beneficiation, marketing and development.⁵⁴ The special and unique conditions are not spelt out. In line with international best practices of transparency and accountability and especially when one takes into account the fact that these are the country's most important minerals, these 'unique and special conditions' must be spelt out

⁴⁴ R.Coulombo, S. Dietz, M. Godunova and T.B Nielsen (2015). Critical Minerals today and in 2030: An analysis of OECD countries (2015). OECD Working Papers.

⁴⁵ R.G Eggert. Critical Mineral and Emerging Technologies (2010) Volume XXVI, Issue 4. See also R. Coulombo opcit.

⁴⁶ Section 16 of (n 28 above).⁵⁴
Section 5(3).

or provided for under the MMAB. The IvWIAB should set up clear and transparent guidelines on how strategic minerals are designated. The failure to do so may inhibit Foreign Direct Investment (FDI) due to the lack of clarity on the special conditions and their implications.⁴⁷ These must be known upfront before an investor makes a commitment.

3.3 Institutional changes

Another important provision is changing the composition of the Mining Affairs Board and extending its functions.⁴⁸ The MAB is an important institution in the governance of the mining sector. Institutions are key in achieving sustainable development. It therefore follows that for stakeholders to participate effectively in the governance of the mining sector, they have to participate in the policy and decision-making institutions and the MAB is one such institution. Members of the MAB are the Permanent Secretary in the Ministry of Mines who shall be the Chairperson of the Board, all Principal Directors, Director of Geological Survey, any other two Ministry officials appointed by the Minister and six other members appointed by the Minister. In appointing the 6, the Minister shall include two representing the Chamber of Mines, one representing small scale miners, one representing farmers, one shall be a member of the Institute of Chartered Accountant and one⁴⁹ shall be based on his or her experience or qualification that the Minister deem to be of assistance to the Board.

In appointing the six members, the Minister has to endeavor to secure gender balance. This is a progressive provision, which is in line with the Constitution, which calls for gender balance. Both genders are required to be equally represented in institutions and agencies of government at every level. Furthermore, women are required to contribute at least half of all Commissions and other elective and appointed government bodies established by the Constitution or an Act of Parliament. Once enacted, the MMAB will become an Act of Parliament and as such the provisions to secure gender balance in the appointment of the

⁴⁷ Zimbabwe Environmental Law Association (2016) An analysis of the Mines and Minerals Amendment Bill.

⁴⁸ Section 6.

⁴⁹ Section 17 of the Constitution.

Board is in fulfillment of the Constitution and therefore progressive. The gender balance is also recognition that women are more directly affected by the negative impacts of mining activities than man.⁵⁰

However, the composition of the MAB falls short of standards or best practices that are expected of multi-stakeholder initiatives. The mining sector affects a number of stakeholders. These include government, business, communities, labour, traditional leaders and CSOs. This diversity should be reflected in the governance structures like the MAB. The draft Minerals Policy for example, calls for mutually beneficial partnerships between government, the private sector, CSOs and communities.⁵¹ An inclusive governance structure is also very much in line with the tenets of the Africa Mining Vision which calls for tri-partite partnerships between stakeholders in the mining sector.⁶⁰ The EITI Standard also calls for the establishment of Multistakeholder Group (MSG) composed of Government, CSOs and business. The Constitution of Zimbabwe also calls for the participation of communities in natural resources governance including minerals and to benefit from their exploitation.⁵²

A review of the Mining Affairs Board, a very important policy and decision-making body in the governance of the mining sector shows that it marginalizes a number of stakeholders. These include labor, CSOs, communities, traditional leaders and other relevant government departments and Ministries like Local Government and the Environmental Management Agency/ Ministry of Environment, Water and Climate and Zimbabwe Mining Revenue Authority / Ministry of Finance and Economic Development.

Inspiration on board composition for effective mineral resource governance can be drawn from other countries that have recently undergone reforms of mining legislation. These are South Africa and Sierra Leone. The South African Minerals and Petroleum Development

⁵⁰ Platforms for Gender and Extractives in Zimbabwe. Position Paper on Issues to be Incorporated into the proposed Mines and Minerals Amendment Bill (2016).

⁵¹ Government of Zimbabwe (n23 above) 9.⁶⁰
African Union (n 19 above) 12.

⁵² Section 13 (4) of the Constitution.

⁶² Section 59(1).

Act establishes a Mineral and Petroleum Development Board⁶² while the Sierra Leone Mines and Minerals Act establishes Minerals Advisory Board.⁵³ In terms of composition, apart from the traditional representation of government and business, the South African Minerals and Petroleum Development Board provides for three people to represent organized labour, at least one person to represent relevant Non Governmental Organisations (NGOs) and two people to represent relevant Community Based Organisations.⁵⁴ Similarly, the Sierra Leone Minerals Advisory Board includes Commissioner General of National Revenue Authority, representative of the Ministry responsible for Local Government, a representative from the Environmental Protection Agency, a representative from CSOs and a representative of the Paramount Chiefs nominated by the Council of Paramount Chiefs. The inclusion of these stakeholders is very much in line with the principles of multi-stakeholderism or Multistakeholder Initiatives (MSI).

There is still an opportunity to address this governance deficit. The MMAB provides for the establishment of one or more Board committees, which the Board may vest, such of its functions, as it considers appropriate.⁷² This can be regarded as an opportunity to address the gaps that currently exist in the governance of the mining sector through the Mining Affairs Board. The stakeholders that are currently missing in the MAB namely labour, CSOs, communities, traditional leaders, Local Government and the Ministry of Environment, Water and Climate and Ministry of Finance and Economic Development can be accommodated. The Ministry of Environment, Water and Climate is responsible for environmental management through the Environmental Management Agency in terms of the Environmental Management Act. Mining by its nature is inherently destructive of the environment hence the need to include Agency in the board. Traditional leaders play an important role in natural resources management. In terms of the Constitution, their role include facilitate development and in accordance with an Act of Parliament, to administer Communal Land and protect the environment.⁵⁶ The Traditional Leaders Act⁶⁶ also accords traditional leaders a very important role in natural resources management. Their role

⁵³ Section 11(1).

⁵⁴ Section

⁵⁵ Section 6(7).

⁵⁶ Section 282 (1)(c) and (d) of the Constitution of Zimbabwe.

⁶⁶ Chapter 29: 17.

includes ensuring that land and its natural resources are used and exploited in terms of the law in particular the indiscriminate destruction of flora and fauna and general preventing the degradation, abuse or misuse of land and natural resources in his area.⁵⁷ Mining activities can result in land degradation and indiscriminate destruction of fauna and flora. It is therefore important that traditional leaders as representatives of the people and stewards of natural resources participate in the Mining Affairs Board.

CSOs play a very important complimentary oversight role in natural resources management and should also participate in natural resources governance institutions as shown by the South African and Sierra Leone examples. The Ministry of Local Government is very important as most mining activities take place in the rural areas and the Ministry is responsible for administering communal areas through the Rural District Councils Act. The Ministry of Finance and Economic Development through their agency the Zimbabwe Mining Revenue Authority (ZIMRA) are very important in light of the new focus on Domestic Resources Mobilisation to support economic development. ZIMRA is an institution and creature of statute, the Revenue Authority Act.⁷⁶ Its responsibilities includes acting as an agent of the State in assessing, collecting and enforcing⁵⁸ the payment of all revenues and advice the Minister on matters relating to the raising and collection of revenues.⁷⁷ In addition, ZIMRA advises government on fiscal and economic matters such as revenue forecasting and tax reforms. ZIMRA's mandate makes it an indispensable player in the management of mineral resource revenue.

The Africa Mining Vision emphasises the need to design efficient, transparent and optimal tax regimes.⁵⁹ One of the functions of the revenue authority is to advise government on designing efficient tax systems, calculating and disclosing lost income due to tax incentives. In terms of transparency in mining revenue generation, ZIMRA administers tax revenue and it has the opportunity to disclose the performance of mining contribution per revenue head (income tax, royalties, VAT, customs duty etc). ZIMRA is an important part

⁵⁷ Section 5(1) (iii) and iv of the Traditional Leaders Act. ⁷⁶

Chapter 23: 11.

⁵⁸ Section 4(1)(a)(b).

⁵⁹ African Union (n 19 above) 15.

⁷⁰ Section 3 2 .

of inter-agency cooperation needed to stem illicit financial flows which are very rampant in the mining sector.

Communities are among the stakeholders that are affected most by mining activities. Communities bear the brunt of the negative impacts of natural resources management as it affects their EESCR. The Environmental Management Act and the Constitution calls for their participation in the management of natural resources. The principle of good governance that is provided for in the Constitution includes the sharing of national resources and these include minerals.⁷⁰ Furthermore, the State is required to ensure that local communities benefit from the resources that are found in their areas and these include minerals.⁶⁰ The principles of public administration, calls for broad representation of the diverse communities in Zimbabwe and encourage citizens to participate in the policy decision-making processes. Citizens include communities and sitting in policy and decision-making institutions is one of the ways of participating in policy decision-making processes. Participation in the Mining Affairs Board by communities is one of the ways of promoting the principle of good governance and ensuring that communities benefit from the resources that are found in their areas.

3.4 The Mining Cadastre System

The MMAB also proposes the establishment of a mining cadaster, and this is a very welcome development.⁶¹ The introduction of a mining cadastre is in line with trends in the region. Countries that are rich in mineral resources like Zambia, Mozambique, Democratic Republic of the Congo and South Africa have also established mining cadastre systems. A mining cadastre is defined as 'the system for manual or electronic management and recoding of processes that create mining rights and titles' .⁶² It is the principal public institution that is responsible for managing mining titles in a country.⁶³ It is regarded as the cornerstone or foundation of good mineral resource governance in any country that is

⁶⁰ Section 13(4).

⁶¹ Section 14.

⁶² Section 14 (1).

⁶³ E.O.Girones A.Pugachevsky and G. Valsler Mining Rights Cadastre: Promoting Transparent Access to Mineral Resources (2009) 4. ⁸⁴ Ibid, 1.

serious in ensuring that mineral resources contribute effectively to economic and social development. The significance of a mining cadaster system is captured by Girones et al:

- a) It formally captures applications for various types of mineral licences
- b) It registers changes and updates to mineral titles any time a title is granted or an owner is changed
- c) It checks licence applications for possible overlaps with earlier claims or other impediments
- d) It advises the granting authority on whether a title is technically admissible or not
- e) It ensures compliance with payment of fees and other requirements to keep a mining title valid
- f) It advises the granting authority when a mining titles should be cancelled.⁸⁴

While the conditions and context may differ from one country to another, there are some basic principles and rules that underpin the establishment of a Mining Cadastre for it to be effective. These are security of tenure, security of title, First Come First Served and Auctioning. The introduction of a mining cadastre in Zimbabwe is a very welcome development that is going to promote transparency in a system that was open to abuse and fuelled corruption and conflict. Due to lack of a mining cadastre, there have been some challenges as a result of some licences being awarded over claims that already belonged to other people. The mining cadastre will be presided over by the Cadastre Registrar, who is the Permanent Secretary in the Ministry of Mines and Mining Development.⁷⁵ The mining cadastre replaces the Mining Commissioners who were previously responsible for the issuing of mining licences. The Cadastre Registrar shall have exclusive authority and jurisdiction over the whole country although he/ she may delegate his [her power functions to anyone as they deem fit.

The mining cadastre shall be administered through a Register of Mining Rights and Titles.⁸⁶ The Cadastre register shall consist of the following information:

- a) the name of every holder of a mining right or title or limitation of a mining right or title; and
- b) a chronological record of dates and time of lodging of applications for mining rights or title ; and the contact details of every applicant including physical and postal address , telephone numbers , email address and fax number ; and
- c) the receipt numbers of prescribed fees paid and the amounts paid

- d) the nature of every application ; and
- e) the date of approval and rejection of an application ; and
- f) relevant particulars of each mining right or title or limitation of a mining right or title ; and
- g) particulars of any renewal , cancellation or suspension of the registration of each mining right or title or of any forfeiture , relinquishment or abandonment of a mining right or title and
- h) the location and coordination of any mining right or title ; and
- i) such other particulars as the Cadastre Registrar may consider necessary

The Cadastre Register information is very detailed and this complies with best practices in the establishment of a mining cadastre and this is going to promote transparency and accountability, which are key components of mineral resources governance. In order to kick start the relevant processes, Spatial Dimension of South Africa has signed a 3-year agreement with the Government of Zimbabwe to develop and maintain a mining cadastre. One of the provisions of the Cadastre states that 'such other particulars as the Cadastre

⁷⁵ Section 150).

⁸⁶ Section 16.

Registrar may consider necessary'. ⁶⁴ This provision can be utilized to request for other information that may not be provided for under the mining cadastre. This may include mining agreements.

It should be noted that a mining cadastre requires resources to maintain it. In terms of the Bill, the Cadastre Registrar will do this through the collection of prescribed fees. ⁷⁷ The fees that will be collected includes processing fee for the application of a mining title or rights, annual service fees for administrative and management services and any other fees that may be prescribed in the Mines and Minerals Act or through regulations made under it.

⁶⁴ Section 16 (2) (j).

⁷⁷ Section 17.

It should further be highlighted that a mining cadaster system enhances access to essential information to interested stakeholders in the hands of the Cadastre Registrar. Access to information is very important for the good governance of the mining sector as it is critical in transparency and accountability. Section 62 of the Constitution of Zimbabwe provides that every Zimbabwean citizen or permanent resident, including juristic persons and the Zimbabwean media, has the right of access to any information held by the State or by any institution or agency of government, at every level, in so far as the information is required in the interests of public accountability. Zimbabwe's mining sector is notorious for its opacity, and consequent lack of transparency, good governance and accountability.⁶⁵ To promote access to information and accountability, the MMAB provides for the inspection of Cadastre Register by any person upon the payment of a prescribed fee.⁷⁹ This provision on access to information combined with the detailed information that is provided in the cadastre register, should in theory, be able to provide credible and accessible information to those who may want to hold policy and other decision makers accountable. The hope is that the "prescribed fee" will not be exorbitant to restrict the access of information. It should be pegged at such a rate that it will be able to promote access to information to the majority of the people especially communities that are affected by mining activities in line with Constitutional provisions and the spirit and intent of the MMAB.

There are concerns about high fees being charged for access, and these concerns are important since high access fees negates the right to access to information. Under the Environmental Management Act, access to Environmental Impact Assessment Reports (EIAR) is only upon payment of a fee in terms of the Environmental and Natural Resources Management (Environmental Impact Assessment and Ecosystem Protection) (Amendment Regulations) (No. 1) of 2011.⁶⁶⁶⁷⁶⁸ The fee that are currently required for access by the Environmental Management Agency is USD250-00; and this is exorbitant and prohibitive. It can even be argued that these high access fees are against the spirit and letter of the

⁶⁵ Zimbabwe Environmental Law Association. *Mineral Revenue Disclosure and Information Needs of Various Stakeholders. A Gap Analysis* (2016). ⁷⁹ Section 18(1).

⁶⁶ Statutory Instrument 3 of 2011.

⁶⁷ Section 119 (1) (n 28 above).

⁶⁸ Article 119(4).

provisions on access to information in both the Environmental Management Act and the Constitution, and should be revised.

It is from this perspective that it is submitted that the provisions of access to information in the MMAB could have been strengthened. In Kenya for example, there is better access to information relating to the mining sector compared to Zimbabwe. All mineral agreements are required to be in the public domain and be made accessible to the public at no cost to the public." This is made possible through their publication on the website of the Ministry responsible for mining. Apart from mineral agreements other information that is published on the Ministry responsible for mining include records, reports and any other relevant information. 93 (Own emphasis added).

Furthermore, the Cabinet Secretary is required to make regulations to provide for accountable and transparent mechanisms of reporting mining and mineral related activities that include revenue paid to the government by mineral rights holders and production volumes under each licence or permit. ⁶⁹ These are very good and comprehensive provisions that can be used to promote transparency and accountability across the whole mining value chain. Sadly the NflvfAB lacks these and the Cadastre Register information is not as detailed as the Kenyan one. It could also have been enhanced by making a specific provision on the 'Right to information' with regards to information related to the mining sector in the MMAB given the centrality of the sector to Zimbabwe's economic development hopes.

The MMAB Bill also promotes the principles of an effective cadastre system by applying the First Come First Served Principle and to some extent, the auctioning principle. ⁷⁰ First Come First Serve also known as First in First Assessed is recognized and regarded as a principle of best practice in the world and also under the Africa Mining Vision, which promotes transparency and accountability and FDI while auctioning of mineral rights ensures that the government get value for money especially in those situations where the

⁶⁹ Articles 119 (3) (a)(b).

⁷⁰ Sections 19 and 391 H.

quality and quantity of the mineral resource is known. The only problem is that the MMAB proposes auctioning as optional rather than mandatory.

The other weakness with the Mining Cadastre is that the Registrar is the Permanent Secretary in the Ministry of Mines and Mining Development. The Permanent Secretary is also the Chairperson of the Mining Affairs Board. This may result in conflict of interest and also violates tenets of good corporate governance, which call for the separation of powers. Should there be a dispute involving him and a licence holder regarding the allocation of a mining licence and the aggrieved party applies to the Mining Affairs

Board, the Permanent Secretary as the Chairperson will preside over it unless he recuse himself.

3.5 Environmental Rights

Mining is one of the economic activities that have got devastating impacts on the environment.⁷¹ Mining activities if not carried out in a sustainable manner, can result in environmental degradation and pollution that affect the realization of a number of constitutionally recognized rights because of the linkage of environmental rights to other rights. These include the right to a clean and health environment, economic rights, social and cultural rights, the right to water and the right to life.⁷²⁷³ Over the past 15 years, Zimbabwe has made great strides in promoting environmental rights as human rights. The Environmental Management Act,⁹⁸ which is anchored on the concept of sustainable development, makes provisions for environmental rights as human rights.⁹⁹

The recognition of environmental rights as human rights as provided for in the Environmental Management Act, find expression in the 2013 Constitution of Zimbabwe under the expanded Bill of Rights. Section 73 of the Constitution provides that every person has the right to:

- a) an environment that is not harmful to their health or well-being ; and
- b) to have the environment protected for the benefit of present and future generations, through reasonable legislative and other measures that prevent pollution and ecological degradation , promote conservation and secure ecological sustainable

⁷¹ Zimbabwe Environmental Law Association. Pollution of rivers by diamond mining companies operating in Marange (2013). See also Government of Zimbabwe. Ministry of Environment and Natural Resources Management. Zimbabwe Environmental Outlook: Our Environment, Everybody's Responsibility. Executive Summary. Unpublished (2016) 28.

⁷² Social and Economic Rights Action Center and Another v Nigeria 2001 AHRLR 60. See also Government of Zimbabwe. Ministry of Environment and Natural Resources Management. Zimbabwe Environmental Outlook: Our Environment, Everybody's Responsibility. Executive Summary Unpublished (2016) 28. ⁹⁸ Chapter 20:27.

⁷³ 4.

Section

development and use of natural resources while promoting economic and social development.

The Constitution of Zimbabwe also establishes the Zimbabwe Human Rights Commission (ZHRC). The functions of the ZHRC includes the promotion of awareness of all human rights, protection, development and attainment of all rights, monitor, assess and ensure observance of human rights and investigates the conduct of any authority or person regarding allegations of human rights violations.¹⁰¹ The ZHRC can be used to promote environmental rights as human rights as its mandate focuses on all categories of rights and freedoms. The ZHRC even have an Environmental Thematic Working Group. The Constitution also provides for an expanded locus standi¹⁰², which can be used to promote, and protect the realization of environmental rights as human rights.

The constitutionalisation of environmental rights as human rights is a very progressive development from the provisions of the Environmental Management Act as this means that they are now justiciable unlike under the 1980 Lancaster House Constitution where they were not. The only drawback is that the Constitution provides for their progressive and not immediate realisation depending on the availability of resources. The progressive realization proviso maybe used by government not to provide adequate resources towards the promotion, protection and fulfillment of environmental rights as human rights.

Influenced by the provisions of the Constitution, which calls for alignment of existing legislation to the Constitution, the MMAB makes provisions for Environmental Protection under Part XVA of the Act. With regards to mining, the Minister and his/ her team of mining experts, shall be responsible for determining the best method of mining to be used in any area including rivers, surface and underground, the tools and machinery to be used and the level and extent of such mining activities.¹⁰³ It is assumed that this provision is motivated by the desire and need to protect the environment and that any mining activities that are carried out does not result in irreversible damage to the environment. This assumption is strengthened by the provision on the protection of

100 Section 242.

101 Section 243.

Section 257

102 Section 85. 103 B (2).

natural ⁷⁴resources and the environment. 104 It requires the Cadastre Registrar to take into account the need to conserve the natural resources on the land over which the right is sought or in neighbouring land in granting a mineral right or title.

An Environmental Impact Assessment (EIA) is also required to be carried out and submitted to the Cadastre Registrar as part of the application process before any mining right or title is issued out. This is a very important provision which if implemented will result in the mitigation of environmental degradation and pollution by mining activities. An EIA is very important planning and decision-making tool. The objective of an EIA is to:

Ensure that the environmental and socio-economic costs and benefits of economic development projects are properly accounted for, that unwarranted negative impacts are avoided or mitigated and that potential benefits are realized.⁷⁵

This provision which applies to both Large Scale Miners and Small Scale Miners ⁸⁹ is in line with the provisions of the Environmental Management Act. ⁷⁶ Furthermore, the prevention, limitation or treatment of pollution, minimization of the effects of mining on adjoining or neighboring areas and their inhabitants, are part of the conditions for the protection of the environment that will be included in a mining title or right. ⁷⁷⁹² Every holder of a prospecting, exploration or mining title or right is obliged to manage the environmental impacts in accordance with his or her environmental management plan or programme and is responsible for any environmental damage, pollution and ecological degradation that may result as a result of his/ her activities inside his/ her or outside his /her area.¹⁰⁹

⁷⁴ Section 257(C).

⁷⁵ Southern Africa Research and Documentation Center. Business and the Environment. Environmental Policy BriefN0.7 (2000). ⁸⁹ Section 257 (A).

⁷⁶ Section 97.

⁷⁷ Section 257 (D) and (b).

⁹² D

Section 257

The importance of the provisions on the protection of the environment and natural resources and the conditions for the protection of the environment becomes very evident

1)(a)
1(e).

when one takes into account the effects that communities living in, around and down stream of mining activities face as a result of mining activities. A good example are communities that are living around and down stream mining areas of the Chidzwa Diamond Mining Fields that have suffered environmental degradation and water pollution as a result of the activities of diamond mining companies. Mining activities have polluted the Save and Odzi Rivers thereby affecting the livelihoods of communities living around the mining areas and those that are downstream that are dependent on the two rivers for the sustenance of their livelihoods. Attempts to hold the diamond mining companies through advocacy and litigation have hit some brick walls.¹¹⁰ These provisions of the MMAB requiring that the holder of the mining right and title is not only responsible for the area inside his / her title or right but even those areas that are outside and neighbouring areas that are being affected negatively by the mining activities are therefore very progressive.

3.6 Strict Liability of Company Directors

The MMAB introduces the concept of strict liability for directors of mining companies for acts that mining company would have conducted and that leads to environmental pollution and degradation. The Bill states that:

"Notwithstanding the provisions of the Companies Act [Chapter 24:03] the directors of a company or members of a close corporation or syndicate are jointly and severally liable for any unacceptable negative impact on the environment, including damage, degradation or pollution advertently or inadvertently caused by the company or close corporation or syndicate, which they represent or are

„111

represented.

This provision is a masterstroke and lifts the corporate veil traditionally used as a shield by directors of mining companies facing allegations of pursuing mining activities in a

¹¹⁰ Malvern Mudiwa and Others v Mbada Mining Private Ltd and Others HC 6334/09 1 1
1 D (3).

manner that leads to environmental degradation. To an extent therefore, the introduction of strict liability is an indicator of how serious the government is, at least in theory, in dealing with environmental degradation and pollution by mining companies pursuing dangerous policies set by directors. More often than not, directors of mining companies get away with environmental offenses such as environmental pollution and degradation under the corporate veil. They better take note of this new provision, as it is a game changer.

In addition to introducing strict liability, the penalty attached to degrading and polluting the environment as result of mining activities has been made very deterrent. In terms of the Bill, for instance, those found guilty shall be liable to a fine not exceeding level fourteen or imprisonment for a period not exceeding twenty years or to both such fine and imprisonment. ¹¹²This is a very progressive and strong provision compared to the penalties in the current Mines and Minerals Act for environmental crimes. This provision on strict liability is similar to the provisions in the *Zambian Mines and Minerals Development Act*.

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To further strengthen the protection of natural resources and the environment, the MMAB provides for the establishment of an Environmental Rehabilitation Fund known as the Safety, Health and Rehabilitation Fund [SHRF]. ¹¹⁴The objectives of the SHRF as its name suggests, are to rehabilitate the environment with regards to environmental degradation associated with mining activities that includes mine fires and explosions, entrapments and inundations, ground subsidence, tailings and waste dump breaches and contamination, chemical spillages or acid mine drainage and chemical leaks, water contamination and collapse.¹¹⁵

Section 257

Every miner, that is Large Scale Miners (LSM) and Small Scale Miners (SSM), is required to contribute to the Fund on annual basis. The fees will be prescribed by the

1 12 Section 257 (C) ~~(4)~~.

1 13 Section 87

(1)(2)(3).

1 14 Section 257 E (1).

115 E (2).

Minister and in doing so, the Minister shall differentiate between fees that are applicable to SSM and LSM. The SHRF, which will join other Statutory Funds (SFS) that have already been established¹¹⁶, is a progressive provision in that it eases the financial burden on the government to rehabilitate environmental pollution and degradation. Currently, the Ministry of Environment, Water and Climate, needs around USD 8 million to rehabilitate one decommissioned LSM¹¹⁷. Why should this be responsibility of the government while those that enjoyed the profits from mining activities are not held accountable? A SHRF will address the current gap in the Mines and Minerals Act where mining companies are not paying enough to rehabilitates mined out areas. The environmental protection regime provided under the 2015 N•B/IAB is much stronger than the one that was provided for under the 2007 MMAB and the Environmental Rehabilitation Fund (ERF) in terms of scope, content and extent.¹¹⁸

To show how serious the Government is with the SHRF, failure to contribute towards it can result in the cancellation of a mining right or title and such cancellation shall not

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waive the miner's obligation to pay the amount due. Furthermore, the miners' contribution to the SHRF does not absolve them of their obligation to prevent environmental damage by carrying out rehabilitation work during mining activities and

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the cessation of mining activities or to minimize environmental damage.

While the introduction of SHRF is a progressive provision and is much better and stronger compared to the ERF under the 2007 MMB which was only focusing on LSM, it needs to be reconciled with other existing Statutory Funds that are aimed at making sure that miners contribute towards environmental rehabilitation as a result of the negative impacts of their activities on the environment. A good example if the Environmental Fund under the Environmental Management Act.¹²¹ The two SFS should be synchronized

¹¹⁶ Other Statutory Funds in existence include the Water Fund, Sovereign Wealth Fund and Environment Fund.

¹¹⁷ E Chigona. Environmental Rehabilitation and Mining Closure. Presentation at the Zimbabwe Alternative Mining Indaba (2016).

¹¹⁸ This was provided for under Part XVA on Environmental Protection.

¹¹⁹ Section 257 E (3). ¹²⁰ 257 (F).

¹²¹ Section 48.

to avoid duplication. At the moment, it is not clear whether the mining companies are going to be required to contribute to one of them or both. The Chamber of Mines is also of the view that the mining industry should be given a wide range of options as a way of contributing to the SHRF. These include establishing individually or collective funds, providing guarantees and insurance cover among other as instruments of managing environmental liabilities.⁷⁸

3.7 Riverbed Mining

While the MMAB has some very progressive provisions on the environment, it also has some very disturbing provisions especially with regards to riverbed mining. While the Bill prohibits riverbed mining, it has some provisos that make it acceptable.⁹⁴ The Bill exclusively reserves the right to carry out riverbed mining to the Government of Zimbabwe through the Ministry of Mines and Mining Development. In carrying out riverbed mining, the Government may decide to do it in partnership with relevant companies and organisations through Joint Venture Partnerships (JVPs). However, the decision to go into partnership through JVPs or not, is the Government's alone to make based on its own discretion. Through the 2016 Mid — Year Fiscal Policy Review Statement, the Government of Zimbabwe identifies Angwa, Mazowe, Gatshe Gatshe, Save, Odzi and Mutare rivers as potential areas for riverbed mining. It is evident from the Mid — Year Fiscal Policy Review that the Government of Zimbabwe is planning massive riverbed mining.

The provision on riverbed mining in the IVWIAB is of great concern for a number of reasons. The first concern is the impact of riverbed mining on the environment, water sources and aquatic life. Riverbed mining can result in serious environmental and water degradation.⁷⁹ Riverbed mining can cause river morphology, which affects the river channel, width and other features thereby negatively affecting environmental sustainability and water resources. It can also result in reduced water velocity as a result of sedimentation

⁷⁸ Chamber of Mines of Zimbabwe. Proposals to the Draft Mines and Minerals Act Amendment Bill (2016).

⁹⁴ Section 319 A. ⁹⁵ Section 319 A (3).

⁷⁹ For a detailed discussion on the impacts of riverbed mining, see B. Chazovachii and A. Musingarimi 'Gold Panning and Runde river morphology in Mwenezi. A quest for a sound catchment management and sustainable development' 2013. Global Research Journal of Social Science (GARJSS) Vol 25 100-113.

deposition on the riverbed and this narrows the water pools. Environmental degradation from riverbed mining results in siltation of rivers, which affects their carrying capacity making it unsuitable for both domestic and industrial use. The sum total of river bed mining is its potential to affect the realization of the right to safe, clean and portable water as provided in the Constitution of Zimbabwe and other rights that are interlinked to it like the right to food, health life and environmental rights as a result of pollution and siltation of rivers and dams.⁸⁰

The Government of Zimbabwe tries to distinguish between environmental friendly riverbed mining and unfriendly riverbed mining.⁸¹⁹⁹ In an attempt to promote environmental friendly river-bed mining, the provides that:

Where the Government undertakes mining operations on riverbeds, it shall ensure the protection of the environment by undertaking such mining operations in accordance with the prescribed environmental impact assessment guidelines referred to in the Schedule.

Furthermore, if decision to proceed with riverbed has been reached by the Government on its own or as joint ventures with relevant companies and organisations, the Environmental Management Agency shall ensure that all riverbed-mining operations are done in accordance with the preferred standards outlined in the Second Schedule and no damage or pollution is caused.⁸² However, the question is whether riverbed mining can ever be environmentally sustainable or friendly as the both the N'WIAB and the 2016 Mid-year Fiscal Policy Statement alleges.

The second concern is the enforcement of regulation of 'environmental' riverbed mining.

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0 Currently, the Environmental Management (Control of Alluvial Mining Regulations) controls riverbed mining. Alluvial mining is defined as mining activities and prospecting along streams and rivers. These regulations were introduced after realizing that riverbed

⁸⁰ Section 77 of the Constitution of Zimbabwe.

⁸¹ Government of Zimbabwe: The 2016 Mid-year Fiscal Policy Review Statement (2016).⁹⁹
Section 391 A (6).

⁸² Section 391 A (8).

mining causes environmental degradation and pollution of water bodies. While their objective is not to stop alluvial mining, they ensure that it is controlled.

Through these Regulations, the Government of Zimbabwe has been able to control alluvial mining along riverbeds. For example, the operations of DTZ-OZGEO, which was

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arrying out alluvial gold mining activities along the Mutare River in Phenalonga. Similarly, the activities of Angel Hills Mining Company, which was carrying out alluvial

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old mining in the Angwa River, were also stopped using the regulations.

The challenge posed by the MMAB is that riverbed mining will now be done by the Government on its own or in partnership with other companies or organizations. The ability of the Government to effectively self regulate in matters that it has a direct interest in is questionable and this may result in the flouting of regulations that are meant to protect the environment from pollution and degradation as a result of river bed mining. These fears are not unfounded based on the experiences of diamond Joint Venture partnerships in the Marange Diamond Fields. Some of the mining activities commenced without the required Environmental Impact Assessments and some of the mining activities resulted in the pollution of water bodies like the Save and Odzi Rivers.¹³³ This shows that the participation of Government in mining activities through JVPs is not a panacea for addressing environmental degradation and pollution from mining activities.

If anything the involvement of Government is likely to worsen matters.

130 Statutory Instrument 92 Of 2014.

131 <https://www.newsday.co.zw/2014/04/08/mining-company-pleads-mercy/>.

132 <http://www.herald.co.zw/ema-chinese-firm-on-collision-course/>.

133 M. Dhliwayo. Public interest litigation as an empowerment tool: The case of the Chiadzwa Community Development Trust and diamond mining in Zimbabwe (2013).

3.8 Harmonizing Environmental Protection and Mining Development

The Environmental Management Act is the principal law regulating environmental protection and management in Zimbabwe. If any law is in conflict or inconsistent with it

with the exception of the Constitution, with regards to environmental management, the Environmental Management Act, shall prevail.⁸³ In terms of the Environmental Management Act, the Environmental Management Agency is the authority that is primarily responsible for environmental management by setting standards, regulating, monitoring, review and approval of Environmental Impact Assessments. Through EIAs, the Environmental Management Agency is able to regulate and monitor the negative impacts of economic activities on the environment including mining. It also has the powers to regulate and monitor the management and utilization of ecological fragile ecosystems like riverbeds.¹⁰²

However, from the provisions of the NINIAB, it appears as if the Environmental Management Agency is going to be playing a secondary role in the regulation, management and utilization of ecological fragile systems like river beds when it comes to mining activities, with the primary responsibility falling on the Ministry of Mines and Mining Development. It is the responsibility of the Minister with his or her team of experts to determine the best methods of mining to be used in any area including rivers, on surface and underground, the tools and machinery to be used and the level and extent of such mining activities through out Zimbabwe.¹⁰³

Under the MMAB, the role of EMA appears to be only monitoring and not making decisions. With regards to mining activities, it provides that the Environmental Management Agency or any other body established under the Environmental Management Act, „shall in consultation with and agreement with the relevant officials from the Ministry responsible for Mines, monitor that such recommended mining methods are being adhered to."

The methods and standards will be set by the Ministry of Mines with support from his or her mining experts and not by the Environmental Management Agency. This notion of a monitoring role rather than a standard setting and monitoring role by the Environmental Management Agency is further reinforced by Section 391 A (7) of the MMAB which provides that;

⁸³ Section 3 of the Environmental Management Act.

¹⁰² Section 10 (1)(b)(vii). ¹⁰³ Section 257 b (2).

"The Environmental Management Agency shall ensure that all riverbed mining operations are done in accordance with the preferred standards outlined in Second Schedule and no damage or pollution is caused".

The Standards for Riverbed Mining provided for in the Second Schedule are not set by the Environmental Management Agency under the Environmental Management Act, but the Ministry of Mines and Mining Development. This being the case, one wonders what powers the Agency will have through monitoring to address and where possible halt environmental degradation and pollution of water bodies as a result of river bed mining. It is doubtful that their recommendations will be taken into account by the Ministry of Mines and Mining Development who would have in the first place, embarked on the mining activity based on advice from mining experts in the Ministry.

Overall, the provisions of the MMAB on the management and utilisation of fragile ecosystems like riverbeds seem to be a usurpation and subversion of the powers and independence of the Environmental Management Agency by the Ministry of Mines and Mining Development. The Mines and Minerals Amendment Bill amends both the Environmental Management Act and Statutory Instrument 92 of 2014 controlling alluvial mining of riverbeds.

The shortcomings of the MMAB with regards to environmental protection especially riverbed mining, are very evident when compared and contrasted to the Kenyan and Zambian Mining laws. In both Kenya and Zambia, the Mining Acts makes it abundantly clear that environmental laws will prevail. The Kenyan Act states 'A mineral right or other licence or permit granted under this Act, shall not exempt a person from complying with any law concerning the protection of the environment'.⁸⁴ Furthermore, it categorically states that a mining licence will not be granted unless the person has obtained an EIA licence, social heritage assessment and the environmental management plan has been approved.¹⁰⁵

The fear associated with the Government of Zimbabwe being involved in riverbed mining are already being realized. Riverbed mining of Gache Gache River by the Government of

⁸⁴ Section 176 (1). ¹⁰⁵ Section 176(2).

Zimbabwe through the Zimbabwe Consolidated Diamond Mining Company (ZCDC) commenced without an EIA in violation of the Environmental Management Act and Statutory Instrument 92 of 2014. This violation resulted in the Environmental Management Agency issuing four orders and four tickets and the temporary suspension of activities until compliance with the law.⁸⁵ If this is a foretaste of how Government is going to conduct riverbed mining in other designated areas, then there is a real cause for concern on the environmental implications. Riverbed mining was roundly condemned by stakeholders during the outreach by the Parliamentary Portfolio Committee on Mines and Energy to gather views on the MMAB.

3.9 Mining Title

Another important feature introduced by the MMAB is a new mining title management system.¹⁴⁰ The current title management system can be described as complex, confusing and overlapping. The ongoing reforms are therefore an opportunity to rationalize and simplify Zimbabwe's mining title system. Currently, there are six different titles for mining. These are Exclusive Prospecting Orders (EPOs), Special Grants (Energy Minerals), Special Mining Leases, Special Grants (General Minerals) Mining Leases and Mining Claims.

All mining activities start with mineral exploration, which is the scientific search, evaluation and quantification of mineral resources for the purposes of mineral extraction. The current Mines and Minerals Act recognizes two forms of exploration title. These are Exclusive Prospecting Orders (EPO) and Special Grants (SGs). EPOs are applied for through the Mining Affairs Board and the Minister of Mines and Mining Development and eventually approved by the State President.⁸⁶ The EPOs are granted for a period of three years with an option for renewal for another three years. An EPO cannot be renewed beyond 6 years, and can be granted for any mineral. Further, it is granted in respect of a maximum land size of 65 000 hectares and a minimum of 2 000 hectares. EPOs are issued with conditions relating to performance; for instance, every holder of an EPO is required to

⁸⁵ Gache Gache Mining Stalls <http://www.herald.co.zw/gache-gache-mining-stalls/>. ¹⁴⁰ Section 14.

⁸⁶ Section 87.

submit a six monthly progress report to the Minister of Mines. Failure to produce a progress report can result in the revocation of the EPO.

Special Grants (SGs) are issued for energy minerals like coal, coal bed methane and gas. Special Grants are applied for under section 297 of the MMA and the procedures for application are the same with those of the EPOs. They are approved by the President. SGS can be issued for any period of time, usually between three to five years with an option to renew upon satisfactory work having been done.

On the other hand, a mining lease is a consolidation of more than one contiguous mining locations for ease of administration, and is issued in terms of section 135 of the MMA. The application for a Mining Lease is made to the Mining Affairs Board, through the respective Mining Commissioner. The application is accompanied by a claims plan and a description of the area applied for. A Special Mining Lease is a package of incentives granted to an investor in mining who invests in excess of US \$100 million dollars on one project. The application for a Special Mining Lease is made through the respective Mining Commissioner, and is issued in terms of section 135 of the MMA.

Mining Claims are applied through the Mining Commissioner and any person who is a permanent resident of Zimbabwe and is above the age of 18 years can take out a prospecting licence. A foreign investor is required to register a company.

The current approval for mining title can be summarized as follows: Exclusive Prospecting Orders and Special Grants (Energy Minerals) and Special Mining Leases are approved by the President. The Mining Affairs Board approves mining leases and Special Grants (General Minerals) are approved by the Permanent Secretary while mining claims are approved by the Mining Commissioners.

Below is a summary of the Application Procedure for Mining Title under the current MMA.142

TITLE (Part of Act)	AREA	MINERALS	APPLICANT REQUIREMENT	LENGTH OF TENURE

Ordinary /Special prospecting licence (IV)	10 ha precious metal/stone 25ha base metal	All	Any person above the age of 18 years of age permanently resident in Zimbabwe A company duly registered in Zimbabwe	2 years
Exclusive Prospective (VI)	65 000ha Any defined area (including reserved)	All except coal	Any person/ company duly registered in Zimbabwe	Initial period of 3 years renewable maximum period another 3 years
Mining Lease (VIII)	Amalgamation of contiguous mining location	All	Holder of registered mining location	Perpetual Annual renewal

¹⁴² Ministry of Mines and Mining Development Procedures of Acquiring Licences and Permits. Unlocking our mineral resources potential (Undated) 10.

Special Mining Lease	As mining Lease	All	Holder of registered mining location Investment in Forex exceeding USD\$100 million. Mine output intended for export	Perpetual Annual renewal
Special Grant (XIX)	Any defined area	All	Any person/comp any registered in Zimbabwe Area to be situated in reserved ground	Perpetual Annual renewal

Special Grant under Part XX of Act (XX)	20 000 ha for coal 100 000 ha for CBM and Natural Gas	Coal Mineral Oils,Natural	<ul style="list-style-type: none"> • Any person/ company duly registered in Zimbabwe Area to be situated in reserved ground • Intention to mine Coal, Minerals Oils, Full information on o Financial Status o Technical expertise 	Perpetual Annual renewal
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Adapted from Ministry of Mines and Mining Development Procedures of Acquiring Licenses and Permits.

The MMAB proposes to replace the current mining system with three mining titles namely:

- a) An exclusive prospecting licence; or
- b) An exclusive exploration licence; or
- c) Special grant for exploration

With regards to mining rights, it again proposes three types of mining rights. These are:

- a) Special mining lease; or
- b) Mining lease ;or
- c) Special Grants for mining

The Chamber of Mines of Zimbabwe is of the view that title management system can be better rationalized by combining mining titles and mining rights of three distinct titles namely mining claims for small workings, mining leases for large scale mining and special grants for energy minerals and hydrocarbons.⁸⁷

The biggest concern is that the proposed new title management system does not seem to address the problems that affect the current title management system under the current MMA. The hope was that through the N^an,4AB reforms would result in one body or agency

⁸⁷ Chamber of Mines of Zimbabwe (n 121 above) 2.

becoming responsible for the issuance of all mining titles and mining rights. This was one of the objectives of the MMAB 2007.⁸⁸ However, the reforms have left the crowded field of many players responsible for issuing mining titles and rights intact. The Cadastre Registrar who is the Permanent Secretary in the MNflvD, the Minister of Mines and Mining Development, the MAB and the President, all have role to play in the issuance of mining titles and rights and this will be illustrated through examples.

An application for an Exclusive Exploration Licence (EEL) is made in terms of section 87. The Application is made to the MAB. Upon receiving the application, the MAB will publicise the application through a notice in the Gazette and a newspaper circulating in the area concerned, giving details of the application and inviting objections to it to be lodged within 21 days and if the application is to explore any registered block within the proposed exclusive exploration reservation, written notice will be given every registered holder of the block. This is a very good provision as it promotes access to information and accountability. However, the only concern is that the applicant is required to pay for the publication of the notice. It is proposed that the application fee that is paid to the Cadastre Registrar should include the cost publishing the notice.

In considering the application, the Board will take into account a number of factors. These include if the applicant is a "fit and proper person" and whether "it would not be against the national interests to issue the applicant with the exclusive exploration licence sought", . 146 These provisions are problematic as the conditions that will qualify one to be considered a fit and proper person are neither defined nor provided for. The same applies to what is considered to be against the national interest. It is recommended that these are either removed or clarified in the interest of transparency and accountability in the administration of the provisions. Fit and proper person and what would be against national interest are currently very vague and could be subjective and open to abuse. There is therefore need for these terms to be defined and clarified.

If the Board is satisfied with the application, it will recommend it to the Minister for the issuance of an exclusive exploration licence. On receipt of the recommendations and the

⁸⁸ Mines and Minerals Amendment Bill Memorandum (d). 145
Section 87 (3) (a) and (b).

accompanying documents, the Minister shall submit them together with his or her own recommendations to the President. The President has the power to either decline or authorize the issuance of an EEL based on the recommendations of the Board or on such amended terms and conditions, as he may consider appropriate.¹⁴⁷ An EEL shall be valid for three years, but may be extended by the President for one further period not exceeding three years. This is in line with the 'use it or lose' it principle.

The application process raises a number of concerns. The first one is that there are no set timeframes for the application and processing of application. In the absence of timeframes, the application can face inordinate delays. The use it or lose it policy is meant to open up more ground for investment. To complement it, it is recommended that the time for processing the application should be stipulated to ensure the efficiency of the

146 Section 89(1)(a) and (b). 147
Section 90(2).

system. Lessons can be drawn from the process of the application of EIA, which has stipulated timeframes for processing once, and application has been lodged.⁸⁹¹¹¹

The second concern is the discretionary powers that the President has to either approve or decline to issue an exclusive exploration licence. The WY'IAB states that:

"For the avoidance of doubt, the President, shall have the discretion to approve or decline the applications for exclusive exploration licences received by him or her from the Minister or he or she may cause to be amended such terms and conditions as attached by the Board and the Minister.,,149

There is too much discretionary power that is placed in one person to issue or decline the issuance of the licence especially if both the Board and the Minister would have made recommendations after carrying out the necessary due diligence. Further, the inclusion of the State President is difficult to justify, and adds unnecessary red tape and sophistication in the application process. This centralizes the application process, exposes it to political indiscretions and executive decision —making processes that might respect other

⁸⁹ Section 100(1)(a)(b) of the Environmental Management Act. ¹¹¹
Section 91.

considerations not connected to transparency, effectiveness, accountability or good governance.

The third concern is the involvement of too many players in the licencing regime. In this case, the MAB, the Minister and the President are all involved. Apart from being time consuming, this split licencing regime as proposed by the MMAB presents administrative challenges and loopholes for manipulation, corruption and ineffective use of already scarce resources.⁹⁰ The same complex licencing system and the multiplicity of players is applicable in the application of other mining titles like the exploration prospecting licence, mining leases and special mining leases.

One way of addressing this complex, time consuming and overlapping title management system is by giving one body or agency, the responsibility for issuing of all mining titles and rights. This will result in a system that is effective and efficient. In the interests of promoting transparency and accountability, this will allow the public to have access to the register of all the licenses that would have been issued as provided for under section 18 of the MMAB. Transparency and accountability over the titling system can further be strengthened by operationalizing the provisions of section 315 (2) of the Constitution of Zimbabwe, which states that:

"An Act of Parliament must provide for the negotiation and performance of the following State contracts:

- a) Joint Venture contracts
- b) Contracts for construction and operation of infrastructure
- c) Concessions of mineral and other rights to ensure transparency, honesty, cost effectiveness and competitiveness."

3.10 Indigenization

One of the objectives of the MMAB is to provide for the indigenisation and localization of the mining industry. This is in line with the Indigenization and Economic Empowerment Act. The objectives of the Indigenisation and Economic Empowerment Act are to provide for measures for the further indigenisation of the economy and to provide for support

⁹⁰ Zimbabwe Environmental Law Association (n 62 above) 6.

measures for the economic empowerment of indigenous Zimbabweans. One of the ways through which the objectives of the indigenisation and economic empowerment are met is through securing at least fifty-one per centum of the shares of every public company and any other business to be owned by indigenous Zimbabweans.¹⁵² Section 393A of the MMAB provides for the localization of shareholding of corporate holders of mining title. It states that no mining rights or title shall be granted or issued to a public company unless the majority of its members are listed on a security exchanges in Zimbabwe. To show how serious the Government of Zimbabwe is regarding this requirement, the Minister of Mines and Mining Development

¹⁵¹ Chapter 14:33.

¹⁵² Section 3(1)(a). ¹⁵³ Section 393 A (1).

has powers to cancel any mining right or title, if it is proved that it was obtained fraudulently by falsifying information about the shareholding structure.⁹¹

While it will still be possible for companies that are listed on the foreign stock exchanges to be granted a licence, they will be required to inform the Minister about their listing outside Zimbabwe and required to ensure that eighty —five per centum of the funds that would have been raised from such listing shall be used solely for the development of the mining rights and title in Zimbabwe. The change in the shareholding structure by any company holding a mining title or right in Zimbabwe is also required to be brought to the attention of the Minister within fourteen days of change in such shareholding.⁹²⁹³ Furthermore, no shareholder of a company that is holding a mining right or title shall be allowed to dispose of, or transfer a Zimbabwean registered security to a non-indigenous person without the approval of the Minister. Such sale, disposal and transfer done without the approval of the Minister shall be null and void. However, the Chamber of Mines is of the view that the requirement on localization of shareholding will discourage mining companies from listing on the Zimbabwe Stock Exchange.

The objectives of these provisions on localization of shareholding and limitations on change of shareholding is to promote the participation of indigenous Zimbabweans in the mining

⁹¹ Section 393A(3).

⁹² Section 393 (1).

⁹³ Section 393 C 2

sector in line with the Indigenisation and Economic Empowerment Act. It is also hoped that this will increase revenue flows into the economy. Zimbabwe is currently in a financial crisis with one of the features of this crisis being cash shortages. The rationale behind this provision can be best understood by taking stock of mining companies that are listed on the Zimbabwe Stock Exchange. Zimbabwe has a number of multinational corporations that are undertaking mining activities in Zimbabwe. These include Zimplats, Mimosa and Anglo American. However, with the exception of Falgold, Hwange Colliery, Bindura Nickel Corporation and RioZim, some of the country's biggest mining companies are not listed on the local bourse, the Zimbabwe Stock Exchange (ZSE). Zimplats is listed on the Australian Stock Exchange while Metallon Gold Zimbabwe, which owns five local gold producing companies namely Arcturus, Mazowe, How Mine, Redwing and Shamva and is the biggest producer of gold not listed on the ZSE. Its parent company Metallon Corporation is listed on the Alternative Investment Market (AIM) of the London Stock Exchange (LSE). Similarly, Mimosa is indirectly listed on the Johannesburg Stock Exchange through Sibanye Gold and Unki Mine, which is owned by Anglo American, listed on the London Stock Exchange.

The argument for mining companies to trade on the ZSE is that they are exploiting finite resources in Zimbabwe and it is unfair for them to trade outside Zimbabwe's borders.⁹⁴ The requirement for mining companies to list on the Zimbabwe Stock Exchange is a very progressive one as it promotes transparency and accountability. Information about Environmental, Social and Governance (ESG) issues will be easily accessible and interested stakeholders can use it to hold mining companies accountable. It must be noted that the requirement for mining companies to list on the Zimbabwe Stock Exchange does not stop companies from listing on other stock exchanges. As most of them are already listed on other stock exchanges, it will be mainly secondary listing.

The MMAB also requires all holders of mining title or right to utilize Zimbabwean financial institutions.¹¹⁷ The objective of this provision is to make sure that revenue derived from mining activities in Zimbabwe by mining companies is available to stimulate economic growth through lending. It is hoped that this will be one of the ways of nipping illicit

⁹⁴ <http://www.theindependent.co.zw/2010/08/20/zse-pushes-for-mining-firms-listing/>.¹¹⁷
Section 393 B.

financial flows in the bud in the mining sector. The mining sector is one of the biggest contributors to illicit financial flows. Zimbabwe is currently facing a liquidity crisis and the Governor of the Reserve Bank of Zimbabwe has argued that illicit financial flows are one of the major causes of the crisis.⁹⁵ While this a very good provision, the challenge at the moment is that there is very low confidence in the local banking sector and most mining companies may not be very comfortable in putting all their resources in the local banking institutions.

3.11 Value addition and beneficiation

The failure to promote objectives related to value addition and beneficiation is regarded as one of the major weaknesses of the current MMA. The Act does not make it mandatory for minerals to be beneficiated before they are exported. Although Zimbabwe is a producer of significant and diverse mineral resources, the bulk of these minerals are exported as raw materials without being beneficiated. This results in them fetching low prices on the international market as the true value of minerals is realized after they have been processed. The value of minerals appreciates greatly throughout the beneficiation process. Furthermore, through value addition and beneficiation, linkages that is backward, side and forward linkages that are advocated for by the Africa Mining Vision are realized thereby creating new jobs. Value addition and beneficiation is a big driver of linkages. ZINFASSET also advocates for value addition and beneficiation. Out of the four clusters it establishes, one of them is on value addition and beneficiation and this includes the mining sector. The Draft Minerals Policy also provides for value addition and beneficiation under the Forward Linkages and Regulatory Framework section.

The MMAB states that 'no mineral (including industrial scrap) derived from minerals in Zimbabwe shall be exported raw or unprocessed except with the consent of the Minister to the exporter'.¹⁶¹ This provision is aimed at promoting value addition and beneficiation. While this provision, does not completely ban the export of raw materials, it requires the Minister to give consent through written authorization and it is hoped that the process of getting consent will result in due diligence to determine the circumstances why the mineral

⁹⁵ <https://www.newsday.co.zw/2016/02/05/rbz-moves-on-illicit-financial-flows/> accessed on 16 November 2016.

can not be beneficiated local. Even in those instances where consent is given, there are taxes that are imposed to discourage exportation without value addition.

In order to promote value and beneficiation, the Bill encourages the Minister to be proactive in identifying minerals that can be beneficiated economically in Zimbabwe and come up with the necessary terms and conditions. Furthermore, the hvnvåAB also makes

160 The other clusters are Food Security and Nutrition, Social Services and Poverty Reduction and Infrastructure and Utilities. 161 Section 307 A. provisions for the Minister to make incentives to promote the beneficiation of minerals in Zimbabwe ⁹⁶The Minister also has the power to declare any factory, refinery, smelter or treatment plant which is situated in Zimbabwe to be an approved beneficiation plant in relation to a mineral or mineral bearing plant. ¹²⁰ All these measures are aimed at promoting value addition and beneficiation. While the provisions on value addition and beneficiation are progressive they need to be supported by a clear policy and programme for implementation that are cognizant of the fact that value addition and beneficiation are a process and not an event and are dependent on other factors like power, infrastructure and other support mechanisms. It has to be done in stages. Section 307 A (3) should be rephrased to make sure that responsibility to value add minerals mined in Zimbabwe is the responsibility of the exporter. As it stands, it maybe interpreted as implying that third parties who access minerals from Zimbabwe in foreign countries would need to make application to the Minster to beneficiate such minerals.

3.12 Regulation of Miner—Farmer relations

Disputes between miners and farmers are very common in mining areas. This is due to the fact that minerals are subsoil resources and are often found on land that is under cultivation. Because of the perceived superior contribution of the mining sector to economic development, the Mines and Minerals Act provided that mining activities would take precedence over all other economic activities including agriculture. However, this situation seems to have changed dramatically as a result of the Fast Track land Reform Programme

⁹⁶ Section 307 A (5). ¹²⁰ Section 307 B (1).

(FTLRP) as most new farmers are a very powerful constituency in Zimbabwe that miners cannot run roughshod over them as they did in the past. Furthermore, as a result of FTLRP, there are now more farmers that miners have to contend and negotiate with unlike in the past when they were fewer. This situation is made worse by the fact that many new farmers are engaging in illegal mining on their farms and this results in conflicts when someone is allocated mining rights to the land.

To address conflicts between miners and farmers, the MMAB makes provisions for ground that is not open to prospecting.⁹⁷ Ground not open to prospecting includes land which has been bonafide cleared or ploughed or prepared for the growing of farm crops, ploughed land on which farm crops are growing, ploughed land from which farm crops have been reaped, for a period of three years from a date of completion of such reaping, land which has been bona fide prepared for the planting of such permanent crops as orchard or tree plantations, and land on which such crops have been planted and are being maintained.⁹⁸ It also includes ploughed land on which grass has been planted and maintained for harvesting, rotation of crops or stock feeding, for period of six years from the date of planting.⁹⁹ However, if the land is not utilized through the growing of farm crops or of such permanent crops that may include orchards, or tree plantations and within two years after having been bonafide cleared, ploughed or prepared, then that land will become open for prospecting.

Co-habitation between miners and farmers is further provided for in terms of section 81. It proposes to allow farmers to cultivate the surface of a mining location by allowing the occupier of any land on which a registered mining location exists to apply for permission to cultivate the land from the Registrar of the Cadastre. However, the cultivation is temporary and cannot be for the purpose of planting or establishing orchards, tree plantations or other long term, permanent crops.¹⁰⁰ While this provides a reprieve to farmers that are cultivating on land that has been registered under a mining title or right, the cultivation is temporary and is meant for crops that can easily be planted and reaped.

⁹⁷ Section 65.

⁹⁸ Section 71 (a)(b)(c)(d).

⁹⁹ Section 71 (e).

¹⁰⁰ Section 81 (2)(a)(i).

Additionally, the miner is required to fence off a mining location that is adjacent to pasture land. If the miner fails to fence off the area in the manner prescribed within the period that is specified by the Cadastre Registrar, the owner or occupier of the land can fence off the whole of the mining location at his own cost and recover it from the miner. This is likely to resolve tensions and conflicts between miners and farmers. Farmers usually lose their cattle, which fall in mined out areas that have not been fenced or rehabilitated resulting in serious economic loss.

3.13 Fiscal Provisions

Miners are required to make certain payments to Rural District Councils (RDCs). These payments are determined by the Minister of Mines who can do so with the approval of the Minister of Finance and Economic Development and after consultation with the Minister for Local Government. The MMAB provides that the Minister 'may by statutory instrument, require any miner of a registered mining location, or any class of such miners, to pay a specified sum at specified intervals to any local authority within whose area the registered mining location is situated , . 169 The payment of these certain payments is building on the provision of the Rural District Councils' Act, which makes provisions for the payment of levies, rates and other charges. ¹⁷⁰ The fact that the Minister of Mines and Mining Development has to get approval from the Ministry of Finance and consult with the Minister of Local Government is a welcome development and is in line with the tenets of the 2013 Constitution which advocates for consultation, participation and transparency. This will also come as a great relief to the miners who feel that some of the levies that are imposed on them are too high and are not as a result of participatory and consultative processes. This is likely to result in reasonable payments if done properly.

This provision is also in line with the principles of Public Financial Management, which are provided for in the Constitution. These include transparency and accountability, sharing of the burden of taxation fairly, sharing of revenue equitably and that expenditure must be directed towards the development of Zimbabwe and special provisions must be made for marginalized groups and areas. ¹⁷² Mining areas are among the most marginalized in terms of economic development and usually bear a disproportionate

168 Section 85 (A) (2).

169 Section 76 (1).

170 Sections 95 and 96 of the Rural District Councils Act [Chapter 29:13]. 171 Section 298.

172 Section ~~298(i)(a)~~

burden of mining costs. ¹⁷³ This is also in line with the founding values and principles, which makes provisions for the devolution and decentralization of governmental powers and functions. ¹⁷⁴ However, the concern here is that these "certain payments" are not defined and this may become arbitrary by Government as it looks for resources to improve the fiscal space both at the local and national level.

While these provisions are progressive, the MMAB misses a great opportunity for progressive taxation. This approach, which is the norm these days, gives the government a greater share of profits as revenues rises rather than having them fixed. This would have fulfilled one of the principles of Public Financial Management, which requires public funds to be expended prudently, economically and effectively. ¹⁷⁵ This would also have been in line with the provisions of the Africa Mining Vision which calls for self adjusting resources tax regimes ' which argument with increasing profitability and thus allow the State to garner windfall rents during commodity booms , . ¹⁷⁶ Furthermore, it should also have taken a step further by defining the effective ways on how these resources revenues generated through the payment of certain amounts by mining companies to local authorities should be managed to ensure that they effectively benefit the local communities in line with the constitutional provisions. The Constitution calls on the State to ensure local communities benefit from the resources in their areas ¹⁷⁷ and for the equitable sharing of national resources. The MMAB makes the mistake of equating local authorities with communities.

173 Zimbabwe Environmental Law Association. Mining within Zimbabwe 's Great Dyke: Extent, Impacts and Opportunities (2012). See also Zimbabwe Environmental Law Association Extractive Industries Policy and Legal Handbook: Analysis of the Key Issues in Zimbabwe's Mining Sector. The Plight of Mining Communities. Case Study of the Marange and Mutoko Communities (2010).

174 Section 3(2) (1).

175 Section 298(1)(d).

176 Africa Union (n19 above) 15. ¹⁷⁷ Section 13(4). ¹⁷⁸ Section 3(2)(i).

3.14 Women's Rights

While the negative impacts of mining activities affect communities generally, women along with children are affected most.¹⁰¹ The Constitution is alive to the unique challenges that women face in development issues including in mining. This explains why it calls for the facilitation of rapid and equitable development¹²⁶ and equal opportunities in development.¹⁰² Development will not be equitable without the involvement of women. Furthermore, the Constitution calls on the State to promote full gender balance in Zimbabwean society, and in particular the full participation of women in all spheres of Zimbabwean society on the basis of equality with men.¹⁰³¹⁰⁴ Additionally, the state is required to take measures, including legislative measures to ensure that both genders are equally represented in all institutions and agencies of government and at every level and women constitute at least half the membership of all Commissions and other elected and appointed governmental bodies established by or under this Constitution or Act of Parliament.¹³⁰¹⁰⁵

Despite these progressive constitutional provisions, unfortunately, there are very few provisions for women's participation in the mining sector in the MMAB. Section 6 establishes the Mining Affairs Board. The Bill provides that the Board shall consist of "six other members appointed by the Minister, with respect to whose appointments the Minister shall endeavor to secure gender balance"¹⁸⁵. (Emphasis added). However, apart from this provision, it is not clear how this is going to be realized or achieved with regards to women's participation in the mining sector. One such measure that can promote women participation in mining is through the establishment of a quota system, for example, in the allocation of mining rights so as to achieve the substantive equality concept that is provided for in the Constitution. The Constitution is very prescriptive that gender balance can be achieved through a quota system while the provision in the MMAB is not clear how this gender balance will be achieved. This lip service approach does not enhance gender balance or

¹⁰¹ Action Aid International Zimbabwe. When extractives come home: A report of an action research into the impacts of the extractive sector on women in selected communities in Zimbabwe with a focus on mining. Unpublished (2016). ¹²⁶ Section 13(1).

¹⁰² Section 13(3).

¹⁰³ Section 170) (a).

¹⁰⁴ Section ¹³⁰

Section ¹³⁰

¹⁰⁵ Section 6 (1) (e).

promote gender inclusivity in mining, a field traditionally regarded as the exclusive reserve for men only.

3.15 Children's Rights

Children, as with women, are among the most vulnerable and exposed social group in mining areas.¹⁰⁶ One of the most negative impacts of mining activities on children is through child labor. Child labour is forbidden by a number of international conventions.¹⁰⁷¹³⁴ Child labour is regulated by section 403 B of the MMAB. It empowers the Minister to reserve the right to revoke, cancel or withdraw any mining right or title once he or she contravenes the provisions of the Labor Act [Chapter 28:01) by employing child labour. Furthermore, any miner whose licence would have been revoked for using child labour in violation of the Labour Act will not be eligible to hold a mining right or title under this Act for a period of five year from the date of such revocation, cancellation or withdrawal.¹⁰⁸

This is a very important provision, which sends a clear and deterrent message to miners that child labour in the mining sector is prohibited, and any contravention of it will be dealt with severely. However, the concern is that the focus here seems to be on LSM and SSM, as the Bill does not make provisions for artisanal miners. This is a missed opportunity because Zimbabwe has no history of rampant child labour in LSM and SSM. By contrast, this is very rampant in the artisanal mining sector, which ironically is not regulated by the Bill.

3.16 Compensation

One of the biggest problems that are associated with mining activities is compensation of communities negatively affected by mining activities. Common problems that are associated with mining activities include involuntary displacement and resettlement and violation of communities' Environmental, Economic and Cultural Rights (EESCR) without

¹⁰⁶ United Nations Children's Fund. *Children's Rights and the Mining Sector*. UNICEF Extractive Pilot (2015).

¹⁰⁷ These include Convention on the Rights of the Child, United Nations Convention on the Right of the Child and the African Charter on the Rights and Welfare of the Child. ¹³⁴ Section 403B(a).

¹⁰⁸ Section 403B (b).

fair and adequate compensation.¹⁰⁹¹³⁷ The N'MAB makes provisions for compensation. It provides that:

Any owner or occupier of ground who is injuriously affected by the affected exercise of any right under any mining rights or title granted under this Act shall be entitled to recover compensation from the person to whom the mining rights or title was granted or in whose favour the mining rights or title was granted or in whose favour the mining rights or title was made in such amount as maybe agreed upon or, failing such agreement, as shall be determined by the Administrative Court¹⁹¹

The compensation shall be limited to direct and proven loss. Compensation is likely to be enhanced by the provisions of Section 85 of the Constitution, which provides for expanded locus standi. Public Interest Litigation (PIL) based on this provision is likely to be mounted by the victims themselves or on their behalf for compensation for any kind of loss occasioned by mining.

While this provision is good, it falls short of the provisions of the best practices under international standards. The United Nations Basic Principles and Guidelines on Development Based Evictions and Displacement¹¹⁰ are a standard-bearer with regards to involuntary displacement and resettlement. These Principles and Guidelines entail that when people are involuntarily displaced as a result of development projects like mining, they are paid fair and just compensation for any losses that they may suffer including personal, real or other property or goods.

At the regional level, there are also better provisions for compensation. The Kenyan Mining Act makes provisions for Principles of Compensation.¹³⁹ Section 153 (1) (e) provides that: 'A demand or claim for compensation maybe made to the holder of the mineral right to pay prompt, adequate and fair compensation to the lawful owner, occupier or user of the land in accordance with the provisions of this Act'. (Emphasis added).

¹⁰⁹ Zimbabwe Environmental Law Association (n 171 above).

¹³⁷ Section 85 B.

¹¹⁰ United Nations. Annex 1 of the Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living. All-IRC 4/8. ¹³⁹ Part IX, Surface Rights Compensation and Disputes.

To strengthen the need for fair, adequate and prompt compensation, the Act makes it a prerequisite for compensation to be paid before mining activities commence by providing that "a holder of a mineral right shall not commence mining of minerals unless the lawful occupier, owner or user of land is compensated , .¹⁴⁰

Zambia also has an equally progressive provision on compensation. The Zambian Mines and Minerals Development Act provides compensation for:

- a) Any harm or damage caused directly or indirectly by the mining or mineral processing to the economy or social cultural conditions
- b) Any negative impact on the livelihood or indigenous knowledge systems or technology of any community
- c) Any disruption of damage to any production or agricultural system
- d) Any reduction in yields of the local community
- e) Any air, water or soil contamination or damage to biological diversity
- f) Any damage to the economy of an area or community
- g) Any costs and medical expenses
- h) Any disability suffered; and
- i) Any loss of life¹⁹⁵

Benchmarked against these, the Zimbabwean compensation provision provided in the MMAB falls very short of international and regional best standards. The major weakness of the N'WIAB is that it does not make the discussion and finalization of compensation a prerequisite before communities are involuntarily displaced and relocated which is also a major flaw of the current MMA. Lack of clear Principles and Guidelines have resulted in haphazard involuntary displacement and resettlement in Zimbabwe depending on who is carrying it out. These weaknesses were very evident in the case of Malvern Mudiwa and Others v Mbada Mining Private Limited and Others.¹⁴¹ This was an urgent chamber application on behalf of Chiadzwa Community Development Trust (CCDT) by ZELA who among other things, wanted compensation issues to be discussed and finalized before they were relocated. With regards to compensation, the judge had this to say:

The respondents had not refused to pay compensation, although no agreement had been reached on the amount of compensation. In the event of a deadlock in

¹⁴⁰ Section 153 (7).

¹⁹⁵ Section 87 (9).¹⁴¹
HC 6334/09.

negotiations, the applicants were entitled to approach the Administrative Court for Adjudication in terms of section 80 of the MMA.

Essentially, the judge was saying that the applicants were not contesting relocation per se but the circumstances under which they were being relocated as they did not know the amount of money they were going to be paid. While it is true that the MMA does not require compensation issues to be discussed and finalized before communities are relocated, therein lies its weakness and this is what the MMAB should have addressed. Once communities are relocated, their limited negotiating power is annihilated completely. That is why the Kenyan position of no compensation no mining is a masterstroke. In the Chiadzwa case, communities were eventually involuntarily displaced and relocated before compensation issues were finalized. Some of the diamond mining companies have since folded as result of the consolidation of diamond mining in the Chiadzwa Diamond Fields. Meanwhile the communities that were relocated have not yet been compensated and will never be compensated despite Government's and mining companies' promise to do so. Involuntary displacement, forcible relocation and compensation issues can be greatly enhanced through the concept of Free, Prior and Informed Consent (FPIC). Under the current MMA and also reflected in the NINIAB, the RDCs are expected to express the communities' views and concerns on many issues including relocation based on the assumption that as the administrators of communal land where communities dwell, they know what is best for them when it comes to development issues including mining. However, the best practices on involuntary displacement and relocations are moving towards FPIC. FPIC is a principle, which provides that a community has the right to either give or withhold consent to proposed projects including mining, that may affect the access to the land they customarily own, occupy or otherwise use.¹¹¹ Should the affected community's consent not be granted, the State should not grant a permit for the proposed mining activity to commence until such consent is granted. In light of the concept or principle of FPIC, there therefore need for the MMAB to state in clear and unambiguous terms, the need to consult with both the affected communities and the RDCs directly regarding mining projects rather than to make decisions based on the consultations with the RDCs only as is the usual norm.

¹¹¹ International Alliance for Natural Resources Model Law on Mining on Community Land in Africa (2016) 17.

4. Recommendations

From the analysis of the Mines and Minerals Amendment Bill benchmarked against a number of international, regional and national best practices a number of recommendations emerge. The Government must take these recommendations into consideration before the MMA is finalized into law, or in the near future when considering necessary changes and modification of the system established by primary mining legislation.

4.1 Development of a new and comprehensive Mines and Minerals Act

The first recommendation relates to the MMA, the legislation being amended by the MMAB. The MMA has outlived its usefulness and should be repealed and replaced with a new piece of legislation that is in tandem with stakeholders' aspirations in the mining sector. As already noted, there are a number of stakeholders that are interested in the mining sector and these should be embedded in the principal law governing the sector. Zimbabwe has repealed whole pieces of legislation in the past, and examples in the recent past include the repeal of the Natural Resources Act, which was replaced by the Environmental Management Act, and the Lancaster House Constitution, which was repealed and replaced by a new Constitution in 2013. After many fits and stops through amendments, the Government decided to take the bull by its horns and came up with a new Act and a new Constitution. The same root and branch approach is required to deal with the fundamental flaws of the MMA rather than to try and patch them as what the MMAB attempts to do. The Draft Minerals' policy was very clear on what needs to be done. It provides a roadmap and that's the pathway that needs to be followed.

4.2 Alignment with the Africa Mining Vision

Should the Government of Zimbabwe decide to address the myriad of problems in the mining sector through an amendment as seem to be the case with the MMAB, then at the very least it should be aligned with the Africa Mining Vision and international best practises. The African Mining Vision is blueprint on how African countries, Zimbabwe include, can develop economically from their significant and diverse mineral resources. The African Mining Vision is not about mining only, but about mining and its contribution to economic development and this is very clear as it calls for 'transparent, equitable and optimal exploitation of mineral resources to underpin broad-based sustainable growth and

socio-economic development'. Unlike other mineral resource blue prints like the Natural Resources Charter and the EITI, AMV is a homegrown initiative by African Governments and States and cannot be tainted by imperialist connotations. There is therefore no reason whatsoever why Zimbabwe should shy away from it, more so when the AMV 's technical arm, the Africa Minerals Development Center (AMDC) is ready to provide both technical and financial support to those countries that are undergoing legal and policy reforms. The reform of the N/fNfA through the MMAB could learn a lot from the Draft Minerals Policy, which was anchored on the AMV.

4.3 Access to information

Access to information provisions can be strengthened through specific provisions on access to information in the mining sector rather than rely on provisions in the Constitution and the Access to Information and Protection of Privacy Act (AIPPA). The MMAB should therefore contain a specific Right to Information provision which require the Minister to make any information relating to minerals available to any member of the public, local or foreign who has an interest in mining activities and investment. Access to information can be further improved by either reviving the Zimbabwe Mining Revenue Transparency Initiative (ZNfRTI) or by adopting the World Bank's EITI. The ZMRTI was an initiative of the Government of National Unity, which was viewed as the first step on Zimbabwe joining the EITI. Countries that have adopted the EITI like Ghana, Zambia, Mozambique, Liberia and Nigeria provide better access to information to stakeholders

4.4 Compensation

Provisions on compensation should be improved for those that are affected by involuntary displacement and resettlement and other inconveniences associated with mining activities. Those that are affected should be paid fair and adequate compensation promptly and compensations issues should be discussed and finalized before mining activities commences and communities are involuntarily displaced and relocated. The Zambian and Kenyan positions on payment of compensation are instructive and provide very good guidelines on how compensation can be done effectively. The Zimbabwean provision in the MMA and reflected MMAB leaves a lot to be desired and is the source of great suffering to communities who more often than not have been evicted and relocated without being fairly compensated by mining companies.

4.5 Broad Participation in the Mining Affairs Aboard

There is need for broad representation of all the stakeholders that have an interest in mining activities in the mining policy and decision-making bodies. The MAB is one of the most important policy and decision bodies in the mining sector. Currently, its representation as reflected in the MMAB is mainly comprised of officials from the Mines Ministry while other important stakeholders are conspicuous by their absence. The missing stakeholders include important Government Departments and Ministries like the Ministry of Environment, Water and Climate and the Zimbabwe Environmental Management Agency, the Ministry of Finance and Economic Development and ZINIRA, Ministry of Local Government and traditional leaders, CSOs and CBOs. The failure to include other stakeholders is very much out of tune with the trends in mineral resource governance as reflected in the EITI and the African Mining Vision. The concern here is that while these important stakeholders are not participants in the MAB, its deliberations and decisions have significant impacts on them. While it may be argued that their concerns and views will be taken into account through representative democracy by those that are there, it must be noted that there is now a move towards participatory democracy. International best practices require each stakeholder in the sector to have its own representative to ensure that their concerns are taken on board in the policy and decision making process.

4.6 Locus Standi

There is need to operationalize the expanded locus standi provided in the Constitution in the MMA through the MMAB. Expanded locus standi is very important for Public Interest Litigation (PIL). Expanded locus standi will enable those stakeholders whose rights have been negatively impacted either by the policy and decision-making processes or mining activities to vindicate their rights in the courts. While locus standi is provided for broadly in the Constitution under section 85, this could be enhanced through specific locus standi provisions in the MMAB. The NWIAB can borrow from the provisions in the Zambian Mines and Minerals Development Act. With regards to locus standi, it provides that. A person, group of persons or a private or State organization may bring a claim and seek redress in respect of the breach or threatened breach of any provision relating to damage to the environment, biological diversity, human and animal health or to socio-economic conditions —

- a) in that person's or group of persons' interest
- b) in the interest of or on behalf of, a person who is, for practical reasons unable to institute such proceedings ;

- c) in the interest of , or on behalf of , a group of class of persons whose interests are affected
- d) in the public interest ; and
- e) in the interest of protecting the environment or biological diversity. ¹¹²

The amelioration of costs can also enhance PIL. The standard procedure is that a losing party pays the legal costs of the successful part. This is a very big financial disincentive for PIL as those that may be interested to pursue PIL cases are held to ransom by fear that they will be forced to pay the costs of the successful part should they lose the case even in those cases in which they were bona fide in carrying out legal action. The Zambian Act provides for the amelioration of costs.

It provided that 'costs shall not be awarded against any of the persons specified under section 7 who fail in any action if the action was instituted reasonably out of concern for the public interest or the interest of protecting human health, biological diversity and in general, the environment. ¹¹³ The amelioration of costs is very necessary when consideration is taken into account of the progressive provisions of the MMAB on the environment and the threats posed by riverbed mining. This will spur PIL.

4.7 Clear gender provisions

Gender parity should be seriously considered in the mining sector, and the MMAB provides an opportunity for gender inclusivity in mining decision making and policy arenas. The gender provisions in the MMAB are not satisfactory at all. Apart from the commitment to ensure balance in the MAB, it is not clear how gender considerations and specifically women's participation in the mining sector will be achieved. The MMAB should explore how certain provisions can be leveraged to ensure that the call for gender equity and participation including in the mining sector is achieved.

4.8 Recognition of artisanal miners

The N'WIAB must recognize artisanal mining. While it recognizes and regulates smallscale mining, one of the biggest weaknesses is the non-recognition of artisanal miners. The

¹¹² Section 87 (7)

¹¹³ Section 87(8)

nonrecognition is despite the important role that they play in economic development especially in the gold sector, which has been acknowledged by the Government and various policy pronouncements to the effect that they were going to be recognized. The Africa Mining Vision calls for the recognition and regulation of Artisanal and Small Scale Mining (ASM). Both the Kenyan and Zambian mining laws specifically recognizes and provides for ASM while one of the objectives of the draft Minerals Policy is to achieve a vibrant, environmentally friendly ASM sector. By not recognizing and regulating artisanal mining, the provisions of the MMAB are a continuation of the current MMA, which criminalizes artisanal mining.

4.9 Local Content Development

The MMAB must include Local Content Development (LCD) so as to maximize on local employment, local procurement and local enterprise development. This will result in the maximization of non-fiscal benefits that accrue to the country as this integrates mining business into the local economy. The Bill currently does not make any provisions for LCD and fails to establish any procedures for handling local content programmes and monitoring their implementation. The failure by the Bill to include LCD is very surprising for a country that has made a number of policy and legal pronouncements on it in the form of the Indigenization and Economic Empowerment Act, the Special Economic Zones Act, Statutory Instrument 64 of 2016¹¹⁴ and ZIMASSET. The MMAB is an opportunity to concretise LCD in the mining sector and this missing. Inspiration can be derived from the Zambian Mines and Minerals Development Act which makes provisions for LCD through preferences for Zambian products, contractors and services and employment of citizens.¹¹⁵

4.10 Compulsory competitive allocation of known mineral resources

The must make competitive allocation of mineral rights mandatory for known resources. Currently it is optional. This will ensure that the country derives maximum possible benefits from the exploitation of its vast and significant mineral resources. This is also in line with best international and regional practices and also in line with the provisions of section 315 of the Constitution, which calls for competitive allocation of mining rights.

¹¹⁴ Statutory Instrument 2016:64 of 2016 Control of Goods (Open General Import License)(No.2) (Amendment) Notice, 2016.

¹¹⁵ Section

4.11 Clear FPIC Provisions

The MMAB must make clear provisions on FPIC especially with regards to involuntary displacement and relocation as a result of mining activities and the resultant compensation.

4.12 Development of a model contract law

The MMAB must make provisions for the development of a model contract and creation of a single licencing authority. One of the reasons why Zimbabwe has not derived maximum value from its minerals resources is as a result of poorly negotiated contracts. This is as a result of factors among them corruption and incompetence by the negotiators due to lack of experience and expertise. Negotiating a mineral's contract requires skill and expertise which most of our negotiators lack hence the poor contracts that unlock value to individuals rather the country. One way of going around this problem as Zimbabwe tries to build a critical mass of expertise, is to have a model contract. Examples of model contracts include the International Bar Association's Model Mining

Development Agreement. The African Legal Facility under the African Development Bank can help in the development of a model contract. This can be tied to the creation of a single licencing authority as proposed by the MMAB 2007. This will streamline the licencing procedures and reduce room for discretionary decision-making, which increases chances of corrupt practices and inefficiency.

4.13 Human Rights Impact Assessments

The N'ft'lAB should in addition to Environmental Impact Assessments require Large Scale Miners to conduct a Human Rights Impact Assessments [HRIAs). HRIAs are different from EIAs in that that they are based on binding international human rights laws to which governments have voluntarily submitted themselves through and participation in international treaty negotiations. They measure the extent to which the project complies with human rights both in terms of content and processes.

4.14 Mandatory Community Development Agreements

The WY'IAB must make provisions for mandatory Community Development Agreements as is the case under the Nigerian Minerals and Mining Development Act or alternatively make Community Share Ownership Schemes or Trusts (CSOS/Trusts) mandatory. This will

address the current challenges that are there with regards to the Social Licence to operate and Corporate Social Responsibility (CSR).

4.15 Conclusion

This research has reviewed the Mines and Minerals Amendment and highlighted its progressive provisions, which are known as its promises as well as its negatives, which are known as its pitfalls. While the MMAB has some very good provisions, which are certainly, and improvement on the current Mines and Minerals Act, it also has some very worrying provisions. Overall, the research has argued that the reforms of the Mines and Minerals Act which are being proposed by the MMAB are not good enough or do not go far enough to address the fundamental flaws that are currently in existence. What is needed are comprehensive reforms of the Mines and Minerals Act to ensure that the potential of the mining sector is realized. Comprehensive reforms are only possible through the development of a new Mines and Minerals Act as was envisaged by the draft Minerals Policy of 2012.

A new comprehensive Mines and Minerals Act should be preceded by wide consultation of all the stakeholders that are interested in the mining sector and should be based on best regional and international best practices that include the Africa Mining Vision, the Natural Resources Charter, the Extractive Industries Transparency Initiative and aligned to the Constitution which has some very progressive provisions. It is only through such a process that the transformative and development al potential of the mining sector as envisaged by the Africa Mining Vision will be fully realized. It is hoped that as discourse on the ongoing legal reforms, this research paper, its findings and recommendations can be part and parcel of those discussions.

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