"RACKETEERING BY REGULATION."

SUMMARY

This is a brief guide to the detailed paper issued earlier on the Indigenisation debate. Here see "*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]"*

[http://www.researchandadvocacyunit.org/index.php?option=com_docman&task=cat_view&Itemid=90]

Validity.

1. The legal validity of the Regulations is open to challenge on several grounds:

a) The Act (and thus the Regulations) may be held to offend the Constitution in several ways. They violate the freedom of association and (if implementing provisions are put into place, as has purportedly been done in the case of Mining Companies) violate protections against the compulsory deprivation of property, as well as equality clauses. The first two constitutional provisions do not provide for any derogation from the rights protected on the grounds of an "affirmative action programme", and while the last does, it is doubtful that the scheme envisioned by the Minister could be held to be such a programme.

b) The appointment of the maker of the Regulations (the Minister of Youth Development, Indigenisation and Economic Empowerment, Saviour Kasukuwere) is itself questionable. Zimbabwe's Constitution provides for the appointment of 31 Ministers only. Kasukuwere is one of the 10 Ministers appointed beyond this quota. If his appointment is held to be invalid then so too may be any Regulations made by him[1].

c) The Act only empowers the Minister to make Regulations governing indigenisation in respect of businesses which are merging, de-merging, restructuring, relinquishing a majority shareholding or similar transactions. It does not grant the Minister the power to make wide ranging regulations governing indigenisation for all non-indigenous business enterprises in the manner in which the Minister has arrogated to himself.

d) Specific sections of the Regulations are either *ultra vires* the Act, internally contradictory or unintelligible, and thus legally unenforceable, or any combination of these factors. Many of these problems arise from the fact that the Regulations seek to

[1] The appointment of the 10 extra Ministers was challenged in the High Court, and is currently being appealed after a dubious decision by the Judge President, Justice George Chiweshe.

compel companies to do that over which they have no control; i.e. to dispose of shares which they do not own. Shareholders, and not companies, own shares. The legislative difficulties which arise are particularly acute in the case of publicly listed companies. This problem is itself symptomatic of the fact that the Minister has arrogated to himself the right to make regulations for all non-indigenous businesses, and not merely those undertaking specific transactions as provided by the act.

Regulatory Requirements.

2. Business enterprises affected by the Regulations may conveniently be split into three groups: **Group 1** – non-indigenous businesses with a net asset value of $500 000 or more which fall under sections 4 and 5 of the Regulations; **Group 2** – those businesses undertaking mergers, demergers, restructuring, relinquishing a majority shareholding or undertaking a similar transaction; and **Group 3 -** businesses involved in Mining.
3. **Group 1** – non-indigenous businesses with a net asset value of $500 000 or more. The Regulations require that these enterprises submit IDG 01 Forms. These are forms through which a business is to disclose basic details such as the location of its registered office and site of business, and to disclose the current level of indigenisation through the shareholding or otherwise. If the business it not indigenised (which should always be the case as only non-indigenous businesses must complete the form), the business is asked to submit an indigenisation plan. The form provides that the indigenisation plan may involve the relinquishment of less than 51% of the shareholding or "controlling interest" only on certain specified grounds relating to social and economic benefits to the country. However, there is no penalty for a failure to submit an IDG 01 form of one's own accord. It only becomes an offence not to submit an indigenisation plan if a business has specifically been called upon to do so. If such notice has been received the business has 30 days within which to return a completed IDG01 form. It is not mandatory at this stage to submit an indigenisation plan with the IDG 01 form, and, once again, it only becomes an offence not to do so if, after the Ministry has assessed the IDG 01 form, it determines that it ought to have been accompanied by an indigenisation plan and gives the business written notice to submit the same. If the indigenisation plan is rejected by the Minister, a revised indigenisation plan must be submitted. The Regulations are silent as to what is to happen if the indigenisation plan is again rejected.

   The forms are difficult to complete as often the respondent is asked to choose between two alternates when none in fact may apply. Aspects of the form also appear self-contradictory. A further difficulty arises from the fact that in terms of the Regulations the Minister must "as soon as possible" with the assistance of "sectoral committees", established for this purpose, gazette what "**lesser** share" than "the minimum indigenisation quota" may be held by indigenous Zimbabweans and the maximum period such lesser may be held. The Minister has failed to do so as required and the sectoral committees recommendations to the Minister suggest **greater** indigenisation quotas rather than lesser as stipulated by the Regulations. A business intending to submit an indigenisation plan which conforms to (ungazetted) lesser quotas will be at a loss as to how to proceed. Other aspects of the Regulations in regard to quotas are, however, so

poorly drafted as to render them virtually unintelligible in any event.

There is no provision compelling the implementation of indigenisation plans, preventing the variation of indigenisation plans once submitted, or which criminalise the failure to indigenise. However, the Regulations contain a political threat that "the intention" is that every non-indigenous business without an approved indigenisation, within five years of the coming into being of the Regulations, "dispose of "51% of its equity to indigenous Zimbabweans. The threat is political rather than legal as no provisions of the Regulations currently give effect to this intention. Accordingly, with respect to this group of businesses, the provisions are more in the nature of a mapping exercise than provisions will compel companies to dispose of shares or "a controlling interest" – contrary to reports which have appeared in the press.

4. **Group 2** - businesses undertaking mergers, demergers, restructuring, relinquishing a majority shareholding, or undertaking a similar transaction. Where a transaction of this nature takes place, and the result of the transaction is such that indigenous Zimbabweans will hold less than 51% of the resultant entity, prior approval of the Ministry is necessary. This will be granted or declined after the submission of an IDG 02 form (similar to the IDG 01 form) and approval or rejection of an indigenisation plan. Failure to comply with this provision is an offence.[2] 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.

5. **Group 3** – Mining Enterprises. On 25th March, 2011 a General Notice (114 of 2011) pertaining to mining enterprises was published in an extraordinary government gazette. The Notice consists of four paragraphs – a preamble and three sections. Each is so badly drawn as to be legally unintelligible. 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 is that the Minister shall gazette:

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

The Minister may also gazette the weighting (as a percentage to count toward meeting the minimum indigenisation empowerment quota of businesses) to be accorded to economically and socially desirable projects undertaken by the business. Section 5A establishes sectoral committees to advise the Minister on these issues. These sections thus do not authorise the making of a law compelling the disposition of shares "*to designated entities*", (section 3(1) of the Notice), nor a law setting out a method by which the value of such shares are calculated (section 3(2) of the Notice), nor a law requiring the submission of indigenisation plans (section 2 of the Notice).

[2] Section 10(3) of the Regulations. The penalty is a level 12 fine, five years imprisonment or both.

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. Rather than being a "General Notice", an instrument which usually sets various quantums, dates, or publicises the names of persons appointed to statutory office, the Notice in fact purports to put further indigenisation regulations into place.

Hence, section 2 of the "General Notice" requires every non-indigenous mining businesses with a net asset value of over $1.00 to submit an indigenisation plan to the Ministry within 45 days[3] unless "its indigenisation plan is complaint with the minimum requirements of this notice". No minimum requirements are in fact set out in the Notice, and the assumption that the business has an indigenisation plan may be unwarranted, rendering this clause difficult to understand. Fortunately there is no penalty for non-compliance.

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…*

"Designated entities" are defined in section 1 as meaning 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 by the Act – a person, or descendant of a person, discriminated against on the grounds of race before Zimbabwe's independence or any business controlled by indigenous Zimbabweans or who hold the majority shareholding.

The disposal of shares by a business to these entities is to take place after "*the approval of its indigenisation implementation plan*". 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,[4] and only one of the designated entities is currently a lawful transferee. This disposal must take place within six months of the Notice,[5] though the failure to do so is not made an offence.

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

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[3] I.e by 10.05.11.

[4] These quota have not been gazetted. Furthermore, the definition in the Regulations cross-references incorrect sections and is otherwise problematic.

[5] [5] I.e. by 24.09.11.

> *[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 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.

Given the incoherence of this Notice and absence of any penalty for non-compliance, its provisions are best ignored.

6. In addition to the three groups of businesses referred to above, the Regulations also seek to reserve certain sectors of the economy for "indigenous Zimbabweans. These sectors are the enterprises listed in the Third Schedule:

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.
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.

A new Section 9(4),[6] 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 investment 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, and invalid.

The Politics

7. The Regulations have been drawn with the intention of creating as much controversy as possible, and simplistic interpretations placed upon the laws by the press have fed into

[6] Also by way of S.I. 34 of 2011.

the notion that white owned and foreign businesses will soon be dispensed as largesse to the ZANU PF faithful. While the Regulations do not currently provide for this, the Minister has made various threatening statements warning business of dire consequences if they fail to immediately take steps to "indigenise". Businesses have also been directly threatened by telephone by officials within the Ministry and are then invited to "come and talk" so that "an arrangement" can be reached. Mugabe, the Minister and other ZANU PF officials have specifically stated that the Regulations will be used as a weapon and an instrument of revenge against those deemed politically recalcitrant. 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 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.