



# **EVERYTHING YOU EVER WANTED TO KNOW (AND THEN SOME) ABOUT ZIMBABWE'S INDIGENISATION AND ECONOMIC EMPOWERMENT LEGISLATION BUT (QUITE RIGHTLY) WERE TOO AFRAID TO ASK. [Second Edition, May 2011<sup>1</sup>]**

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## **Introduction.**

The Indigenisation and Economic Empowerment (General) Regulations, 2010, Gazetted on the 29<sup>th</sup> January, 2010, with an effective date of 1<sup>st</sup> March 2010<sup>2</sup>, have generated heated debate. The proclaimed objective<sup>3</sup> of the Regulations is that every business with an asset value of or above a prescribed amount<sup>4</sup> must, within five years, “cede a controlling interest of not less than 51% of the shares or interests therein to indigenous Zimbabweans” unless a lesser share, or longer period within which to achieve the indigenisation, is justified.

An “indigenous Zimbabwean” is defined in the enabling Act, the Indigenisation and Economic Empowerment Act [Chapter 14:33] as:

*any person who, before 18<sup>th</sup> April, 1980<sup>5</sup> was disadvantaged by unfair discrimination on the grounds of his or her race, and any descendant of such person, and includes any company, association, syndicate or partnership of which indigenous Zimbabweans form the majority of members or hold the controlling interest.<sup>6</sup>*

Given the racist policies of the pre-independence governments, this definition would exclude almost every white person and include every non-white person<sup>7</sup>. In short then, the proclaimed intention of the Regulations is that all foreign-owned businesses and all businesses owned by white Zimbabweans or permanent residents valued at a prescribed amount cede a controlling 51% share to black Zimbabweans.<sup>8</sup>

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<sup>1</sup> This edition includes the amendments made to the regulations to date (the last being S.I. 34 of 2011) and commentary on General Notice 144 of 2011 pertaining to the mining industry. It also updates, expands upon and in some places corrects or adjusts comments made in the first edition.

<sup>2</sup> Section 1(2) of the Regulations.

<sup>3</sup> Section 3(a) and (b) of the Regulations.

<sup>4</sup> The threshold was widely assumed to be \$500 000, and the first edition of this paper stated as much. In fact, as discussed below, no thresholds have as yet been gazetted as required. The \$500 000 was inferred from the fact that only businesses with a net asset value of this amount are required to submit “primary documents” in terms of section 4 of the general Regulations. This amount is cross-referenced in sections 7 and 8, and thus the threshold may be held to have been set for companies involved in demergers or unbundling, and those where the majority shareholding is relinquished – but only these companies.

<sup>5</sup> The date of Zimbabwe's independence.

<sup>6</sup> Section 2(1). The Act was first gazetted as a Bill in June 2007 and passed through Parliament in October, a few months ahead of the general election in which ZANU PF lost its majority in parliament. There is little doubt that such a Bill would not be passed by the current Parliament.

<sup>7</sup> One can conceive of hypothetical examples where a white person might be included. For example, only whites were initially drafted into the Rhodesian army, and many fled the country as a result. However, disadvantage to whites might be regarded as sufficiently exceptional to be disregarded for these purposes.

<sup>8</sup> An attempt to accord a precise meaning to this appears below.

## **Justifications**

The furore which accompanied the publication of these Regulations lies, in part, in the extremely tenuous political, ideological, and economic justifications for such a policy.

### **a) Ideology?**

Land seizures in Zimbabwe which commenced after 2000 have some ideological traction in President Robert Mugabe's claim that the policy merely restores land, misappropriated from autochthonic Zimbabweans without recompense, to the rightful owners (even though in reality the vast majority of the seized land was bought after independence<sup>9</sup>).

Similarly, an ideological argument can be developed that Zimbabwe's mineral resources belong to Zimbabweans as a whole rather than multi-national companies which leave Zimbabweans with but a large hole in the ground when the resource is depleted. The concomitant of this argument is that it is Zimbabweans as a whole that should benefit from the exploitation of mineral resources within Zimbabwe. This, in turn, suggests full or partial nationalisation of mining companies. However, there is no provision in the enabling Act for state control of mineral resources for the benefit of Zimbabwe as a whole. In fact, the Government is omitted from the definition of specified beneficiaries – indigenous Zimbabweans. Public companies and “any other business” are required to indigenise. This requirement seems to include state enterprises. The objective of the Act thus appears to be to place these mineral resources into the hands of individuals. However, a General Notice (114 of 2011) published at the end of March 2011 has been read as effectively nationalising mining enterprises through a requirement to transfer shares to state owned institutions.<sup>10</sup> The Notice thus sits uncomfortably with the Act, as is discussed below. Regardless of the intent of the Act and interpretation of the Notice, the effect on capital flight is unlikely to be any different if the policy were one of (partial) nationalisation.<sup>11</sup> In any event, issues relating to the exploitation of mineral resources would have been better addressed by amendment of existing legislation dealing with mines and minerals or an appropriate fiscal regime.

### **b) Redressing Historical Injustices?**

It is difficult to advance any ideological justification similar to that for mineral resources as an explanation for the wide range of people and businesses caught in the net of the Regulations. To give but one example, for what reason should a white Zimbabwean, born at independence, who has successfully established a business in Zimbabwe after completing his or her education, and after much toil, sweat and competition with ZANU PF aligned entrepreneurs (who may have gained favoured access to government tenders and scarce foreign exchange) be compelled to transfer 51% of the fruits of his or her labour, possibly, and even probably, to those self same competitors? What debt does he or she owe to the “indigenous” Zimbabweans who will benefit from the transfer of the shareholding? Why should he or she carry the burden of empowering black Zimbabweans? Attempts to answer these questions suggest that all Zimbabwean whites and foreigners, regardless

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<sup>9</sup> 80% of white commercial farmers on the land purchased their farms after 1980, and almost all of them had letters “of no present interest” (i.e. letters indicating that the government had declined to exercise its option to purchase the land) *Adding Insult to injury. A Preliminary Report on Human Rights Violations on Commercial Farms, 2000 to 2005*. Zimbabwe Human Rights NGO Forum and the Justice for Agriculture Trust [JAG] in Zimbabwe p7. However, no study has been done to determine how many constituting the 80% had the means to buy the land as a result of previous familial landholdings which could be traced historically to an iniquitous allocation of land by the colonial governments.

<sup>10</sup> *Govt Won't Pay for Mining Shares: Kasukuwere* <http://www.newzimbabwe.com/> 17.04.11.

<sup>11</sup> However, the Regulations allow for foreign investments to relinquish less than the 51%, allowing political expedience to play a significant role in relation to foreign owned enterprises – see below.

of their backgrounds and benefit or otherwise from past privilege, owe an indeterminate and indefinite debt to black Zimbabweans, simply on account of their race or alien status. A policy with this as its rationale perpetuates the very inequity (unfair discrimination on the basis of race or origin) which is supposedly the *raison d'être* of the Regulations.

In this regard, it is worth noting that the definition of “indigenous” in the Regulations differs markedly from the commonly understood or dictionary definition of the term:

*born of or produced naturally in a region; belonging naturally.*

The term “indigenous” for purposes of the Act, repeated in the Schedules to the Regulations, thus has been chosen, not because it is the correct word to use, but to exploit insidious political and racial considerations. By excluding whites from the definition of “indigenous” in the Act, the suggestion, when combined with the dictionary definition or common understanding of the term, is that whites do not “belong naturally” in Zimbabwe. The correct word to describe the original inhabitants of a geographical area is “autochthonous” rather than “indigenous”, though such a term could be construed as excluding the Ndebele, who arrived in Zimbabwe only about 60 years before white colonialists.

Remarkably, whether one is to be considered “an indigenous Zimbabwean” is determined under the Act by the criterion of having suffered discrimination on account of one’s race before 18<sup>th</sup> April, 1980. There is no need for such discrimination to have taken place in (pre-independent) Zimbabwe or for the person to be a Zimbabwean, as the definition specifies “any person” rather than “any Zimbabwean citizen” as it ought. A black South African discriminated against before 18<sup>th</sup> April, 1980, under the system of apartheid in South Africa, thus qualifies as “an indigenous Zimbabwean” in terms of the Regulations and is entitled to the benefits of empowerment under the Regulations - although to define such a South African as “an indigenous Zimbabwean” is oxymoronic. The position applies in a less absurd manner if the South African who suffered discrimination in South Africa has acquired Zimbabwean citizenship. The effect of the definition is clearly not what the Legislature intended, but it is certainly what the Act provides.

The most accurate term to give effect to the stated intention of the Act in the definition of indigenous is “non-white”. However, the title “Non-White Economic Empowerment (General) Regulations” probably would be unpalatably, though not entirely inappropriately, redolent of the terminology of apartheid South Africa. Merely to state the title makes it quite clear why the correct, but imprecise, term “non-white” was eschewed in favour of the incorrect and euphemistic term “indigenous”. Political considerations will determine who is, and who is not, deemed to be “non-white” (and thus having suffered discrimination) for the purpose of being considered indigenous as defined by the Act. The spectre of legislation defining “white” and “non-white” and the deployment of apartheid South Africa’s notorious “pencil test”<sup>12</sup> is thus unlikely even if, as a matter of jurisprudential logic, necessary. Apartheid style scenarios emerge elsewhere. For example, it is reasonable to assume that the vast majority of buildings in Harare’s central business district are owned by companies rather than individuals. Since the objective of the legislation is that the majority shareholding in these companies is held by non-white Zimbabweans, virtually the entire CBD will be an area for non-white controlled companies only –the Group Areas Act in apartheid South Africa had a similar effect.

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<sup>12</sup> Those responsible for placing people into racial categories for the purposes of South Africa’s apartheid legislation were often at a loss as to whether a person should be classified as being of mixed race (“coloured”) or white. Bureaucrats are alleged to have adopted the arbitrary and offensive practice of placing a pencil in the hair of the person under consideration. If it fell out, the person was deemed to be white rather than coloured. The result was often that children from the same family were placed into separate racial categories with devastating consequences.

The racially neutral wording of the definition of indigenous Zimbabwean fools none as to its racially biased effect. It is analogous to legislation which claims to be impartial on the basis that "*its majestic equality forbids rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread.*"<sup>13</sup>

The claim that it is appropriate that black Zimbabweans should own a controlling share of Zimbabwe's economy<sup>14</sup> does not address this issue or justify the proposed means to achieve this. While some representatives of lobbying organisations such as the Affirmative Action Group have stated that the 51% share or controlling interest will have to be paid for at a fair price<sup>15</sup>, this is not in fact provided for in the Regulations or Act. In fact, as will be seen below, the words "sell" and "buy" have been studiously avoided in both the Act<sup>16</sup> and Regulations. The original requirement was that each non-indigenous company "cede" 51% of the shareholding "therein" to indigenous Zimbabweans. After it was pointed out that the term "cede" did not require that payment would be made for the shares, the first substantial amendment<sup>17</sup> to the Regulations replaced the word "cede" with "dispose of". This alteration was meaningless in that it did not change the sense of the provision at all, and, at the same time, meaningful in that it clearly signalled the reluctance of the Minister to close the door on the possibility of requiring the compulsory transfer of shares without payment. The General Notice relating to mining, referred to above, appears to be further evidence of this intention.

It is clear that although the legislation has been couched as "indigenisation", suggesting a restoration of "sovereignty" and ownership to Zimbabweans, the definition of "indigenous" makes it clear that the law would be more correctly described as "black economic empowerment" legislation. This is different to "indigenisation" as the emphasis is upon correcting imbalances caused by past racist policies, rather than ownership and sovereignty. The drafters of the laws may have felt it impolitic to title the legislation as "black economic empowerment" some 30 years after independence, even though this would have more accurately reflected its substance.

### **c) Empowering the Majority?**

Even if it had been made clear that controlling shares in a business will need to be paid for at market rates, if the threshold for acquisition pertains to businesses with a net asset value of or above \$500 000 (which appeared to be the threshold originally implied by the Regulations<sup>18</sup>), a 51% share means that the indigenous Zimbabwean, or consortium of indigenous Zimbabweans, would need to have capital of at least \$255 000 and the business acumen required to control a company effectively. Since the majority of Zimbabweans (whom the Minister of Youth Development, Indigenisation and Economic Empowerment claims are the intended beneficiaries) do not have these attributes, the Regulations appear to miss their target. For those that do have these qualities, it is apparent that they have the financial wherewithal and know-how to start their own business operations without the need to descend cuckoo-like upon those already established. Furthermore,

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<sup>13</sup> A well known quote by Anatole France.

<sup>14</sup> Saviour Kasukuwere quoted in the Herald, 08.03.10 *No Going Back on Indigenisation: Govt.*

<sup>15</sup> For example AAG's Supa Mwandiwanzira on BBC's Focus on Africa 01.03.10 and AAG's Tafadzwa Musara *Empowerment our Divine Right* The Zimbabwe Independent 11.03.10.

<sup>16</sup> This applies to the main body of the Act relating to indigenisation. The word "sell" for example does appear in the Schedule dealing with the powers of the Board in relation to the Unit Trust Account established by the Act.

<sup>17</sup> S.I. 116 of 2010. S.I. 95 of 2010 made changes to section 4 alone, which are discussed briefly below.

<sup>18</sup> The general Regulations do not in fact set a threshold - as stated in footnote 4 above. The \$500 000 must be implied from the fact that only companies above this threshold are obliged to submit an IDG 01 form and indigenisation plan (the primary documents) and is cross referenced in sections 7 and 8. Section 5A of the general Regulations allows the Minister to gazette such thresholds. This has not been done, though the provisions of the General Notice pertaining to mining have been read as inferring that the threshold in the case of mining enterprises is \$1. This is discussed further below.

those with the necessary financial resources and expertise, will, in most instances, quite evidently already have managed to overcome, in the 30 years since independence, any historical disadvantages suffered by themselves or their families without the (further) assistance of the post-independence state.

South Africa's Broad Based Black Economic Empowerment Act<sup>19</sup> is crafted as legislation intended to narrow the Gini co-efficient in that country.<sup>20</sup> However, it has been subjected to criticism as having been manipulated to enrich a political elite and “tenderpreneurs”.<sup>21</sup> Unlike the South African legislation (which can be manipulated to elite advantage), Zimbabwe's empowerment legislation contains several clauses which seem specifically designed to achieve elite enrichment – notwithstanding the Minister's protestations that it is “intended to ensure sustainable development of the economy and fight poverty among the majority of the people”.<sup>22</sup> There are several clauses in the Regulations which give rise to this suspicion.

The most obvious is section 15(1). This section requires the Minister to maintain a database of people who are potential beneficiaries of controlling interests in non-indigenous businesses. No criteria are set out for the purpose of determining who ought to be entered on the database and who ought to be excluded. The legislation merely provides that “if the Minister is satisfied” that the application is made “in good faith” the applicant “shall be registered in the database”. This leaves the Minister with a fairly broad discretion as to who may be put forward as a participant in an indigenisation scheme. But more importantly, the provision concerning the maintenance of a database must be read with section 5 of the Regulations, which gives the Minister a largely unfettered discretion to decide whether to approve or reject an indigenisation plan or to attach conditions to such a plan. This arrangement leaves the possibility of plans being accepted and rejected on the basis of “*who*” rather than “*what*” is proposed in the indigenisation plan. Rejection may be based upon the extent to which the terms of indigenisation are beneficial to the person identified as a partner rather than whether they meet the criteria set out in the Act or Regulations.

Although the exercise of the discretion ought to depend upon compliance with legislated indigenisation requirements,<sup>23</sup> cronyism and corruption in this regard will be extremely difficult to prove or prevent. By placing the procedure in the hands of the Minister rather than the Board<sup>24</sup>, and by giving the Minister such a broad discretion, the legislation thus appears purposely designed to allow the Minister the possibility of compelling, against the threat of rejection of an indigenisation plan, the inclusion of selected individuals identified by the Minister in indigenisation plans, and the inclusion of such persons only on terms which the Minister deems sufficiently “beneficial”.<sup>25</sup> Oddly, and significantly, no appeal lies against a Ministerial decision to reject an indigenisation plan other than in limited specified circumstances (Group 2 businesses, defined below).<sup>26</sup>

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<sup>19</sup> No 53 of 2003.

<sup>20</sup> The Gini co-efficient is the index of the wealth gap between the rich and poor in a society.

<sup>21</sup> See for example Business Day *Government Keeps Soil Fertile for Tender Fraud* 11.03.10.

<sup>22</sup> Saviour Kasukuwere, *ibid*.

<sup>23</sup> Section 5(1).

<sup>24</sup> Established by Part III of the Act.

<sup>25</sup> In a recent statement, the Minister has indicated that the indigenisation proposals for each business will be assessed by the Board, notwithstanding the provisions in the Regulations – see *No Going Back on Indigenisation* The Herald 05.05.11. However, there is credible anecdotal evidence of the Minister personally introducing people to companies as individuals “prepared to help a business indigenise”. The introduction has been preceded by threatening letters from the Ministry to the business concerned falsely claiming criminal sanctions apply to the business due to its non-indigenous status. Threatening letters from the Ministry have also been sent to companies at the instigation of individuals wishing to take them over, who then approach the companies and offer “to help” the company indigenise.

<sup>26</sup> Section 20 of the Act. In relation to indigenisation plans, an appeal to the Administrative Court is only available for transactions under section 4(2) of the Act. Section 4(2) concerns ministerial disapproval of indigenisation plans pursuant to a proposed foreign investment, mergers, de-mergers restructuring, unbundling, and relinquishment of a controlling interest in a businesses – sections 3(1)(e)(b)(c)(d) of the Act respectively. The last is confusing as in

With lucrative white farming enterprises no longer available for distribution as largesse (this resource having been depleted), the Regulations thus create the conditions for a new source of patronage for the ZANU PF<sup>27</sup> elite and a weapon against businesses and individuals perceived to support the MDC<sup>28</sup> ahead of the next elections.

There is a passing nod to the empowerment of “the majority” in the form of provisions for employee share ownership schemes.<sup>29</sup> A disincentive for businesses that might wish to consider this route was removed by the amendment to the Regulations in June 2010.<sup>30</sup> Whereas originally the Minister was not obliged to consider the shares held by employees as part of the minimum 51% shareholding, or to consider the full extent of the employee shareholding as part of the 51%, the Regulations now make it mandatory for him to do so.<sup>31</sup> A second disincentive in the requirement that, where employees were granted a shareholding of more than 20%, the employee shareholding scheme would not be given any consideration whatsoever unless 50% of the participants in the employee shareholding scheme comprised women, or the disabled, or a combination of the two, was also removed.<sup>32</sup>

#### **d) Similar Legislation Exists in South Africa?**

South Africa's Black Economic Empowerment (BEE) legislation is very different from that in Zimbabwe. Under the BEE Act, the Minister has a wide power to develop BEE codes for particular sectors of the economy. Each business within the sectors is allocated “empowerment” points in accordance with the extent to which the ideal set out in the Code, expressed as a percentage, is met. The points are based upon a wide variety of criteria, such as (in relation to empowerment beneficiaries) voting power, economic interest, employee ownership schemes, board participation, distribution of executive directors and managerial positions, skills development expenditure, socio-economic expenditure, employment of first time employees, and procurement. The list is not exhaustive. Most importantly, points are gained by dealing with other businesses which score well on the basis of these criteria.

There is no criminal penalty attached in failing to attain a good empowerment rating. The sanction comes through the fact that empowerment points count in the award of government tenders, and businesses thus prefer to deal with others with a good empowerment rating in order to improve their own standing.

#### **What the Regulations Require.**

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

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theory all indigenisation plans require relinquishment of a 51% shareholding. However, the section intends to require any alienation of controlling interest in a business to indigenous Zimbabweans. 3(1)(d) raises interpretive and practical difficulties – see below.

<sup>27</sup> Zimbabwe African National Union (Patriotic Front), prior to the formation of Zimbabwe’s Unity government, the ruling party led by Robert Mugabe.

<sup>28</sup> The Movement for Democratic Change, prior to the formation of Zimbabwe’s Unity government, the official opposition, but now an “equal” partner in the Government.

<sup>29</sup> Section 14(1). These provisions were extensively revised by amending regulations.

<sup>30</sup> Amended on the 14.05.10 by the Indigenisation and Economic Empowerment (General) (Amendment) Regulations, 2010 (No. 1), published as SI 95/2010.

<sup>31</sup> Section 14(1) provided that such schemes merely “may” be taken into consideration by the Minister. The section was repealed and replaced, and “may” substituted by “shall”.

<sup>32</sup> Previously section 14(4).

section 4, then particularises specific business dealings which will not be approved and may not be concluded unless the law pertaining to the 51% requirement has been met. The requirements of the Regulations largely follow these provisions and thus may be divided into two distinct groups:

1. Provisions which apply to every public company and any other business with an asset value of or above a prescribed value.
2. Provisions which apply to specific commercial undertakings. These are:
  - a) any merger or restructuring of the shareholding of two or more companies, or acquisition of a controlling share in a company, which falls within the ambit of the Competition Act, Chapter 14:28.<sup>33</sup>
  - b) any de-merger or unbundling of a business with a value of or above \$500 000<sup>34</sup>.
  - c) any relinquishment of a controlling share in a business above \$500 000.<sup>35</sup>
  - d) any proposed foreign investment requiring a licence under the Zimbabwe Investment Authority Act, Chapter 14:30.

The distinction between these two groups will be referred to repeatedly in what follows and a third group considered, Mining Enterprises, affected by Government Notice 114 of 2011.

#### A: Group 1

Sections 4 and 5 of the Regulations apply to the first group. The most remarkable aspect of these sections is that they contain no provisions for the implementation of the laws pertaining to the indigenisation requirement. The current provisions constitute largely an information gathering exercise in two areas – firstly, to provide the Minister with information as to which businesses are currently “indigenised”, and to what extent in which sectors, and, secondly, to receive information from the businesses in the form of indigenisation plans as to how the business might propose to “indigenise”. There are currently no provisions criminalising a failure to implement an indigenisation plan, criminalising a failure to indigenise, or (with the possible exception of the General Notice pertaining to mining, discussed below) which compel the transfer of 51% of the shares in a business to indigenous Zimbabweans.<sup>36</sup> In other words, the legislation does not enforce the stated 51% objective, but is merely preparatory.

##### **a) The Supply of Information**

Section 4(1) requires non-indigenous businesses<sup>37</sup> with a net asset value<sup>38</sup> of or above an amount of \$500 000 to submit a duly completed Form IDG 01.

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<sup>33</sup> Section 3(1)(b). The Competition Act requires that notice of a proposed merger be given to the Competition Commission by companies with assets or a turnover above a prescribed threshold. However, the threshold does not appear to have been gazetted, the previous amount having been gazetted in Zimbabwe dollars, which are not in use at the time of writing.

<sup>34</sup> Section 3(1)(c) as read with section 7 of the Regulations, which establishes the \$500 000 by way of a cross reference to section 4 .

<sup>35</sup> Section 3(1)(d). This does not apply where the shares are relinquished other than for value to a family member or another partner or shareholder in the business as read with section 8 of the Regulations, which establishes the \$500 000 by way of a cross reference to section 4 .

<sup>36</sup> See further on this below, in the section on Implementation.

<sup>37</sup> It was previously unclear as to whether the section applied to “every” business or only non-indigenous businesses. The position was clarified by S.I. 116 of 2010 which inserted the term “non-indigenous” into the provisions.

<sup>38</sup> S.I. 116 of 2010 changed “asset value” to “net asset value”

This section originally required the submission of the IDG01 form within 45 days of 1<sup>st</sup> March, but was subsequently amended to extend the period to the 30<sup>th</sup> June, 2010 for extant companies and to provide a 75 day period for new companies. There is no penalty for failure to submit an IDG 01 form within this period, or in fact at all, in terms of this section. However, if a business fails to submit IDG 01 within the time period the Minister may (but not necessarily will) serve a copy of IDG 01 on the business concerned in terms of sub-section 4(4).<sup>39</sup> It then becomes an offence<sup>40</sup> not to return the form duly completed within 30 days.<sup>41</sup> It is also an offence to submit false information on the form.<sup>42</sup>

The time limits are established for extant companies and new businesses only. In the case of the latter, the time limit runs from the date of the establishment of the company. At the date of the establishment of the company, the net asset value may not exceed \$500 000 and may not do so within the 75 day period. It would not then be obliged to submit the IDG01 form. No provision is made for companies in this category which reach the \$500 000 threshold more than 75 days after commencement of business.

The form presents several difficulties for those attempting to complete it on account of ambiguities, a failure by the Ministry itself to act as the Regulations require and because several questions demand a “yes or no” answer and contain assumptions which may not pertain to the business in question.

The form requires a business to specify the nature of the enterprise, its address, and “net asset value”. This last requirement presents some difficulty. There are several methods by which accountants may determine the net asset value of a business. The result will vary considerably depending upon whether, for example, the accounting method adopted applies a standard system of capital depreciation to fixed assets or whether the “net asset value” is calculated as the hypothetical sale value the company would realise for such assets. Despite the widely differing results that may be obtained, the Regulations provide criminal sanctions if a “valuator” appointed by the Minister finds the company to have been undervalued by more than 10%.<sup>43</sup> In passing it should be noted that the valuator appointed by the Minister must be one “registered in terms of the Public Accountants and Auditors Act [*Chapter 27:12*]”. However, this Act contains no provision for the registration of “valuators.”<sup>44</sup>

The business must then list its shareholders, partners or owners. After the matrix of details relating to the business (which includes a column for the details of shareholders, owners or partners) paragraph 6 provides that “If a company”, details of the shareholders and date of registration must be given. It is unclear if the phrase “If a company” refers to the business completing the form (for example whether it is a company, as opposed to a partnership etc) or is to apply where the stakeholder in the business is itself a company rather than an individual, and details of the shareholding in that company, rather than the company completing the form, must then be given.

While the first interpretation is the more sensible, officials within the Ministry have adopted the second interpretation and have refused to accept forms which do not give details of the shareholders in the company which holds shares in the business completing the IDG01.<sup>45</sup> These officials have probably taken this position in order to be able to assess whether the shareholding company is

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<sup>39</sup> Section 4(4).

<sup>40</sup> Section 4(4) – a level twelve fine, five years imprisonment, or both – the maximum allowed by the enabling Act (section 21(2)).

<sup>41</sup> An application for an extension of time to do so may be made.

<sup>42</sup> Section 4(7).

<sup>43</sup> Section 16. The penalty, as everywhere in the Regulations, is the maximum allowed by the Act.

<sup>44</sup> This was noted by Veritas when publicising the Regulations.

<sup>45</sup> This information was supplied by the company in question, though the company wishes to remain anonymous.



“indigenous”. It is not necessary to do so, as the next question requires the business to state whether a controlling interest or 51% in the company is held by indigenous Zimbabweans.

The extent to which the business is owned or controlled by indigenous Zimbabweans must also be given, expressed as a percentage.<sup>46</sup> It is not currently possible for a business to answer this question with any precision. Section 5(4)(c) requires the Minister to gazette “*what weighting (expressed as a fixed percentage that may be added towards the fulfillment of the minimum indigenisation and empowerment quota) to assign to .... socially and economically desirable objectives.*” These weightings have not in fact been gazetted by the Minister despite the requirement that he do so “*as soon as is practicable*”.<sup>47</sup> Accordingly, businesses currently do not know the percentage to which they may be indigenised on the basis of these yet to be gazetted weightings.

If the business is not owned or controlled by an indigenous Zimbabwean, the questionnaire demands a “yes or no” response as to whether the business has “a plan for ensuring that, within five years, [the] business will be owned or controlled by indigenous persons to the extent of at least fifty-one per centum”.

Two paragraphs then follow and it is unclear (since neither the conjunction “*or*” nor “*and*” links the two) whether they are alternative or cumulative.<sup>48</sup> If the business does not have an indigenisation plan, the non-indigenously owned or controlled business is required to indicate why “*it may not be possible*” for the business to be indigenised within five years and/or why a “lesser share of indigenisation” or “*longer period to achieve it*” is required.<sup>49</sup> The option that the business cannot be indigenised within five years or *any* period is not provided. Having answered “No” to whether an indigenisation plan has been included, the business must indicate that a lesser share of indigenisation or longer period to achieve indigenisation is justified. However, the justification must rest on certain specified grounds only. These are:

- a) that the business is involved in development work in its community;
- b) that the business is beneficiating raw materials in Zimbabwe for export;
- c) that the business is involved in technology transfer to Zimbabwe;
- d) that the business is employing local skills or imparting new skills to Zimbabwe; and
- e) that the business is achieving socially and economically desirable objectives.

However, by confining the reasons as to why a lesser share of indigenisation may be justified to these social or economic grounds, several other possibilities are ignored.

Firstly, in terms of section 5(4) of the Regulations the Minister is obliged to gazette “*as soon as practicable*”<sup>50</sup> a “*lesser share*” than 51% that indigenous Zimbabweans may hold in any business for each sector of the economy *and* the maximum period for which such lesser share may be held.<sup>51</sup> This lesser share and maximum period for which it may be held is to be determined by the Minister

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<sup>46</sup> Paragraph 7 of IDG01.

<sup>47</sup> A time period of 12 months was previously stipulated until changed by S.I 116 of 2010.

<sup>48</sup> The second of these two paragraphs also refers to the issue of the five year period, but does so in slightly different terms, suggesting that a different meaning is to be accorded to the provision relating to the five year period than that of the first of the two. One could read different meanings from the use of “indigenised” in the first and “indigenisation” in the second – see the footnote immediately below.

<sup>49</sup> What “it” refers to here is unclear. Presumably it refers back to “indigenisation” but indigenisation is not defined. Although “non-indigenous” is defined to mean a business where a controlling interest or less than 51% thereof is not held by indigenous Zimbabweans, “indigenisation” cannot simply be assumed to be the converse of this as the Regulations make it clear that “indigenisation” may refer to a process where less than 51% of a business is held by indigenous Zimbabweans.

<sup>50</sup> Previously the gazetting was to take place within a year. This provision was changed by S. I. 116 of 2010.

<sup>51</sup> This is in conformity with the Act. Section 3(a) of the Regulations which uses the word “or” here is thus not in conformity with the Act.

on the basis of information gleaned from the submitted IDG 01 forms. In this endeavor the Minister is to be assisted by “*sectoral committees*” for each business, established for this very purpose by the amending regulations.<sup>52</sup>

The business thus may not have submitted an indigenisation plan as defined (i.e. one which proposes the disposal of sufficient shares to meet the 51% share or controlling interest required by the statutory definition of such a plan and the question itself<sup>53</sup>) as its proposal is one incorporating the lesser share of indigenisation which the Minister is required to gazette and which thus does not fall within the definition of an “indigenisation plan”.

Secondly, the IDG01 form may have been submitted in terms of section 4(4) and not section 4(1). Section 4(4) applies if, in the opinion of the Minister, a business ought to have submitted an IDG01 form in accordance with section 4(1); that is, because in his opinion it falls within the \$500 000 threshold. The opinion of the Minister may be wrong. The reason why a company answers “No” to the non-inclusion of an indigenization plan may thus arise from the fact that it is not obliged to do so as the company is below the prescribed threshold for the submission of the IDG01 and indigenisation plan. Despite the error of the Minister, the business is obliged to submit the IDG01 form as a failure to do so constitutes an offence.<sup>54</sup> It is not an offence, at this stage, not to submit an indigenization plan.<sup>55</sup>

Thirdly, a business may wish to indicate that it is not possible to submit an indigenisation plan as it has been unable to persuade shareholders to relinquish sufficient shares to meet the 51% requirement of such plans and there is no legal instrument available for it to compel them to do so.

Finally under this head, it should be noted that the Minister may also gather information by requiring (through a gazetted notice published no more than once a year) every business to submit Form IDG 03<sup>56</sup> to allow the Minister to make annual indigenisation and empowerment ratings of the businesses. In fact the sectoral committees, in order to make the recommendations referred to above (section 5A), sent notices to companies during 2010 asking them to reveal their current extent of indigenisation.

## **b) The submission of “Indigenisation Plans”**

### **i) Basic requirements and time limits**

As stated, the requirement to supply the above information applies to every non-indigenous business of or over a value of \$500 000. In terms of section 4(2), every such business must submit “together with IDG 01” an indigenisation plan. These documents are now jointly defined as “*primary documents*”.<sup>57</sup> The provision was confusing in that it purported to apply to *every* “non-indigenous” business, and not just those with an asset value of or over \$500 000. The confusion was cured by the amendment to section 4(1).<sup>58</sup>

The Regulations originally referred to an “*indigenisation implementation plan*”. This was

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<sup>52</sup> Section 5A(2) of the Regulations inserted by S.I. 116 of 2010. The sectoral committees have made recommendations to the Minister as required, though these have not been made public.

<sup>53</sup> The internal contradiction in the Regulations between the requirement to gazette lesser shares of indigenisation (than 51%) and the definition of an indigenisation plan which requires a minimum of 51% should be noted here and is discussed further below.

<sup>54</sup> Section 4(4).

<sup>55</sup> The submission of indigenisation plans is discussed in the next section.

<sup>56</sup> The form is similar to IDG 01.

<sup>57</sup> By virtue of the definition inserted by S.I. 34 of 2011.

<sup>58</sup> By way of S.I. 116 of 2010.

subsequently amended and the word “*provisional*” inserted into sections 4 and 5 possibly to distinguish between indigenisation plans the approval of which is pending and those already approved – as referred to in sections 6, 7, 8 and 10 for example. Yet the definition section does not refer to an “*indigenisation implementation plan*” or “*provisional indigenisation implementation plan*” but simply an “*indigenisation plan*”. It is assumed in what follows that the drafter intended the various phrases to be the same thing, and that the disparity is simply inadvertent.

The indigenisation plan is to be completed “*in accordance with the guidelines provided*” on the IDG 01 form. Since the form does not in fact clearly identify any such guidelines, these must be assumed to mean the provisions relating to why a business may not be able to indigenise within five years, or why a lesser extent of indigenisation or longer period to do so is required. There is no penalty provided by the section for a failure to supply an indigenisation plan “*together with IDG 01*” in terms of section 4(2). Furthermore, if the business does not submit IDG 01, or an indigenisation plan, and the Minister serves IDG 01 on the business in terms of section 4(4) as described above, it is only an offence not to return IDG 01 (not the indigenisation plan) duly completed. Section 4(4) does not require that the form is returned duly completed “*together with*” an indigenisation plan.

If no indigenisation plan has been submitted with form IDG 01, and if the Minister believes that an indigenisation plan is required, the Minister has 45 days to give written notice “*requesting*” the business concerned to submit the same.<sup>59</sup> The business then has 30 days within which to submit the indigenisation plan. The anomaly that it was not an offence not to submit the indigenisation plan when so called upon to do so, but it was an offence not to respond to a request for further information in relation to an indigenisation plan, has been cured by amending regulations.<sup>60</sup> The penalty is the maximum permitted by the Act - a level twelve fine and/or five years imprisonment – a remarkably severe penalty when compared with the transgression.

ii) The attempt to deal with the fundamental problem relating to indigenisation plans.

Difficulties similar to those confronting a company attempting to submit an IDG01 form present themselves in relation to the submission of an indigenisation plan. These difficulties arise from the fact that the Regulations are fundamentally flawed, claim an ambit of indigenisation which exceeds that provided for by the Act,<sup>61</sup> attempt to enforce that which cannot be legally accomplished, and attempt to achieve by Regulation that which requires the amendment of various Acts of Parliament.<sup>62</sup> At the core of the Regulations is the objective that 51% of the shares of companies are transferred to indigenous Zimbabweans. But the drafter is, unsurprisingly, at a loss as to how this might be provided for by law. Companies do not own shares, shareholders do. By placing the onus upon companies to “dispose of” shares, the Regulations seek to compel companies to do that which they have no legal authority to effect. Intractable legal problems result if the obligation were placed upon shareholders to “*dispose of*” 51% of their shares to indigenous Zimbabweans. How, for example, is one to determine which shareholders are to relinquish shares? If the relinquishment of shares is to be done on a pro-rata basis, what happens where a company has, for example, only two shareholders? How does one compel a company to issue shares to meet this requirement? Can this be accomplished without making shares available to the public (restricted for private companies)? How does one avoid the pre-emptive rights provided for in most companies’ articles of association without legislative amendment? Since the drafter is at a loss as to how to compel the disposition of

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<sup>59</sup> It is not stated as to what is to happen if the 45 day period is not adhered to and the provision appears merely directory rather than peremptory.

<sup>60</sup> 116 of 2011. The amendment failed to cure the incorrect cross reference to the time period for new companies in section 4(4). It should read 75 not 45.

<sup>61</sup> This assertion is expanded upon below.

<sup>62</sup> A route which is closed to ZANU PF, lacking the necessary parliamentary majority.

shares, the subterfuge of an “indigenisation plan” is adopted. Rather than the maker of the Regulations prescribing how indigenisation might be achieved, companies themselves must indicate how this is to be done through an indigenisation plan.

That the drafter is aware that shareholders rather than companies control the disposition of shares is reflected in an amendment introduced by S.I. 34 of 2011. Section 10(4)(a) of the Regulations now requires an indigenisation plan submitted by a company secretary to be accompanied by “*a resolution of the company concerned authorising the submission of the primary documents<sup>63</sup> in question to the Minister*”. The resolution is now defined as a “secondary document”. This requirement skirts around the problem, as the shareholders are not required to pass a resolution approving an indigenisation plan, but merely to authorise the company secretary to submit such plan.

iii) Penalising the failure to submit the company resolution.

The question then arises as to what is to happen if the shareholders refuse to pass such a resolution, making it impossible for the secretary or company directors to comply with the provision. The knots into which the drafter has managed to tie him or herself is reflected in the wonderfully convoluted sub-section<sup>64</sup> which seeks to penalize the failure to submit the company resolution:

*“a [company] ...shall **not** be considered **not** to have complied with section 4(1) and (2) unless [the secretary] also submitted the secondary document, either simultaneously with the primary documents or no later than the final day for compliance with section 4(1) or (2), whereupon section 4(4) shall apply to [the company] as if it had not submitted any primary documents.”*

Unless one has particularly keen powers of comprehension, several readings of this section are required to determine its meaning. Presumably the second “**not**” has been inserted in error, otherwise the provision means that one is considered to have complied with the Regulations unless one supplies the secondary documents (as required by 10(4) ), when one is then considered to be in violation of section 4(1) or (2). The effect is that one can only comply with section 10(4) by violating section 4(1) or (2). If the second “**not**” is elided, the provision would mean that there is no compliance with section 4(1) or (2) without the submission of the company resolution. In that case, section 4(4) applies “as if the company had not submitted any primary documents”.

However, section 4(4) refers to two different situations where primary documents have not been submitted. The first is where they have not been submitted in terms of section 4(1) or (2) and no notice to do so has been received from the Minister. In this case, the Minister may give such notice and it then becomes an offence not to submit *an IDG 01* form. The second is the case where they have not been submitted after notice has been given to do so, whereupon it is an offence not to submit the IDG 01 form within the requisite period. We are not told which of these two situations is to apply. That is, if one is to be treated as not having submitted any primary documents, does this mean that the Minister must now call upon one to do so. If so, the position could arise that the person may fail to submit the company resolution with the IDG 01 form, the IDG 01 form is regarded as not having been submitted, the Minister calls upon the company to do so, once again the resolution is not submitted with the IDG 01 form, once again 4(4) has application and once again the Minister may call upon the person to submit the primary documents, the resolution is again not submitted etc ad infinitum.

If the second instance is to apply (the failure to submit the documents after notice), and the director

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<sup>63</sup> As noted, these are the IDG01 form and indigenisation plan.

<sup>64</sup> 10(5).

of the company is treated as having committed an offence without anything more, it is inexplicable why the regulations do not simply say that any company that fails to submit a company resolution with any primary document shall be guilty of an offence, avoiding the convoluted reference to section 4(4).

It could be that one must read the words “*section 4(4) shall apply to such business as if it had not submitted any primary documents*” to mean section 4(4) shall apply to the failure to submit the company resolution in the same manner as a failure to submit a primary document, *mutatis mutandis*.<sup>65</sup> This would then mean that the Minister may call upon the company to submit the secondary document within the same period as would be required for an IDG 01, and it would be an offence not to do so.

The obligation is upon the company secretary to submit the company resolution, but section 4(4) makes directors of a company guilty of the offence if there is a failure to submit the IDG 01. Unless one assumes that “company secretary” is to be substituted for “directors” in 4(4) when there is a failure to submit the company resolution after being called upon to do so, certain difficulties arise.

Shareholders may refuse to pass the resolution, either because they do not wish to do so, or because they are unable to agree an indigenisation plan for any number of reasons, including which member or members are to dispose of their shares to meet the indigenisation target. The directors may thus be unable to ensure compliance with section 10(4), but have no intention to commit an offence. Is the company then guilty of an offence due to the failure of the directors to ensure the submission of the resolution? The Criminal Law Codification and Reform Act provides:

*For the purposes of imposing criminal liability upon a corporate body, any conduct on the part of*

*(a) a director or employee of the corporate body; or*  
*(b) any person acting on instructions or with permission, express or implied, given by a director or employee of the corporate body;*

*in the exercise of his or her power or in the performance of his or her duties as such a director, employee or authorised person, or in furthering or endeavouring to further the interests of the corporate body, shall be deemed to have been the conduct of the corporate body, and if the conduct was accompanied by any intention on the part of the director, employee or authorised person, that intention shall be deemed to have been the intention of the corporate body.*

It is not the director who has failed to submit the document (the obligation is upon the company secretary), so no liability should attach to the company. The section would only have application if “company secretary”, an employee of the corporate body, is substituted for “directors” in 4(4).

If the shareholders refuse to pass the resolution are the directors guilty of an offence? Common sense and the Code suggest not, due to the proviso in the following section (277(3)):

*Where there has been any conduct which constitutes a crime for which a corporate body is or was liable to prosecution, that conduct shall be deemed to have been the conduct of every person who at the time was a director or employee of the corporate body, and if the conduct was accompanied by any intention on the part of the person responsible for it, that intention shall be deemed to have*

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<sup>65</sup> “The necessary changes having been made”.

*been the intention of every other person who at the time was a director or employee of the corporate body:*

***Provided that, if it is proved that a director or employee of the corporate body took no part in the conduct, this subsection shall not apply to him or her.***

The maximum fine to be levelled in this regard is level 12, currently at \$1000.

iv) A second problem with indigenisation plans.

The second major difficulty with the indigenisation plan is that it is not consistently defined in the Regulations, and there are two contradictory provisions setting out the contents of an indigenisation plan. The Regulations define an indigenisation plan as:

*a written proposal to the Minister on how and when **fifty-one per centum** or a controlling interest in any business shall fall under the control of the indigenous Zimbabweans*

Accordingly, the threshold of 51% must be met before a plan can be deemed an “indigenisation plan”. However this requirement is contradicted by sub-section 5(4) of the regulations which provide that the Minister must, as soon as practicable gazette:

*(a) what **lesser share than the minimum indigenisation and empowerment quota** shall be the minimum lesser share that indigenous Zimbabweans may hold in a business operating in the sector or subsector in question; and*  
*(b) for what maximum period a business referred to in paragraph (a) may continue to operate with such lesser share until the minimum indigenisation and empowerment quota is achieved.*<sup>66</sup>

The minimum indigenisation and empowerment quota is defined to mean:

*a controlling interest or the fifty-one per centum of the shares or interests which in terms of the Act is required to be held by indigenous Zimbabweans in a business pursuant to any transaction referred to in sections 3, 4, 5, 6, 7(1), 9 and 11.*

Accordingly, the lesser share which the Minister must gazette for each sector must always be below the 51% threshold which defines an “indigenisation plan”. Yet, if a business submits a plan in which meets the gazetted lesser share than 51%, it is referred to in the Regulations in several sections<sup>67</sup> as “an indigenisation plan” despite its non-conformity with the definition of such plans. Further issues arise from this contradiction and are elaborated upon in the next section.

### **c) Procedure after the Submission of an Indigenisation Plan.**

The action to be taken by the Minister after the submission of an indigenisation plan has been amended by S.I. 34 of 2011. If an indigenisation plan has been submitted to the Minister, the Minister must, within 45 days, make one of three determinations. Section 5(1)(a) allows the

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<sup>66</sup> This conforms with section 3(5) of the Act though slightly different wording is deployed, in particular the reference in the Regulations to the “minimum indigenisation and empowerment quota.” The Act refers to 51% or a controlling interest, which for reasons indicated below the drafter of the Regulations would have been wise to follow in view of the faulty definition of “minimum indigenisation and empowerment quota.”

<sup>67</sup> For example 5(1)(b)(i).

Minister to approve the indigenisation plan. The discretion appears unfettered. The section does not bind the Minister to make approval conditional upon the minimum indigenisation quota having been achieved or any other consideration. Section 5(1)(b)(ii) allows the Minister to reject the plan, but here his discretion is fettered – it can only be rejected if it does not meet the “*minimum indigenisation requirements*” for the relevant sector. Since these have not been set, an indigenisation plan cannot be rejected on this basis. The third option is to defer the decision and make approval or rejection dependent upon the conformity or otherwise with the gazetted minimums. The decision will thus remain in limbo until these amounts have been published. If the plan meets or exceeds the requirements for the sector when gazetted, the Minister “*shall*” approve the plan. If it does not, the Minister must reject the plan.<sup>68</sup>

If the Minister does not respond to an indigenisation plan within 90 days then, if the plan meets or exceeds the minimum requirements in the notice, it is deemed approved, and if it does not, it is deemed rejected. The Regulations are silent as to who decides the point. A business, for example, may decide that its plan meets or exceeds the requirements and is thus deemed accepted. The Minister may believe the contrary. To avoid this situation the criteria set out in the gazetted notice would, rather improbably, have to admit of no ambiguity *vis-à-vis* the plan.

If an indigenisation plan is deemed rejected as not meeting the gazetted “minimum indigenisation requirements”, the business has 45 days to submit a revised plan to the Minister. This is provided for by the new section 5(5). The same provisions are needlessly repeated in section 5(6)<sup>69</sup> with the additional stipulation that within three months the Minister may approve the plan or reject the revised plan if, “*in his or her opinion*”, the plan does or does not meet the minimum indigenisation requirements. If the plan is again rejected, the further opportunity, which was given to submit a plan for approval within 45 days, has been removed by the repeal of 5(7). The Regulations are silent as to what is to happen if the indigenisation plan of a business is never approved – a point which is discussed further below – but the “*general objective*” of the Regulations that every business without an approved indigenisation plan after five years “*must*” dispose of 51% of its shares to indigenous Zimbabweans<sup>70</sup> should be noted here, even though no provisions to compel such disposal currently exist.

The Minister’s power to reject an indigenisation plan which does not meet the gazetted “*minimum indigenisation requirements*” requires some scrutiny as the provisions in this regard are so badly drafted as to render the intention of the Regulations obscure. The gazetted “*minimum indigenisation requirements*” must refer to the “*minimum indigenisation and empowerment quota*” gazetted in terms of section 5(4). This is the phrase defined in the Regulations and it is extremely poor drafting to change the phrase to “*minimum indigenisation requirements*” when the defined phrase is appropriate. This repeats the error of referring to “*provisional indigenisation implementation plans*” when the defined phrase is “*indigenisation plan*”. Such drafting creates uncertainty as to whether the phrases are intended to mean the same thing. It is assumed here that the phrases are intended to be interchangeable. As noted above “*minimum indigenisation and empowerment quota*” means:

*a controlling interest or the fifty-one per centum of the shares or interests which in terms of the Act is required to be held by indigenous Zimbabweans in a business pursuant to any transaction referred to in sections 3, 4, 5, 6, 7(1), 9 and 11*

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<sup>68</sup> Sub-section 5(1)(b) paragraphs (i) and (ii) respectively.

<sup>69</sup> Presumably another drafting error. Section 5(6) also refers to indigenisation plans submitted in terms of section [sic] 4(1)(a) and (2)(a), when 4(1)(a) relates to the IDG01 form only.

<sup>70</sup> Section 3(b).

It is a “*lesser*” share than this quota for “*each sector and sub sector of the economy*”<sup>71</sup> that the Minister is obliged to gazette under section 5(4) on the basis of information gleaned from IDG01 forms, and after considering the recommendations of the sectoral committees established by section 5A. Despite the recommendations having been duly made by the sectoral committees, no lesser share of indigenisation for each sector has been gazetted.

However, an examination of the definition of “*minimum indigenisation and empowerment quota*” reveals that this quota is not intended to apply to every business. It only refers to:

- the 51% of shares which *in terms of the Act* are required to be held by indigenous Zimbabweans; and
- they must be shares which are to be held *pursuant to specified transactions*; and
- the transactions must be those referred to in sections 3,4,5,6,7,9 and 11.

The Act, however, does not **require** that 51% of shares be held by indigenous Zimbabweans in any business. The Act merely stipulates that through the Act itself or through regulations it shall:

*endeavour to secure that at least fifty-one per centum of the shares of every public company and any other business shall be owned by indigenous Zimbabweans*

It also expresses (in section 3) that it shall endeavour through the Act itself or regulations to secure that no unbundling, merger, demerger, new investment by a foreign investor, divestment by a foreign investor or restructuring of a business and several other transactions shall take place unless the transaction results in 51% of the business being held by indigenous Zimbabweans. Once again the Act itself does nothing to achieve this endeavour and anticipates that this will be done through Regulations.

Accordingly, there is no **requirement** in terms of the Act that 51% of a company be held by indigenous Zimbabweans. There is also no absolute provision to this effect in the Regulations which merely requires that the transactions mentioned in section 3 of the Act be subject to an approved indigenisation plan, without any indigenisation percentage being set.<sup>72</sup> The relevant transactions are referred to in sections 6, 7, 8, 9 and 11 of the Regulations.

The definition of the “*minimum indigenisation empowerment quota*” reliant on the Act for its substance, is thus meaningless, referring as it does to a non-existent requirement.

The 51% must also be the share to be held by indigenous Zimbabweans pursuant to “*any transaction referred to in sections 3, 4, 5, 6, 7(1), 9 and 11*”

However, sections 3, 4 and 5 of **the Regulations** have nothing to do with “*transactions*”. Sections 3, 4 and 5 (and 6) of **the Act** refer to transactions, the provisions of which are implemented by sections 6, 7(1) 9 and 11 of the **Regulations**. It may be that this definition meant to refer to sections 3, 4 and 5 of the Act and sections 6, 7(1) 9 and 11 of the Regulations. If this is the case (and there is no reason why one should be obliged to rewrite the Regulations on behalf of the drafter in order to make sense of them), the “*transactions*” referred to are those referred to in terms of section 3, subsections (1)(b)(iii), (1)(c)(i), (1)(d) and (e) of the Act. This would bring the definition into conformity with the Act, as the Act only allows the Minister to gazette a lesser interest than a controlling interest in respect of these transactions.<sup>73</sup> The Act also contains several drafting errors in

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<sup>71</sup> The sectors and subsectors referred to appear as item 3 in the IDG01 form.

<sup>72</sup> The minimum for such plans could variously be regarded as the gazetted minimum indigenisation quota or the 51% which forms part of the indigenisation plan. However, since the Minister is given an unfettered discretion to approve plans, the percentage could be whatever the Minister decides to approve.

<sup>73</sup> It will be argued below that the Act in fact only intended empower the Minister to make indigenisation Regulations in respect of these transactions.



this regard. Section 3(1)(b)(iii) and Section 3(1)(c)(i) of the Act also do not refer to “*transactions*”. The intention was probably to refer to paragraphs 3(1)(b)(i) and (ii) and Section 3(1)(c) respectively. With these adjustments, the transactions then referred to are:

- a merger or restructuring of a company which requires the Competition Commission to be notified; and
- the acquisition of a controlling share in a business which requires the Competition Commission to be notified; and
- any relinquishment of a controlling share in a business.<sup>74</sup>
- any proposed foreign investment requiring a licence under the Zimbabwe Investment Authority Act, Chapter 14:30.

These all fall within Group 2 referred to above.

Once again the manner in which these transactions have been specified is problematic. Only mergers, restructuring, or the acquisition of shares where the value is above a gazetted threshold must be notified to the Competition Commission. No such thresholds have been gazetted which take into account dollarization<sup>75</sup> in Zimbabwe, and thus it is not known which of these transactions require notice to the Competition Commission. No foreign investor is required to obtain a licence under the Zimbabwe Investment Authority Act. The Act merely provides that investors *may* do so if they so “wish”.<sup>76</sup> This leaves the transaction relating to the relinquishment of a controlling share in a business as the only provision with any traction.

Ignoring the other anomalies outlined above, boiling the issue down and combining it with the definition of “*minimum indigenisation and empowerment quota*” and section 5(4) of the Regulations, the provision would mean that the Minister must gazette for every sector or subsector of the economy a lesser amount than the 51% indigenous Zimbabweans may hold pursuant to the relinquishment of a controlling share in a business. Recall that the definition of an indigenisation plan is one which indicates how a controlling share in a business or 51% thereof will be held by indigenous Zimbabweans. Thus, every indigenisation plan which is to proceed on this basis (rather than, say on the basis of weightings accorded to economically or socially desirable objectives) falls within the ambit of 5(4), and the Minister is obliged to gazette the lesser amount that indigenous Zimbabwean may hold after the relinquishment of a controlling share. The odd result is that for these provisions to apply a controlling share must still be relinquished, only less than 51% or the controlling share needs to fall under the control of indigenous Zimbabweans at the conclusion of the transaction. It is unlikely that the Regulations intended this effect.

The “*minimum indigenisation and empowerment quota*”, when gazetted, is the yardstick by which the Minister may accept or reject an indigenisation plan in terms of section 5(1)(b) of the Regulations. If the indigenisation plan does not meet the “*minimum indigenisation and empowerment quota*” gazetted it must be rejected. But the “*minimum indigenisation and empowerment quota*” is the gazetted amount which is to apply only on account of the relinquishment of a controlling interest in the business. If the business does not intend to relinquish a controlling share there is no applicable “*minimum indigenisation and empowerment quota*” for it to meet and the indigenisation plan cannot be rejected on this basis. Only if the company does intend to relinquish a controlling share must the result accord with the minimum requirements. The result is that companies intending to dispose of a controlling shareholding run the risk of having their proposal rejected, while companies with an indigenisation plan which does not involve the

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<sup>74</sup> This does not apply where the shares are relinquished other than for value to a family member or another partner or shareholder in the business.

<sup>75</sup> “Dollarisation” is a misnomer and is used for convenience. Multiple hard currencies are legal tender in Zimbabwe.

<sup>76</sup> Section 13(1) of the Zimbabwe Investment Authority Act [Chapter 14:30].

disposal of any shares at all or less than a controlling share, may not have their plan rejected. This cannot be what the drafter intended.

The tenor of section 5(1)(b) seems to be that whatever the gazetted minimum indigenisation and empowerment quota for businesses relinquishing a controlling share, then this quota must apply to all indigenisation plans, regardless of whether they include one of the transactions which form part of the definition of the minimum indigenisation and empowerment quota. This interpretation once again requires one to read into the Regulations that which is not there and to guess at the drafter's intent. While it is permissible to do so on occasions where that intent is clear and the redrafting is not extensive, it is not permissible to do so where the change would contradict the Act. The Act clearly confines the authority to gazette a lesser quota than a controlling share to the specified transactions. Section 5(1)(b) would have it that one reads into the section provisions that the sections apply to all indigenisation plans regardless of the transactions which might be taken pursuant to those plans.

Indigenisation plans are the nucleus of the Regulations, and almost all other provisions are directed towards the presentation of an acceptable indigenisation plan to the Minister. Yet the provisions relating to the submission of such plans are incoherent to the point of being unintelligible. The flaw lies in the structure and the provisions would remain incoherent even if the numerous technical drafting deficiencies relating to syntax, grammar, cross referencing, and definitions were rectified. Furthermore, if one guesses at the meaning the drafter intended (as the press has done with some liberality of interpretation on the basis of utterances by the Minister), then, in broad brush strokes, the intention might have been as follows.

Non-indigenous companies were to submit IDG01 forms indicating their extent of indigenisation. On receipt of these documents, and with the assistance of sectoral committees, the Minister was to gazette minimum indigenisation quotas, which were to be less than 51% for a specified period. Companies were then to submit indigenisation plans indicating how they intended to meet or exceed these quotas. In the absence of the gazetting of these quotas, the sequencing anticipated by the Regulations has been disrupted and companies are now being required to submit indigenisation plans which must conform to unknown quotas and which will be accepted or rejected on the basis of these unknown quotas.

## B: Group 2

The Regulations are somewhat simpler (though more draconian) in their application to mergers, unbundling, foreign investment, etc. Only the provisions relating to foreign investments have been changed by the various amendments to the Regulations.<sup>77</sup> Unlike Group 1, some of the requirements are specified “*endeavours*” of the Act. If the transaction meets the indigenisation requirements, or a proposed transaction is accompanied by an acceptable indigenisation plan, it may proceed.<sup>78</sup> The intended conclusion of all such transactions must be preceded by the submission of Form IDG 02 to the Minister.<sup>79</sup> Unlike businesses under Group 1 which are required to submit an IDG01 form, discussed above, the failure to submit the form is an offence.<sup>80</sup> Furthermore, the Minister has the power to direct the non-renewal or termination of any licence issued by a licensing authority and held by a “*non-compliant*” business. Such licences would include licences required to operate a financial institution, a shop licence, motor transportation licences, etc.<sup>81</sup>

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<sup>77</sup> See below.

<sup>78</sup> Sections 6, 7, 8, and 9

<sup>79</sup> Section 4(1)(a) of the Act.

<sup>80</sup> Section 10(3). The penalty is a level 12 fine, five years imprisonment or both.

<sup>81</sup> Section 5 of the Act.

If the Minister approves the transaction, or does not respond to IDG 02 within 45 days or within such longer period as he or she advises is required, the transaction may proceed.<sup>82</sup> If the plan is rejected by the Minister, the Minister has 90 days in terms of section 4(3) of the Act within which to inform the business as to what must be done to conform to (then ungazetted) indigenisation requirements.<sup>83</sup> The Act is silent as to what is to happen if the Minister rejects a plan within the 45 day period but does not indicate within 90 days what amendments are required. One could assume that the plan must be deemed approved in the same way as it is deemed approved when the Minister fails to respond to an IDG 02 notification. A further drafting anomaly appears in the proviso to section 4(3), in that the amendment directed by the Minister must not be one which allows the transaction to be concluded “*on less favourable terms*” than those initially suggested by the notifying business. We are left to assume that this means that the terms must be less favourable to the indigenisation process, rather than the notifying party.

An important change<sup>84</sup> has been made to section 9 of the Regulations pertaining to the situation where a foreign “*investor projects or proposes an investment for which an investment licence is required in terms of the Zimbabwe Investment Authority Act*”. In this situation, section 9(2) now provides that no investment licence shall be issued unless primary documents have been submitted as required and an indigenisation plan approved.

Two points require consideration under this head.

Firstly, it has been noted that no foreign investors are “*required*” to apply for a licence. The Zimbabwe Investment Authority Act merely permits them to do so if the investors so wish - though foreign investors require permissions, permits and licences from various other statutory bodies, such as the Department of Immigration (for work permits) and Zimbabwe’s Reserve Bank in order to externalise profits, sell shares, and generally operate effectively. These permissions are usually declined if the applicant does not have a licence issued under the Zimbabwe Investment Authority Act.

Secondly, it is doubtful that this provision is valid. In terms of the Zimbabwe Investment Authority Act<sup>85</sup>, the discretion as to whether to issue a licence lies with the Board. This discretion granted by the Act cannot be overridden by Regulation. While the Board may take into account any “*considerations it considers appropriate*”,<sup>86</sup> including, presumably, whether an indigenisation plan has been approved, it cannot be compelled to do so.

i) Section 9(3) of the Regulations.

This section attempts to introduce a blanket restriction, unless approval has been obtained, on investment by “*foreign investors*” in any proportion in any business engaged in the following:

1. Agriculture: primary production of food and cash crops.
2. Transportation: passenger busses [sic], taxes [sic] and car hire services.
3. Retail and wholesale trade.
4. Barber shops, hairdressing and beauty saloons.
5. Employment Agencies.
6. Estate Agencies.

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<sup>82</sup> Section 4(1)(b) of the Act as read with sections 6,7,8 and 9 of the Regulations.

<sup>83</sup>Section 4(3).

<sup>84</sup> By way of S.I. 34 of 2011.

<sup>85</sup> Section 14.

<sup>86</sup> 14(1)(i).

7. Valet services.
8. Grain milling.
9. Bakeries.
10. Tobacco grading and packaging.
11. Tobacco processing.
12. Advertising Agencies.
13. Milk processing.
14. Provision of local arts and craft, marketing and distribution.

As already indicated, no investor “requires” a licence under that Act. A new Section 9(4),<sup>87</sup> makes it an offence for any non-indigenous investor (whether foreign or otherwise) to make an investment in a sector listed in the Third Schedule if the investments results in the investor holding the controlling interest in the business, unless the prior approval of the Minister has been obtained.

However, such a blanket restriction on investments in particular sectors is nowhere authorised by the enabling Act, and is thus *ultra vires* its provisions.

C: Group 3

### **The Government Notice Pertaining to Mining Enterprises.**

The Indigenisation and Economic Empowerment (General) Regulations, 2010 S.I. 21 of 2010 are notable for numerous errors and general drafting incompetence. G.N. 114 of 2011 continues this trend, and once again one is left to guess at what the Notice seeks to accomplish. The media has guessed that the intention is that all non-indigenous mining companies must dispose of 51% of their shares to the National Indigenisation and Economic Empowerment Fund, the Zimbabwe Mining Development Corporation, or an Employee Share Ownership scheme. This guess work relies more upon pronouncements by ZANU PF officials reported in the press than the Notice itself. The Notice presents problems relating to interpretation and law in almost every sentence of its four paragraphs.

The interpretation accorded to the Notice by the press is one that amounts to nationalisation of the mining industry in Zimbabwe. However, it seems improbable that the legislature intended that a policy, with such far reaching implications and repercussions, could be implemented at the discretion of a single Minister and by way of a Notice comprising three sections in an extraordinary government gazette.

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

*what lesser share than the minimum indigenisation and empowerment quota shall be the minimum lesser share that indigenous Zimbabweans may hold in a business operating in the sector or subsector in question*<sup>88</sup>.

The Minister may also gazette the weighting as a percentage to count toward meeting the minimum indigenisation empowerment quota of businesses to be accorded economically and socially desirable projects undertaken by the business. Section 5A establishes sectoral committees to advise

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<sup>87</sup> Also by way of S.I. 34 of 2011.

<sup>88</sup> This must be gazetted together with the time period for which such lesser share may be held.

the Minister on the issues outlined in section 5.

These sections thus do not authorise a requirement to “*dispose of shares to designated entities*”, (section 3(1) of the Notice), nor to set out a method of calculating the value of such shares (section 3(2) of the Notice), nor to require the submission of indigenisation plans (section 2 of the Notice).

Given the heading, one expected the Notice to set out the minimum indigenisation requirement for the mining industry. One thus expected a provision stating “*the minimum indigenisation requirement for the mining industry shall be X% or words to that effect*”. Nothing of this nature appears. Instead we have a definition which essentially repeats that of the Regulations to the effect that the “minimum indigenisation and empowerment quota” means:

*a controlling interest or the fifty-one per centum of the shares or interests which **in terms of the Act** is required to be held by indigenous Zimbabweans in the non-indigenous mining business concerned.*

The problems arising from this definition in the Regulations, discussed above, with the exception of the erroneous section references, are thus imported into the General Notice. The difficulties with section 1 of the Notice, the definition section, do not end there. The section also defines “designated entities” to mean the National Indigenisation and Economic Empowerment Fund; the Zimbabwe Mining Development Corporation; a putative statutory sovereign wealth fund; and an employee share ownership scheme. Only the last of these may qualify as an “indigenous Zimbabwean” as defined in the Act, discussed at the outset of this paper.

Institutions such as the ZMDC whose shares are held by the Government do not fall within this definition, and thus the disposal of shares to such entities is not part of the “endeavour” required by the Act, and thus is *ultra vires* its provisions. Although there have been statements in the press that most designated entities will simply warehouse shares pending subsequent disposal to indigenous Zimbabweans, such reported utterances do not bring about this result. In terms of the Notice, disposals remain as disposals to designated entities and not indigenous Zimbabweans.

Section 2 of the Notice then requires that non-indigenous mining businesses with a net asset value of above \$1 submit an “*indigenisation implementation plan complying with this Notice*”. It does not state with which part of the Notice compliance is required. Is it an indigenisation plan which merely fulfils the invalidly defined indigenisation quota of the definition section, or is it to be one which complies with section 3(1) which requires that the quota must be met by the disposal of its shares to the designated entity? In this case it seems that “*the plan*” as to how “*indigenisation*” is to be achieved is already prescribed, and there should be no need to submit a plan to the Minister other than to say to which of the four extant designated entities shares will be transferred, the quantum of the shares, and when the transfer will take place. Since only one of such entities, the employee shareholder scheme, may qualify as “indigenous” only transfer to this entity has the potential to be legally valid. Any proposed quantum of the consideration for the shares cannot form part of the “plan” as this is provided for in section 3(2): only suggestions as to the “how” and “when” of the consideration for the shares would be relevant.

The comments made previously in regard to IDG01 forms above relating to the determination of the asset value of a business and the accounting system used are equally apposite in relation to the \$1 threshold.

The submission of the plan is to be done “*in accordance with section 5(1)*” of the regulations. Yet section 5(1) has nothing to do with submission of indigenisation plans, but rather deals with the time limits for the approval thereof and basis for acceptance or rejection by the Minister.

As the “*indigenisation implementation plan*” is now defined as a primary document, it would need to be accompanied by a company resolution discussed above, though whether the failure to do so constitutes an offence is, as indicated, obscure. It is now an offence not to submit an indigenisation plan when given written notice to do so. It is doubtful that publication of the Notice in the gazette constitutes the written notice required by section 5(2) of the Regulations, and thus the provisions of section 5(2a) making the failure to submit an indigenisation plan an offence do not apply to a failure to submit an indigenisation plan in term of the Notice.

Section 3(1) of the Notice provides that:

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

The disposal is to take place after “*the approval of its indigenisation implementation plan*”.<sup>89</sup> The Notice and Regulations are silent as to what is to happen if no implementation plan has been approved. There is no valid definition of the minimum indigenisation and empowerment quota, and only one of the designated entities is currently a lawful transferee. This disposal must take place within six months, though the failure to do so is not made an offence. The omission is peculiar considering that amending regulations published simultaneously with the General Notice sought to repair the failure to make certain violations of the Regulations an offence, so presumably avoiding these kinds of errors, rather than repeating them, was on the drafter’s mind. Section 3(2) of the Notice provides that any shares to be disposed of to a designated entity other than an employee shareholder scheme (the only entity to which a valid disposition could take place) shall be calculated on the basis of:

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

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

The section is also significantly silent as to any obligation to pay for the shares once evaluated or any time period within which any such payment is to be made. The State’s record in this regard, particularly in relation to paying for improvements on farms seized by the State, does not inspire confidence. It is unlikely that the State has the money to pay for of 51% of all shares in every mining business in accordance with the endeavour of the Act, within the set six months period.

Given the incoherence of this Notice and the failure to penalise compliance, one would have thought that many mining companies might consider that its provisions are best ignored.

## **Procurement**<sup>90</sup>

Section 3(1)(f) of the Act provides that:

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<sup>89</sup> For an unknown reason the word “provisional” has been omitted for purposes of the Notice.

<sup>90</sup> These provisions have not been changed by any of the amending Regulations.

*all Government departments, statutory bodies and local authorities and all companies shall procure at least fifty per centum of their goods and services required to be procured in terms of the Procurement Act [Chapter 22:15<sup>91</sup>] from businesses in which a controlling interest is held by indigenous Zimbabweans.*

and Section 3(1)(g) of the Act provides that:

*where goods and services are procured in terms of the Procurement Act [Chapter 22:14] from businesses in which a controlling interest is not held by indigenous Zimbabweans, any subcontracting required to be done by the supplier shall be done to the prescribed extent in favour of businesses in which a controlling interest is held by indigenous Zimbabweans.*

The Procurement Act only applies to “procuring entities” which, in terms of Section 2 of that Act, is any governmental entity. It is thus anomalous for section 3(1)(f) to include “all companies”.<sup>92</sup> The Procurement must be from businesses the “controlling interest” of which is held by indigenous Zimbabweans (see below). The basic intention is that government bodies procure at least 50% of goods and services from indigenous Zimbabwean businesses, and, where a non-indigenous business is contracted to supply goods and services, but needs to engage a subcontractor to do so, the subcontract must be with an indigenous Zimbabwean business.

The Regulations only set out provisions in regard to subcontracting. Accordingly, there are no regulations to govern the primary procurement of goods and services under section 3(1)(f) of the Act.

Where a non-indigenous Zimbabwean business can only fulfil a contract by subcontracting, the subcontract must be to an indigenous Zimbabwean business if that business can supply the goods or services on terms “not less favourable than any other subcontractor”. Indigenous Zimbabweans may lodge complaints in writing to the Minister that the provisions have not been complied with and the Minister may thereafter direct enforcement.<sup>93</sup>

Section 12(3) and (4) make the provisions in regard to subcontracting applicable to indigenous Zimbabwean businesses which also need to subcontract. However, there is no equivalent right of complaint by a non-indigenous Zimbabwean business. Accordingly, if one indigenous Zimbabwean business subcontracts to another, but on terms which are less favourable than those offered by a non-indigenous business in violation of the Regulations, the non-indigenous business cannot lodge a complaint in the manner outlined above. This discrimination will probably not pass constitutional muster (see below).

### **Implementation.**

As noted above, in regard to the first group, the Regulations are of a preparatory nature only and no provisions exist at present to enforce the 51% indigenisation requirement. Even in relation to Group 2, there are no positive provisions enforcing the 51%, but rather negative provisions which disallow particular transactions from taking place unless an indigenisation plan is approved. The provisions only apply to those businesses undertaking these transactions. There are no provisions to enforce a foreign company to indigenise unless undertaking these transactions. Only the provisions relating to mining might be said to intend to compel indigenisation.

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<sup>91</sup> The reference is incorrect. The Act is Chapter 22:14.

<sup>92</sup> The inclusion has no legal effect.

<sup>93</sup> A business so directed has the right of representation.

Provisions to implement the 51% requirement are susceptible to challenge as violating the Declaration of Rights in Zimbabwe's Constitution (see below). Even without this problem, the formulation of practical provisions for implementation is fraught with difficulty, and a highly complex and possibly impossible undertaking. Consider section 3(a) of the Regulations which set out the "general objective: of the Regulations. The object is declared to be:

*that every business of or above the prescribed value threshold must cede a controlling interest of not less than fifty-one per centum of the shares or interests therein to indigenous Zimbabweans.*

As alluded to above, the glaring anomaly with this provision, in relation to Group 1 companies, is that companies do not own the shares in the company, causing intractable problems as to how to frame the law to achieve the stated objective.

There are other related difficulties. Small private companies are often formed and operate in a manner analogous to partnerships. Thus, the company may have only two directors with a single share each. The basic premise of the company and essential element for its continued operations is equality between the two directors and shareholders. Such companies could comply with the 51% requirement through a share issue and subsequent purchase of those shares by an indigenous Zimbabwean, but it is doubtful that many directors would want to continue with the enterprise. Many such companies depend not only upon the personal relationship between the directors, but also upon the specific expertise they bring to the company. Such companies may well not survive a complete take over unless the indigenous purchasers of the shares have appropriate expertise. Where only two shares are issued, other than the transfer of the entire shareholding, the 51% requirement could only be achieved by a fresh share issue.

Joint venture companies, which, while being large enterprises, may have small shareholdings based upon delicate and complex financial considerations and negotiations. Attempting to restructure such arrangements to accommodate indigenisation requirements may well prove impossible.

Potential problems are also evident in the case of large public companies. These companies may have millions of issued shares distributed over thousands of shareholders. Determining the race of each of these shareholders is a daunting task – a fact recognised by the Regulations themselves, as, for such companies, the IDG forms used to assess indigenisation only require the returns to list shareholders holding more than 10% of the total shareholding. This does not, however, deal with the problem. In the case of a public company, the shareholding is subject to constant change through trade on the stock exchange. Accordingly, the extent of "indigenisation" of the 51% could be in a state of constant flux depending upon who is purchasing the shares. To avoid this, there would have to be legislation requiring that the race group of each purchaser and seller of shares is disclosed, and, if the 51% is to be retained once reached, a prohibition on the transfer of shares to a person of a particular race once a certain threshold is reached. This will require a separate, racially determined index of shareholdings to be maintained at the stock exchange. So, for example, once the index reveals that a threshold of 49% of shares held by non-indigenous Zimbabweans is reached, there would have to be a prohibition on any further transfer to this race group. As the threshold is approached, this will affect the amount offered for particular shares depending on the race group of the buyer or seller.<sup>94</sup>

Such a scenario leads to consideration of what is meant by "*a controlling interest*" in a company. A controlling interest may be held simply by having a plurality of shares rather than 51%. Consider a company where one shareholder owns 37% of the shares, another 30% with the rest disbursed as

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<sup>94</sup> The result is a scenario akin to those depicted by writer Tom Sharpe, who satirised such distortions caused by apartheid legislation in South Africa.



small holdings over numerous shareholders. The transfer of only 4% of shares by the 37% shareholder to the 30% shareholder could be regarded as being a relinquishment of a controlling interest for the purposes of the Act. The definition of “controlling interest” in the Act is unhelpful:

*“controlling interest”, in relation to—*

*(a) a company, means the majority of the voting rights attaching to all classes of shares in the company;*

*(b) any business other than a company, means any interest which enables the holder thereof to exercise, directly or indirectly, any control whatsoever over the activities or assets of the business;*

It does not in itself clarify whether the majority is to be an absolute majority or merely a plurality. The better interpretation is that the definition must be read in conjunction with the 51% requirement, suggesting that an absolute majority is intended. This then leaves open the possibility that an actual controlling shareholding in a company may be held by a non-indigenous Zimbabwean, which seems contrary to the intention of the legislation expressed in paragraph (b) of the definition of controlling interest.<sup>95</sup>

Similar difficulties arise in regard to non-incorporated businesses, operating as partnerships or trusts. Here the Regulations require the cession of a controlling interest, presumably as defined above.<sup>96</sup> In the case of a partnership, most of the comments applicable to a small company of two shareholding directors apply. The partners may be in the business precisely because of the equality between them. Any tinkering with the arrangement which places one partner under the power of another (with the overtones that the partner’s position is more akin to an employee) may result in the collapse of the collaborative enterprise. In the case of a Trust, whether a controlling interest is held by indigenous Zimbabwean will depend upon the racial composition of the Board. The implication of the Regulations is that the composition of non-indigenously controlled Boards will need to be changed so that at least 51% of the number of Trustees is composed of indigenous Zimbabweans. In theory, to accomplish this, either some non-indigenous Zimbabweans would need to be removed from the Board, or a sufficient additional number appointed.<sup>97</sup> In the first instance a problem arises as most Trust Deeds only allow for the removal of Trustees on the basis of malfeasance or an inability to discharge duties, not to meet the “controlling interest” requirement. In the second instance, the appointment of additional Trustees may encounter a problem because, in order for a controlling interest to be held by non-indigenous Zimbabweans, more Trustees would need to be appointed than allowed for by the Trust Deed, and alteration of the same would be required.

Similarly, some Trusts are established as family Trusts, the objective of which is to generate income for particular family members. The cession of control of the Trust to indigenous Zimbabweans, while still obliging the Trustees in terms of the registered objects of the Trust to generate income for a non-indigenous family seems anomalous and unlikely. Yet if the amendment of a Trust Deed requires a percentage of votes by Trustees which exceeds the indigenisation quota, the beneficiaries of the Trust cannot be altered by the indigenous Zimbabwean Trustees and the position *will* be that a Trust is required to have a majority of indigenous Zimbabweans administering a Trust for the benefit of a family of non-indigenous Zimbabweans.

Many more examples of this kind of bizarre scenario could be imagined. There is also the difficulty

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<sup>95</sup> In an attempt to allay investor fears, this possibility has been highlighted by members of the Affirmative Action Group – e.g. by Supa Mwandiwanzira, *ibid*.

<sup>96</sup> The definition of a controlling interest in the Act has not been imported into the body of the Regulations.

<sup>97</sup> In which event, of course, the ratio would be well above the 51% threshold, unless there is a Board of 100 members, as people, unlike share percentages, must be divided as integers.

that existing court orders, such as those sanctioning Deeds of Compromise,<sup>98</sup> may conflict with the requirements of indigenisation regulations, and that Deeds of Compromise that might otherwise be agreed become untenable due to the requirements of Regulations to implement the 51% or controlling interest requirements.

Finally, under this head it should be noted that as far as Group 1 is concerned, the enabling Act contains no provisions as to “how” the 51% minimum is to be obtained. Accordingly, without an amendment to the Act, any Regulations, for example, compelling the cession of shares would be *ultra vires* the Act (see below).

## **Validity**

### **a) International Law**

To the extent that the Indigenisation and Empowerment legislation is unfairly racially discriminatory, or any implementing Regulations will be so, Zimbabwe is, or will be, in violation of several international covenants which prohibit this – most obviously the International Covenant on Civil and Political Rights<sup>99</sup> and the African Charter on Human and Peoples Rights.<sup>100</sup> Such covenants also provide for freedom of association.

It is difficult to see how Regulations which compel the transfer of 51% of the interests in any business would square with Bilateral Investment Promotion and Protection Agreements [BIPPA], which invariably protect property from compulsory acquisition. It has also been suggested that the 1992 World Trade Organisation principles, which call for equal treatment for both foreign and local traders by governments, would be violated.<sup>101</sup>

### **b) Constitutionality.**

Three provisions of the Declaration of Rights in Zimbabwe’s Constitution are of potential relevance in regard to the Act and Regulations:

- a) the protection of freedom from discrimination (section 23);
- b) the protection of freedom of association (section 21); and
- c) the proscription against the compulsory acquisition of property (section 16).

The relevant portions of section 23 read as follows:

*23 (1) Subject to the provisions of this section—*

*(a) no law shall make any provision that is discriminatory either of itself or in its effect; and*

*(b) ....*

*(2) For the purposes of subsection (1), a law shall be regarded as making a provision that is discriminatory and a person shall be regarded as having been treated in a discriminatory manner if, as a result of that law or treatment, persons of a particular description by race, tribe, place of origin, political opinions, colour, creed, sex, gender, marital status or physical disability are prejudiced—*

*(a) by being subjected to a condition, restriction or disability to which other*

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<sup>98</sup> A Deed of Compromise is the term used to refer to an arrangement agreed with creditors of a company for the take over of a company against payment of a percentage of the company’s debts.

<sup>99</sup> Article 26.

<sup>100</sup> Article 19.

<sup>101</sup> See *Law Violates Trade Ideals: UN Official* <http://www.thezimbabwetimes.com/13.03.10>

*persons of another such description are not made subject; or*  
*(b) by the according to persons of another such description of a privilege or advantage which is not accorded to persons of the first-mentioned description; and the imposition of that condition, restriction or disability or the according of that privilege or advantage is wholly or mainly attributable to the description by race, tribe, place of origin, political opinions, colour, creed, sex, gender, marital status or physical disability of the persons concerned.*  
*(3) Nothing contained in any law shall be held to be in contravention of subsection (1)(a) to the extent that the law in question relates to any of the following matters—*  
*(a) ....*  
*(g) the implementation of affirmative action programmes for the protection or advancement of persons or classes of persons who have been previously disadvantaged by unfair discrimination.*

The Regulations quite clearly have a discriminatory effect (as indicated at the outset) by imposing a prejudicial condition (the requirement to submit an indigenisation plan or the attempt to compel the disposition of shares in mining enterprises) on particular people that is based upon race and/or place of origin. The only issue is whether the law is saved by the derogation which allows for such discrimination on account of it being the “*implementation of an affirmative action programme for the protection or advancement of persons or classes of persons who have been previously disadvantaged by unfair discrimination.*”

Generally such programmes involve the implementation of a previously extant programme in an affirmative manner, for example, the preferential allocation of a limited number of positions on a university campus, to blacks or women. While most jurisdictions regard this as discrimination on the basis of race or sex<sup>102</sup>, the discrimination is not generally regarded as unfair and thus not unconstitutional as it seeks to remedy a past wrong. Most racial discrimination is to the prejudice of one race group and in favour of the other. While “affirmative action” is not defined, to propose that any discrimination on the basis of race which prejudices one group and favours another, will be acceptable so long as the other group was previously disadvantaged is to effectively provide that the provisions against racial discrimination only protect some race groups. If this were the intention of the Constitution it would have prohibited discrimination against blacks and possibly no other groups. It does not.

There is clearly a gamut of circumstances between an equitable affirmative action programme and crude retaliatory discrimination based on past historical injustices perpetrated by a particular racial group. Given the breadth of the application of the Regulations and that the Regulations do not simply provide for the preferential application of existing policy, but rather seek to institute a policy which will take rights from one racial group and give them to another solely upon the basis of the racial group of each, the Regulations appear to be unacceptably close to the wrong end of the scale. They should not therefore be held to be an affirmative action programme justifying discrimination.

The provisions relating to procurement under 3(1)(f) and (g) may reasonably be said to constitute affirmative action. However, as was noted above, to the extent that an appeal to the Minister in terms of the Regulations implementing these provisions is only available to indigenous Zimbabweans, the provisions must be held to be discriminatory and in violation of the Constitution.

The proposed objective of the Regulations would also violate other constitutional provisions if implemented.

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<sup>102</sup> For which reason the Constitution of France does not admit the possibility of affirmative action programmes.

Firstly, companies (which operate in terms of Articles of Association), Trusts, partnerships, etc are clearly associations. The stated objective of Regulations is to compel people to belong to an association the nature of which is other than one of their choosing. Section 21(2) specifically provides that included in the right to freedom of association is the right not to be compelled to belong to an association. While there are several derogations from this right in the Constitution, derogation on the basis of affirmative action is not one of them. Many of the businesses concerned depend upon comity amongst the members which has arisen through free association. The Constitution appears to specifically protect such an arrangement.

Secondly, section 16 of the Constitution provides protection from compulsory acquisition of property. There is nothing to suggest that the acquisition must be by the state before the protection is available. Section 16 is otherwise badly phrased as it suggests that the protection is against being forced to acquire property, when, in fact, it is really aimed at protecting individuals from the compulsory *deprivation* of property. Provisions that require the compulsory transfer of 51% of a company's shareholding or controlling interest in any business constitute the compulsory deprivation of property. Once again, while several pages of derogations follow this right in the Constitution, most are designed to legitimise the compulsory acquisition of land. "*Affirmative action*" does not appear as a permissible derogation from the right.

With the possible exception of mining enterprises, since the Act and Regulations currently do not compel the transfer to indigenous Zimbabweans of 51% of shares or a controlling interest, the question arises whether, as the legislation currently stands, the Act or Regulations violate the Constitution. Non-indigenous and foreign-owned businesses, and only these groups, are obliged to submit IDG 01 forms and indigenisation plans. If a person submitting the plan knows that the information contained in the plan is false, he or she is liable to criminal sanction.

Accordingly, if such a plan is submitted by someone with the full knowledge that there is no intention to ever implement the plan, the statements as to the "how" and "when" of indigenisation required by such plan will clearly be false and attract the penalty. Weak and indirect as these provisions are to enforce the indigenisation of businesses, they are arguably sufficient to cause the provisions to fall foul of the constitutional protections outlined above.

### **c) Procedural Problems**

#### **i) The Validity of the Act and the 21 Day Requirement.**

In considering whether the procedural requirements that must be followed to render the legislation valid have been met, two interpretive provisions are pertinent. Firstly, section 53 of the Constitution provides:

*53(1) As soon as may be after an Act of Parliament has been assented to by the President, the Clerk of Parliament shall cause a fair copy of the Act, duly authenticated by the signature of the President and the public seal, to be enrolled on record in the office of the Registrar of the High Court and such copy shall be conclusive evidence of the provisions of such Act.*

A copy of an Act registered at the High Court is thus conclusive evidence of the contents of an Act only, and not conclusive evidence that the legislation has been validly or duly enacted.

Secondly, section 32 of the Interpretation Act<sup>103</sup> provides:

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<sup>103</sup> Chapter 1:01.

*32(1) It shall be presumed, unless the contrary is proved, that any enactment which has been published in the Gazette or the Federation of Rhodesia and Nyasaland Government Gazette has been duly made, and all courts shall take judicial notice of any such enactment.*

Accordingly, while there is a presumption that a gazetted Act is valid, the contrary may be proved.

All legislation passed by Parliament must receive presidential assent before becoming law.<sup>104</sup> When a Bill is passed to the President for assent, such assent must be given or “withheld” within 21 days. If the assent is withheld, and the Bill is returned to Parliament it does not become law unless a motion to this effect is approved within six months by two-thirds of the members of the House of Assembly. The Act was passed by Parliament in October, 2007, but Presidential assent was only given on the 15<sup>th</sup> January, 2008<sup>105</sup>, well outside the 21 day period. The Act must be registered with the High Court as soon as possible after assent.<sup>106</sup> It should then presumably appear in the next publication of the Gazette.<sup>107</sup> It did not, being gazetted as law only on 7<sup>th</sup> March, 2008. The date of commencement was fixed in terms of section 1(2) by SI 63A/2008 as being the 17<sup>th</sup> April, 2008. The Constitution does not specify what is to happen if the President neither assents to a bill, nor returns the bill to Parliament within the 21 day period. One suggestion is that the bill lapses. In this event, the registration and gazetting of the Act on 7<sup>th</sup> March, 2008, after belated assent had been given by the President, would not validate the legislation. It is not open to the President to give assent after the 21 day period, as any executive action in violation of the Constitution is void and the Act is invalid on this basis. The bill can only be passed if returned to parliament and passed with the requisite two-thirds majority.

It is more likely, however, that the courts will regard a failure to assent within 21 days or return the bill to Parliament as merely a violation of the Constitution in regard to the time period. The Act itself does not violate the Constitution due to the failure by the President to comply with the time limits. Accordingly, the violation does not affect the validity of the legislation itself.

## ii) Consultation.

Before making regulations, the Minister responsible for the administration of the Act is obliged to consult with several bodies. Firstly, for regulations in general, the Minister must first consult with the National Indigenisation and Empowerment Board (the Board).

32 (4) of the Interpretation Act provides:

*Where by any enactment it is provided that a statutory instrument may be made or that any appointment may be made or function performed with the approval or consent of, or after consultation with, the President, a Minister or any other authority, a notification in the Gazette or Federation of Rhodesia and Nyasaland Government Gazette stating that such approval or consent has been given, or that consultation has taken place, shall be prima facie proof for all purposes whatsoever of such approval, consent or consultation.*

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<sup>104</sup>Section 51(1).

<sup>105</sup> This information was obtained from the Papers Office of Parliament.

<sup>106</sup>Section 53 of the Constitution.

<sup>107</sup> While the Act must be registered in the High Court as soon as possible after assent, there do not appear to be any time limits indicating when the Act must appear in the Gazette. An Act does not, however, come into operation unless so gazetted.

The establishment of the 13 member Board appeared in the Gazette of 25<sup>th</sup> December, 2009.<sup>108</sup> In compliance with section 32 of the Interpretation Act, the preamble to the Regulations indicates that the Regulations were made “after consultation with the Board” as required by section 21.

However, in addition to consultation with the Board, consultation with other government Ministers is required.<sup>109</sup>

- a) In the case of regulations pertaining to section 3(1)(b) of the Act (relating to mergers or restructuring) such regulations may not be made “except after consultation with the Minister for the time being responsible for the Competition Act [*Chapter 14:28*]”.
- b) In the case of regulations pertaining to section 3(1)(e), (relating to foreign investments) such regulations may not be made “except after consultation with the Minister for the time being responsible for the Zimbabwe Investment Authority Act [*Chapter 14:30*]”.
- c) In the case regulations pertaining to sections 3(1)(f) and (g) of the Act (relating to procurement) such regulations may not be made “except after consultation with the Minister for the time being responsible for the Procurement Act [*Chapter 22:14*]”.

The President has the sole power to allocate Ministerial duties.<sup>110</sup> It is usual on the formation of a new government, for the assignment of the Administration of Acts to various Ministers to be published in the Gazette. Unusually, this was not done shortly after the formation of the inclusive government on 13<sup>th</sup> February, 2009. As far as the public was concerned then, the Indigenisation and Economic Empowerment Act was Administered by the “Minister of State for Indigenisation and Empowerment”.<sup>111</sup> Yet, on the formation of the new government, there was no such Minister, only (subject to what is said below) a Minister of Youth Development, Indigenisation and Empowerment. Similarly, the Minister administering the Competition Act and Zimbabwe Investment Authority Act, was the Minister of Industry and International Trade. There is now no such Minister. The Procurement Act was administered by the Vice-President, not a Minister. If this situation pertained at the time the Regulations were made, then clearly there could not have been consultation with these “Ministers”.

However, there is no obligation for the assignment of Acts to Ministers to be gazetted. It appears that on appointment to Zimbabwe’s “inclusive” government, letters of appointment handed to each Minister were accompanied by a list of Acts to be administered by them. This procedure would validate the assignment of Acts to extant Ministers and Ministries. The Ministries in question are now the Minister of Industry and Commerce (the Competition Act) and the Minister of Economic Planning and Investment Promotion (the Zimbabwe Investment Authority Act). The Procurement Act is purportedly assigned to the “Office of the President and Cabinet”. Such an assignment is not authorised by the Constitution and would render the necessary consultation with an appropriate Minister impossible. Notice to the public of these assignments was given by way of statutory instruments published on 4<sup>th</sup> March 2010.<sup>112</sup> If this situation pertained at the time of the making of the Regulations, the provisions relating to procurement would be invalid.

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<sup>108</sup> The members are David Chapfika (chairman), Ellen Gwaradzimba, Sitholakele Masuku, Adam Molai, Sheila Sidambe, Engineer Musanhu, Thankful Musukutwa, Prince Mupazviriho, Farai Mutamangira, Desire Sibanda, Dayford Nhema, and T. Mungoni.

<sup>109</sup> Section 3(4) of the Act.

<sup>110</sup> Section 31(D)(1) of the Constitution.

<sup>111</sup> Section 2 of the Act.

<sup>112</sup> S.I. 35, 45 and 49 of 2010.

Notwithstanding the possibility and likely valid assignment of Acts, it does not, however, appear that Mr. Kasukuwere, by his own admission consulted with the relevant Ministers or vice president as required. The Minister of Industry and Commerce has specifically stated that he was not consulted<sup>113</sup>, and Mr. Kasukuwere has denied that he had any obligation to do so.<sup>114</sup>

In the absence of the requisite consultation, the Regulations are invalid where they purport to regulate those areas referred to in the sections listed above. The affected sections in the Regulations are 6, 7, 9, 10(2), 11(a) and (d), and 12.

iii) Ministerial Power.

The most salient procedural defect affecting the validity of the Regulations lies in the fact that the Regulations were not made by a person authorised to do so, thus rendering the lack of consultation referred to above irrelevant.

The establishment of the Ministries appears in Article 20.1.6(5) of Schedule 8 to the Constitution:

*There shall be thirty-one (31) Ministers, with fifteen (15) nominated by ZANU PF, thirteen (13) by MDC-T and three (3) by MDC-M.*

On the 13<sup>th</sup> February, 2009 President Mugabe purported to swear into office 35 Ministers and, on the 19<sup>th</sup> February, 2009, a further six Ministers bringing the total to 41, ten more than are permitted by the Constitution. As such, the appointment of these ten additional Ministers is unconstitutional, unlawful and void. Which Ministers are unconstitutionally in office depends upon the order of the swearing-in. Once the quota of 15 ZANU PF nominees was reached, the purported assumption of office by any ZANU PF nominee thereafter was unconstitutional. The same considerations applied once the quota of 13 MDC-T and 3 MDC-M Ministers had been reached. Ministers are required to both take and subscribe to oaths of loyalty and of office. While they all took the verbal oaths simultaneously on the date of their swearing in, the process was not completed until they had subscribed in writing to these oaths. The ten that did so after the quotas had been reached are not constitutionally appointed as Ministers. Amongst this 10 is Saviour Kasukuwere. Since he is not a constitutionally appointed Minister, any executive act, such as the making of regulations, purportedly undertaken by him is a nullity. The Indigenisation and Empowerment Regulations thus can, and should be, declared null and void on this basis alone. The question of a surfeit of Ministers has been brought before Zimbabwe's High Court, but the application to have their appointment nullified was dismissed.<sup>115</sup> The matter is currently on appeal.

**d) *Ultra Vires* the Act?**<sup>116</sup>

i) Authorisation Under 3(1)(a) of the Act.

Most of the structural problems outlined above arise from the fact that a close reading of the Act reveals that 3(1)(a) was not intended to provide the Minister with a general power to make regulations to achieve "indigenisation" as defined. The Act only provides that the Minister may make regulations governing the transactions specified in section 3(1)(b) of the Act – that is those referred to in Group 2 above.

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<sup>113</sup> *Harare Reviews Firm Seizure Laws* <http://www.zimonline.co.za> 04.03.10.

<sup>114</sup> *I only consult when there is need — Kasukuwere* <http://www.theindependent.co.zw/10.03.10>: an ironic title given that there was such a need.

<sup>115</sup> *Moven Kufa & Anor v The President of Zimbabwe and Ors* HC 3045/10. The judgment appeared as HH 86 -11 and is discussed further below

<sup>116</sup> *Ultra vires* is a technical legal term meaning "beyond the power". The converse is "*intra vires*".

Section 3(1)(a) merely sets out the endeavour that eventually 51% of all businesses are to be owned by indigenous Zimbabweans. Section 3(1)(b) indicates that the endeavour is to be realised by regulating the transactions specified in that section. Yet the Minister has arrogated to himself a power to make detailed and extensive regulations of an extremely wide ambit simply on the basis of a single phrase in section 3(1)(a).

Unlike 3(1)(b), 3(1)(a) does not specify or guide any content for such regulations. In stark contrast with section 3(1)(a) and the broad discretion the Minister has assumed ostensibly by virtue of that section, section 4 of the Act particularises in some detail the contents of any statutory instrument to be made to regulate the matters in section 3(1)(b). If the general statement in 3(1)(a) was intended to be within the ambit of regulations, why was the same particularity of content for regulations under 3(1)(b) not provided? Section 3(1)(a) is intended as merely introductory to explain that which follows in section 3(1)(b). If only transactions under 3(1)(b) are regarded as being subject to regulation, most of the difficulties and contradictions referred to above fall away.

For example, the difficulty of compelling a company to dispose of that which it does not own, the shareholding, does not arise. On the other hand, it is quite possible to provide (constitutional considerations aside) that where there is a relinquishment of more than 50% of the shares in a company by shareholders (a section 3(1)(b) transaction) that the disposal must be to an indigenous Zimbabwean. Similarly, the difficulties with the definition of minimum indigenisation and empowerment quota – would not arise if this limiting reading had been followed. Recall that the Act provides that the Minister “*may prescribe a lesser share than fifty-one per centum or a lesser interest than a controlling interest may be acquired by indigenous Zimbabweans in any business*” pursuant to transactions detailed in section 3(1)(b). The logical reason why this lesser share is confined to these transactions (and not situations arising under 3(1)(a)) is because the legislation anticipated these transactions to be the only situations where such lesser share might be prescribed.

The implication then is that no such situations were anticipated to arise under 3(1)(a) as the provision is not substantive and was not intended to authorise the making of statutory instruments. The Regulations were not to regulate anything outside 3(1)(b), and thus there was no need to allow a lesser share to be prescribed in respect of anything outside 3(1)(b). Many other provisions of the Act only relate to transactions under 3(1)(b). Hence, the Act only allows for appeals against a decision of the Minister in relation to 3(1)(b) transactions;<sup>117</sup> the Government may implement indigenisation measures specifically on behalf of women, young persons and the disabled only in relation to 3(1)(b) transactions;<sup>118</sup> the withdrawal of licences issued by other statutory authorities is confined to situations involving the contravention of 3(1)(b) transactions;<sup>119</sup> and the identification of indigenous counterparts by the Minister upon request is confined to counterparts in section 3(1)(b) transactions.

This limited reading of the Minister’s regulatory power is supported by other considerations. Section 3 of the Act commences with the heading:

*Objectives and measures in pursuance of indigenisation and economic empowerment.*

and then proceeds to declare that in section 3(1):

*The Government shall, through this Act or regulations or other measures under*

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<sup>117</sup> Section 20 of the Act.

<sup>118</sup> Section 3(3) of the Act.

<sup>119</sup> Sections 5(2) and 5(3).



*this Act or any other law, endeavour to secure that –*

- a) at least fifty-one per centum of the shares of every public company and any other business shall be owned by indigenous Zimbabwean.*
- b) ...etc.*

3(1) thus, as stated, appears to set out the “objectives” of the legislation or the endeavour without actually legislating enforceable provisions.

3(1)(b) to (e) suggest that regulations and laws should endeavour to attain indigenisation pursuant to the various transactions referred to above, such as upon merger, restructuring, unbundling, relinquishment of a controlling interest, etc., but does not actually establish the law or even authorise the regulations necessary. Sections 3(1)(b) to (e) are more specific as to what measures are desirable to attain the general objective of indigenisation set out in 3(1)(a), but still must be classed as merely describing the objective of legislation as being to implement such measures through further legislation, rather than the measures themselves. All are part of the opening phrase in 3(1) – “*the Government shall through this act or regulations...endeavour to secure that...*”.

Some of these objectives may, however, be said by implication to be transformed into “*measures*” by virtue of section 4 of the Act which refers to the Minister prescribing “*what is required to be prescribed for the purposes of*” sections 3(1)(b) – (e) and that none of these transactions shall be valid unless approved by the Minister in terms of regulations. By stipulating that the kinds of transaction mentioned in 3(1)(b) to (e) will not be valid unless approved, they effectively become substantive provisions and the authorisation to make regulations in this regard is implied. Sections 3(1)(a), (f) and (g), however, are not mentioned in section 4 and are not, therefore, so transformed.

3(1)(a), (g) and (f)<sup>120</sup> thus remain merely a declaration of governmental policy rather than substantive legislation. Such a declaration of the objective of a piece of legislation or the policy considerations informing it, are usually part of a Memorandum to a Bill. It is unusual in Zimbabwe for the policy to form part of the legislation itself.

The Minister’s power to make Regulations is established by section 21 of the Act:

*21(1) The Minister, after consultation with the Board, may make regulations providing for any matters which by this Act are required or permitted to be prescribed or which, in his or her opinion, are necessary or convenient to be provided for in order to carry out or give effect to this Act.*

Generally speaking, regulations are subordinate legislation designed to implement the substantive provisions of the Act. To the extent that the Regulations seek to actually legislate measures in order to give effect to *policy* rather than to put in place the instruments to implement measures already enacted by Parliament, their validity is questionable. Legislative authority in Zimbabwe vests “*in the Legislature which shall consist of the President and Parliament*”.<sup>121</sup> The Minister has essentially interpreted his power under section 21 as being one that allows him to enact primary legislation to give effect to policy. Whether this is permissible is unclear. While primary legislative authority is that of Parliament and the President under section 32(1) of the Constitution (and not that of the Minister), section 32(2) provides that this “*shall not be construed as preventing the Legislature from conferring legislative functions on any person or authority*”.

This proviso does not, as it might appear, settle the matter. In other jurisdictions where similar

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<sup>120</sup> 3(1)(g) and (f) relate to procurement.

<sup>121</sup> Section 32(1) of the Constitution.

provisions appear, they have been interpreted to mean that this delegation of the legislative function by the legislature can only apply to subordinate legislation.<sup>122</sup> A delegation of the primary legislative function by parliament to a member of the executive authority blurs the separation of executive and legislative powers that may be regarded as an essential feature of Zimbabwe's Constitution.

There is a third reason why it is clear that the Minister does not have the power to pass indigenisation and empowerment regulations in regard to Group 1 entities and in the general and broad manner he has done. As stated, the power ostensibly arises from section 3(1)(a). This section, which reads as follows

*at least fifty-one per centum of the shares of every public company and any other business shall be owned by indigenous Zimbabweans.*

can be read in two ways:

- a) at least 51% of the shares:
  - i) of every public company; and
  - ii) of any other businessshall be owned by indigenous Zimbabweans

or

- b) at least 51%
  - i) of the shares of every public company; and
  - ii) of any other businessshall be owned by indigenous Zimbabweans

In the first reading, it is implicit that the businesses (which are not public companies) to which the law is to apply are incorporated as companies and thus have a shareholding. The provision would not therefore apply to Trusts, partnerships etc. If this is the case, the Minister had no power to make regulations governing the indigenisation of these entities by virtue of section 3(1)(a).

On the second reading, however, the 51% refers to a proportion of ownership of every business whether the ownership is through a shareholding or otherwise.

The provisions of 3(1)(b) to (g) [the provisions relating to mergers etc – Group 2 businesses – and procurement] distinguish between the ownership of 51% of the shares and a “controlling interest”. A “controlling interest” is specifically defined in a manner that makes it clear that businesses, which are not companies, are included in some of the provisions of 3(1)(b) to (g). The definition provides that “controlling interest” in relation to—

*a company, means the majority of the voting rights attaching to all classes of shares in the company;*<sup>123</sup>

*any business other than a company, means any interest which enables the holder*

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<sup>122</sup> *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others* 1995(10)BCLR 1289(CC). Also 1995(4) SA 877(CC).

<sup>123</sup> As discussed above, the “majority of voting rights” in a company, may or may not be 51% depending upon whether the “majority” is a plurality or absolute majority. If the definition is read as being subject to the general intention of the Act as expressed in 3(1)(a) which refers to 51%, then the majority must be absolute. However the term “controlling interest” does not appear in 3(1)(a) but only in 3(1)(b) – (g). These latter provisions may be read as expressing a second endeavour of the Act rather than being a subclass of the endeavour under 3(1)(a) to which the 51% in 3(1)(a) would not, therefore, apply.

*thereof to exercise, directly or indirectly, any control whatsoever over the activities or assets of the business.*

Accordingly, sections 3(1)(b) to (g) of the legislation may be read as stipulating a 51% requirement only when intending to include and refer to incorporated companies with a shareholding, and uses the “*controlling interest*” requirement when intending to refer both to companies and to businesses that are not companies.

If 3(1)(a) is read in a manner consistent with this, since the phrase “*controlling interest*” does not appear in section 3(1)(a), it may be assumed that there is no intention that it apply to businesses other than companies, and the first reading above correctly reflects the intention of the legislature. It should be noted that the first reading is supported by the fact that the authorisation originally given to the Minister under section 3(6) of the Act specifically only extended to companies. The change introduced by the General Laws Amendment Act extended the power to “businesses” was made in ignorance of these considerations.

A like problem arises *vis-à-vis* the Regulations, the provisions of which, as subordinate legislation, must find authority within the Act. Sections 3, 4, and 5 of the Regulations rely on section 3(1)(a) for their authority. They thus must fall within the ambit of section 3(1)(a) if they are to be valid and *intra vires* the Act. Sections 3, 4, and 5 of the Regulations refer to “a controlling interest” a phrase which does not appear in section 3(1)(a) of the Act. These sections thus purport to include businesses which are not companies, which is not authorised by the Act, and, to the extent that “a *controlling interest*” differs from the criterion of 51% as specified by 3(1)(a) of the Act, generally exceeds the ambit of the Act in this regard.

Furthermore (and supporting the interpretation which excludes businesses which are not companies from the ambit of the law), section 3(1)(a) refers (on reading b above) to a 51% “ownership” of a business. This does not make sense in relation to businesses that are indivisible. Consider the position of a Trust. The Trustees do not own the Trust; they administer it, and thus manage the business. There is no such thing as “51%” of a Trust. It is possible for 51% of the Trustees of the Trust to have control over the activities of the assets of the Trust, but this possibility is not provided for in 3(1)(a), and only appears in relation to some Group 2 businesses in the Act.

Oddly, sections 3(1)(b) and (c) of the Act do not use the phrase “*51% share or controlling interest*”,<sup>124</sup> but only 51% share, suggesting that they are only applicable to companies, while sections 3(1)(d) and (e) of the Act use the term “*controlling interest*” without reference to a 51% share, leaving open the possibility that the share may be less than 51% so long as it is “controlling”. This distinction is largely<sup>125</sup> followed by the Regulations in sections 6 and 7 and sections 8 and 9 respectively where “*51% share*” is referred to in the first dyad and “*controlling interest*” for purposes of the second.

However, if one reads the term “*controlling interest*” with the 51% objective for all companies under 3(1)(a) of the Act,<sup>126</sup> in the case of those businesses falling under sections 8 and 9, the 51% shareholding must be “controlling” and the “*controlling interest*” must be at least 51%. Clear and precise legislation this is not.

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<sup>124</sup> 3(1)(b)(ii) does use “controlling interest” but the effect thereof is immediately negated by 3(1)(b)(iii) which reverts to the 51% requirement.

<sup>125</sup> But not uniformly so. For, example, section 10(2)(a)(ii) and (iii) refer to notices given by businesses which are not companies in terms of sections 6 and 7 where on the argument presented here these sections can only apply to companies. The sub-paragraphs are thus *ultra vires* the Act.

<sup>126</sup> However, businesses falling under sections 3(1)(b) – (g) may be regarded as a second “endeavour” of the Act rather than falling under 3(1)(a), as suggested above.

The drafter of the Regulations was aware of the confusion created by the Act. An attempted resolution appears in section 3 of the Regulations. The section indicates that the general objective of the Regulations is that every business of or above the prescribed threshold must cede

*a controlling interest of not less than 51% of the shares or interests therein to indigenous Zimbabweans; unless, in order to achieve other socially or economically desirable objectives, a lesser share of indigenisation or a longer period within which to achieve it is justified.*

The provision thus introduces the notion of “a controlling 51% shareholding” for all provisions relating to companies – something that is not provided by, and is thus *ultra vires*, the Act.

None of these contradictions between the Act and regulations arise, of course, if the power to make regulations is regarded as confined to section 3(1)(b) transactions or Group 2 businesses. The problems arise through the attempt to read 3(1)(a) as authorising that which it does not – a broad power to generally make whatever regulations the Minister feels fit to achieve indigenisation.

#### ii) Other *ultra vires* provisions of Section 3 of the Regulations.

Since the endeavour of the Act is that indigenous Zimbabweans own a minimum 51% share of every business, a further aspect of section 3 of the Regulations is also *ultra vires* the Act. The Act requires that the law be applicable to “every and any” business, not only those above (the yet to be gazetted) threshold as provided by the Regulations.<sup>127</sup>

The provisions requiring the supply of information to the Minister by way of IDG Forms and Indigenisation Plans are arguably *ultra vires* Section 19 of the Act. The Act only authorises the request for information relating to the shareholding of companies “or similar interests”. Clearly these forms go well beyond the permissible ambit of the Act. The same considerations apply to other sections of the Regulations which require the submission of IDG Forms or information, such as section 11. Furthermore, the penalty for a failure to submit IDG Forms is a level twelve fine, five years imprisonment or both.<sup>128</sup> Yet section 19 of the Act only allows a maximum of a level five fine, without any alternative of imprisonment in relation to the failure to supply information.

#### iii) Weightings

Section 5(4) of the Regulations purports to allow the Minister to allocate a “weighting (expressed as a fixed percentage that may be added towards the fulfilment of the minimum indigenisation and empowerment quota)” for various socially and economically desirable activities undertaken by the business. Nothing in the Act authorises this and the section is thus *ultra vires* the Act.

#### iv) Procurement.

The Act, in section 3(1)(g), only provides for the situation where subcontracting is required by a non-indigenous business. Yet the Regulations in sections 12(3) and (4) seek to apply the provisions to indigenous businesses that subcontract. This is logical in that, in the absence of such a provision, an indigenous business would be free to subcontract a primary contract to foreign and white businesses. While the Regulations may be logical, this is not provided for in the Act, and is thus *ultra vires* the Act which only applies to non-indigenous businesses. The Regulations cannot seek to repair the omissions of the Act.

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<sup>127</sup> The Regulations are obviously the more sensible, but it is not for the Minister to amend the Act.

<sup>128</sup> Section 5(3) of the Act.

*Ultra Vires* the Regulations.

It has already been noted that General Notice 114 of 2011 is purportedly issued in terms of sections 5 and 5A of the General Regulations. These sections do not authorise the issuance of Notices, and in any event, the Notice issued constitutes further regulations rather than being a “Notice”. Notices usually publicise quantum (prices, distances etc) dates or specify people or places and this means is employed on account of the fact that the things so specified are subject to change. None of these criteria apply to this Notice.

### **The Courts.**

The legislation is so replete with errors and badly structured that it is arguably *void for vagueness*. It is also open to challenge on constitutional and procedural grounds. It is thus worth considering how Zimbabwean courts are likely to approach the difficulties of interpretation and contests around the validity of the legislation. Two recent cases are illustrative. In the first<sup>129</sup>, the Supreme Court considered the validity of the election of the Speaker of Parliament whose appointment was disputed on the basis that six members of Parliament had shown their completed ballots to their colleagues before placing them into the ballot box. The Constitution as read with the Standing Rules and Orders of Parliament provides that “the Clerk of Parliament *shall* conduct the election of the Speaker by a secret ballot.” The majority of the five judge bench held that:

*The golden rule of interpretation is that one has to give the words of a Statute their primary meaning....In view of the explicit language of the Statute, it is not open to the Clerk or any Member of Parliament to substitute the method of electing a Speaker with another method of their own choice, such as by open ballot.*<sup>130</sup>

Neither the usual rule that a procedural irregularity will not nullify an election if it does not affect the result of the ballot<sup>131</sup> nor the fact that legal precedent in other jurisdictions held that the secrecy of the vote was the right of the voter which could be waived in certain circumstances was sufficient, the majority held, to override the clear provisions of the constitution which the use of the word “*shall*” rendered mandatory.

The second case<sup>132</sup> was an application to declare void the surfeit of Ministers, referred to above. To revisit the relevant provision of the constitution cited above:

*There shall be thirty-one (31) Ministers, with fifteen (15) nominated by ZANU PF, thirteen (13) by MDC-T and three (3) by MDC-M.*

Judgment in this case was delivered within a few weeks of the judgement in the first case. The Judge President, as in the first case, considered the meaning to be given to the use of the word “*shall*” in a constitutional provision. Rather than “giving the words in the provision their primary meaning”, as was done in the first case, the judge determined that a “*liberal and broad approach*” to interpretation should be adopted. The purpose of the current constitution is, the judge declared, to create stability and

*“[i]f the order that the applicants seek were to be granted, it would destabilize the*

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<sup>129</sup> *J. Moyo & Ors v A. Zvomo & Anor* S.C. 28/10.

<sup>130</sup> At p 13.

<sup>131</sup> As in this case, as the speaker was elected by more than a six vote majority.

<sup>132</sup> *Moven Kufa & Anor v The President of Zimbabwe and Ors* HH 86 -11.

*government of national unity and cause unnecessary confusion within the body politic and prejudice the public interest at large".<sup>133</sup>*

The application was thus dismissed as conflicting with “*the purpose of the constitution*”. Both judges were called upon to consider the use of the word “*shall*” and both reached a conclusion which was politically convenient. The second judgment stopped little short of stating this as the explicit basis for the ruling. Diametrically opposed approaches were adopted by the judges in the two courts in order to reach their determinations. If the judge in the second case had adopted the approach of the Supreme Court, the following statement, transposing that of the first, could have appeared

*The golden rule of interpretation is that one has to give the words of a Statute their primary meaning....In view of the explicit language of the Statute, it is not open to the President or Prime Minister to substitute the method of achieving stability with another method of their own choice, such as by appointing additional ministers.*

If the courts feel entitled to exercise such latitude in statutory interpretation, when faced with a provision as clear as that specifying the number of Ministers that may be appointed, they are likely to feel entirely at large when called upon to make sense of the incoherence, ambiguities and unintelligibility of the laws on indigenisation. They may well hold that the law means whatever the Minister claims it to mean.

## **The Politics**

### **a) Timing.**

The Indigenisation and Economic Empowerment Act was passed by Parliament in October, 2007, five months before the “harmonised elections” of 28<sup>th</sup> March 2008. Yet, it was only assented to by the President and gazetted as law once the peak period of campaigning commenced at the start of the same month. The legislation could have become operational immediately upon gazetting. Instead it was to commence from a date fixed by the President in a statutory instrument. The President then fixed the date as the 17<sup>th</sup> April, 2008, the day before Independence Day celebrations and the usual accompanying speeches. The date also fell between the first and second round run-off of the Presidential election. It does not thus seem far-fetched to suppose the timing of these successive legislative moves was intended as an election campaign tool by Mugabe and ZANU PF.

Nothing was then done until December, 2009, when the Indigenisation and Economic Empowerment Board was put into place as a prelude to passing the Regulations.<sup>134</sup> The Board was established at exactly the time that, following the threat of a consumer boycott, Nestle Zimbabwe declined to accept milk deliveries for processing from dairies run by Robert Mugabe and his wife Grace through Gushungo Holdings. Attempts to strong-arm Nestle into reversing the decision through intimidatory visits by senior police officers and the Affirmative Action Group failed.<sup>135</sup> Mr. Kasukuwere stated that Nestle’s refusal to accept milk for processing from the first family’s business constituted a form of sanctions. He then stated:

*"We will bring under indigenous control all companies that continue to pursue the policy of sanctions."<sup>136</sup>*

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<sup>133</sup> P9 of the judgment.

<sup>134</sup> As noted above, the Board must be consulted by the Minister before he may make regulations.

<sup>135</sup> Kasukuwere, *Made, Force Mugabe's Blood Milk On Nestle* <http://www.radiovop.com>

<sup>136</sup> *Nestle Suspends Zim operations* <http://www.herald.co.zw>

The Board was in place two days later.

Significantly, as seen above, the Regulations included milk processing as one of the industries from which new foreign investors are now completely precluded, and this is an industry in which Grace Mugabe has recently made significant investment.<sup>137</sup>

This sequencing belies the impression created in some media<sup>138</sup> that the Regulations were an irresponsible act of a maverick Minister. In fact, they appear as a carefully considered strategy – a care which is not, unfortunately, reflected in the drafting.<sup>139</sup>

The General Notice pertaining to mining enterprises was published on the 25<sup>th</sup> March, 2011 at a time when ZANU PF declared that there should be general elections in the same year, and such elections probably held around the time that mining companies are ostensibly required to dispose of shares to the “designated entities”.<sup>140</sup> The December 2010 ZANU PF National People’s Conference was held under the theme “*Total control of our resources through indigenization and empowerment*”. ZANU PF’s election campaign material is likely to be of a similar tenor.

Shortly after the Regulations were gazetted, the Minister threatened journalists by advising that those who write “negatively” about Zimbabwe and the Regulations should not expect to benefit from the empowerment Regulations.<sup>141</sup> Mugabe and the Minister have specifically stated that the Regulations will be used as a weapon against those pursuing policies of which they disapprove. Banks have been threatened, ostensibly on the ground of refusing to give loans to black businesses,<sup>142</sup> businesses owned by nationals of countries that have imposed what ZANU PF calls “sanctions” on “Zimbabwe”<sup>143</sup> have been threatened with compulsory acquisition as “revenge”<sup>144</sup>, as has Nestle Zimbabwe, against whom Mugabe is pursuing a personal vendetta over its refusal to purchase milk produced on one of his farms.<sup>145</sup>

## **b) Another Kind of Empowerment?**

Attempts to strong-arm Nestle failed, despite threats of the use of immigration legislation and the criminal law against the directors.<sup>146</sup> As indicated by the quotes given above, the Regulations are purposely framed so as to empower government with an intimidatory weapon which will avoid another Nestle saga. Non-politically compliant businesses face the threat of the imposition of

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<sup>137</sup> *Germans Assist Grace Mugabe Build High Tech Milk Processing Factory* <http://www.thezimbabwemail.com/zimbabwe/4871.html>

<sup>138</sup> *Harare Reviews Firm Seizure Laws* <http://www.zimonline.co.za/> 04.03.10.

<sup>139</sup> Apart from the substantive drafting errors which have been commented upon here, there are several typographical errors. The Third Schedule was cross referenced to section 21 (there are only 17 sections) instead of section 9. The amendment to the Regulations sought to correct this, but in so doing referred to the First instead of the Third Schedule; Section 4(4) still refers to 45 days instead of 75, even though the section was amended; Section 5(6) still cross references subsection (3) instead of (4), even though the same cross reference was amended in section 5(1)(b) where a comma had been inserted instead of the number “4”. Incorrect paragraph sequencing has not been corrected by the amendments – see section 14B(4)(c). There are several spelling errors.

<sup>140</sup> At the time ZANU PF’s rhetoric was that the “unity government” was for a two year period only which ended in February. Mugabe announced that it would not be extended for more than six months, taking one into August, 2011, with elections held shortly thereafter. The date in the General Notice for disposition of shares to designated entities is 30.09.11 – see *GNU To Continue* *Newsday* 10.02.11.

<sup>141</sup> *Kasukuwere Indigenisation Here to Stay Zimbabwe* *Guardian* 07.03.10.

<sup>142</sup> *Kasukuwere Threatens Foreign Banks Over Loans* *The Standard* 06.03.10.

<sup>143</sup> There are no sanctions on Zimbabwe as a country as the term is commonly understood. The restrictions referred to pertain mainly to travel bans and assets freezes applied to targeted ZANU PF officials.

<sup>144</sup> *Sanctions: Zim to Reciprocate* *The Herald* 18.12.11.

<sup>145</sup> See for example *Mugabe Threatens to Grab Nestle Zim* *The Standard* 27.02.11. See further, below.

<sup>146</sup> *Zim Puts the Screws on Nestlé* *Mail and Guardian* 21.12.10.

“indigenous Zimbabweans” selected by the Minister onto their Boards and the implementation of the Regulations to their fullest extent on terms as unfavourable as the Minister’s discretion allows.

The very threat of indigenisation laws brought a sycophantic response from some businesses, eager to demonstrate political innocuousness and servility, and thereby hoping to secure a favourable empowerment deal for themselves.<sup>147</sup> Mining companies have also sought to make special indigenisation arrangements with the Minister, following the publication of the General Notice.<sup>148</sup> Despite the absence of any criminal sanctions attached to the failure to comply with the General Notice; despite the fact that the Regulations and Act are susceptible to legal challenge on a plethora of different grounds; and despite the fact that human rights NGOs have offered to take up a test case on behalf of an affected company, no legal challenge to the laws has eventuated. This speaks volumes about the political climate in Zimbabwe, the ethos of Zimbabwe’s business community, confidence in Zimbabwe’s judiciary, or any combination of these factors.

### **c) Creating Controversy**

The Regulations also appear to have been drafted with the intention of stirring as much controversy as possible. In this they have been entirely successful.<sup>149</sup> In particular, the Regulations have been castigated as pernicious racist legislation designed to facilitate theft of property by an avaricious and venal ZANU PF-affiliated black elite. This is precisely the response the Regulations were designed to provoke. The reasons for this are two-fold.

Firstly, Mugabe’s survival has always depended upon dispensing largesse to this black elite. However, it is quite clear that extensive largesse through further expropriation of productive white farms is no longer possible, the resource having been depleted. Media outrage at the Regulations functions as free, and very effective advertising and election campaign material that sends a message to this elite that the larder may currently be empty, but that it is about to be abundantly replenished.

Secondly, the Regulations operate as a legislative fig leaf. They have been deliberately crafted to allow the facile, but erroneous impression, that they authorise the taking of white and foreign businesses by black Zimbabweans and compel the disposition of mining shares against criminal sanction. Accordingly, should invasions of white and foreign businesses take place in the same manner as the invasion of white owned farms from 2000, the invaders may claim that they are simply enforcing the Regulations. The media will have usefully created the impression that it is only the method of acquisition which is at fault, rather than a violation of substantive law. This trope appears in conjunction with other legislation. For example, in decrying the Public Order and Security Act as one which gives the police excessive powers, a cover is provided for the police to act in a draconian fashion and claim that their actions are authorised by the oppressive provisions of the legislation, when this is not in fact the case.

In commenting upon Zimbabwe’s indigenisation legislation, journalists are required to reduce prolix legislation to a few sentences which capture their effect. Accuracy is often lost and a spin put on the provisions to justify the moral indignation which makes for a good story. Internationally

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<sup>147</sup> Zimplats in 2007 gave up some of its platinum concessions worth over US\$150 million in a bid to win 30% empowerment credits well before the Regulations came into effect. By handing over the concessions, it was agreed that Zimplats had complied with empowerment policies. Essentially the move meant Zimplats had complied with empowerment and only needed to sell an additional 19%. However, the Minister has now stated that the Regulations supercede any such arrangement - see *Honour 2006 Plan, Zimplats Urges Govt* <http://www.dailynews.co.zw/> 28.04.11. Anglo also gave up its platinum claims in the Shurugwi area held by its subsidiary, Unki Mines. *Empowerment: Govt Flip-flopping Undoes Economy* <http://www.theindependent.co.zw/> 11.03.10.

<sup>148</sup> See *Zimplats Set to Conclude BEE Deal With Govt* *The Independent* 06.05.11.

<sup>149</sup> *Majority Opposes New Empowerment Law* <http://www.thezimbabwetimes.com/?p=27999> 15.03.10.



renowned journalist, Alistair Sparks writes in the respected South Africa paper *Business Day*:

*Three weeks ago ZANU-PF suddenly revived an "Indigenisation Act" passed by a pre-unity ZANU-PF Parliament back in 2007 but never activated, which requires all companies with a capital value of more than US\$ 500,000 to hand over 51% of their equity to "the people" -- meaning ZANU-PF's elitists – and to do so within 45 days or face five years imprisonment.*

As seen above, the Regulations in fact provide nothing of the sort. Reports such as this, however, are music to the ears of the intended beneficiaries. The more the media condemns the fact that a black elite is about to take white property and mines, the more the beneficiaries are likely to believe that the promise of riches is real.<sup>150</sup>

There are several sections which suggest that the Regulations were drawn with the deliberate intention of engendering discourse of this nature. Two requirements lie at the heart of the Regulations - the submission of IDG 01 forms, and the submission of indigenisation plans. The first is a mapping exercise which allows the Minister to determine the current extent of indigenisation. This will allow the Minister to gazette indigenisation requirements for various sectors of the economy, in a similar fashion to the South African BEE Act. If the Regulations had stopped there, it is unlikely that they would have generated the controversy they have done. The controversy had to be generated by, unusually, including a policy statement in the legislation that the “*objective*” of the Regulations is that all non-indigenous” businesses “*dispose of*” 51% of the interest in the business to indigenous Zimbabweans – though no provisions actually exist to implement the disposition other than the requirement to submit an indigenisation plan.

The General Notice pertaining to mining enterprises is designed to ensure that the controversy will be on-going, and the non-state controlled media has, no doubt to the satisfaction of the Minister, repeated the howls of outrage in regard to the Notice which greeted the introduction of the indigenisation regulations, with the same distortions as to their contents.<sup>151</sup>

## Conclusion

Mugabe himself has drawn parallels between the land policy and the Indigenisation and Empowerment legislation.<sup>152</sup> War veterans have demanded a 20% share in all mining enterprises, in the same manner as they did for land.<sup>153</sup> Where the indigenisation plans of a business have been rejected or not submitted in the first place, section 3(b) of the Regulations states the objective that any such business not operating in terms of an approved indigenisation plan after five years must dispose 51% of the interest in the business to indigenous Zimbabweans. By deliberately avoiding the word “sell” throughout the legislation, the door is left open for the possibility of further legislation allowing for the appropriation of the interest in these businesses for whatever compensation the government deems to be adequate or for the seizure of businesses, as has ostensibly been done in relation to mining enterprises.<sup>154</sup>

Over the Regulations hover the spectre of the land invasions and the tacit threat that if a business has not suggested a means by which 51% of the business can be transferred to indigenous

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<sup>150</sup> *Time to Scrap Zim's Unity Deal and have a Supervised Election* <http://www.businessday.co.za> 17.03.10.

<sup>151</sup> *Foreign Mining Firms Under Siege* <http://www.zimonline.co.za> 29.03.11.

<sup>152</sup> *Mugabe Encourages Takeovers* <http://www.thezimbabwean.co.uk> 17.03.10.

<sup>153</sup> *'Succession clique a bunch of sellouts'* <http://www.zicora.com> 18.03.10.

<sup>154</sup> The Act does establish a National Indigenisation and Economic Empowerment Fund to assist with the finance of share acquisitions which may receive funds through the imposition of levies – sections 12 and 17 – but obviously this does not create the requirement that all share acquisitions are paid for in this manner.

Zimbabweans, the business will simply be seized in the same manner that land was taken from white farmers. This is probably the single most alarming and important signal conveyed by the Regulations. Despite the absence of enforcing provisions in the law, this tacit threat may thus compel compliance by fearful businesses. The laws are thus little more than racketeering by regulation.

The lure of unearned riches once again presents itself for a select few, and may convince any waverers within ZANU PF's ranks to remain where they are. For any foreigner intending to invest in Zimbabwe, it seems the first item of capital expenditure should be a very, very long spoon.

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