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"STRENGTHENING THE LEGAL REGIME FOR MINING CONTRACTS IN ZIMBABWE" A COMPARATIVE ANALYSIS

SUBMITTED BY

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CHAPTER ONE: INTRODUCTION AND BACKGROUND

1.1. INTRODUCTION

Africa has vast mineral resources the exploitation of which is the major contributor of revenue in most African countries.[1] In addition to contributing to fiscal revenue, mining also plays a pivotal role in the creation of employment as well as infrastructural development. Africa is home to about 30% of the world's mineral reserves.[2] That, coupled with relatively cheap labour and costs of production are the reasons why multinational companies that engage in mining are flocking Africa for investment opportunities.[3] These multinational companies that operate in Africa include BHP Billiton, Rio Tinto, Anglo American and Xtrata.[4]

In the Zimbabwean context, mining forms an integral part of the economy. As a country endowed with many minerals such as gold, platinum, coal ,chrome, uranium, asbestos, iron, zinc, silver, manganese, copper, dolomite- limestone, granite to mention but a few, it is not surprising that the government regards mining as one of the major drivers for economic change between 2020 and 2030.[5] To ensure that revenue is realized from mining, there is need for major investments in the industry not just from local entities but also from multinational companies[6] which ideally have the financial capacity and muscle to take on big projects, bring in foreign currency and create employment opportunities for Zimbabweans.[7] The realization of the fact that investment is needed in Zimbabwe is one of the major reasons why the government enacted the Zimbabwe Investment Development Agency Act.[8] The preamble of the Act reads;

> *AN ACT to provide for the promotion, entry, protection and facilitation of investment; to provide for the establishment of the Zimbabwe Investment and Development Agency; to provide for the One Stop*

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[1] L.Signe for Africa *Portal Africa's Mining Potential: Trends, Opportunities, Challenges and Strategies* 31 May 2021 Accessed 11 May 2022
[2] Ibid
[3] https://blogs.afdb.org/fr/afdb-championing-inclusive-growth-across-africa/post/mining-industry-prospects-in-africa-10177
[4] ibid
[5] NATIONAL DEVELOPMENT STRATEGY NUMBER 1 *"Towards a prosperous and empowered upper middle class by year 2030"* page 18-19
[6] https://marketbusinessnews.com/financial-glossary/multinational-company/ *"A **multinational company**, known more commonly as a **multinational corporation** or **transnational corporation** in North America, is a business with branches, offices or production facilities in more than one country."*
[7] The herald, 15 July 2021 *About Viability of Mining Sector*
[8] Zimbabwe Investment and Development Agency Act [Chapter 14:37].

Investment Services Centre; to repeal the Zimbabwe Investment Authority Act [Chapter 14:30], the Special Economic Zones Act [Chapter 14:34] and the Joint Ventures Act [Chapter 22:22]; and to provide for matters incidental to or connected to the foregoing.[9]

The Act aims at providing ease of doing business between Zimbabwe and investors. Miners/mining enterprises can contract with other parties/entities just like any other business. A mining right is in itself a contract between the government and the miner setting out the terms and conditions upon which the miner has to mine.[10]These "contracts" can have any number of names: Mineral Development Agreement, Exploration and Exploitation Agreement, Mining Investment Agreement, Mining Contract, Mining Concession.[11] This thesis seeks to analyze the legal regime for these mining contracts in Zimbabwe, contrasting it with the regime in South Africa, Botswana and Ghana. Ultimately, the goal is to recommend ways or measures to strengthen the legal regime for mining contracts in Zimbabwe.

1.2. BACKGROUND OF THE STUDY

The Statute that regulates mining in Zimbabwe is the Mines and Minerals Act.[12] It vests the rights to and in minerals to the President of Zimbabwe.[13] , the *cuius est solum eius est usquie ad caelum et ad inferos* maxim[14] is no longer applicable in the present day Zimbabwe.Some have argued that the rights to minerals is vested in the president, not in his personal capacity but as the custodian of the minerals on behalf of the Zimbabwean people.[15] One can argue that if the legislature intended for the provision to extend rights to the people of Zimbabwe or to mean the president is a custodian of mineral resources on behalf of the people that would be expressly stated. The mere fact that the provision excludes does not mention expressly mention the people of Zimbabwe or the republic as the real right holders means the provision is subject to all kinds of interpretation. It qualifies as an ambiguous

[9] PREAMBLE to the Zimbabwe Investment Development Act [Chapter 14:37].
[10] NOTE 5 ABOVE.
[11] https://eiti.org/files/documents/mining-contracts-how-to-read-and-understand-them.pdf
[12] Mines & Minerals Act [Chapter 21:05]
[13] Section 2 of the Mines & Minerals Act *The dominium in and the right of searching and mining for and disposing of all minerals, mineral oils and natural gases, notwithstanding the dominium or right which any person may possess in and to the soil on or under which such minerals, mineral oils and natural gases are found or situated, is vested in the President, subject to this Act.*
[14] https://www.oxfordreference.com *cuius est solum, eius est usque ad coelum et ad inferos [Latin: whoever owns land it is theirs up to the heavens and down to hell] A maxim, attributed to the 13th-century jurist Accursius, that describes the vertical extent of an owner's right in land; this is taken to include the substrata, the surface, and .*
[15] Dr Tsabora, Lecture notes

provision. It creates room for abuse and takes away the right of the people to lay a claim for infringement.[16]

As this paper seeks to do a comparative analysis of the legal regime for mining contracts in Zimbabwe and other jurisdictions, the South African Act regulating the Mining industry, the Mineral and Petroleum Resources Development Act[17], highlights as follows;

Mineral and petroleum resources are the common heritage of all the people of South Africa and the state is the custodian thereof for the benefit of all South Africans[18]

The significance of the above sections is that they shed light on how contract signed between Zimbabwe or South Africa with a multinational company will be couched. Some critics argue that vesting mineral rights on the President is done in the name of the public trust doctrine which seeks to develop a comprehensive legal approach to resource management problems.[19] In the South African context, the state is the custodian of mineral resources. The state consists of more than one office and or individuals hence the South African approach from the initial standpoint recognizes that ultimately, the people of South Africa ought to benefit from their mineral heritage. The implications of the above provisions are to be seen in the mining contracts negotiated by both countries with investors. However, no matter what the legal system is, a mining company will always seek a recognized legal right to engage in mining activities from the state.[20] A common feature in all the mining agreements is how the authority granting the rights, does so against an undertaking by the recipient of the rights to pay a royalty, foster development or perform any other obligation for the benefit of the granting authority. In some instances, the nature of the rights granted to an entity is largely dependent on the mineral sought to be exploited.[21]

The Mines & Minerals Act provides two ways through which an entity can obtain mining rights. This is through a license were the investor is to engage in small-scale mining. For large scale mining or were the holder of one or more contiguous mining locations intends to establish or develop a mine thereon, and Investment in the mine

[16] NOTE 3 ABOVE.
[17] Mineral and Petroleum Resources Development Act.2002
[18] Ibid at section 3(1)
[19] See note 6 above
[20] [20] https://eiti.org/files/documents/mining-contracts-how-to-read-and-understand-them.pdf
[21] Tsabora J, *the legal regime for mining contracts* lecture notes

will be wholly or mainly in foreign currency and will exceed US$100 million,[22] and the mine's output is intended principally for export, he or she may apply in writing to the mining commissioner for a special mining lease in respect of a defined area.[23] The Special mining lease is the mining contract in the Zimbabwean context.[24] Zimbabwe has concluded several of these agreements with various investors and it is the prevalence of problems emanating from those mining agreements that has necessitated this research.

Many of the disadvantages that come with mining can be attributed to the unsustainable means of mining that are employed by holders of mining contracts. These include deforestation, leading to land degradation, siltation of dams, atmospheric and water pollution, cyanide and mercury contamination. One can be driven to assert that the prevalence of these disadvantages is attributed to the mining agreements not placing emphasis on the employment of sustainable means of mining.

1.3. LITERATURE OVERVIEW

Various scholars have written on mining contracts, how they are to be couched and the terms that have to be included in them. Notably, Bonnie Campbell asserts that in light of the challenges and evolvements in the mining industry lately, there is need for African countries to review their mining legal frameworks and re-negotiate mining agreements with a view to address contemporary mining issues.[25] Thomas Akabzaa put it across that;

over- bloated tax concessions and incentives to investors in the mining sector leave little in the way of retained earnings for visible national development efforts.

He states the above as one of the significant shortfalls of the Ghanaian regime for mining agreements. Charles Abugre highlights the fact that there is unequal negotiating power between governments and mining companies in the negotiation of mining contracts.[26] Resultantly, the contracts negotiated reflect the inequality as they offer more to the mining companies and little to the host countries, confirming the assertion by Thomas Akbzaa above. The main industry specific

[22] The herald, 19 August 2021 *Zimbabwe: Act Covering Mining Leases*
[23] Section 160 of the Mines & Minerals Act supra
[24] Ibid at section 164 & 167
[25] International Development Research Centre, *Mining in Africa : Regulation and Development* edited by Bonnie Campbell published by Pluto Press 2009
[26] Ibid at page 143

source for understanding the legal regime for mining contracts in Zimbabwe is the Mines and Minerals Act. It is the main statute regulating the mining industry in Zimbabwe.[27] The Constitution of Zimbabwe[28], as the Supreme Law of Zimbabwe[29] has provisions that can be regarded as guidelines for the negotiation of mining agreements. 2[30]. There are many other instruments regionally and internationally that Zimbabwe has ratified that have to do with the governance of natural resources and which more. These provisions can also be viewed as themes in the mining indoverustry. These themes can be traced back to international instruments that Zimbabwe has ratified and domesticated. These include the Stockholm declaration of 1972,[31]the Rio Declaration of 1992[32]as well as the Johannesburg Declaration of 200or less provide an idea of what should be considered when negotiating mining agreements.

There are also various mining agreements that can be scrutinized in assessing the legal regime for mining contracts in Zimbabwe and other jurisdictions. In Zimbabwe, one of these agreements is the agreement between the government of Zimbabwe and Grandwell holdings which was the subject of serious litigation.[33] Regionally, the Mbalama agreement[34] will be assessed and contrasted with the Zimbabwean Model to see if there are any features that Zimbabwe can adopt. From a comparative analysis with other jurisdictions as well as international instruments and cases several theoretical concepts can be identified cutting across the mining industry at an international level. Tracing these themes is important in so far as they are a checklist against which the regime for mining contracts in Zimbabwe can be scrutinized and the gaps therein can be addressed.

1.4. RESEARCH PROBLEM

The Zimbabwean regime for mining contracts appears weak. There seems to be no clarity on the law governing mining contracts in Zimbabwe. Provisions in the Mines and Minerals Act are ambiguous and capable of various interpretations. The regime is undeveloped and archaic in the light of modern mining problems. Zimbabwe has minerals. Zimbabwe has acknowledged that it aims to boost its economy from the

[27] Ibid at preamble
[28] Constitution of Zimbabwe [amendment 20] 2013
[29] Ibid at section 2
[30] Johannesburg declaration,2002
[31] Stockholm declaration,1972
[32] Rio Declaration, 1992
[33] Grandwell Holdings v ZMDC & Others (HH 125-17 HC 1290/17) [2017] ZWHHC 125 (24 February 2017);
[34] https://resourcecontracts.org/contract/ocds-591adf-6424799341

exploitation of these minerals through investment.[35] The Mines and Minerals Act provides for an all-encompassing special mining lease to be concluded with a prospective investor in the sector. From the ones that have been concluded, it is apparent that there are gaps in these agreements which are hindering the realization of much needed foreign currency for boosting the economy. Whether an entity undertakes to foster development or to pay a royalty, there has not been any recognizable benefit to the government as the royalties are not sufficient or adequate for economic development. Regarding development in the host communities, little to no development is taking place as will be highlighted with case studies in the thesis .Essentially, there is massive exploitation of minerals by investors with little to no benefit to the host country and communities. This is despite the Constitution providing that local communities ought to benefit from the mineral resources in their communities.[36] The real problem stems from the agreements with these multinational companies. There is room for the companies to negotiate the terms on which they are to operate.[37] The government lacks foresight to predict how the agreed upon will impact the realization of revenue for economic development. The entire regime for mining contracts is marred with gaps which are hindering the realization of the aforementioned goal. It stems from the chief legal framework for mining in Zimbabwe which in addition to being archaic and unresponsive to contemporary mining problems, is inadequate and unclear in so far as it lays down the requirements for the special mining lease. The mining contracts have gaps relating to accountability, transparency and efficiency.

This thesis will bring to bring to the fore, how the failure to realize revenue from mining is attributable to the mining agreements entered into between the Zimbabwean government and investors.

1.5. RESEARCH QUESTIONS

1.5.1. What is the nature of the legal regime for mining contracts in Zimbabwe?
1.5.2. What gaps and problems exist in the legal regime for mining contracts in Zimbabwe?
1.5.3. How have other jurisdictions provided for mining contracts in their mining legal frameworks?

[35] Note 1 above
[36] Constitution of Zimbabwe (Amendment 20)2013, section 13
[37] Section 167 of the Mines & Minerals Act

1.5.4. What recommendations can be made to strengthen the Zimbabwean Regime for mining contracts?

1.6. RESEARCH METHODOLOGY

The methodology to be applied in this research will be desktop research which will entail an amalgamation of descriptive analysis, comparative analysis as well as doctrinal analysis. Desktop research entails an analysis of literature that exists in the mining industry relating to mining contracts. The literature may be in written on soft format. The aim is to provide an understanding of the legal regime for mining contracts. Comparative analysis will in the form of comparison between the Zimbabwean regime and other jurisdictions.

Doctrinal research will emphasize on an analysis of legal frameworks governing the mining industry. It is an assessment of the legal frameworks that will shed light on the prevailing legal regime for mining contracts in Zimbabwe. A detailed description of the principles and accepted international standards in the mining industry will also be employed as part of the research.

1.7. SIGNIFICANCE OF STUDY

The way in which mining agreements are formulated contributes immensely to the realization of revenue for development. These agreements are legally binding on signatories on behalf of Zimbabwe as well as the investing entity. Zimbabwe has concluded many of these agreements with multinational companies but little revenue has been realized from the operation of these agreements. Many a times, the government has then employed drastic measures against the companies after realizing the mistakes in these agreements and terms which if had been carefully negotiated, would not have led to the problem at hand. Some of the problems in these agreements is that they are either weak or silent on the accountability of multinationals regarding acts done contrary to the terms in the agreements. There is no transparency in the manner in which these agreements are formulated and corruption is a cancer that has caused state representatives in the negotiations of these agreements to negotiate in bad faith. Consequently, because of all these problems, mining contracts have not been serving their intended purpose.

This research will find and recommend ways to strengthen Zimbabwe's legal regime for mining contracts. Much has been written about the problems in the manner in which mining title is acquired as well as the problems rampant in the Zimbabwean mining sector chief of which is corruption. Multinational companies have been called out for their failure or lack of realization that they ought to conduct their mining activities sustainably and ensure that the host communities benefit in line with the dictates of the constitution.

However, there has not been much emphasis on and scrutiny of the mining contracts giving rights to these investors as the real problem creating the chaos in the mining sector and influencing the manner in which mining companies are operating. This research seeks to highlight how the problem lies with the mining agreements and suggest ways of strengthening the legal regime for mining contracts in Zimbabwe.

1.8. LIMITATION OF THE STUDY

Zimbabwe has a dual regime for the acquisition of mining title. Licenses are given for small scale investors while mining contracts are given to those intending to engage in large scale mining. This research will be limited to the gaps and problems in the acquisition of and terms of the mining contracts which are hindering the realization of sufficient revenue from the mining sector.

1.9. CHAPTER SYNOPSIS

Chapter 1

Chapter one introduces the discussion by giving a background of mining in Africa, highlighting the extent to which the mining industry is depended on in the region. The discussion then flows into giving a background of mining in the Zimbabwean context and introduces the problem sought to be addressed in this paper. Research questions are put forward and the significance of the study is highlighted as well as the limitations of the study.

Chapter 2

The thrust of chapter two is to describe the nature of the regime for mining contracts in Zimbabwe. An overview will be given of the primary legislation governing mining contracts in Zimbabwe. The provisions therein will be analyzed to give a clear picture of the nature of the regime. Reference will also be made to international instruments

that influence the regime highlighting the extent to which these instruments do so. There is a Mines and Minerals amendment bill to be enacted. It will also be enacted for an analysis of whether or not it amends the relevant provisions on mining contracts in the Mines and Minerals Act.

Chapter 3

This chapter provides an analysis of the gaps and problems in the Zimbabwean Legal regime for mining contracts as described in chapter two. The primary aim is to identify the gaps or problems and their sources.

Chapter 4

Analysis of the approach adopted by other jurisdictions in their legal regimes for mining contracts. Countries to be analyzed are;

a. South Africa
b. Botswana
c. Ghana

Chapter 5

This chapter will point out the major arguments in the paper. Findings made in the research will also be summarized along with a proposal for recommendations to strengthen the legal regime for mining contracts in Zimbabwe.

CHAPTER TWO: THE LEGAL REGIME FOR MINING CONTRACTS IN ZIMBABWE

2.1 INTRODUCTION

The focus of this chapter is on giving a detailed description of the legal regime for mining contracts in Zimbabwe. Reference will also be made to international instruments that Zimbabwe has ratified that have principles which assist with natural resource governance. Some of these principles are encompassed in Zimbabwean legislation governing natural resources. Although, largely centered on the environment, the very apparent interlink between mining and the environment makes these principles relevant and applicable in the mining industry. Sustainable mining comes as a result of the preservation and sustainable use of the environment. Sustainable mining ensures revenue is realized from the industry which not only benefits present generations but also future generations. There is however, no emphasis regarding the inclusion of these principles in mining contracts in Zimbabwe. This chapter also provides an analysis of mining agreements in terms of the Mines and Minerals Amendment bill in a bid to bring to the fore the nature of the legal regime for mining agreements in Zimbabwe.

2.2 MINING AGREEMENTS IN TERMS OF THE MINES & MINERALS ACT CHAPTER 21:05

Mining agreements or contracts give rights to their holders to conduct mining activities within a specific area. In Zimbabwe the acquisition of mining title is regulated by the Mines & Minerals Act.[38] The acquisition of mining title may be in the form of registration of mining claims on land open to prospecting and pegging[39], tribute agreements, mining leases[40], special grants[41] as well as the special mining lease.[42] Generally, Zimbabwe has a hybrid regime of licenses as well as mining contracts. Licenses are for small scale mining projects whereas mining contracts are prevalent for large scale projects.[43]

2.2.1. The Special Mining Lease

[38] Mines & Minerals Act chapter 21:05
[39] Section 15 of the Mines & Minerals Act
[40] Ibid at section 135
[41] Ibid at section 291
[42] Ibid at section 159
[43] Part ix of the Mines & Minerals Act

The Special mining lease is the equivalent of the mining agreement or contract in Zimbabwe. It is regulated under part IX of the Mines & Minerals Act. A special mining lease is given in specific limited circumstances. It is given to a holder of a mining location whose mining project is wholly or partly in foreign currency, the investment is worth one hundred million or more and the output is intended principally for export.[44] However, a prospective applicant who does not meet the above conditions may be allowed to make the application. The conditions that are taken into account are, the nature and size of the mineral deposits within the area over which the applicant seeks a special mining lease,[45] the estimated life and economic viability of the proposed mine, the extent of the investment that will be made in the proposed mine, the proposed method of extraction, mining and treatment of ore from the proposed mine and any other relevant circumstance if the board considers that it is desirable in the interests of the development of Zimbabwe's mineral resources to consider the grant of a special mining lease to the applicant.

2.2.2 The Application Process

The applicant submits the application and attaches to it various documents required to be attached to the application for consideration.[46] From there, the application takes the normal course as that for an ordinary mining lease.[47] Of paramount importance to note however is, it is not the board that grants the application, it is remitted to the minister and the board only makes recommendations to the minister.[48] In making recommendations to the minister, the board, in addition to the requirements stated in section 159(1) also considers if it is desirable in the interests of Zimbabwe for the application to be granted. Desirable is construed to mean, the area to which the application relates contains a mineral or group of minerals which may profitably be mined and sold or otherwise disposed of; and the applicant's mining development plan takes proper account of environmental and safety factors; and the applicant's programme of mining operations will ensure the efficient, timely and beneficial use of the mineral resources concerned; and the applicant's proposals for the procurement and use of local goods and services and the employment of Zimbabwean citizens are satisfactory; and the applicant is able and willing to comply with the terms and conditions of any special mining lease that may be granted to him and of any agreement that may be concluded with him in terms of section one hundred and sixty-seven; and the applicant possesses or can obtain the technical and financial resources required to

[44] Section 159(1)
[45] Ibid at section 159 (2)
[46] Ibid at subsection 3
[47] Section 160 (1)
[48] Section 160(1)

develop and operate the proposed mine; and it would be in the national interest for the applicant to be granted a special mining lease.[49]

The board may however not recommend the refusal of an application on the basis that the applicant does not satisfy the above requirements without first notifying the applicant of the defect in his or her application and allowing them to rectify same.[50] Were the board recommends the granting of the application it may include further recommendations as to the minimum amount which the applicant should be required to invest in the development of the proposed mine; and where the proposed mine is to be developed by a company, the minimum shareholding which the applicant should hold in the company; and the area to be included in the special mining lease; and the period of the special mining lease and any renewal thereof; and the terms and conditions to be inserted in the special mining lease and in any agreement to be entered into with the applicant under section one hundred and sixty-seven; and the period within which construction of the proposed mine should commence; and any other matter connected with or incidental to the special mining lease. The Minister or President then considers the application and the special mining lease is issued.[51] The special mining lease is not issued to a person who is not a citizen of Zimbabwe or a body corporate[52] and it is not issued for a period exceeding 25 years but may be renewed.[53] An applicant who does not qualify for a special mining lease may be offered a mining lease if they satisfy the requirements for it.[54]

2.2.3. The Mines and Minerals Act and the Mining Contract

Given all the above attributes of a special mining lease, the question becomes, how is it an agreement if all the above dictates are from the grantor and all the applicant has to do is satisfy stated requirements. The answer lies in section 167 which states that;

> ***167 Agreement re issue of special mining lease***
> *The Minister, with the approval of the President, may enter into an agreement, not inconsistent with this Act, with any person regarding—*
> *(a) The issue of a special mining lease to that person, and the renewal of the special mining lease; and*
> *(b) The terms and conditions of any special mining lease that may be issued to that person; and*

[49] Ibid at subsection(2)
[50] Ibid at subsection (3)
[51] Section 163
[52] Section 164(1)
[53] Ibid at subsection 4
[54] Section 166

(c) The liabilities and obligations of that person in terms of any special mining lease that may be issued to him, including payments by way of royalties, rents and fees; and
(d) Any other matter connected with or incidental to any special mining lease that may be granted to that person.

In terms of the above provision, a special mining lease is therefore an agreement as there is leeway for both parties to negotiate and agree on the terms of the contract.[55] There is room for compromise on renewal, issue, royalties and modus operandi hence it is in essence a contract. The contract is the primary document establishing the terms and governing the mining project. Such contracts cover the same issue areas as those in a licensing regime but the depth, detail and specificity with which they do so depends on the level of development and comprehensiveness of the. Country's legal regime[56]. The legal regime for mining contracts in Zimbabwe is therefore understood in the context of the special mining lease.

A detailed analysis of the provision is important at this point.

2.2.4 The Agreement

… The Minister, with the approval of the President, may enter into an agreement, not inconsistent with this Act, with any person…[57]

As earlier on observed, rights in minerals are vested in the president. It is not clear whether in his personal capacity or merely as a custodian for the people of Zimbabwe. The Minister of Mines and Mining development acts on behalf of the President. Whatever decision is made by the minister in terms of the act is construed as being made by the president himself in the administration of the act. Notably, the agreement in terms of section 167 for the issuance of a special mining lease does not involve the mining commissioner. Were an individual makes an application for a special mining lease in terms of section 159, the application is determined by the mining commissioner and the mining affairs board is involved[58] Issuance is left to the president but the decision

[55] Section 167
[56] Dr J Tsabora Mineral Resources law lecture notes
[57] Note 58 above
[58] 159 Application for special mining lease Where the holder of one or more contiguous registered mining locations intends to establish or develop a mine thereon and, subject to subsection (2)— (a) investment in the mine will be wholly or mainly in foreign currency and will exceed one hundred million United States dollars in value; and (b) the mine's output is intended principally for export; he may apply in writing to the mining commissioner for a special mining lease in respect of a defined area within which his mining location or locations are situated

is made after a consideration of recommendations from the board.[59]The difference with section 167 is a cause for concern. Mining contracts are sui generis. It is therefore important that individuals or entities that conclude these contracts on behalf of the government of Zimbabwe are individuals with the expertise to negotiate contracts of such a technical nature or at least are obliged to seek for recommendations from experts. The agreement is required to not be inconsistent with the Mines and Minerals Act. This provision would be progressive if the act itself addressed issues of lack of transparency and environmental damage that have become prevalent in the mining industry. The Mines and Minerals Act is the principal legislation regulating the mining industry in Zimbabwe. It is therefore important that it addresses all issues related to the acquisition of mining rights and the conditions for the granting of such rights, which conditions must relate to contemporary mining problems. Reference to *person* in the provision includes multinational companies as they are persons in terms of the company laws of Zimbabwe. They have the ability to sue, be sued and enter into contracts. The obligations and liabilities that fall on the entity do not shift to individuals in the background.

…regarding the issue of a special mining lease to that person, and the renewal of the special mining lease…[60]

That terms of issuance and renewal are left to the negotiating parties is indicative of the fact that the agreement itself is the law. Provisions of the Mines and Minerals Act relating to the renewal of special mining lease do not apply to a special mining lease issued as a result of the agreement under section 167. Ordinarily, a special mining lease is supposed to subsist for a period of 25 years.[61] At the lapse of the 25 year period, it may be renewed for a period not exceeding 10 years.[62] For a special mining lease under section 167, the renewal can be negotiated. The provisions of section 164. The minister is given a wide discretion to negotiate the renewal of a special mining lease. He is only answerable to the president to whom he is required to take instructions from. The danger with giving the minister such wide discretionary powers is that, as a human being, he is not immune to corruption. A mining company may not be performing well or generating revenue but the minister may be convinced to renew its special mining lease.

2.2.5. Terms and Conditions of the Agreement

[59] Section 163
[60] Note 60 above
[61] Section 164 (4)
[62] ibid

… terms and conditions of any special mining lease that may be issued to that person…

Terms and conditions are the important part of a contract. They determine how the mining entity is to operate or conduct its mining activities. As earlier on stated, mining contracts are sui generis. It follows that the negotiation of the terms and conditions of the contract should be left to individuals with expertise in the mining industry. The mining commissioner and the board are better positioned to negotiate terms and agreement than the minister who may not have a background in mining hence will not possess the technical know-how of negotiating the terms of a mining agreement.

2.2.6. Liabilities and Obligations of the parties

… the liabilities and obligations of that person in terms of any special mining lease that may be issued to him, including payments by way of royalties, rents and fees…

The liabilities and obligations of the mining entity are dictated by the mining agreement. This includes matters regarding the payment of royalties. The issue of whether a royalty dictated by statute takes precedence over a royalty agreed by parties was the reason for argument in the matter between Zimplats and Zimra which is elaborated on in chapter 3.

The above provision can and should be interpreted in the context of the various international agreements relating to natural resource governance that Zimbabwe has ratified. The Stockholm declaration was signed at the Conference on the Human Environment held at Stockholm from June 5 to 16 1972.[63] Though the emphasis was on the preservation of the environment in light of first generation environmental problems like climate change, the principles discussed and adopted apply with equal force to current environmental problems which include land degradation. In Zimbabwe, some Chinese companies have been accused of causing land degradation through the means they apply in mining particularly those that are in gold, diamond and chrome mining.[64] Another contemporary environmental problem to which the principles apply is the erosion of bio-diversity.[65] Essentially all of these problems can be attributed to mining

[63] Louis B Sohn, *The Stockholm declaration on the human Environment,* THE HARVARD) INTERNATIONAL LAW JOURNAL \'OLLME 14, NUMBER 3 SUMMER 1973

[64] Andrew Mambondiani for Business & Human Rights Resource Centre, ***Zimbabwe: Chinese mining firms accused of environmental degradation***, Published on 14 Apr 2019

[65] Laura J. Sonter, Saleem H. Ali and James E. M. Watson, ***Mining and biodiversity: key issues and research needs in conservation science*****,** Published: 05 December 2018 "*Mining affects biodiversity at multiple spatial scales (site, landscape, regional and global) through direct (i.e. mineral extraction) and indirect processes (via industries supporting mining operations, and external stakeholders who*

activities. The relevance of this analysis to this study is that it brings out to the fore principles which if incorporated in mining agreements would go a long way towards ensuring that mining is done sustainably. The mining agreements that are concluded by Zimbabwe are largely focused on the realization of revenue, which ironically is not being achieved. Sustainable mining would ensure that later generations also benefit from revenue from mining. The principles that can be found in the Stockholm declaration include; Sustainable Development[66]Inter and Intra- generational equity[67] and Co-operative Governance[68]

In 1992, states met again at Rio De Jenairo in Brazil were they concluded the Rio Declaration on Environment and Development.[69] The declaration emphasized and hammered on the principles in the 1972 Stockholm declaration.[70] Sustainable Development is seen as a theme running throughout the declaration.[71] It is of paramount importance to not that it is in the rio declaration that the term "sustainable development" starts to be used. Before, in the Stockholm declaration the theme is seen but not the term itself. The significance of the term itself is that it accommodates and puts into perspective the obligation upon human beings to preserve the ecosystem as a whole for the benefit of present as well as generations to come. The declaration also places emphasis on co-operative governance[72] in the preservation of the environment. It also fosters the participation of communities in the governance of resources.[73]Community participation ensures devolution. Devolution is especially important in this discourse in that, if local communities are involved in the selection of investors and negotiation of mining agreements, they are alive to the immediate needs of their communities and are quick to flag out proposed activities which may hinder their environment and negatively affect their way of life. A community based approach to natural resource management[74] promotes corporate social responsibility[75] and

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gain access to biodiversity-rich areas as the result of mining), mining companies have little incentive or capability to contribute towards conservation goals"

[66] PRINCIPLE 1,2 OF THE STOCKHOLM DECLATION, 1972

[67] Ibid at Principle 5

[68] Ibid at principle 11,22

[69] Rio Declaration of 1992

[70] Ibid at preamble

[71] Ibid at principle 5,8

[72] Ibid at Principle 5

[73] Iibid at principle 10, principle 22

[74] https://pdf.usaid.gov/pdf_docs/pa00jrv1.pdf *"CBNRM aims to create the right incentives and conditions for an identified group of resource users within defined areas to use natural resources sustainably. This means enabling the resource users to benefit (economically) from resource management and providing strong rights and tenure over land and the resources. CBNRM also supports the development of accountable decision-making bodies that can represent community members and act in their interests."* Accessed 30 April 2022

[75]

accountability. Mining companies are held accountable and appropriate measures taken when they breach their agreements. Although corporate social responsibility is not a requirement per se, it is a way through which mining companies can show their commitment to developing host communities. In the mining industry, the term is defined as;

" the voluntary actions undertaken by mining companies to reduce the negative effects of mining initiatives, and to improve the lives of locals, the local economy and the environment."[76]

The Rio declaration also promotes a precautionary approach to avert damage to the environment.[77]States met in Johannesburg in 2002 for a world summit on sustainable development.[78] The declaration recognized the eradication of biodiversity and the environment due to human activities and insisted on sustainable development as a means of averting the problem. The states emphasized their commitment to the principles set out in the Stockholm and Rio Declaration.

One can observe from the above summaries of the objectives of these international instruments that section 167 falls short of meeting the international standards. The above instruments are a yardstick for the management of natural resources. They are checks and balances in the exploitation of natural resources which are applicable in the Zimbabwean mining industry but notably, are not encompassed in section 167.

2.3. Analysis of the Zimbabwe Investment Development Act [Chapter 14:37]

Mining contracts are awarded to mining companies investing in the mining sector. Ordinarily, the companies are licensed as investors under the Zimbabwe Investment Development Act (hereinafter referred to as "ZIDA"). Accordingly, ZIDA is critical in the regulation of mining investment. An analysis of the ZIDA Act is therefore necessary to assess whether the ZIDA agency has a role to play in the awarding of mining contracts. The Act is relevant in so far as it regulates investment in Zimbabwe. The preamble of the Act defines it as an act for;

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[76] https://miningafrica.net/mining-news/social-responsibility-in-mining-in-africa accessed 30 April 2022
[77] Principle 15
[78] UN department of Social & Economic Affairs, Johannesburg declaration on Sustainable Development.

... the promotion, entry, protection and facilitation of investment…[79]

It defines an investor as any person, natural or juristic who intends to make an investment in Zimbabwe.[80] A foreign investor is defined as a natural or juristic person domiciled outside Zimbabwe, who seeks to make, is making or has made an investment in Zimbabwe.[81] The difference therefore, relates to domicilia. As the preamble highlights, the Act seeks to promote investment. It creates a one stop shop for all things[82] investment and establishes an agency to further its mandate.[83] It goes hand in glove with the goal of the new republic to promote investment.[84] As mining forms is one of the strategic industries were investment is encouraged, it goes without following that the statute is relevant in the present discourse.

The special mining lease which for all intents and purposes exists as the model mining contract[85] in Zimbabwe is only given to applicants who intend to do large scale mining[86]and whose projects are wholly or mainly in foreign currency. Foreign investors in the form of multinational companies have the capacity to invest in large scale mining. Examples of these companies that are already operating in Zimbabwe include Metallon Corporation Limited[87] whose subsidiary, metallon gold is operating in Redwing Mine, How mine and Mazowe mine.[88] Another example is Zimplats mining company.

Ideally, the ZIDA act is meant to regulate these companies as they fall under its purview. It promotes and encourages freedom of investment,[89] transparency,[90]the fair and equitable treatment of investors[91] as well as non-discrimination between foreign and domestic investors.[92] It obliges investors to comply with domestic legislation[93], to

[79] Zimbabwe Investment Development Act [Chapter 14:37]
[80] Ibid at Section 2
[81] ibid
[82] Section 5 of the ZIDA Act
[83] Section 3 & 4 of the ZIDA Act.
[84] Zim.gov.zw, Minister Hon Mthuli Ncube, *Zimbabwe is open for business, Zimbabwe is OPEN FOR BUSINESS is a call by the President to Investors and Traders or Business Entities, both Local and International, to take up abundant opportunities in the country. Accessed* 29 April 2022
[85] Note 35 above
[86] Note 24 above
[87] https://metcorp.co.uk
[88] Ibid
[89] Section 12 of ZIDA
[90] Ibid at section 18
[91] Ibid at section 16
[92] Ibid at section 13
[93] Ibid at section 20

preserve the environment,[94]keep and maintain proper accounting books in line with international standards.[95]

However, The Act largely promotes investment and does not emphasize on the reparations for non-compliance with its dictates by investors. The only remedy stated is cancellation of the investment license.[96]

2.4. Analysis of the Mines and Minerals Amendment Bill, 2015 in relation to Mining Agreements

The purpose of the bill is to amend the Mines & Minerals Act chapter 21:05.[97] Special mining leases are regulated under part ix of the Mines & Minerals Act. From section 159 to section 167. Those relevant portions are not amended in the bill. What that essentially means is that if the bill is enacted, the provisions relating to mining agreements in the current Mines and Minerals Act will still apply. The problems with this status quo or weaknesses of Zimbabwe's regime for mining agreements as gleaned from those relevant sections will be highlighted in the next chapter.

On the other hand, it is progressive in its amendment of provisions that affect all holders of mining title regardless of the form of the title. It introduces the "use it or lose it policy" which obliges holders of mining title to actually work on the ground increase production.[98] This is especially important in the regulation of special mining leases considering the length of the subsistence of the lease. The bill id also progressive in so far as it

2.5. CONCLUSION

In conclusion, this chapter has highlighted the regime for mining agreements in Zimbabwe. An analysis of the ZIDA act and the Mines and Minerals Amendment bill was in a bid to give a holistic picture of how the agreements are or ought to be couched and construed. Reference to international instruments has achieved the goal of depicting the yardstick or considerations in the formulation of mining agreements. An

[94] Ibid at section 21(a)
[95] Ibid at (21b)
[96] Section 22 OF ZIDA
[97] Explanatory Memorandum of the Mines & Minerals Bill, 2015

[98] Centre for Research & Development, POLICY ANALYSIS VOL 1. NO. 1 *AN ANALYSIS OF ZIMBABWE'S MINES & MINERALS AMENDMENT BILL (2015)* accessed 30 April 2022

analysis of how the Zimbabwean regime falls short of meeting the considerations in the international instruments in its formulation of mining agreements and consequently fails to achieve the intended goal of realizing adequate revenue from the mining sector will be seen in the next chapter.

CHAPTER THREE : GAPS AND PROBLEMS IN THE ZIMBABWEAN REGIME FOR MINING CONTRACTS

3.1. INTRODUCTION

This chapter focuses on the gaps and problems within the Zimbabwean regime for mining contracts. The idea behind this thesis is to suggest measures for strengthening the regime which in the previous chapter was described as provided for in section 167 of the Mines and Minerals Act.[99] Of importance to note is the fact that the gaps are an indication of the resource curse phenomenon that has bedeviled most mineral rich African countries.[100]The gaps in the special mining lease regime which gaps are essentially problems within the regime include the fact the relevant provision itself is ambiguous, there little to no room for accountability and transparency, the act does not provide for due diligence of a mining company especially multinational companies before contracting with them, there is non-alignment to regionally and internationally accepted standards in the extractive industry, no room for contract monitoring and community participation and non- alignment of the parent mining legislation with other related legislation. The weaknesses are categorized into legislative weaknesses, institutional weaknesses as well as enforcement and implementation weaknesses. These problems and their interrelatedness will be explained hereunder in detail.

3.2. LEGISLATIVE WEAKNESSES

Legislative weaknesses relate to the frailty of the provision relating to mining contracts in the Mines and Minerals Act.

3.2.1 INADEQUACY OF THE PROVISION

Section 167 states as follows;

167 Agreement re issue of special mining lease

The Minister, with the approval of the President, may enter into an agreement, not inconsistent with this
Act, with any person regarding—
(a) the issue of a special mining lease to that person, and the renewal of the special mining lease; and

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[99] Section 167 to the Mines & Minerals Act chapter 21:08 *The Minister, with the approval of the President, may enter into an agreement, not inconsistent with this Act, with any person regarding— (a) the issue of a special mining lease to that person, and the renewal of the special mining lease*

[100]https://www.fairplanet.org/op-ed/the-mineral-resource-curse-in-zimbabwe-extractives-environmental-justice-and-sustainable-development/

(b) the terms and conditions of any special mining lease that may be issued to that person; and
(c) the liabilities and obligations of that person in terms of any special mining lease that may be issued to him, including payments by way of royalties, rents and fees; and
(d) any other matter connected with or incidental to any special mining lease that may be granted to that person.

The foremost thing to pick up from the above provision as explained in the previous chapter is how inadequate it is to be the only provision regulating an entire regime for an industry as big as the extractive industry. It does not state the considerations for the granting of the special mining lease, the generic terms of the special mining lease and the liabilities and obligations of the contracting parties is left to the minister. There is no room for consultation with experts in the extractive industry in the evaluation of and conclusion of these mining agreements. Everything is left to the minister of Mines with the approval of the president.[101] Matters relating to transparency, accountability and environmental sustainability are not provided for in the section. The provisions are therefore open to various interpretations which is a problem in that there is no uniformity regarding the negotiation of the terms of these agreements, each agreement is interpreted in context.

3.2.2 **<u>THE PROVISION IS AMBIGUOUS</u>**

Inadequacy creates room for ambiguity. Ambiguity comes about when a provision is unclear and subject to multiple interpretations. The provision is couched in generic open ended terms. As observed in the previous chapter, section 167 of the Mines and Minerals Act is ambiguous. Paragraph d of the provision gives the minister the leeway to negotiate any other issues connected with or incidental to a special mining lease.[102] The minister is given the power and discretion to negotiate any other terms of the special mining lease. The lack of clarity as to the limit and extent to which the minister can exercise this discretion makes the provision ambiguous and subject to various interpretations.

The inadequacy of this provision can also be gleaned from how the agreements concluded do not elaborate on the tax obligations of the holders of special mining leases in terms of section 167 and their subsidiaries. A case in point is Unki Mine (Private)

[101] Section 167 of the Mines & Minerals Act.
[102] Section 167 (d) of the Mines & Minerals Act *any other matter connected with or incidental to any special mining lease that may be granted to that person.*

Limited v ZIMRA. In the case, Unki Mine a subsidiary of AmZim Holdings Limited Group entered into an agreement with the government of Zimbabwe and was granted a mining lease to engage in the mining of platinum. The holding company, in compliance with the Indigenization and Economic Empowerment initiative implement by the government of Zimbabwe under the Indigenization and Economic Empowerment (General) Regulations, 2010 Statutory Instrument 21 of 2010 submitted a plan which later resulted in it being obligated to make a contribution of US$ 10 million to the Tongogara rural district Community Share Ownership Trust. The subsidiary company, Unki mine made the payment on behalf of its holding company. A dispute arose between the parties regarding the nature of the donation made. The respondent disallowed as a deduction the amount paid in assessing the revenue tax of the appellant. The appellant argued that the amount was of a revenue nature.

The issue before the court was whether the payment was of a capital or revenue nature for the assessment of tax. The other issue for determination was whether a subsidiary had the obligation to pay the said amount on behalf of its holding company. The court decided that the subsidiary was a separate company on its own and the obligations of the holding company were not to be visited upon it.

From the above, it can observed that the special mining lease concluded between Unki Mine and the government of Zimbabwe was not clear on the tax obligations of the company in its capacity as a subsidiary of Amzim Holdings.

3.2.3. NON-ALIGNMENT OF THE MAIN LEGISLATION WITH RELATED LEGISLATION

The extractive industry does not operate in a vacuum. In Zimbabwe, the main legislation for mining is the Mines and Minerals Act which aside from being archaic and inapplicable to modern mining problems is not aligned to other forms of legislation that play a key role in mining. Mining in Zimbabwe is mostly done in communities that have traditional leaders whose functions are governed by the Traditional Leaders Act.[103] The Act states as one of the duties of the traditional leaders, ensuring that the land and its natural resources are used and exploited in terms of the law and, in particular, controlling over-cultivation, and over-grazing and the indiscriminate destruction of flora and fauna and illegal settlements; and generally preventing the degradation, abuse or misuse of land and natural resources in his area.[104] This power of traditional leaders is not given any weight in the conclusion and subsequent operation of mining agreements in Zimbabwe. The Mines and Minerals Act in terms of mining contracts only

[103] Traditional Leaders Act [chapter 29:17]
[104] Ibid at section 5

vests the power to negotiate in the President and the Minister who perform this function through various mining departments. There is no room for consultation with traditional leaders as the custodians of natural resources in local communities. These traditional leaders could also be utilized for contract performance monitoring but the legal regime for mining contracts in Zimbabwe does not give effect to this function of traditional leaders granted in terms of the traditional leaders Act.

In South Africa, an instance where the role of traditional leaders was given effect to was where the Minerals and Energy minister was forced to put on hold, the processing of a license for a company which had not adequately consulted with traditional leaders in the area it sought to operate in.[105] The Zambian parliament also noted that although consulting traditional leaders is not a requirement per se for the acquisition of mining rights, the failure often creates conflicts.[106] It is therefore prudent to consult with traditional leaders.

Section 4(2) of the Environmental Management Act states as follows;

(2) Subject to this Act, the following principles of environmental management shall apply to the actions of all persons and all government agencies, where those actions significantly affect the environment—

(a) all elements of the environment are linked and inter-related, therefore environmental management must be integrated and the best practicable environmental option pursued;

(b) environmental management must place people and their needs at the forefront of its concern;

(c) the participation of all interested and affected parties in environmental governance must be promoted and all people must be given an opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation;

(d) environmental education, environmental awareness and the sharing of knowledge and experience must be promoted in order to increase the capacity of communities to address environmental issues and

engender values, attitudes, skills and behavior consistent with environmental management;

(e)development must be socially, environmentally and economically sustainable.

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[105] V Novoselova *Of African "Traditional Leaders" and Mining Licenses* 19 february 2009 accessed 13 July 2022
[106] ibid

(f) anticipated negative impact on the environment and on people's environmental rights shall be prevented, and where they cannot be altogether prevented be minimized and remedied;

(g) any person who causes pollution or environmental degradation shall meet the cost of remedying such pollution or environmental degradation and any resultant adverse health effects, as well as the cost of preventing, controlling or minimizing further pollution, environmental damage or adverse health effects;

(h) global and international responsibilities relating to the environment must be discharged in the national interest;

(i) sensitive, vulnerable and highly dynamic or stressed ecosystems require specific attention in management and planning procedures, especially where they are subject to significant human resource usage and development pressure.

Mining is, due to its impact on the environment, an environmental issue for which the above section is stipulating the participation of all affected people. That would include the involvement of other stakeholders other than the government in the negotiation of mining contracts. However, the legal regime for mining contracts restricts this process to the government and its mining de partments who are the least affected by mining activities in local communities. Subsection 4(2)(g) speaks to entities that cause pollution and degradation being held accountable for these harmful activities. However, the inadequacy and ambiguity of section 167 of the Mines and Minerals Act is seen in how it does not make it a requirement

3.3 INSTITUTIONAL WEAKNESSES.

Institutional weaknesses are weakness related to the mining industry and expected standards within the industry.

3.3.1. LACK OF ACCOUNTABILITY & TRANSPARENCY

Transparency and accountability principles ensure that the government has an obligation which flows from certain legal frameworks requiring the proper access to and disclosure of information relating to allocation of mining contracts, income generation, allocation of revenue, environmental impacts and any other information related thereto by the government to the public. Accountability means that the

government and the stakeholders involved should comply with the obligations and the standards set and be held responsible for non-compliance. There is a lack of transparency and accountability in the extractive industry in Zimbabwe and that is a major gap in the regime. Transparency and accountability are key facets of just, equitable and sustainable exploitation of natural resources.[107]Transparency is largely hinged on a clear contract disclosure framework which Zimbabwe currently lacks. In the limited circumstances that mining companies decide to disclose information relating to their mining activities, ZEPARU noted that;

The major concern raised by stakeholders is that the information is not sufficient, timely and accurately provided. The information is mostly not up to date, not readily available or accessible and is made available upon written approval from the ministry of mines. Further, information is not provided by individual mines.[108]

Therefore, it is clear that the amount and quality of information disclosed through platforms like parliamentary committee on mining, mining reports by ministry of mines, Zimra, national budget, ZMDC, MMCZ, RBZ and auditor general's office is not enough and of expected quality. Companies listed on Zimbabwe stock exchange are expected to disclose information however most of the information on public listing relates to revenues than terms and duration of mining contract.

The extractive industry is one of the major sectors expected to generate revenue in Zimbabwe. However, the secrecy surrounding the exploitation of minerals has led to the promotion of activities like corruption and the smuggling of mineral resources with an estimation of over 70 % of the country's gold output finding its way out of the country through unsanctioned and illegal ways into international markets.[109] It was put forward that for transparency, mining companies would have to accept and undertake to disclose the full text of their mining contracts.[110]

The discretionary nature of the mining contract regime as allowed by the Mines and Minerals Act undermines transparency and accountability at the same time it fuels corruption. This was aptly stated by ZEPARU who said;

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[107] Mining Zimbabwe, Call for transparency in Mining Contracts grow louder, October 4 2020 accessed 16 July 2022

[108] An Analysis of Zimbabwe mining Revenue And disclosure Frameworks Prepared by Zimbabwe economic Policy Analysis and Research Unit (ZEPARU) pp16

[109] M.Nyoni, the Standard, *Zimbabwe: Gold Smuggling Syndicates Exposed,*30 May 2021 *"A new report has illustrated the depth of the gold smuggling scourge in Zimbabwe, estimating that over 70% of the country's output has found its way into backstage international markets."*

[110] Mining Zimbabwe, *Call for transparency in Mining Contracts grow louder*, October 4 2020 accessed 16 July 2022

the legal framework has loopholes as it allows for the discretion of senior public officials like the Permanent secretary and the minister in negotiation of mining contracts.[111]

The Act gives the Minister of Mines and Mining Development wide discretionary powers to act unilaterally with little regard for the principles of accountability, transparency and professionalism that should guide his conduct as a government minister serving the people. The wide discretionary powers given to the Minister responsible for mines are unconstitutional. The wider discretionary powers given to the minister by the Act are subject to abuse by officials for personal enrichment as is the case currently prevailing. A case in point would be the case of Henrietta Rushwaya, president of the Zimbabwe Miners Federation who ironically stated that;

small-scale mining must be a preserve for indigenous Zimbabweans. if that was embraced, then we will not be in this predicament of disturbances that are affecting production. Even things like smuggling in the case of gold usually become rampant when you factor in foreign participants.[112]

Only to be found in possession of gold attempting to smuggle it in October 2020.[113] Her case is a clear example of how the lack of transparency in the mining industry has opened the floodgates for corruption and smuggling. Disclosure has the advantage combatting these negative forces and inform policy on ways of combatting them.[114]

Issues to do with mining constitute financial issues contemplated under section 298 of the Zimbabwean Constitution.[115] The section, in clear and unambiguous terms speaks to transparency and accountability as principles governing issues to do with public finance.[116] Transparency from before signing the mining agreement to the terms of the agreement ensures that when the multinational companies fall short of complying with the terms of their agreements, they are held accountable and brought to question regarding the non-compliance. The real question therefore is, transparency to who? Section 167 restricts issues to do with the acquisition of and negotiation of terms of the mining contracts to the executive and the mining company as the contracting parties.

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[111] Note 109 above

[112] https://miningzimbabwe.com/reserve-small-scale-mining-for-locals/ on 29 June 2020

[113] https://zimfieldguide.com/midlands/rushwaya-gold-smuggling-case-exposes-microcosm-corruption-exists-zimbabwe-today

[114] Note 109 at page 4 *disclosure of information has its own benefits. it ensures that the mining sector contributes meaningfully to increased economic growth and development. further, it informs policy through research, combats corruption, reduces poverty, and promotes greater public confidence.*

[115] Section 298 of the Constitution of Zimbabwe Amendment 20 of 2013 Principles of public financial management, the following principles must govern all aspects of public finance in Zimbabwe, there must be transparency and accountability in all financial matters.

[116] ibid

The duty of transparency is owed to other sectors and people that are affected by the mining activities and the nation as a whole as these issues constitute fiscal issues for which section 298 of the constitution inserts an obligation for transparency. The duty of transparency is owed to local communities whose livelihoods are severely impacted by mining activities.

3.3.2. **NO CONTRACT PERFOMANCE MONITORING MECHANISMS**

Closely related to the above problem is the lack of contract performance monitoring. Monitoring is the gathering, analysis and interpretation of information for the assessment of performance.[117] Performance monitoring is a key function of proper contract administration that helps confirm that the contractor is performing all of its duties and obligations in accordance with the terms of the contract, and identify and address any developing problems or issues. In the Extractive Industry, performance monitoring would involve monitoring the tenure of the agreement, the payment of royalties and related taxes, feasibility studies on environmental and social impact, ensuring that the mining entity has acquired the relevant accreditation from relevant authorities regarding the impact of the project before commencement as well as ensuring that the financial books of the entity are accessible for assessment. Performance monitoring is one of the major ways through which sustainable development can be achieved in the mining industry. It sees to it that mining is done sustainably, considering the environment through ensuring that it is not harmed. However, contract performance monitoring is not a requirement in Zimbabwe or put subtly, the legal regime for mining agreements in Zimbabwe does not place emphasis on the need for contract performance monitoring. Mining companies are given mining rights and left to operate as they wish. Resultantly, these companies do not account for their earnings, destroy the environment and employ methods of mining that cause pollution, to the disadvantage of host communities. Performance monitoring is a huge component of effectiveness in the context of mining contracts. Section 315 of the constitution calls for performance monitoring of mining contracts but there is no legislative backing in line with the section.

It was noted that Civil Society Organizations can be utilized in the monitoring of mining contracts.[118] The first step in this regard would be the identification of the terms and obligations for operation by mining companies to pick out which of the obligations to

[117] *EVALUATING PERFORMANCE: MONITORING AND AUDITING* Leading Practice Sustainable Development Program for the Mining Industry September 2016
[118] ZELA, *Monitor mining contract performance-CSOs urged*. May 28 2021 Accessed 16 July 2022

monitor.[119] It would assist in bringing out the nature of the commitment made by the mining company to be granted mining rights. This would mean a complete disclosure of the mining contract for assessment but given the lack of transparency highlighted above, that would be a major challenge as the legal regime for mining contracts in Zimbabwe does not emphasize on transparency.[120] Where there are contract monitoring mechanisms, fostering accountability is achievable.

In 2021, it was reported that stakeholders in the mining industry were moving towards the implementation of mechanisms to improve the monitoring and evaluation of mining contracts which would see the mining industry achieving the status of a $12 billion mining economy by 2023.[121] However, a few months away from 2023, the goal has not been realized. Not even traces of it have been seen which goes to show that where commitments are made for contract performance monitoring, it is the implementation that does not see the light of day.

3.3.3. NO ROOM FOR COMMUNITY PARTICIPATION

The permanent sovereignty principle of natural resource governance stipulates that natural resources belong to the citizens of a state. The state is only a custodian of those resources on behalf of the citizens. Following that logic, where the Mines and Minerals Act vests ownership of natural resources in the president, he does so on behalf of the people although the vesting of mineral rights in the president is not without its problems. The Constitution in section 13(4) guarantees the right of local communities to benefit from the resources in their areas. For local communities to benefit from mining enterprises, they have to be made aware and a part of the negotiations with these mining entities. There are limited platforms for engagement between the government, local communities and mining companies.[122]Local communities are not adequately notified of or consulted in discussions leading to the imposition of mining

[119] ibid

[120] *Women and Law in Southern Africa-Zimbabwe Director, Mrs Fadzai Traquino highlighted that the first step in civil society monitoring is to identify the company's obligations and to determine which of those obligations to monitor. In a contractual regime, this requires access to the contracts. Citizens will need to see the mining contracts to be able to understand the full range of commitments the company has made in terms of taxes, royalties, social infrastructure, the environment, among others.*

[121] Note 111 above Stakeholders in the industry are advocating for a move that will improve the monitoring and evaluation of mining contracts as the government targets a $12 billion mining economy by 2023.

[122] Matsika, Lillian and Zano, Veronica and Hove, Dorothy and Murungu, Ronnie, Community Participation in Natural Resources Governance: An Exposition of the Outcomes of Alternative Mining Indabas in Zimbabwe (December 30, 2014). OIDA International Journal of Sustainable Development, Vol. 07, No. 11, pp. 89-98, 2014, Available at SSRN: https://ssrn.com/abstract=2568492

projects in their areas. The need for local communities to participate emanates from the fact that they are the most affected by the mining activities of these multinationals.

However, the attitude in Zimbabwe has been to displace and ignore these people and prioritizing mining rights of a mining entity. It was succinctly put across that;

Some of the problems affecting mining communities include issues of forced evictions and relocations of communities from their traditional lands without free and prior informed consent and lack of fair and adequate compensation in order to pave way for mining activities. These irregular relocations and resettlements have been done and continue to be done without government and the mining companies recognizing local communities as an important stakeholder in the mining sector.[123]

The recurrent conduct by the state has come to be known as Mining Induced Displacements (MID'S).MID cases includes, Marange community where 4321 families were affected. Families from Chiadzwa village were relocated to Arda Transau Relocation area, 24 km from Mutare in 2009. Historically, MID also happened in Murowa in 2004 when Rio Tinto's Murowa diamond mine relocated 926 people to six farms purchased by the company under the resettlement program. The same company relocated 142 families to Shashe, about 150 kilometres east of Murowa in 2005.

Community participation would assist in ensuring accountability as community members who know about a mining enterprise and its terms of operations will be quick to notice where there is non- compliance and hold the mining entity accountable for its actions. Community participation would also assist with contract performance monitoring. A case in point is **Anjin Investments Private Limited V The Minister Of Mines & Mining Development.**[124] In that case, the Ministry of Mines and Mining Development decided to cancel a special grant purportedly granted to the applicant, Anjin Investments Private Limited. The basis for the cancellation was that the special grant had expired hence the applicant no-longer possessed any legal right to continue engaging in mining activities. The applicant was also given 90 days within which to cease operations and vacate the area. The applicant in its application argued that it had a reasonable expectation that it would be allowed to continue conducting its operations post the subsistence of the special grant. This reasonable expectation emanated from the fact that a lot of money had been injected into the project hence the entity had to be allowed to recoup its investment. It was then realized that the special grant was not in the name of the applicant and it had expired five years prior to the notice of expiration of the special agreement.

[123] ibid
[124] HH-228-16

What can be observed from the foregoing is that the applicant was mining for five years with no legal right whatsoever to engage in the mining activities. It proves that the Ministry of Mines had not been monitoring the mining operations which monitoring would have alerted the ministry when the special agreement expired of the expiration. Due to the fact that mining is the major revenue generating industry in Zimbabwe, many people and entities are engaging in it. The Ministry as the regulatory authority is overwhelmed to a point were performance monitoring is impossible. To that end there are various Community Based Organizations (CBO'S) in mining communities which can be utilized for the above duty but are not being utilized. They can assist in the monitoring of mining companies and report back to the ministry for it to stay informed on the activities of those it grants mining concessions. The devolution of ministerial powers in this regard will go a long way in promoting other facets of the legal regime and ensure the resource curse is adequately destroyed. However, the Zimbabwean Legal regime for mining contracts has no room for community participation. The legal framework for mining contracts does not provide for it.

3.3.4. MISALIGNMENT TO REGIONALLY AND INTERNATIONALLY ACCEPTED STANDARDS

Closely related to the lack of transparency and accountability is the misalignment to regionally and internationally accepted standards. Regionally, the Africa Mining Vision is the blueprint for standards of how mining regimes ought to operate.[125] Not only does it promote sustainable development[126] but it also advocates for transparency in how mining revenue is managed. It aims at improving the capacity of African states to negotiate contracts with multinational companies on the exploitation of resources within Afirca.[127] This is especially important considering the fact that the negotiation of mining contracts in Zimbabwe is left to the Minister in consultation with the President.[128] There is no explicit requirement for consultation with experts in the field. One is driven to conclude that the negotiation of mining agreements is largely motivated by and influenced by political interests as opposed to the need to ensure revenue for development and to be equitably shared by citizens is realized from the

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[125] https://au.int/en/ti/amv/about
[126] https://en.unesco.org/themes/education-sustainable-development/what-is-esd/sd *The concept of sustainable development was described by the 1987 Bruntland Commission Report as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."*
[127] https://au.int/sites/default/files/documents/30995-doc-africa_mining_vision_english_1.pdf
[128] Note 2 above

mining enterprise[129]. It is therefore unlikely that in such a situation, any close attention is given to the terms of the agreement and their repercussions in the future.

A case in point would be the Zimplats agreement which resulted in a lengthy and topical court case.[130] Zimplats was the holder of a Special Mining lease issued by the Minister of Mines in terms of the Mines and Minerals Act. Zimplats was also a holder of a Mining Agreement (M.A) signed between it and the Government of Zimbabwe. Both documents were executed on 24 August 1994. Up until December 2003, Zimplats paid a flat royalty rate of 2.5% across the board for all products as per the royalty rate contained in the Mining Agreement. The revenue authority claimed royalties from Zimplats using the legislated rates (which were generally higher than those provided for in the law and which are payable monthly) not the rates in the Mining Agreement. When Zimplats did not pay the amounts claimed by the revenue authority, the revenue authority issued a garnishee against Zimplats. The court ruled that the Mines and Minerals Act recognizes special mining agreements entered into between the government of Zimbabwe and mining companies and considers their provisions superior to provisions in the Act. Essentially, it was a bad agreement and that realization was made years after it had been concluded.

Internationally, the best practice standards are in the Extractive Industry Transparency Initiative[131] hereinafter referred to as EITI. EITI aims at promoting transparent and accountable management of gas, oil and mineral resources.[132] The aim is hinged on the idea of permanent sovereignty of natural resources. It follows therefore, that transparency and accountability in terms of EITI is owed to the citizens of a country. A commitment to EITI is a commitment to the disclosure of information in the extractive industry value chain.[133] From the selection of an investor, the negotiation process, the revenue realized from the enterprise and how that revenue is utilized. The Zimbabwean regime for mining agreements as espoused in the Mines and Minerals Act is silent on the duty to disclose all the above information. The terms of agreement are negotiated by and in the discretion of the parties involved only. The public is only made aware of these issues when problems arise such as in the Zimplats case. Zimbabwe is not a part of EITI but an attempt was made to set up an initiative like EITI which was named

[129] The need for equitable sharing of natural resources is constitutionally guaranteed under section 13
[130] Zimbabwe Platinum Mines Pvt Ltd versus Zimbabwe Revenue Authority and Three Others HH169/15,
[131] https://eiti.org
[132] ibid
[133] ibid

Zimbabwe Mining Revenue Transparency Initiative (ZMRTI) in 2011 but it died a natural death.[134]

3.3.5. NO DUE DILIGENCE BEFORE CONTRACTING

Another weakness of the Zimbabwean regime for mining contracts is how it does not make it a requirement on paper for the government and mining departments to do due diligence before contracting with potential mining investors. Due diligence in business refers to research and analysis of a company or organization done in preparation for a business transaction (such as a corporate merger or purchase of securities)[135] Due diligence in the context of mining would entail research regarding the capacity of the mining company to take on the proposed mining project. Capacity in terms of capital and expertise. The checklist would also include an assessment of previous mining projects conducted by the entity to see if it complies with environmental and social impact assessments, takes on any corporate social responsibility and relates well with host communities and adheres to fair labour standards if it employs natives in its project. Due diligence before contracting would ensure the government has knowledge of who they are contracting with and has an idea of what to expect from them regarding whether or not the mining company will comply with the mining contract.

A case in point regarding this is the Metallon corporate rescue case that became topical in 2021. Metallon gold is a subsidiary of the Metallon Corporation and has been operating and developing Redwing Mine, How Mine, Shamva Mine and Goldfields of Mazowe in Zimbabwe.[136] The company was taken to court by various affected persons in terms of the Insolvency Act[137] for failure to honor employment contract obligations and obligations in terms of agreements with service providers like ZESA and local authorities.[138] In Mazowe and Shamva, the company was successfully [139]placed on corporate rescue in February 2020 by an order of the High Court and rescue practitioners were appointed to facilitate the revival of the companies. [140] It is important that an order for corporate rescue is given were a company is financially distressed and its liabilities exceed its assets to a point where it is likely that it will fall

[134]http://www.zela.org/looking-back-the-zimbabwe-mining-revenue-transparency-initiative
[135] https://www.merriam-webster.com/dictionary/due%20diligence
[136] https://metcorp.co.uk
[137] Section 121 of the Insolvency Act chapter 6:07
[138] HC 2619/19 and HC 2696/19

[140] The Herald, 27 February 2020, Golden Sibanda *Zimbabwe: Gold Miner Metallon Put Under Rescue Plan*

into liquidation in the ensuing six months.[141] Corporate rescue is aimed at ensuring that a company is resuscitated to a point where it is able to settle its obligations to employees, shareholders as well as service providers.[142]

It would not be too far from the truth to conclude that placing subsidiaries of a multinational mining company on corporate rescue for failure to honor agreements and sinking into financial distress is a desperate attempt to cure a failure to conduct proper due diligence before granting mining rights to the multinational company. It also speaks to a lack of contract performance monitoring as one would assume that the mining contract granted to this company places an obligation on it to honor Zimbabwe's labour laws. The assumption is because there is no transparency regarding these agreements hence one is left to assume based on the ensuing trend of events.

Interestingly, an order for the placement of Redwing mining Company, a subsidiary of Metallon on corporate rescue was overturned by the Supreme court in the case of Metallon Gold Zimbabwe (Private) Limited And 3 Others v Shatirwa Investments (Private) Limited And 3 Others.[143] The order was overturned on technicalities regarding the procedure for the placement of the company on corporate rescue. The Supreme Court in this case majored on the minor. The real issue was that the company was not performing as expected and its books of accounts were not balancing. What that can only mean is that such a company cannot be expected to inject adequate revenue into the national fiscus for development as the idea behind granting these company mining rights is ensuring that their exploitation of minerals benefits the country. One can conclude that the decision by the Supreme Court was meant to "save face" and not bring to the limelight the failure of the government to conduct proper due diligence before granting this entity mining rights in Zimbabwe.

3.4. CONCLUSION

In conclusion. The Zimbabwean regime for mining contracts is heavily flawed. The regime ought to reflect a combination of an adequate legal framework governing mining contracts as well as institutional mechanisms for efficiency and effective enforcement. The absence of the above factors is the major reason why mining has not been able to achieve its purpose in Zimbabwe.

[141] Section 124 of the Insolvency Act chapter 6:07
[142] Absa Bank Limited vs Caine No and Another 2014 ZAF SCH 48
[143] 2021] ZWSC 107

CHAPTER FOUR: ANALYSIS OF THE LEGAL REGIMES FOR MINING CONTRACTS IN OTHER JURISDICTIONS

4.1. INTRODUCTION

This chapter seeks to do a comparative analysis between the legal regime for mining agreements in Zimbabwe with that of South Africa, Botswana and Ghana. The three countries chosen are strategic in that they, like Zimbabwe have extractive industries that contribute significantly to economic development. South Africa is reported to have ore reserves to the value of US$2.5 Trillion.[144] It also has the largest reserves of platinum group minerals.[145] More significantly and of paramount importance to this thesis, it has been ranked 5th internationally for the contribution made by the mining industry to the Gross Domestic Product.[146] For the above reasons, it is only proper and worthwhile that comparison and lessons be drawn from a country with such a major mining industry. The biggest mineral commodity in Botswana is Diamond.[147] One would wonder how such a small country can over a short period of time experience immense economic growth from one mineral commodity. The real reason behind Botswana's success has been the transparent manner in which mining revenue is managed.[148] As of the second quarter of 2021, the mining and quarrying sector in Ghana contributed around 809.4 million U.S. dollars to the country's GDP[149]. As of 2020 Ghana was the 6th largest producer of Manganese in the world.[150]

It follows from the foregoing that the above countries are benefitting exceptionally from their extractive industries. An analysis of the Cameroon and Cam Iron South Africa agreement will also be made as it is an example of a near perfect mining agreement the provisions of which could be copied by Zimbabwe. Zimbabwe could be equally good and competing with these countries but as seen in the previous chapter, the problem

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[144] http://www.southafrica.info/business/economy/sectors/mining.htm#.V6vx0Y9OKUk, accessed 12/07/22

[145] ibid

[146] University of Witwatersrand, Johanesburg, *The South African mining sector*, Wits Mining Insitute

[147] https://www.imf.org/en/News/Articles/2018/09/05/na090518Botswana

[148] Ibid *it has managed its diamond revenues in a prudent and transparent manner (Botswana has been consistently ranked among the top 50 countries in terms of governance in the world), contributing to sizable savings that can be used to stabilize the economy in case of a downturn and save for investments and future generations.*

[149] Doris Dokua Sasu Mining industry in Ghana - statistics & facts Published by on Jan 31, 2022 accessed 12 July 2022

[150] Ibid

lies with the legal regime for mining agreements. This chapter seeks to study and analyze the legal regimes of the aforementioned countries in a bid to bring to the fore the similarities and differences that exist between the regimes.

4.2. SOUTH AFRICA

Due to colonization, mineral resources in South Africa were privately owned.[151] The status quo changed in 2004.[152] The South African government led by the African National Congress enacted the Mineral and Petroleum Resources Development Act, 2002 (MPRDA). A Minerals and Mining Policy was also put in place to elaborate on the finite details in the act. [153] The Act states as one of its objectives, the sovereignty of the state over the mineral resources of the state.[154] The section can be seen as a justification for rectifying the imbalance that existed during the colonial era wherein the enjoyment of mineral rights was limited to those that were aligned to the colonial dispensation who were not indigenous South Africans. This is true taking into account the section that follows which recognizes the mineral resources in South Africa as the common heritage of the people with the state as a custodian of these mineral resources.[155] Another objective of the Act is seeing to it that individuals and entities given mining rights contribute to social and economic development.[156]

The above provisions can be seen as disclaimers in the principal legislation governing mining in South Africa which influence the mining industry and consequently, the negotiation of mining concessions. They are progressive and suggestive of a people centered regime for mining contracts. People centered in the sense that the negotiation of and granting of mining rights has the South African people in mind. The situation is different in Zimbabwe were the main legislation governing mining does not provide for a people oriented approach to mining. Reference has to be made to the constitution which advocates for the equitable sharing of natural resources.[157] It also guarantees that local communities have to benefit from the resources in their areas.[158] The real issue however is that the legislation that governs mining in Zimbabwe, unlike its South

[151] F.T. Cawood* and R.C.A. Minnitt, *A historical perspective on the economics of the ownership of mineral rights ownership, 1998* Accessed 12July 2022
[152] Carlyn Frittelli Davies, Edwin Berman and Dorencia Pillay, Edward Nathan Sonnenbergs Inc *Mining in South Africa: overview*. 01 0ctober 2018 accessed 12 July 2022
[153] MINERAL AND PETROLEUM RESOURCES DEVELOPMENT ACT,2002
[154] Ibid at section 2
[155] Section 3 of the MPRDA *Mineral and petroleum resources are the common heritage of all the people of South Africa and the State is the custodian thereof for the benefit of all South Africans.*
[156] Note 128 above.
[157] Constitution of Zimbabwe Amendment 20,2013 at section 3
[158] Ibid at section 13

African equivalent does not have a people centered approach to all issues regarding the allocation of rights for the exploitation of minerals and this is reflected in the agreements consequently signed with entities given mining rights. One may be driven to assert as alluded to in chapter one of this thesis that section 2 of the Mines and Minerals Act sufficiently captures the inclusion of the people of Zimbabwe in all mining related matters. [159] This assertion is drawn from the inference that the president holds mineral rights on behalf of the state which in all essence acts on behalf of the Zimbabwean people. This is inadequate as the provision is unclear and does not, in clear and unambiguous terms assert the right of the Zimbabwean people to mineral resources in a manner that can be referenced in the granting of rights to mineral exploitation.

The MPRDA also states sustainable development as an underlying principle in the exploitation of mineral resources.[160] Sustainable development as earlier on alluded is development that strikes a balance between the needs of present and future generations. The exploitation of mineral resources therefore has to be considerate of the fact that future generations benefit from the resources in South Africa. This entails and is indicative of the fact even in its negotiation of mining concessions, South Africa takes into account the fact that in as much as the underlying need is for revenue to be realized from the exploitation of mineral resources, future generations also need to benefit from the same resources. This balance is necessary as it ensures that the exploitation of natural resources is done carefully, regard being had to the need to ensure mineral resources are not depleted to the detriment of future generations. The section also outlines that mining development has to take into account the national environmental policy of South Africa. The National Environmental Policy of South Africa promotes the conservation and sustainable use of the environment.[161] It follows therefore that when entities are granted mining concessions, they have a duty to conserve and sustainably use the environment.

An important provision in the Act is section 4 which speaks to an interpretation of the provisions of the Act that is consistent with and in conformity with the objectives of the Act.[162] This essentially means that provisions relating to the granting of mining rights through exploration agreements are included and have to be interpreted within

[159] Section 2 of the Mines and Minerals Act, *The dominium in and the right of searching and mining for and disposing of all minerals, mineral oils and natural gases, notwithstanding the dominium or right which any person may possess in and to the soil on or under which such minerals, mineral oils and natural gases are found or situated, is vested in the President, subject to this Act.*
[160] Section 3(3) of the MPRDA
[161] Department of Environment Affairs and Tourism *White Paper on Environmental Management Policy* July 1997, accessed 13 July 2022
[162] Section 4 of the MPRDA

the bounds of the objectives of the Act which include the fact that the exploitation has to be people centered.

A green paper to guide mining policy is in place in South Africa.[163] This green paper covers key mining aspects like mining investment, participation in mining mainly addressing the racial imbalances that existed due to colonization. It also focuses on environmental management, regional cooperation and governance.[164] Where each of the aspects is addressed contributions of all stakeholders in the mining industry have to be taken into account.[165] These stakeholders include Small miners, foreign companies, government officials, professionals and traditional leaders. The involvement of all stakeholders in policy making ensures that no one is left behind and community participation is guaranteed.

4.3. BOTSWANA

Mining in Botswana is regulated under the Mines and Minerals Act,1999.[166] The act vests rights in minerals in the republic.[167] The republic of Botswana owns the minerals and the administration is done by the Minister who has a duty to ensure that the exploitation of minerals is done sustainably and for the collective benefit of the people of Botswana.[168] A similarity here is seen with the South African regime which disclaims in the MPRDA that the exploitation of resources has to be for the benefit of the people.[169] Notably, both the South African Act and the Botswana Act recognize a principle of natural resource governance known as the permanent sovereignty of states over their natural resources.[170] Both statutes, unlike their Zimbabwean counterpart advocate for a people centered approach to the exploitation of natural resources.

In terms of section 51 of the Act, an agreement can be entered into between the government of Botswana and an entity intending to engage in the mining of diamond in Botswana.

The provision states as follows;

[163] https://www.gov.za/documents/minerals-and-mining-policy-south-africa-green-paper
[164] ibid
[165] ibid
[166]Mines & Minerals Act. Chapter 66:01
[167] Ibid at section 3
[168] Ibid.
[169] Note 129 above.
[170] Y.T. Chekera ,V.O. Nmehielle *The International Law Principle of Permanent Sovereignty over Natural Resources as an Instrument for Development: The Case of Zimbabwean Diamonds* 01 January 2013, accessed 13 July 2022

Notwithstanding the provisions of this Part, any application for the issue, renewal, transfer or amendment of a license to mine diamonds shall initiate a negotiating process, in good faith, between Government and the applicant covering all technical, financial and commercial aspects of the proposed project including Government participation.[171]

The entity applies to be issued with a license to mine diamonds and the application initiates the commencement of negotiations between the parties regarding the terms of the agreement.[172] Terms that can be agreed upon by the parties cover all technical, financial and commercial aspects of the project.[173] Of paramount importance to note is that the agreement also includes the extent of government participation in the project. There is therefore a guarantee that the government will be involved, it is the extent of the involvement that has to be negotiated. The involvement of the government ensures that it is kept abreast of developments in the project and guards against any breaches of the terms of the government. It inspires a sense of transparency in the dealings of the mining entity. If within 6 months from the date of application parties negotiations have not led to an agreement, the application fails.[174] If an agreement is reached, a license is issued reflecting the terms agreed upon by the parties.[175]

The above provision only relates to the mining of diamond. With all other minerals, generic licenses are issued with no room for negotiations. Holders of mining licenses are obliged to adhere to the dictates of the mining licenses issued to them on application. With diamonds, the leeway for negotiations provided under section 51 is an indication of the fact that diamond is a strategic mineral in Botswana. A balance has to be struck between the need to protect the mineral from over exploitation and granting rights for exploitation while ensuring that revenue is realized from the exploitation and guarding against excessive exploitation. Since gold is a high end mineral, entities involved in its extraction are usually multi- national companies that have the capacity to inject exorbitant amounts in capital for the project. The amounts they inject go a long way towards ensuring economic development in the recipient country. With such an investment, multinationals are not keen on operating with generic licenses that do not give them the leeway to negotiate terms of operation. It is

[171] Section 51 of the Mines & Minerals Act,1999
[172] ibid
[173] Note 142 above.
[174] Ibid at subsection 2
[175] Subsection 3

only fair, one may assert that given the nature of the investment, parties be allowed to sit down and find each other regarding the terms of operation. Be that as it may, the terms agreed are still required to reflect an undertaking by the mining entity to mine sustainably.

The government of Botswana also enters into joint venture agreements with multi-national companies for the exploitation of diamonds. One such agreement is the partnership between the government of Botswana and De Beers Diamond Company known as Debswana.[176] The entity has been operating in a mine known as Jwaneng which is believed to be the richest diamond mine in the world by value.[177] Production at the mine is expected to subsist until 2035. Although the agreement was meant to last for 10 years, the period was extended as the proceeds were contributing two thirds of its foreign exchange to the country.[178]These agreements are progressive as they are a safeguard against unsustainable mining and also ensure that the government retains much needed revenue for economic development. Botswana was not spared from the effects of the pandemic and the government is currently inviting investors to invest in diamonds.[179] It is in the process of assessing its legal framework for mining to encourage investment in other minerals like limestone.[180] The move is an attempt to move from overreliance with diamonds. One can observe from the foregoing that the government is moving in a progressive direction in ensuring that revenue is realized from mining. The fears of over- exploitation of the mineral resources or environmental degradation are curtailed by the fact that the government is by virtue of the dictates of the legal framework governing mining in Botswana involved in the process from negotiation of terms to the exploitation of minerals itself. There is therefore to a greater extent, a guarantee for contract monitoring from the government as well as accountability and transparency from the mining company. This is unlike in Zimbabwe

The Legal regime for mining agreements in Botswana is progressive because it is in alignment with internationally accepted standards espoused in the Stockholm agreement and the Rio Agreement which include the sustainable development. The legal framework recognizes that the exploitation of mineral resources has to have the interests of the public at its core.

[176] https://www.thiess.com/en/our-projects/completed-projects/jwaneng-diamond-mine
[177] ibid
[178] T.Collins, *Botswana courts investors amid diamond slump* African Business,4 February 2021, accessed 13 July 2022
[179] ibid
[180] Note 149 above.

4.4. GHANA

Mining in Ghana is regulated under the Minerals and Mining Act, 2006 as amended by the Minerals and Mining Amendment Act (703/2015)[181] Mineral rights are vested in the president in trust for the people of Ghana.[182] Ghana, like Zimbabwe vests mineral rights in the president. However, the Ghana vesting provision goes further to indicate that that the vesting is in trust for the people of Ghana. The significance of including the people in the ownership of minerals has already been explained. The minister on behalf of the president and on the recommendation of the mining commission is empowered to negotiate an agreement for the granting of mining rights.[183] This provision is exemplary in that it does not restrict the negotiation of mining agreements to one office. There are consultations that are done with an affected regulatory authority. The power to grant mining rights is therefore not centralized. Were the contract is negotiated, it only comes into force of operation upon ratification by the parliament.[184] Ratification by parliament ensures that the terms of the contract are made public and are debated on until the parliamentarians, representing the people are satisfied that the operation is beneficial to the people of Ghana. It also speaks to transparency and is in tandem with the principles of the Extractive Industry Transparency Initiative which Ghana is a part of.[185] Having joined the initiative in 2007,Ghana has committed itself to making full disclosure through reports of issues to do with mining revenue and how it is used. The latest report which is accessible on the EITI website was published in 2021 and is on activities from 2019.[186] There EITI principles are administered through GHEITI which is a miniature local version of EITI in Ghana.[187] The principles it strives to abide by include accountability and transparency.

In terms of section 43 of the Act, were an entity intends to be granted mining rights for mining or exploration, the Government shall acquire a ten percent free carried interest in the rights and obligations of the mineral operations in respect of which financial contribution shall not be paid by Government.[188] Free carried interest (FCI) refers to an

[181] Minerals and Mining Act, 2006
[182] Ibid at section 1
[183] Note 152 at section 5(1) *Subject to subsections (4) and (5), the Minister on behalf of the President and on the recommendation of the Commission may negotiate, grant, revoke, suspend or renew mineral rights in accordance with this Act.*
[184] Ibid at section 5(4)
[185]https://eiti.org/countries/ghana
[186] ibid
[187] https://www.gheiti.gov.gh/site/
[188] Section 43 of the Minerals and Mining Act,2006

equity interest granted to the State by the company holding a mining license.[189] The concept has become popular in African mining legislation. The purpose and rationale of FCI's is the granting of ownership rights in a mining project to the state and by extension, the people of that country. [190] What this essentially means is that, whenever mining rights are granted to an entity in Ghana, the state retains a ten percent equity interest in the mining project on behalf of the people of Ghana. This is progressive as it ensures that there is a guarantee that the government is involved to safeguard against breaches of the contract. The government is also kept aware of revenue realized by the mining entity as it partly owns it. It creates room for transparency and effective contract monitoring of the entity by the government.

The minister may enter into a stabilization agreement as part of a mining lease with the holder of the lease for a period not exceeding 15 years.[191] Stabilization clauses are not uncommon in African Mining regimes. The rationale behind these clauses is to ensure that mining agreements are not affected by changes in legislation or the political atmosphere of a host country.[192] They aim at mitigating the risks associated with a project. They attract investors in that there is a guarantee that the terms of the agreement which will subsist for years will not be affected by changes in the host country. However, these clauses have been criticized for their promotion of the selective application of the law. A law that applies in other sectors of the economy and the general populace may, by reason of the stabilization clause not apply to a mining entity that is protected by it.

Where a mining entity intends to make an investment that exceeds US$ five hundred million, the minister may with the advice of the commission enter into a development agreement under a mining lease.[193] The development agreement covers issues like the nature of the project intended to be carried out, the extent of government intervention in the mining venture, dispute resolution as well as issues to do with safeguarding the

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[189] D.Kaba for Lexology *Free Carried Interests in Francophone Africa Mining Legislation - Is there such a thing as a free lunch?* January 26 2017, accessed 13 July 2022
[190] ibid
[191] Note 159 at section 48 *The Minister may as a part of a mining lease enter into a stability agreement with the holder of the mining lease, to ensure that the holder of the mining lease will not, for a period not exceeding fifteen years from the date of the agreement, be adversely affected by a new enactment, order instrument or other action made under a new enactment or changes to an enactment, order, instrument that existed at the time of the stability agreement, or other action taken under these that have the effect or purport to have the effect of imposing obligations upon the holder or applicant of the mining lease*

[193] Ibid at section 49

environment. [194]The development is subject to ratification by parliament and that entails an involvement of the people as parliamentarians are elected representatives of the people.

Section 50 is perhaps the most progressive in so far as community participation is concerned. A holder of a mining lease is obliged to submit to the commission a detailed programme for the recruitment and training of Ghanaian personnel, the idea being the eventual replacement of expatriate personnel by Ghanaian personnel[195]. The provision is reasonable, taking into account the fact that mineral resources by virtue of section 1 of the Act belong to the people. It follows therefore that the people ought to benefit from the exploitation of these resources. Benefitting from revenue does not impact directly on individuals but attaining knowledge through training is a benefit that can be said to directly impact on the lives of Ghanaians. The act in this regard depicts an anthropocentric approach to the exploitation of minerals. The theme continues to the sections that follow specifically section 52 which seeks to regulate who may become a controller of a mining company, bearing in mind the interests of the public.[196] Section 58 gives the minister the power to appoint a person to investigate the ownership and shareholding of a mining company. This due diligence process is of paramount importance as it informs the minister on whether or not to grant mining rights to the mining company. Performing a due diligence process serves as a safeguard against future breaches of agreements. The minister is informed on the shareholding, assets and capital of a mining company and this assists him or her in deciding whether or not the company has the capacity to perform its obligations in terms of a mining lease.

If a mining company fails to perform as promised within two years from when it was granted mining rights, the minister may on recommendation by the commission cancel the mining lease[197]. Cancellation is not automatic, the company is first given a notice to remedy the breach, failure of which cancellation follows.[198] This is an effective measure to suppress idleness.

[194] ibid
[195] Section 50 of the Minerals and Mining Act,2006
[196] Ibid at section 52 *A person may not become a controller of a mining company unless (a) the person has served on the Minister notice in writing stating that the person intends to become a controller of the mining company.*
[197] Section 69
[198] ibid

4.5. CAMEROON & CAM IRON SOUTH AFRICA AGREEMENT (THE MBALAMA CONVENTION)

In 2012, Cameroon entered into a Concession Agreement with Cam Iron S.A known as the Mbalam Convention for the mining of Iron Ore. In the preamble of the agreement, the draftsman made sure to make a disclaimer of the state ownership of the national resources of Cameroon.[199] An important clause in the preamble which shows the advantages of mining contracts over licenses is where it is indicated that the parties convened, negotiated and agreed to the Convention, which is governed by the legislation, subject to any contrary provisions or exemptions required, for the Project's needs, as may be authorized by the Enabling Law.[200] What the above essentially means is that legislation applies but only to the extent to which it does not go against provisions of the agreement that are specific to the needs of the project. The contract itself therefore, takes precedence over national law in the form of legislation.

Another important thing to note is that the preamble confirms that in a mining contract, parties negotiate and whatever becomes binding upon them is the outcome of compromises made during negotiations.[201] This is unlike in a licensing regime where everything is dictated by the national law.

It is interesting to note how the agreement granted the holders the right to expropriate privately owned land for the construction of railway lines.[202] The expropriation is against a compensation for any disturbance of peaceful possession by a third party, for land they occupy or the activities they conduct therein as a result of the grant to such project company of rights to occupy this project area the conduct of activities in the same area; and any loss or damage caused to a third party or their assets by a such project company, its contractors or subcontractors, including their employees.[203] This prima facie appears arbitrary in that a third party has no say in the expropriation and compensation is only for the aforementioned losses. If one is to apply a pro-mining mindset to this, it would appear progressive in that the project is big and highly beneficial to the economy of the country. The losses incurred by the landholders cannot be weighed against the benefits of the project. The fact that there is compensation for the expropriation makes it fair. However, the idea of compensation in the Zimbabwean context has been a problem for local communities that are displaced for mining activities. Families in Marange were displaced to pave way for diamond mining as reserves had been discovered in their land. The displacements were accompanied by a

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[199] https://resourcecontracts-nrgi.s3-us-west-2.amazonaws.com/691/691-cam-iron-sa-cameroon-2012.pdf
[200] Preamble to the Mbalam Convention
[201] supra
[202] Clause 28.1 of the Mbalam Convention.
[203] Ibid at clause 28.2

promise of compensation. A court order was obtained to assure compensation. They were promised monetary compensation of USD$5000 plus a recurring allowance for the assets they had to leave behind.[204] The problem is that the compensation is promised without a valuation being done to ascertain adequate compensation as in the case of the Marange people.[205]

The Mbalama project shows signs of being progressive in that the holder is given an obligation to operate within the bounds of the Mining Code in relation to safety, health and Environment and to keep within the international standards applicable to protection of the Environment, safety, health and protection of living beings generally accepted in the mining, railway and port industries.[206] The agreement also gave Cam Iron the Obligation to strictly perform all its operations in line with the Environmental Plan of Cameroon.[207] The above provisions are progressive in that they allow for the involvement of other stakeholders involved in the mining industry and for the application of international instruments like the Stockholm and Rio declaration where there is non-compliance.

4.6. CONCLUSION

Summarily, the Ghanaian regime for mining contracts is in tandem with prevailing standards for mining agreements. The legal framework governing mining agreements and its related regulations and policy frameworks promote contract monitoring, the participation of Ghanaians in the acquisition of mining rights by mining companies as well as well as in the mining operations. Accountability and transparency is guaranteed through the involvement of the government from the negotiation of the mining agreements to insisting on having a stake in the mining companies themselves. Sustainable development is advocated for and this depicts an effort to align domestic legislation governing mining agreements with internationally accepted standards.

[204] E.Chenjerai, Global Press Journal USA, Zimbabwe: *Desperate for Cash and Without Basic Amenities, Zimbabweans Relocated During Diamond Rush Have Had Enough*.17 March 2019 accessed 17 July 2022
[205] *Forgotten and forsaken, families displaced from Marange diamond mines start the journey back home* March 15 2022 https://africachinareporting.com/forgotten-and-forsaken-families-displaced-from-marange-diamond-mines-start-the-journey-back-home/
[206] Ibid at clause 29
[207] Ibid at clause 29.2.1

CHAPTER FIVE: RECOMMENDATIONS AND CONCLUSION

5.1. INTRODUCTION

As has been observed throughout this thesis, Zimbabwe is experiencing "resource curse" symptoms.[208] Despite having a mining industry that can assist with economic development as anticipated by the government in its National Development Strategies one and two, the country has not realizing enough revenue from the mining industry to foster economic growth. This thesis has traced the problem to the weak mining contracts that are concluded between the government of Zimbabwe and mining investors. A strong legal regime for the negotiation and conclusion of mining contracts can almost certainly cure the resource curse problem in Zimbabwe. The weaknesses of the regime which range from legislative weaknesses, institutional weaknesses as well as enforcement and implementation weaknesses, if dealt with will lead to a strong regime that can assist in the realization of the goal of becoming an upper middle income economy by 2030.[209]

5.2. SUMMARY OF MAJOR ARGUMENTS

The legal regime for mining contracts in Zimbabwe is weak. This weakness is attributed to the fact that the only provision governing mining agreements is inadequate. It is as a result of the weakness that Zimbabwe has not managed to realize any substantial and notable revenue from mining. The status quo has resulted in the country being labelled as having a resource curse, like many African countries that have natural resources but are not benefiting from them.

5.3. SUMMARY OF MAJOR FINDINGS

The legal regime for mining contracts in Zimbabwe is encompassed under section 167 of the Mines and Minerals Act. It does not cover all the necessary aspects of mining contracts. The situation is made worse by the fact that there is no separate policy framework that expands on the inadequate provision. The law governing mining agreements is contained in a statute that is archaic in that respect. This is because it

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[208] N.Ndlovu, ***THE MINERAL RESOURCE CURSE IN ZIMBABWE: EXTRACTIVES, ENVIRONMENTAL JUSTICE AND SUSTAINABLE DEVELOPMENT***. April 20,2020

[209] Government of Zimbabwe *TOWARDS AN UPPER-MIDDLE INCOME ECONOMY BY 2030 "New Dispensation Core Values"* 19 April 2018

does not address contemporary mining problems that ought to be covered in mining agreements. No attempt has been made in all the amendments to the statute to address that particular aspect. The recent bill does not amend section 167 of the Act. What that essentially means is that the problem persists. There are no transparency and accountability mechanisms in the regime and no due diligence is conducted before a mining entity is given rights to mine. Negotiators of mining agreements lack contract negotiation skills and this is manifested in the various bad contracts analyzed in this paper. An analysis of the regimes in other jurisdictions highlighted the need for Zimbabwe to have an all –encompassing legal regime. Ghana has the most exemplary regime which is clear and covers all the important aspects of a mining agreement and addresses contemporary mining problems. Botswana's regime is also commendable in how it is clear and provides for transparency and accountability. The following are measures or recommendations that can be considered in order to strengthen the legal regime for mining contracts in Zimbabwe.

5.5. RECOMMENDATIONS

5.5.1 Align the Mines and Minerals Act with the Constitution

The Constitution of Zimbabwe is the supreme law of the state and any law that is ultra vires the Constitution is invalid to the extent of the inconsistency.[210] The Mines and Minerals Act was enacted during the colonial era and the Constitution in 2013. No efforts have been made to harmonize the two statutes. The constitution in its provisions relating to natural resource governance addresses contemporary mining issues which are not addressed in the Mines and Minerals Act. These include community participation,[211] the equitable sharing of natural resources,[212] the sustainable exploitation of natural resources[213] as well as transparency and accountability in all financial matters.[214] There is therefore need to align the Mines and Minerals Act with the constitution for uniformity.

5.5.2 Develop a policy framework for the negotiation of mining agreements

[210] Section 2 of the Constitution of Zimbabwe (Amendment 20) 2013
[211] Section 13 of the constitution of Zimbabwe (Amendment 20) 2013
[212] Ibid at section 3
[213] Section 73
[214] Section 298

Mining contracts are sui generis in nature. They require a certain level of expertise and knowledge of the prevailing mining climate if they are to yield any benefit for host countries. Zimbabwe needs to develop a policy framework for the negotiation of mining agreements. The act covers the general legislative issues relating to mining agreements. A policy framework is meant to cover the nitty-gritties of mining contracts in a bid to provide a holistic regime for mining contracts which is not ambiguous and prone to abuse and breaches by the entities involved. The policy framework may also provide a generic agreement or model which operates as a precedent for reference in negotiating mining agreements. For mining development agreements, reference can be made to the Model Mining Development Agreement (MMDA) of the International Bar Association.[215] It covers all the finite details of how a Mining Development Agreement ought to be couched.

5.5.3 Revive the Zimbabwe Mining Revenue Transparency Initiative (ZMRTI)

In a bid to promote transparency and accountability in the mining industry, the Zimbabwe Mining Revenue Transparency Initiative was adopted in 2009.[216] One of its responsibilities was to come up with innovative ways of expanding the revenue base for the national purse.[217] The ZMRTI was as a result of the determination of the Government of National Unity to give priority to

" rebuilding the mineral and mining sector as a core pillar of Zimbabwe's economic and social turn around and development plans and to ensure that the country's mineral wealth and natural resources were developed and exploited for national benefit to help achieve growth , poverty reduction and economic and social equity".[218]

The end of the Government of National Unity marked the collapse of the initiative. If revived, it can go a long way towards fostering transparency and accountability in the mining industry.

5.5.4 Adopt principles of the Africa Mining Vision

The Africa Mining Vision (AMV) was adopted by the African Union with a bid to promote the improvement of mining regimes of member states. It acknowledges

[215] H.Mann *IISD Handbook on Mining Contract Negotiations for Developing Countries Volume 1: Preparing for Success* April 2015 accessed 14 July 2022
[216] http://www.zela.org/looking-back-the-zimbabwe-mining-revenue-transparency-initiative/
[217] Thabani V.Mpofu. Principal Director Research and Development, Office of the Prime Minister. Why the Zimbabwe Mining Revenue Transparency Initiative (ZMRTI)? How it will be structured and implemented.
[218] Note 178 above

that despite being endowed with mineral resources, African countries have not been adequately benefitting from the exploitation of these resources. Resultantly, poverty remains a thorn in the flesh and the resource curse unabated. The AMV advocates for transparency in mining as well as the employment of contemporary solutions to contemporary mining problems. Despite being a member of the African union, Zimbabwe has not adopted the principles of the AMV. It is therefore recommended that Zimbabwe adopts these principles as they address the gaps in the Zimbabwean regime for mining contracts.

5.5.5 Foster contract monitoring mechanisms

Contract monitoring would ensure that a mining company does not breach the terms of the agreement. Contract monitoring mechanisms would involve monitoring the tenure of the agreement, ensuring that a mining company has obtained relevant accreditation from regulatory authorities before commencing its mining activities, the payment of royalties and taxes as well as ensuring that the company's financial books are accessible for assessment. If such contract monitoring mechanisms are adopted and made part of the policy framework recommended above, the Zimbabwean regime for mining contracts will be strengthened.

5.5.6 Adopt the concept of Free Carried interest

As earlier on observed, Ghana has adopted the Free Carried Interest concept in its regime for mining contracts. The benefits of the concept include a guaranteed state participation in the affairs of the mining company and transparency. It also ensures that the state benefits from the proceeds of the company as it will have a stake in the ownership of the company. It is another way of ensuring that revenue is realized from the exploitation of mineral resources. While it is anticipated that mining companies will not be forthcoming regarding the inclusion of provisions relating to free carried interest in the mining agreement. A balance can be struck by including other measure to incentivize the agreement which measures may include stabilization clauses. Negotiators have to be careful however and ensure that these clauses are not effected to operate for a long time as they have far reaching implications on the equality of all individuals (entities included) before the law.

5.5.7 Provide for an accessible register for mining contracts

As highlighted throughout this paper, the inaccessibility of mining contracts is the resultant cause of the lack of effective contract monitoring and the lack of community participation. The two problems would be averted if a register existed for all mining agreements. It also promotes transparency. The register would be administered and updated by the Ministry of Mines and Mining Development. It would be open to the public and this is a guarantee against what happened in the Anjin case. All information affecting communities (e.g. social and labour plans, environmental authorisations, environmental management programmes, annual compliance reports must be made publicly available.

5.5.8 Establishment of a community engagement plan

A community engagement plan has to be put in place highlighted the mode and manner of community participation. Local communities are now enlightened about their rights and are reluctant to sit and ignore the infringement of these rights by mining companies. An engagement plan would inform all stakeholders on the need to include mining communities in all issues affecting them. Communities would be consulted through traditional leaders and community based organizations in their areas about a proposed mining project in their area. This is in line with the Free, Prior Informed Consent right of local communities that is recognized by the United Nations. Communities would also be involved in the due diligence process to place confidence in them that the intended development will be carried out in a manner that benefits them.

5.6 CONCLUSION

Mining is undoubtedly the pillar of the Zimbabwean economy. A combination of licenses and mining contracts is essential as both confer rights but to different degrees. Mining contracts are effective for large scale mining projects whose specific circumstances may not be provided for in generic licenses. Given the vast deposits of mineral resources in Zimbabwe and the government's proclamation to invite mining investment, a strong legal regime for mining contracts is an unquestionable essential. Presently, as depicted in this thesis, the regime for mining contracts is weak. The weaknesses that have been classified as legislative weaknesses as well as institutional weaknesses are problems that can be alleviated through the implementation of the various recommendations proposed in this thesis. The ultimate hope is for every Zimbabwean to either directly or indirectly benefit from the mineral resources that

the country has been blessed with. To achieve this, mining agreements have to be carefully negotiated taking into account the recommended measures as well as copying from other jurisdictions that have managed to establish strong regimes for mining contracts.

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