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**UNIVERSITY OF ZIMBABWE**  
**Faculty of Law**

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**ANALYSIS OF THE DISPUTE AND CONFLICT RESOLUTION MECHANISMS  
FOR INVESTOR-COMMUNITY CONFLICTS IN ZIMBABWE**

**A DISSERTATION SUBMITTED TO THE FACULTY OF LAW OF THE  
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RESOURCES (LMLNR)**

**BY**

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## **DEDICATION**

I dedicate this work to my son Chad Khaya “The Comrade” and my late father Mr Batsirayi Mbotshwa “Mr B”. I further make dedication of this work to the local communities in Zimbabwe and across the world who are grappling with mining induced displacement for the law to protect and preserve their identity, cultural heritage and empowerment. It is trite that the displaced local communities be afforded fair and adequate compensation packages in line with global and modern trends of mining law discourse. This progressive realization will be lauded in the whole wide world.

## **DECLARATION**

I Adrian Tanaka Terry Mbotshwa do hereby declare that this dissertation is my original work and has not been submitted for a degree in any other University.

.....  
(Student's signature)

This dissertation has been submitted for examination with approval as University Supervisor.

.....  
(Supervisors signature)

Date.....

## **LIST OF ABBREVIATIONS**

AMV	African Mining Vision
ACHPR	African Commission on Human and Peoples Rights
BHRC	Business and Human Rights Centre
CSOTs	Community Share Ownership Trusts
CSOs	Community Share Ownership Schemes
CSR	Corporate Social Responsibility
EMA	Environmental Management Agency
EMPs	Environmental Management Projects
EITI	Extractive Industries Transparency Initiative
EIA	Environmental Impact Assessment
GDP	Gross Domestic Product
PFAs	Project Affected Families
RDCs	Rural District Councils
MMAB	Mines and Minerals Amendment Bill
MMA	Mines and Minerals Act
SHRF	Safety Health and Rehabilitation Fund
SGs	Special Grants
TIZ	Transparency International Zimbabwe
EEL	Exclusive Exploration Licence
HRIA	Human Rights Impact Assessment

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## CHAPTER ONE

### 1. GENERAL INTRODUCTION

The mining sector or mineral resources sphere is a contested area not only in Zimbabwe but the world at large.<sup>1</sup> The world has become a cosmopolitan society or a global village and this to an extent has been necessitated by economic activities such as mining included. The mining sector has seen an influx of investors both domestic and international flocking into Zimbabwe to exploit mineral resources predominantly for profit making.<sup>2</sup> Zimbabwe is a country which is rich and blessed with vast natural resources which also include mineral resources not limited to gold, diamond among others. The existence and availability of these mineral resources pave way for the investor community to come into Zimbabwe with the sole intention of engaging with the government in order to create a relationship for the exploitation of the mineral resources.<sup>3</sup>

It is imperative to note that the scramble for Africa by the European powers was orchestrated to spearhead imperialism and the control of these mineral resources. The colonization of Zimbabwe by the imperialists ultimately culminated in an arms struggle by the natives who were deprived of control of their resources which included the minerals as well. It is critical to highlight that there was a clash of dispute resolution mechanisms or avenues as the colonial powers considered their way as contemporary and sophisticated whereas that of the Africans were deemed as archaic, backward and anachronistic. The colonialists imposed a grievance redress mechanism upon the black Zimbabwean and eventually promulgated legislation which preferred methods of dispute resolution they considered western, uniform and well developed.<sup>4</sup> The Mines and Minerals Act is an old piece of legal instrument as it was promulgated in the year 1961 which was a colonial era in addition to some piecemeal amendments made in the said legal instrument.

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<sup>1</sup> P. J. Badenhorst, Conflict Resolution between Owners of Land and Holders of Rights to Minerals: A Lopsided Triangle, 2011 J.S. Af. L. 326 (2011)

<sup>2</sup> M. Musemwa, Contestation over Resources; The Farmer-Miner Dispute in Colonial Zimbabwe, 1903-1939.

<sup>3</sup> Tumai Murombo, Regulating Mining in South Africa and Zimbabwe, Communities, the Environment and Perpetual Exploitation, 9 LAW ENV't & DEV. J 31 (2013).

<sup>4</sup> Showers Mawowa: the Political Economy of Artisanal and Small-Scale Gold Mining in Central Zimbabwe, Vol 39. No 4 special issue.

The bulk of the Zimbabwe legislation on mineral resources was promulgated under the pre-colonial era and to date these pieces of legislation are still part of our laws in the post-independence era. The Mines and Minerals Act,<sup>5</sup> Precious Stones Trade Act<sup>6</sup> and the Gold Trade Act<sup>7</sup> are the three legislative instruments that make provision for mineral resource governance in Zimbabwe. These legal instruments did not at all provide for sufficient or adequate methods of dispute resolution as the imperialists aim and goal was maximum extractivism without hindrance from the black natives.<sup>8</sup> The penal provisions under the vast of the Zimbabwean mineral resources were aimed at punishing wrongdoers by means of passing custodial sentences upon those found in the wrong side of the law. There is need for the pieces of legislation to be reviewed and reflect an effective and comprehensive approach on dispute resolution methods among the local community and investor community.<sup>9</sup> The MMA has been primarily premised on the on the extraction of minerals resources for the sole purpose of export and not in line with sustainable development.<sup>10</sup>

## 1.2 BACKGROUND OF THE STUDY

The white colonial masters brought with them a bag of their rules and the mining space was one the sectors they penetrated and institutionalized by making laws which were skewed in their favour and discriminated the natives. The imperialists extracted mineral resources in Zimbabwe and used them for the development of infrastructure which included road, rail and buildings. The profits from the exploitation of minerals resources were further utilized to fund agricultural activities to an extent that Zimbabwe the then Rhodesia was considered the bread basket of the African region. The black Zimbabwean had their traditional methods of dispute resolution which they deemed appropriate and adequate in settling

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<sup>5</sup> Mines and Minerals Act Chapter 21:05

<sup>6</sup> Precious Stones Act Chapter 21:06

<sup>7</sup> Gold Trade Act Chapter 21:03

<sup>8</sup> Maria Prandi, *Unearthing Conflict: Corporate Mining, Activism and Expertise in Peru*, 2 BHRJ 177 (2017)

<sup>9</sup> Ibid note 6

<sup>10</sup> T Murombo "Law and Indigenization of mineral resources in Zimbabwe: Any equity for local communities?" 2010 Volume 10 SAPL 569. See also J Tsabora. *The Legal and Economic Framework for Natural Resources-Related Statutory Funds in Zimbabwe* (2016) 27.

conflicts among themselves. On the other side of the spectrum the colonialists destroyed the legal system which the black Zimbabwean had by bringing in a western ideology of conflict resolution.<sup>11</sup>

In the pre-colonial era the imperial powers came under the umbrella of countries and conquered Zimbabwe and had control of resources. In the post-independence era the vestiges of these countries are now in the form of multinational companies who are coming to Zimbabwe as mining entities to exploit mineral resources. The emergence of conflicts is rampant among the investors who flock into Zimbabwe as mining companies with the local communities. In Zimbabwe there are various Chinese companies who are exploiting mineral resources and causing social problems such as disobeying labour laws of the country, gross human rights violations, breach of mining contracts, corruption inter alia. The multinational companies have in a number of cases left local communities displaced as a result of mining induced activities. The local communities regard their land as the source of their livelihood, the space where they derive their income earning capacity and to some extent their heritage is attached to the land in question. The displacement of a community as a consequence of mining activities ultimately results in conflict between the community and the investor be it domestic or foreign. It is imperative to critically assess these methods of dispute resolution in the event of such conflicts between the two parties.

In terms of section 2 of the Mines and Minerals Act of Zimbabwe which is the major piece of legislation governing mineral resource, it provides that all minerals vest in the President. It must be taken into cognizance that the said legal instrument was crafted and promulgated by colonial masters and to date it still governs mineral resources though there is a Mines and Minerals Bill in place.<sup>12</sup> This provision has the greatest potentiality and does cause conflicts under the Zimbabwean mineral regime. The vesting of all mineral resources in the President under the African or Zimbabwean system is foreign. This provision has been construed to mean that the President vests minerals on behalf of all people in his

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<sup>11</sup>Irving Senzel, Administration of The Mining Laws in areas of conflict Vol 7 No. 2 (April 1967) pp 225-241

<sup>12</sup> Mines and Minerals Bill of 2015

official capacity as the President of the Republic. However this provision is subject to abuse as apparent in Zimbabwe wherein the President uses influence and presidential prerogatives to enrich himself and his cohorts in the expense of the general citizenry.

### 1.3 LITERATURE OVERVIEW

There are authors such as Macartan Humphreys, JC Denarbarch and T Murombo among others from an international, regional and local level who have written extensively on mineral related conflict and dispute resolution mechanisms.<sup>13</sup> The authors have written on what constitutes dispute resolution framework under the mining law discourse in Zimbabwe.<sup>14</sup> There was also extensive writing on the modes of conflict that are likely to occur under the mineral resource regime in Zimbabwe.<sup>15</sup> The mining space has been termed a conflict arena by legal authorities who have analyzed the porosity under our legal regime which governs not only natural resources but mineral law legislation.<sup>16</sup>

The literature and profound academia has discussed that mining goes as far back as 1895 this was when the Mines and Minerals Ordinance was promulgated and became a piece of legislative instrument.<sup>17</sup> The conflicts in mining law are predicated on the legitimate usage of mining law as observed by legal authors such as Showers Mawowa. There are broad conceptions that emanate from conflict which stem from mining related approaches between the local community as farmers and investors who will be miners under the purview of farmer and miner conflict.<sup>18</sup> There has been extensive literature written under this dilemma by renowned writers such as Musemwa.<sup>19</sup> It is further imperative to look on the

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<sup>13</sup> Ibid note 1

<sup>14</sup> Macartan Humphreys, Natural Resources, Conflict, and Conflict Resolution, Uncovering the Mechanisms, 49 508 (2005)

<sup>15</sup> Zimbabwe Environmental Lawyers Association. Mineral Revenue Disclosure and Information Needs of Various Stakeholders. A Gap Analysis (2016)

<sup>16</sup> Mtisi S, Consolidation of Diamond Mines in Zimbabwe. Implications, Commnets and Options (2015) 13-14

<sup>17</sup> June Stoodley, Miner v Landowner: The Conflict over Mining on Private Land in Queensland, 5 U. Queensland L.J 353 (1965)

<sup>18</sup> Morse's, The Nature of Gold: An Environment History of the Klondike Gold Rush, (1965) 62

<sup>19</sup> M. Musemwa, Contestation over Resources; The Farmer-Miner Dispute in Colonial Zimbabwe, 1903-1939

dichotomy between the existing mineral rights and the agricultural rights in Zimbabwe.<sup>20</sup>

The author T Murombo has written extensively on conflicts which also emanate from encroachment on indigenous land which has been considered as ancestral places for the local communities. The Constitution of Kenya under section 150 (6) makes provision for what is termed Traditional Dispute Resolution mechanisms (TDR's) and these have been given superior rights as they are enshrined under the supreme law of the land.<sup>21</sup> The Constitution of Kenya must be lauded for making significant efforts in enshrining dispute resolution mechanisms which are aligned with the locals and natives.<sup>22</sup>

The dispute that took place in the Uzumba and Arda Transaal are practical examples of conflict that is taking place on a mining space in Zimbabwe.<sup>23</sup> The Great Dyke region is also another area in which conflicts took place and the mining company wrecked havoc to local communities in Zimbabwe.<sup>24</sup> It is critical to make a pragmatic analysis of the tax regime in Zimbabwe which governs mineral resource sector as this plays a role in the emergence of conflict between communities and investors. It has been espoused by authors that conflict management mechanisms depend primarily on the institutional systems of governance in order to address issues on free, prior and informed consultation, participation, responsiveness and accountability.<sup>25</sup>

The mining company Anjin Investments grabbed the most lucrative diamond claim in Marange and this has resulted in clear conflicts between the company and the local community who are left to wallow in abject poverty when the majority cannot benefit from the revenue which is in tandem with the constitution of

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<sup>20</sup> Ibid note 2

<sup>21</sup> JC Denabarch "Sustainable development as a framework for national governance" (1998) Number 1 Case Western Review Reserve Law Library 3.

<sup>22</sup> Section 150 (6) Constitution of Kenya

<sup>23</sup> Nutimes Innovations. Mining Survey Report (2015) 7

<sup>24</sup> E Chigona. Environmental Rehabilitation and Mining Closure. Presentation at the 5<sup>th</sup> Zimbabwe Alternative Mining Indaba (2016)

<sup>25</sup> Ibid note 24

Zimbabwe.<sup>26</sup> The company was evicted by the regime of the former President of Zimbabwe Robert Gabriel Mugabe but since the coming in of the Second Republic the said company has been readmitted and allowed to operate in Zimbabwe under the mantra of Zimbabwe is open for business.<sup>27</sup> This shows conflict of state and mining entities over mineral resource as the former administration had chucked out Anjin and the Second Republic is in a re-engagement drive and is ushering in those old mining companies who were not obeying domestic laws and hence clashing with local community interests.

#### 1.4 RESEARCH PROBLEM

The alternative dispute resolution mechanisms (ADR) which are considered more effective and efficient with regards to mining related conflicts are not apparent under the bulk of the Zimbabwean legislation on mineral resource governance. The Mines and Minerals Act makes provisions under its penal sanctions of a criminal nature. The sections under the MMA on dispute resolution prefer criminal sanctions predominantly of custodial sentence of those who would have acted in direct conflict of the law. What is apparent is that there is no uniform and explicit legal provision under the Act which canvass a method of dispute resolution in particular that of a local community and investor. The major contributing factor is that the MMA is predicated under a pre-colonial mindset and it did not encompass an investor and local community clashing over the control of mineral resources as such minerals were predominantly under the control and ownership of the colonial powers.<sup>28</sup>

The Mines and Minerals Act which regulates the mineral resource does not have a provision which can be interpreted to advance and promote a legitimate dispute resolution avenue under the mineral resource sector. The Act has a bulk of provisions which seek to punish those who violate the law by passing custodial sentences and little if not civil penalties at all. The Act is silent on the most delicate issue of conflict resolution between locals and an investor. It is argued

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<sup>26</sup> HH 228-16

<sup>27</sup> The Mnangagwa Administration Business mantra: Zimbabwe is Open for Business in line with governments 2030 Vision.

<sup>28</sup> Samuel J Spiegel: Legacies of a nationwide crackdown in Zimbabwe: Operation ChikorokozaChapera in gold mining communities, 2014 Vol 52 No. 4 pp (541-510)

that the law makers to this date ought to have envisaged the requirement to have adequate legal provisions under the Mines and Minerals Act which seek to provide a legal redress mechanism with the emergence of investors in Zimbabwe's mineral sector.<sup>29</sup> There are various conflicts that take place between investors who are mining firms and the community who are resident on the land resource these range from land based conflicts, environmental, societal, developmental and other forms which have a negative impact on the mining sector in Zimbabwe.

### **1.5 RESEARCH QUESTIONS**

1. What domestic legislation is in existence which provides for dispute resolution mechanisms for investor and community conflicts under mining law?
2. What is the Zimbabwean constitutional provisions and safeguards in curbing mining related conflicts and disputes?
3. To what extent does Zimbabwe's legal system comply with regional and international best practices methods on dispute resolution predicated on mining conflicts?
4. What are the international and regional best practices with regards to the compensation regime of a community affected by mining induced displacement?
5. What are the modes and forms of disputes that are apparent in mineral law governance in Zimbabwe?

### **1.6 RESEARCH METHODOLOGY**

The writer will use a qualitative desk-based research utilization of human rights and international law texts, the international and regional treaties or conventions will be referred to. The journals and articles written by authors concerning the subject will be accessed on the internet. To address the objectives of this research, the researcher conducted a desktop study. This research relies on a combination of primary and secondary sources of data from local, regional and international jurisprudence related to land rights. Primary literature that was used

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<sup>29</sup> Ibid note 7

in the study included the Constitution, legislation and case law. The research also drew insights from secondary data sources in the form of books, journal articles, research papers, thesis and conference papers. These sources of information were of vital importance in providing an understanding of the prevailing circumstances and views other parties have on the topic of communal land versus mining rights and relocation in the dawn of developmental under the mining induced projects in Zimbabwe.

### **1.7 SIGNIFICANCE OF THE STUDY**

The aim and significance of the study has been necessitated by the rampant case scenarios under the Zimbabwean mining laws by local communities and investors clashing over mineral resources. The absence of a proper and adequate legislative instrument and capacitation of the institutional frameworks and stakeholders to deal with such conflicts is another reason for significance of the study. The study is also influenced by the thrust to determine the available Organizational Grievance Redress Mechanisms (OGRM) that are in place under the Zimbabwean mineral law governance system. The impact of Corporate Social Responsibility (CSR) measures will also be interrogated as these measures are deemed as practical solutions in curbing conflicts by coming up with Community Share Ownership Schemes (CSOS's) and Community Share Ownership Trusts (CSOT's). The study goes to the root of mineral law governance in Zimbabwe as the current trends that are heralded by the media nationally, regionally and internationally seem to be dealing with the issues of control of mineral resources by local communities and the investor community. The major theme being the compensation packages of those communities primarily in the rural areas who have been subjected to displacement by foreign or domestic investors who are operating mining conglomerates at the mine sites. Further, it is important to assess the variety and forms of disputes that are taking place between the two communities that is the local dwellers and the investors under the mining enterprises. On the other side of the spectrum it is prudent and wise to undertake a study of this thematic issue under the Zimbabwean framework and compare such with best practices approaches across other jurisdictions at a regional and international level.



## **1.8 LIMITATION OF STUDY**

The study is primarily being limited on the scope of the domestic legislation in Zimbabwe under the purview of mineral law grievance redress mechanism. The study will further be restricted upon the regional and international best practices of avenues on dispute and conflict resolution approaches under the discourse of community and investor mineral interests. The constitutional dispensation under the Zimbabwe will also be interrogated on its efficacy under the discussion in the dissertation.

## **1.9 CHAPTER SYNOPSIS**

### **Chapter 1**

This Chapter will give an introductory set up as well as the background of mining related legislation as well as the pre-colonial impact of mining which has a bearing and effect on the current trends in mining matters.

### **Chapter 2**

This chapter will critically analyze the various types and modes of conflicts or disputes that take shape in Zimbabwe between the investors and the local dwellers. The chief causes of such conflicts will be addressed in this chapter.

### **Chapter 3**

This chapter will make an interrogation of the legal instruments that are in existence in Zimbabwe as well as the institutional frameworks which are critical under the regime or discourse of mining.

### **Chapter 4**

This chapter will provide the framework for the best practices approach and analysis. The chapter will be predicated on the experience and case studies of other jurisdictions on how they deal with their mining affairs.

### **Chapter 5**

The final chapter will give the major and summary findings that have been made in the thesis in its entirety. The last part of the chapter will make the appropriate recommendations and give the conclusion to the thesis.

## **CHAPTER TWO**

### **2.1 NATURE OF CONFLICTS AND DISPUTES**

#### **INTRODUCTION**

The conflicts that take place between investors and local communities are largely severe and debilitating culminating into negative effects such as violence, the degradation of resources, undermining of livelihoods and the displacement of communities.<sup>30</sup> The conflicts under mining related discourse can result in the substantial damage of the societal fabric if not attended to with caution and expedition. The interests of the parties involved in this area are both distinct as the mining companies have a motive to make profit and maximize their capital whereas the community is eager to preserve and maintain its cultural heritage and mode of living without deterrence from mining activities in its region or area as the case may be.<sup>31</sup> This chapter will look at the various conflicts that are apparent under the mining sector between the local communities in Zimbabwe and the other party which is the mining entities either local or domestic investors. These disputes range from the following but are not limited to land-based disputes, environmental, water, labour, societal conflicts as well as developmental.

#### **2.2 LAND BASED CONFLICTS**

It is imperative to note that land as a natural phenomenon and resource is critical and key in the attainment of development which will improve the social, cultural and economic sphere of the people. It must be stressed as has been pin pointed under Chapter 1 of this thesis that land is an emotive issue not only in Zimbabwe but to several other African countries that were dispossessed of their ancestral

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<sup>30</sup> Castro and Nielsen 2001

<sup>31</sup> Ochieng and Odhiambo, 2000

land and prime land which was the source of their livelihood and that of their livestock. It is not disputed that land was always at the centre of attention during the colonial era as well as the post-colonial era. The white minority rule of the former colonial powers of Zimbabwe was empowered and emancipated by the grabbing of land as it was the main source of attaining control over the resources that were on and beneath the said land. The dispute of control and possession of land between miners and farmers has become a perennial problem which is not attended to will create dire consequences if not created already in the land management discourse.

The major land-based dispute that takes place in Zimbabwe is that of farmer and miner. The history of the conflict dates back to the precolonial era wherein there was a protracted disputes between farmers and miners over timber, grazing rights and those mining activities that were primarily conducted on farms under the Gold Belt.<sup>32</sup> The anecdote of this conflict continues up to date in particular those areas where small scale mining is taking place. It is incumbent to note that bot the mining companies and local communities are greatly dependant on land to have productive outputs on their activities. The dispute under the land-based criteria seems to be originating from the inconsistencies of the laws and policies that are not complimenting each other. It is worth to note that the Mines and Minerals Act is a piece of legislation which supersedes all of the land related laws such as the Communal Land Act.<sup>33</sup> The rights that are enjoyed by the farmers under the Communal Lands Act are more of sansufructuary nature and the predicament in such rights is that they are weak and cannot be unassailable against and enjoy superior protection in comparison with mining rights. In cases where a mining related project is coming into operation the communal rights are scampered and trampled upon as these are relatively weaker as the tenorial system under the Communal lands Act is not secure and hence this accelerates conflict as the communal dwellers will not have the know how of the adequacy of the law which provides for the securitization of the land which they till for their survival. The miners on the other hand also contribute to the disputes as they do not exercise

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<sup>32</sup> <https://www.environmentandsociety.org/mml/contestation-over-resources-farmer-miner-dispute-colonial-zimbabwe-1903-1939>

<sup>33</sup> [Chapter 20:04]

the proper prior consultations before embarking on such mining projects and the mine management is done poorly in disregard of the land dwellers.

In the case of Bikita where the mining entity Bayrich Enterprises commenced mining activities sometime in the year 2011 the company proceeded to erect structures on the said area without any prior consultations to the villagers and dwellers of the Bikita community. It is also surprising that the company did not offer or make any compensation to the said community for the major loss of massive land that they had lost as a result of the mining activities by the company. The community made requests which proved to be in vein as they were blatantly ignored by the mining company and such were for the erection of boreholes and building of an irrigation scheme which was to benefit the community but all this was not partaken by the miners in Bikita.

In areas such as the Insiza and Matobo the small-scale miners there were disputes between such miners and the local communities as there was a challenge of having a mining claim being pegged on an area or on the farm of someone else. This resulted in untoward conflicts as the parties would resort to the use of violence and attack each other in order to have control over the land. The farmers in these areas cried foul as they raised critical concerns to the effect that the miners do not utilize appropriate waste disposal facilities. This had a negative effect on the livestock of the farmers mainly cattle which would feed on human waste and caused such to have diseases which made them not suitable for human consumption. The same cattle would be seen trampling on the pegged mines of the mining entities and this created anarchy as miners would retaliate by butchering the said cattle which would have strayed on their mining pegs.

### **2.3 WATER RELATED CONFLICTS**

It is imperative to note that mining activities especially large-scale mining by the big syndicates or consortiums are operated on the land surfaces and these in turn rely on water bodies to enhance the extraction process among others.<sup>34</sup> The communities in the Chiadzwa region under the eastern part of Zimbabwe where

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<sup>34</sup> Madebwe, C, 2011 et al

the livelihoods of people were mainly disrupted by the stringent water usage regime and pollution of such water sources by the mining entities.<sup>35</sup> The local people were relocated to pave way for the mining juntas and this created challenges for the communities and they struggled to have clean water sources. The regions or areas that the community in Chiadzwa were relocated had water shortages and this affected the livelihoods of the people who were depending on subsistence farming predicated on the feeding of their families. This created a conflict in the area as the water shortages hampered development by the lack of clean and affordable water.

The conflict based on water issues created a desperate situation for the local community as they had to travel miles to fetch reliable clean water for their families to ensure their survival. The said mining activities in Chiadzwa severely affected the community as they had to struggle to get a basic commodity such as water which was not the case prior to the commencement of the mining of diamond in the area. The local communities felt disempowered to challenge or confront the big mining entities about the inequitable water usages in their area therefore the villagers pinned their hopes on the government which did little to come to the aid of the communities in Chiadzwa as well as in Chiredzi.

In the Chisumbanje area the Greenfuel company which was operating mining activities released toxic affluent in the Save River and other water bodies across the same community. This created a health hazard which resulted in the loss of lives, livestock and rampage of water related diseases. The use of mercury by some of these mining companies in the Chisumbanje area to extract gold further resulted in problems of water pollution which in turn affected the community as well as their source of watering their gardens and farms for their survival. It seems the water related dispute if not abated it will continue to create and pose a serious health risk on the local people as a result of the mining activities by the mining associations as was in the Umzingwane District in Zimbabwe.

It is of importance to highlight that mining activities have a negative impact on the environment especially if operated close to the settlements of communities as is

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<sup>35</sup> Mambondiyani, A. 2013. The fields of Marange: where is the diamond money?

the case under the Mzinyathini Ward 3 in Matebeleland region in Zimbabwe. Conflicts are apparent in this area as mining activities such as blasting results in pollution which affects farming and grazing. The lives of these communities are greatly endangered as well as that of their cattle which were drowning in some regions hence triggering conflict.

## **2.4 ENVIRONMENTAL CONFLICTS**

It must be clearly stated that when it comes to environmental matters all stakeholders including non-miner or farmers must be held accountable and must strive to maintain the ecological environment clean as prescribed under section 74 of the Constitution<sup>36</sup> which provides for environmental rights as well other related legislation such as the Environmental Management Act.<sup>37</sup> The farmers and miners are one way or the other contributing on the destruction of the environment in different ways.<sup>38</sup> The miners cut down trees and clear such timber purposes which they mainly require for fuel and mine props. On the other side of the spectrum the farmers clear land so that they have access towards the land that they intend to cultivate their crops. The sticking point in this regard is that none of the two will and have usually taken the initiative to accept the responsibility towards securing the environment. The miners will be interested in maximizing their profits similarly farmers will be concerned with having their cultivated crops in place for their sustenance.

The problem that is left unattended to is that of land degradation which is caused by both farmers and miners. This is done despite there having policy in existence such as the National Development Strategy 1 (NDS1) which is instrumental towards the protection of the environment in Zimbabwe and prioritize protection of environment, climate resistance, natural resource management and the management of wetlands.<sup>39</sup> The environmental conflicts are also contributed by the failure of the mining companies to consult and approach the stakeholders such as Environmental Management Agency and Rural District Councils.<sup>40</sup> The

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<sup>36</sup> Section 74 Constitution Amendment No. 20 of 2013

<sup>37</sup> Ibid note 36

<sup>38</sup> Transparency International Zimbabwe 16 August 2020

<sup>39</sup> NDS1 OF 2021-2025

<sup>40</sup> Chapter 29:13

Environmental Management Act which is a piece of legislation in Zimbabwe seeking to protect and preserve the environment is a key legal instrument which if complied with by the mining companies it will go a long way in creating harmony amongst the local communities affected by mining induced activities.

There are other ills which occur on the environment caused by these mining activities and these include erosion, sedimentation and the removal of vegetation. These are chief and major causes of conflicts between the indigenous communities and the investors. The lack of proper mine management seems to be another major contributing factor for failure by the mining companies to be able to avoid and tackle these challenges prior to the commencement of mining activities. The environment on which both farmers and miners operate is not a finite resource as it has to be kept in check and ensure there is compliance with the appropriate legal requirements under the EMA. The damage on the environment seems to have largely been experienced from the mining conglomerates who in a number of scenarios partake activities that hamper and cause damage to the environment in contradistinction to the farmers who till the land for the producing crops.

## 2.5 LABOUR CONFLICTS

The disputes that are apparent under labour related matters seem to be hinged on mining entities as these hire labourers who will be operating on the mines and working under the supervision of their superiors. It has been documented and reported in a number of articles, journals and other related publications on the treatment of workers under mining sites in particular by the Chinese nationals. There is empirical evidence of unfair labour practices, unfair treatment of employees, payment of low wages among other labour negotiations. In the case of **Douglas Mangwiro v Ming Chang Sino-Africa Investments** the applicant as employee under a Chinese mining firm suffered an injury whilst operating a mine equipment.<sup>41</sup> The employee suffered a lot of broken body parts and was deemed to have been at the disability level of 75% from the medical assessment that was from a medical practitioner one Doctor Mangwiro from the National Social Security

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<sup>41</sup> HH 823 OF 16

Association (NSSA). The employee had never been trained to operate a delicate and dangerous machine for operating mining activities, equally the employer had not provided any protective clothing to the employee. There were further no emergency devices to stop the machine and as such the employee could not have been spared from suffering a litany of severe and life-threatening injuries. The employee resorted to litigation to recover monies from the injuries he had suffered as employer was never willing to pay even for the hospital expenses incurred by his former employee whom they had terminated his employment on medical grounds.

The Chinese mining firm Rongxin which mostly mines gold was reported to have been engaging in unfair labour practices as such having their employees working long hours as well as the withholding of wages and benefits.<sup>42</sup> The Zimbabwe Union of Mines Workers (ZUMW) raised a litany of complaints against the said mining entity which boarded on violations of various labour rights including making employees operate without proper safety wear critical for the mining operations.<sup>43</sup> The employees were said to be exposed to hazardous health conditions as well as the communities that were in the vicinity. This without doubt creates a ground of conflict and has done so as the vast majority of these employees will be coming from the villages where these mining activities are taking place.

The mining firm was further accused of willfully violating the Labour Act in particular section 13 which provides for the wages and benefits upon termination of employment.<sup>44</sup> The labourers are employed without specific contracts of employment and this increases abuse from the Chinese employers. The same mining firm was found guilty of Section of the Health and sanitation regulations as the mine of the entity was discharging effluent and laboratory chemicals in rivers that were utilized by the local dwellers for domestic purposes.

The same entity was petitioned against by the Zimbabwe Diamond and Allied Minerals Workers Union (ZDAMWU) to the Zimbabwean government for rampant

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<sup>42</sup> Business and Human Rights Resource Centre 2022

<sup>43</sup> Tinashe Kairiza & Melody Chikono, *The Independent* (Zimbabwe) 2 Feb 2022

<sup>44</sup> Chapter 28:01



casualization of labour as there is failure to provide fixed term contracts to such workers.<sup>45</sup> These labour challenges require urgent attention as they are a major contributory factor of conflict between the community and miners in Zimbabwe.

## **2.6 SOCIETAL CONFLICTS**

There are societal problems between miners and community dwellers in particular those of foreign origin for the former who are not conversant and appreciative of the cultural connotations involved in Zimbabwe. A particular case in point is that of the stubborn and cantankerous mining firm Rongxin where it was mired in another controversy sparking societal concerns. The directors of the mining firm which is based in Sanyati offered ten kilograms of gold to suppress an investigation in a case involving forced child marriage by the Chinese national who was an engineer at the said mine.<sup>46</sup> It was reported that at the material time the girl which was forced into marriage with the Chinese national was aged 15 years and she had since dropped out of school after she had been subjected to a marriage to the Chinese national despite it being illegal under the laws of Zimbabwe. It was alleged that the Chinese engineer paid a price in the sum of USD2000.00 (Two thousand United States dollars) as the customary bride range under Chief Neuso of Sanyati district, in Mashonaland west province. The said minor girl was in her form three at the Tomdrayer Secondary School at the material time of being married off to the miner.

Another social problematization under the miner cum investor and community disputes range on the eviction of indigenous people on their ancestral lands without compensation to pave the way for the operation of mining activities in their area. The mining entities such as Anjin Investments and the Tsinghan Group have been dominating the displacement of people in Chivhu and Kaseke areas commencing mining without due regard to the locals ancestral land and shrines left by their forefathers. In Mutoko, in Mashonaland east province the villagers faced an eviction from their ancestral land as a mining company Heijin had been granted a special grant to extract black granite of an area which covered approximately

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<sup>45</sup> US-AFRICA BUSINESS SUMMIT 2022

<sup>46</sup> NewsDay 4 January, 2022

300 hundred hectares. The Chinese multinational company Tsinghan evicted hundred of people to operate iron and steel mining operations in Chivhu. In Hwange over 600 villagers faced eviction by a mining company Beifa Investments which wanted to mine coal. This shows that these societal disputes are unavoidable if not curbed by the requisite stakeholders and institutions.<sup>47</sup>

## **2.7 DEVELOPMENTAL CONFLICTS**

The conflicts that take place between investors and local communities are also apparent and emanate from development related disputes. The mining activities that are undertaken by the firms venturing in the sector must contribute to the economic development in particular infrastructure development. If mining activities are conducted and they fail to benefit the community resident in the area where the mining activities are taking place then such is futile without such development for the advancement of infrastructure. The blasting that is done by the mining firms causes the dilapidation of homes and mountains. The mining companies utilize heavy duty machinery which blasts hard rocks such as sedimentary rocks in pursuance of achieving their mining activities. There are risks and intricacies involved in the carrying out of mining activities. Infrastructure under the mining framework involves the installations of facilities for the development of roads, railway, water, communication networks and energy which would support the public as a whole.<sup>48</sup> The failure by the mining firms to promote and advance infrastructure development creates conflict as the beneficiaries who are usually communities must be left with tangible products from the proceeds of the mining operations.

The development of public infrastructure such as pipelines, schools, hospitals, clinics and other utility buildings are material as they encourage and promote community involvement.<sup>49</sup> It is reported by MGI that infrastructure makes provision for social and economic progress is it is an enabler of both direct and indirect societal benefits as such it is a core element under the United Nations Sustainable Development Goals.<sup>50</sup> According to the estimate of the World Bank on

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<sup>47</sup> Ibid

<sup>48</sup> Mutemeri, N Callaghan, C and Hermanus, M Good Practice Note: Public Infrastructure and Mining Centre for Sustainability in Mining and Industry (CSMI), University of WitsWatersrand (2010), p 7

<sup>49</sup> Ibid 11

<sup>50</sup> Bughin, J. Manyika, J and Woetzel, J: Bridging Global Infrastructure Gaps. McKinsey Global Institute (2016),

Africa's infrastructure Country Diagnostic, the continent is on the verge of an yearly gap of infrastructure funding gap of thirty one billion united states dollars therefore it is necessary to leverage extractive industry investments to close the gap.<sup>51</sup>

The Chinese mining companies have been accused to have neglected the aspect of contributing towards the development of infrastructure as after the completion of the mine operations they immediately vacate the mine leaving it derelict. The same miners of Chinese origin are accused of not building sustainable structures that will remain in place even after the cessation of the mining activities. The erection of weak buildings by these investors has since created conflicts and will hinder and block investment as the local communities will resist being displaced and allow mining activities without promise of infrastructure development. The conflicts between the Chinese mining firms will continue to escalate at an unprecedented level if no mechanisms are put in place to bring sanity in the mining sector and bring an end to the pandemonium that is currently in the governance of mineral resources in Zimbabwe.

### **2.7.1 ABANDONED MINING TOWNS**

It is not surprising that former mining towns in Zimbabwe which used to be the hub of mining activities will end up assuming the status of ghost towns. The report from the Environmental management Agency (EMA) on mines that were abandoned had effects as chemicals utilized by mining firms had the great potential to pose serious health risks and challenges on the community.<sup>52</sup> These small ghost towns are a recipe for disaster as some panners of gold illegally undertake mining in shafts and pits this therefore worsens the dilapidation of the ground and the lives of the people. This state of affairs sprouts conflict between the said miners and the government of Zimbabwe who will be battling with the illegal miners. The other challenge is that of having the residues of the mineral deposits being sold on the illegal market and hence spanning conflict among bogus investors and the

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p2.

<sup>51</sup> Ibid 11

<sup>52</sup> EMA Report September 2014

illegal miners. Mines in Kamativi Tin Mines, Kadoma Eiffel Flats village, Mberengewa Buchwa mine and Mashava are classic examples of ghost towns.

### 2.7.2 CORPORATE SOCIAL RESPONSIBILITY

Corporate Social Responsibility (CSR) must evolve as an integral part of the community mining relations. The mining firms are encouraged to accept that the communities affected by their operations need to have basic services such as water, electricity, sanitation and health.<sup>53</sup> The development of a mine presents an opportunity to better the conditions among the local villagers unless it benefits the people. At a global level the United Nations have a compact initiative for CSR which include anticorruption, protection of environment, fair labour practices and the protection of human rights. The United Nations implores the mining firm to adopt the European Commissions Renewed strategy.<sup>54</sup> The International council on Mining and Metals which represents global corporate social responsibility standards implores mining companies to adopt approaches and principles for sustainable development for the betterment of the mine management.

In Zimbabwe the concept of corporate social responsibility was sought to be introduced under the Community Share Ownership Trusts or Schemes.<sup>55</sup> Under the Marange area the CSOTs initiative was not implemented successfully but it was progressive policy and legal initiative.<sup>56</sup> The major challenge in Zimbabwe is also borders on the vast and excessive tax regime that the mining companies pay to the government which include royalties and other income tax revenues.<sup>57</sup> The justification and stance by mining firms is that they remit taxes to the government and hence they are not insistent on incorporating corporate social responsibility measures as taxes must be utilized for such. Be that as it may, the failure to fulfill corporate social responsibility by mining companies towards the communities creates untoward disputes as the latter will be expectant of development.

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<sup>53</sup> <http://www.alteri.co.zw> accessed on 14 July 2022

<sup>54</sup> EU strategy 2011-2014

<sup>55</sup> Community Share Ownership Trust emanated from the Indigenisation and Economic Empowerment (General) regulations 21 of 2010

<sup>56</sup> Madebwe, C., Madebwe, V., Mavusa, S., 2011. Involuntary displacement and resettlement to make way for diamond mining: the case of Chiadzwa villagers in Marange, Zimbabwe. *J. Res. Peace, Gend. Dev.* 1 (10), 292e301

<sup>57</sup> Income Tax Act Chapter 23:06

In Zimbabwe the scheme was not successful as a result of administrative ineptitude, corruption, mismanagement and malpractices within the mining sector. The scheme ought to have enhanced economic empowerment through creating economic opportunities for disadvantaged people in particular the PFA's. With respect to Zimbabwe the problem was with the difference between empowerment rhetoric and what was on the ground. For instance, artisanal miners in Zimbabweans tried to earn a living but the State deployed the police to arrest and beat them. Some of them were condemned to long term jail sentences because they were found in possession of minerals. About 500 000 people were into artisanal mining, 120 of which were women.<sup>58</sup> But the government did not do anything to provide a legal and institutional framework to help them mine professionally.

The empowerment drive was not genuine, coherent, consistent, it was rather political. In Zimbabwe the scheme was not successful as a result of administrative ineptitude, corruption, mismanagement and malpractices within the mining sector. The scheme ought to have enhanced economic empowerment through creating economic opportunities for disadvantaged people in particular the PFA's. With respect to Zimbabwe the problem was with the difference between empowerment rhetoric and what was on the ground. For instance, artisanal miners in Zimbabweans tried to earn a living but the State deployed the police to arrest and beat them. Some of them were condemned to long term jail sentences because they were found in possession of minerals. About 500 000 people were into artisanal mining, 120 of which were women.<sup>59</sup> But the government did not do anything to provide a legal and institutional framework to help them mine professionally. The empowerment drive was not genuine, coherent, consistent, it was rather political.

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<sup>58</sup> N.I.E.E.B. 2014. Community Share Ownership Trusts: Natural resource Wealth For Enterprise Development & Sustainable Socio-Economic Transformation. Harare: N.I.E.E.B .

<sup>59</sup> N.I.E.E.B. 2014. Community Share Ownership Trusts: Natural resource Wealth For Enterprise Development & Sustainable Socio-Economic Transformation. Harare: N.I.E.E.B .

The concept of CSR is a progressive measure under the mineral law governance process and it considered as an important tool which cures grievances that are experienced by PFAs<sup>60</sup> as well as locals displaced from a community as a result of mining related activities. It is further a form of a bench-marking concept which is in line with the regional and international best practices models which shall be discussed and assessed under Chapter 4 of this thesis.<sup>61</sup> The other instruments and policy documents which cater for the best practices approach in mining related grievance procedures include the African Mining Vision<sup>62</sup>, Extractive Industries Transparency Initiative<sup>63</sup> and the Natural Resources Charter.<sup>64</sup> The AMVs emphasis is predicated on the need to come up with efficient, transparent and an optimal tax regime.<sup>65</sup> The Achilles hill which fuels conflicts seems to border on the current weak laws and policies which are subordinate to the major legal instrument which is the Mines and Minerals Act as shall be discussed in the Chapter 3 of this thesis. The key strategy on curbing conflicts under the mining space may be resorting to those measures, policies and best practices in other jurisdictions who have managed and are still managing tackling problems under this sphere.

It would take a while for he mining companies to come to a realization that the communities who are affected by their operations would require basic and necessary services which include but are not limited to sanitation, water, health care and electricity. The author H Jenkins considers CSR as a helpful tool as well as a conceptual framework for triggering the attitude of the mining corporate community towards their stakeholders.<sup>66</sup> The applicability and implementation of CSR in the mining domain will go a long way in curing conflicts and disputes alike.

## 2.8 CONCLUSION

The conflicts or disputes that take place between the local communities and mining firms are various and such are caused by a divergent of factors chief among them the power to have control over land as a natural resource. In Zimbabwe as

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<sup>60</sup> Acronym for Project Affected Families

<sup>61</sup> United Nations Guiding Principles on Human Rights, (2015)

<sup>62</sup> African Union, African Mining Vision (2009)

<sup>63</sup> EITI acronym,

<sup>64</sup> July 1 2014

<sup>65</sup> Note 57 above 5-6

<sup>66</sup> H Jenkins page 1393 (2006)

has been addressed in this chapter there is a greater need for intervention by all stakeholders to enable the conflicts to be obliterated or minimized as the case may be. A multi-stakeholder approach seems to be the key element in curing the ills that have bedeviled the Zimbabwean social, cultural and economic sphere under the existence of conflicts and disputes under the mining space as a whole.

## **CHAPTER THREE**

### **THE LEGAL REGIME FOR MINING AND DISPUTE RESOLUTION**

#### **3.1 INTRODUCTION**

The import of this chapter will be to analyze the domestic legal framework governing mineral law in Zimbabwe on whether there are sufficient legal avenues that can be utilized in preempting or curbing conflict under the auspices of investor-community based conflicts. The supreme law of Zimbabwe which is the Constitution will be investigated on whether it encompasses constitutional provisions predicated on conflict resolution under the discourse of mining law. The bulk of the institutional frameworks and bodies that will also be thoroughly surveyed on its provisions that regulate conflict resolution provisions if any in mining. The likes of Traditional leaders, Environmental Management Agency, Mining Commissioner, The Inspectors as well as other stakeholders in the mining fraternity. It will also be imperative to analyze the proposed law which is the Mines and Minerals Bill on its provisions and whether it addresses an effective and comprehensive forum of dispute resolution in mineral law vis-a-vis investor and community conflicts<sup>67</sup>.

#### **3.2 The Constitution of Zimbabwe**

The Zimbabwean Constitution can be lauded for having progressive provisions which seeks to bring about national development that is enshrined under section 13.<sup>68</sup> In contrast with the Lancaster House Constitution which did not anticipate any national development the current Zimbabwean Constitution makes safeguards for development as critical in the economic sphere.<sup>69</sup> Section 13 (4) of The Constitution of Zimbabwe provides for the State to ensure that the local communities must be beneficiaries from the resources in their area.<sup>70</sup> This constitutional provision is cognizant of conflict in the mining space or arena and hence it provides a safeguard that seeks to promote national development as

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<sup>67</sup> Mines and Minerals Amendment Bill, 2015

<sup>68</sup> Constitution of Zimbabwe Amendment No. 20 of 2013

<sup>69</sup> Lancaster House Agreement of 21 December 1979

<sup>70</sup> note 2 above



Zimbabwe is a country which is rich in mineral resource and hence the local communities must have a share in the exploitation of those mineral resources.<sup>71</sup> This provision seeks to eliminate conflict between mining companies and local communities as it incorporates the latter in the enjoyment of the fruits of the proceeds of mineral resources. The provisions is termed a local empowerment clause which seeks to promote and uplift communities through mining activities.<sup>72</sup>

In terms of section 71 (2) of the Constitution of Zimbabwe there exist the conventional property rights clause which provides that every person has the right to acquire property whether individually or in association with others.<sup>73</sup> The provision is alive to the fact of acknowledging different forms of ownership which are propagated by the author Van der Walt under the banner of a fragmented system of land ownership.<sup>74</sup> The provision seeks to eradicate conflict by providing avenues of compensation and legal redress in cases where land is compulsorily acquired. The Constitution is alive to the disputes that are apparent in the mining discourse and hence has made provision for avenues to tackle conflicts which may arise between landowners and investors the bulk of whom are vestiges of mining companies rampant in Zimbabwe.

In terms of section 73 of the Constitution there is a provision that promotes and protects environmental rights.<sup>75</sup> It is critical to note that mining activities are operated on environments which are inhabited by communities. In a number of cases these activities left communities livelihoods threatened disastrously by mining activities on the river beds as was apparent in Mazoe and Mutare rivers which also had an effect of more than three thousand families in Chimanimani and Marange in 2010 and 2016 respectively.<sup>76</sup> The existence of section 73 ring fences and provides legal ground for a community affected by mining activities to lodge a complaint or class action and enforce their environmental rights which is free from

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<sup>71</sup> Anderson C, Creating a Legislative Framework to govern Mining in Zimbabwe (2011) Chamber of Mines of Zimbabwe. Proposals to The Draft Mines and Minerals Act Amendment Bill (2016).

<sup>72</sup> Coulombo R, Dietz S, Godunova M & Nielsen T.B Critical Minerals today and in 2030: An analysis of OECD countries. OECD Working Paper (2015).

<sup>73</sup> note 3 above

<sup>74</sup> Van der Walt and Kleyn "Duplex dominium-the history and significance of the concept of divided ownership" (1989/

<sup>75</sup> note 2 above

<sup>76</sup> SI 92 of 2014 which banned alluvial mining caused the disaster

pollution and ecological degradation. This provision will curb environmental violations or at least sets a pace for a competent and cogent mechanism for redress in cases of such violations therefore creating a more viable space for adequate conflict resolution. The Constitution recognizes economic, social and cultural rights of communities in natural resources that are being exploited.<sup>77</sup>

Under section 301 (5) of the Constitution enshrines provisions which are meant to ensure that local communities duly represented by their municipal authorities must benefit towards the revenues collected.<sup>78</sup> The explicit provision provides that provinces and local authorities must have their annual share per year which is not less than five percent of the national revenues accrued in a financial year.<sup>79</sup> The provision is positive in so far as it allocates resources to the local community. This constitutional step ought to be lauded as it seeks to shun conflict in the mineral law discourse between investors and communities who are the holders of the land where the resources are tapped. The constitutional provisions seem to be more progressive in providing for safeguards and legal avenues under mineral law in Zimbabwe and it is imperative that these provisions be reflected in the bulk of the legal statutes that govern mineral law.<sup>80</sup>

Under Chapter 2 of the Constitution of Zimbabwe one of the National Objectives of the country is premised on foreign policy.<sup>81</sup> In terms of that constitutional provision under section 12 the Zimbabwean foreign policy is based on principles which promote and protect the interests of the Zimbabwe.<sup>82</sup> The provision goes further to promote the preservation of peace and the resolving of disputes of an international nature through peaceful means at all costs.<sup>83</sup> The bulk of investors in Zimbabwe under the mining law discourse are foreign investors and these in cases and scenarios of disputes must strive to adhere to such provisions of the Constitution which are reflective of a noble foreign policy under mining law.

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<sup>77</sup> Chapter 1 of The Constitution 2013

<sup>78</sup> note 3 above

<sup>79</sup> Section 301 (5) note 2

<sup>80</sup> Dhliwayo MA. A Review of Zimbabwe's Draft Minerals Policy. Transforming Comparative Advantage to Competitive Advantage (2014)

<sup>81</sup> Section 12 *ibid*

<sup>82</sup> Section 12 (1) (a)

<sup>83</sup> Section 12 (1) (c)

### 3.3 The Mines and Minerals Act

The Mines and Minerals Act was promulgated in the context of repression of the black majority by the colonial powers.<sup>84</sup> From the onset it must be stated that the available redress mechanism in the Act is that of criminal sanction and a meagre of civil penalty clauses.<sup>85</sup> The Act is not in harmony and synergy with other pieces of legislation such as the Rural District Act<sup>86</sup>, Environmental Management Act<sup>87</sup> and Water Act<sup>88</sup> which promote sustainable development.<sup>89</sup> The mining sector has been predominant in the violation of economic, social and cultural rights of communities mainly because the watchdogs which include the traditional leaders, Rural District Councils and the Environmental Management Act are not part of the Mining Affairs Board. The Mining Affairs Board which is empowered and clothed with quasi-judicial powers and regulating disputes is a toothless bulldog and is concerned towards the maximization of revenues and royalties payable to it and the relevant Ministry. There must be a clarion call to amend the Act and encompass all stakeholder representation from diverse interests in the mining sector. The inclusion of traditional leaders, civil society organizations, environmental rights activists among others is prudent for full realization of a proper Mining Affairs Board which is alive to a sound dispute resolution platform under mineral law in Zimbabwe.

Another hurdle that seems to be bedeviling the mining sector in Zimbabwe under the current MMA is the absence or failure for the legislative instrument to cater for the artisanal miners. The artisanal miners in Zimbabwe are contributors to the economic development and further they promote and cater for the livelihoods of communities as a result of their small scale mining enterprises particularly in the mineral resource of the extraction of gold. The failure to incorporate artisanal miners under the Mines and Minerals Act seem not to be in consonance to the

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<sup>84</sup> Mines and Minerals Act [Chapter 21:05]

<sup>85</sup> Section 368 note 11 above

<sup>86</sup> Chapter 29:13

<sup>87</sup> Chapter 20:27

<sup>88</sup> Chapter 20:24

<sup>89</sup> Principle 2 of The Rio De Janeiro Declaration 1992

dictates of the African Mining Vision which elaborates and promotes the inclusion of artisanal miners in the domestic laws of member African countries.<sup>90</sup>

### **3.1.3 THE MINING COMMISSIONER**

In terms of section 389 of the Act the Mining Commissioner is endowed with a quasi-judicial authority and in that instance his office must be seen to be facilitating justice in favour of the local communities.<sup>91</sup> The mining companies as investors have capital and can easily bribe the Mining Commissioner and he fails to advance the interests and concerns of the local communities in favour of the big pocketed mining companies. It seems the role of the Mining Commissioner in the Act is not predicated on dispute resolution but rather enforcing compliance with mining related offences and this also seems to be inadequate for advancing a more robust and effective conflict resolution forum under mineral law in Zimbabwe.

The Mining Commissioner is imbued with power to adjudicate criminal matters under the provisions of the Mines and Minerals Act.<sup>92</sup> The Commissioner has the latitude in cases where he or she has a wide discretion in granting a criminal sanction which will eventually be signed, transmitted and delivered to the clerk of court as proof that a wrongdoer has appended its signature to an admission of guilt. The power that has been granted to the Mining Commissioner under this provision seem to be excessive as the office of such assumes the duty and responsible to make court centred decisions under the framework of the Commissioner. There seems to be lack of administrative implementation by the Mining Commissioner as there are instances and cases where it was reported that the office of the Commissioner was granting favour on behalf of the investor community as they tend to give the offenders under the Act lighter sentences and therefore abusing the powers that they are granted in terms of the legal instrument which governs mining in Zimbabwe.

The office of the Mining Commissioner must be seen to be operating its role and functions with impartiality and in a none partisan manner. It is however astounding that the officer of The Mining Commissioner is becoming more politically affiliated

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<sup>90</sup> African Union, African Mining Vision, (2010)

<sup>91</sup> note 11 above

<sup>92</sup> note 17 above

and therefore serving the interests of the political elites. The said political elites will have entered into lucrative mining joint ventures with some foreign and domestic investors and hence they hoodwink the functionary capacity of the Mining Commissioner by bribing such hence compromising the Commissioners impartiality. The office must by all means be seen to be dispensing justice as it is empowered with the quasi-judicial authority in handling disputes.

### **3.4 THE MINING INSPECTORS**

Mining inspectors are officials under the provisions of the Mines and Minerals Act and these are similarly endowed with powers on the issuance of permits for the exploring of minerals as well as permits for the for the exploitation of concessions.<sup>93</sup> The functionary roles and duties of mining inspectors are mainly on the enforcement aspect as well as the compliance check with the regulations and provisions under the Mines and Minerals Act. In terms of section 388 of the Act any person who obstructs or resists the mining inspector from performing his duties shall be guilty of an offence and also liable to such form of imprisonment.<sup>94</sup> The Mining inspectors are responsible for the administration of mining locations and making safeguards as officials to ensure that the mining firms are complying and adhering to the dictates and legal provisions under the act. The inspectors are supervised and subservient to the Mining Commissioners as they are mandated and given delegated duties by the former to conduct inspection on development work and make the necessary measurements at the mine locations.<sup>95</sup>

The mining inspectors as officials must at all material times act in accordance with their statutory duties as granted by the Act. This entails that they must shun any form of political affiliation and adhere to their official functionary roles to further the interests sustainable mining practices in Zimbabwe. There inspectors exists under the mineral law framework in Zimbabwe to bring sanity in the governance of natural resources. The two common actors who are mainly landholders and prospectors of mines whom in a plethora of cases are inevitably involved in land related disputes. In terms of section 32 of the Act the disputes that arise between

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<sup>93</sup> *supra*

<sup>94</sup> Section 388 (1) (b)

<sup>95</sup> Section 201 (1)

the landowners and prospectors is limited to the jurisdiction of the Administrative Court.<sup>96</sup>

The mining inspectors are not given the role of the adjudicatory role to decide and determine disputes that are related to a holder of a prospecting licence or special grant or exclusive prospecting order against that of the landowner. This function is a preserve of the Administrative court as is apparent under the Mines and Minerals Act.<sup>97</sup> The scope of duties that are conducted by the mining inspectors seems to be very limited if not restricted with regards to resolving disputes that are apparent under the investor community and the local landowners in Zimbabwe.

### **3.4.1 THE MINING AFFAIRS BOARD**

The Mining Affairs Board is a creature of statute which is created under section 6 of the Mines and Minerals Act.<sup>98</sup> The establishment and functions of the said Board are stipulated in the Act and its powers are directly mandated by the responsible Minister of Mines and Mining Development in Zimbabwe. The provisions under section 6 (2) of the Act is couched in peremptory terms which gives the Minister the prerogative to give additional functions to the said board and conduct its affairs under the microscopic view of the said Ministerial authority. The Constitution of the Mining Affairs Board is prescribed under section 7 of the Act. It is critical to pin point that the Minister has the vast power to make a declaration for the removal of office of any of the members of the board in terms of the proviso under section 8 of the Act.<sup>99</sup>

Under section 11 of the Mines and Minerals Act the Mining Affairs Board is granted the statutory power to determine applications in relation to land owners and miners in Zimbabwe.<sup>100</sup> The power under this section seems to be limited on entertaining and hearing applications of any person who has an interest in either land for agricultural purposes or land that has been given a special grant or such

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<sup>96</sup> Section 32 Mines and Minerals Act

<sup>97</sup> Note 22 above

<sup>98</sup> Section 6 (1) and (2) *supra*

<sup>99</sup> Section 8 (1) *supra*

<sup>100</sup> Section 11 (1) (b) *supra*

other mining related rights. The scope or purview of the Mining Affairs Board under the Act is limited as it does not provide for its powers in determining and handling disputes over farmer and miner conflicts. These are the major disputes that are apparent under the mining space in Zimbabwe as was clearly enunciated under Chapter 2 of this thesis. The Mining Affairs Board therefore does not have the juridical power and discourse under its formal functionaries to resolve disputes that take place under the miner and farmer conflicts.

It is evident under the Mines and Minerals Act that the Mining Affairs Board is not imbued with the power to handle disputes in the capacity of an adjudicatory role. What is clear is that the Minister responsible for the day to day running of the Act is the one who has the sweeping powers to delegated, appoint and give directions as to the management affairs of the Board. The Mining Affairs Board ought to have been granted more powers and functions of a nature which would enable it to operate without hindrance from political interference and manipulation by the ruling elite under the mineral law governance in Zimbabwe. The Mining Affairs Board therefore does not have the prerogative to be an adjudicatory board contemplating the disputes envisaged under this thesis.

### **3.4.2 ENVIRONMENTAL MANAGEMENT AGENCY**

The Environmental Management Agency is established under Part IV of The Environmental Management Act and its functions and powers derive from such legal instrument.<sup>101</sup> The said agency is a body corporate which has the legal capacity to institute legal processes in its own name as well as to be sued in its capacity as a legal entity or a corporate being.<sup>102</sup> The functions and powers which the Agency is empowered with are provided for under section 10 of the Act.<sup>103</sup> It is important to highlight that one of the major function of the Environmental Management Agency regulate, monitor, review and make approvals to environmental impact assessments.<sup>104</sup> The aspect of EIA's will be discussed under

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<sup>101</sup> Chapter 20:27

<sup>102</sup> Section 9 *supra*

<sup>103</sup> Note 28 above

<sup>104</sup> Section 10 (1) (vii)

this chapter as they are critical in the curbing of conflicts that take place between local communities and investors under the mineral resource governance of Zimbabwe. The functions of the Agency are among other things incidental to the preservation of the ecology and the vast natural resources which are in Zimbabwe.

In terms of section 97 of the Act there provision enlists aspects of EIA and stipulates that provisions under Part 1 of the Schedule to the Act are projects which require the implementation of such prior to commencing the proposed projects.<sup>105</sup> It is imperative to note that under the Part 7 of the First Schedule to the Environmental Management Act mining is prescribed as an activity which must comply with the prerequisite of having an EIA process conducted prior to the commencement of mining activities. The EIA is a legal process under the Act as well as the statutory instrument 7 of 2007 which compels the developer of any prescribed project to carry out an EIA as an preventative measure against those projects which may pose danger to the environment and damage to infrastructure.

Another major finding on which the EIA process is premised rests upon the avoidance of adverse impacts on the environment by certain mining activities on an area that is not conducive for such heavy mining explorations. The challenge being experienced by the advocates who defend environmental rights seems to be lack of compliance by the mining entities to conduct the EIA process prior to commencing mining activities. It is incumbent upon such mining firms to be conversant and not ignorant to the laws such as the EMA which prescribe due compliance before any mining activities are commenced.

The non-observance of the environmental laws in Zimbabwe seem to also rest on the nature of punishment to such offenders these include the criminal and civil sanctions that exist under the current legislation.<sup>106</sup> The criminal and civil penalty sanctions regime which is under the Environmental Management Act is not dissimilar to those provisions under the MMA.<sup>107</sup> The big corporate entities operating mining firms have big pockets to pay the meagre civil penalty and

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<sup>105</sup> Section 97 EMA

<sup>106</sup> MMA PART XXVI

<sup>107</sup> Act 13 of 2002



criminal fines that are sanctioned under the legislation. The inadequacies of stiffer penalties and criminal sanctions are one of the macrocosm of problems in mining.

### 3.4.3 THE JUDICIARY

The Judiciary is recognized under the Zimbabwean Constitution in chapter 8 and its various courts which have the judiciary authority.<sup>108</sup> The authority of the judiciary is said to be derived from the Zimbabwean people and vested in the courts of the land.<sup>109</sup> The Chief Justice is made the head of the institution and is empowered to have charge over the Constitutional and Supreme Courts of Zimbabwe.<sup>110</sup> The other courts including the High Court, Labour Court and the Administrative Court are headed by Judge Presidents of those courts. In terms of section 164 of the Constitution the institution of the judiciary is clothed with independence which implores upon it to apply such independence without fear, favour or prejudice and to observe the law with impartiality and expeditiously.<sup>111</sup> The independence that the institution has is the foundation and bedrock of a democratic society and further hinges on the rule of law principle.<sup>112</sup> The independence of the judiciary as an institution can be equated to the independence which is engulfed to the Chapter 12 Institutions which are in the Constitution.<sup>113</sup>

The principles which guide the judiciary are among other things justice, fairness, safeguarding of human rights, freedoms and the respect for their public office. On the other side of the spectrum this institution unlike other stakeholders under the Mines and Minerals Act have the requisite legal capacity to entertain matter that are related or in the purview of landowners and mining entities. It is primarily the High Court in Zimbabwe which has a special kind of jurisdiction termed inherent jurisdiction that grants it the power to adjudicate any matters including those contemplated under this thesis. This inherent jurisdiction is a common law principle which endows the High Court with intrinsic power to hear, determine and

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<sup>108</sup> Section 162 note 2

<sup>109</sup> Section 162 (a)-(h)

<sup>110</sup> Section 163 (2)

<sup>111</sup> 34 supra

<sup>112</sup> Section 164 (2) supra

<sup>113</sup> Section 232 supra

adjudicate matter as was enunciated in the case of **Zimbabwe Rural District Council Workers Union v Nyanga Rural District Council and Another**<sup>114</sup> by justices Mafusire and Chilimbe. The judiciary as an institution handling disputes must be seen to be at the centre stage of resolving disputes without any fear or favour in particular those which take place under the governance of mineral resources. The institution in its plethora of case law seem to be inclined in granting decisions against communal dwellers in favour of mining investors.<sup>115</sup>

In a number of instances the judiciary seem not to be the major problem as the prime ills are evident in the laws and policies that are operative and in place under the mining law governance in Zimbabwe. A typical case in point is that of **Mudiwa & Others v Mbada Mining Private Limited & Others**<sup>116</sup> which evinces the scarcity that is within the legislation on mining law governance. The Applicant had approached the court under the Chiadzwa Community Development Trust represented by ZELA which sought compensation prior to being relocated to a new area. The respondent did not object to paying the compensation but the challenge related to the effect that there was no agreed quantum and the necessary timelines for such compensation packages. They opined that the weaknesses lied in the parameters of the MMA as it did not provide legal provisions of compensation package payable prior to a community being relocated.<sup>117</sup>

The judiciary pronounced its stance under the governance of mineral law governance in the case of **Grandwell Holdings Private Limited v The Minister of Mines & Mining Development and Others**.<sup>118</sup> The learned Mafusire J opined the profound sentiments of the late former Chief Justice Chidyausiku in the case of **Minister of Lands and Others v Commercial Farmers Union**.<sup>119</sup> The sentiments were to the effect that:-*“no one stops the government from governing. No one stops the government functionaries from drafting and implementing policy. But in all this the rule of law must be observed.....”*

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<sup>114</sup> HH 118/22

<sup>115</sup> See Anjin Investments Case and Chilonga cases

<sup>116</sup> HC 6334/09

<sup>117</sup> Zimbabwe Environmental Law Association. Mineral Revenue Disclosure and Information Needs of Various Stakeholders. A Gap Analysis (2016).

<sup>118</sup> HH 193-16

<sup>119</sup> 2001 (2) ZLR 457 (S) pp479-480

The above quote by the arbiters of justice and the judicial officers will go a long way in sending a clear message that justice must be seen to be done in the mining sector and such pronouncements in judgments ought to be lauded and vast.

#### **3.4.4 LOCAL GOVERNANCE INSTITUTIONS**

The Local governance institutions are critical under the mineral resource governance of Zimbabwe as they consist of stakeholders that have an important say in the planning matters of Zimbabwe. This portion of the thesis will restrict its ambit on the impact and role of Traditional leaders and Rural District Councils in handling and tackling mining related disputes between the confines of the local communities and the investors who will be exploiting and extracting mineral resources in Zimbabwe. The institution is prescribed to observe principals of traditional leadership in accordance and in tandem with the dictates and values of the Constitution and the Zimbabwean laws. The traditional leaders themselves are encouraged to treat all persons within their locality and areas with equality and fairness at all times.<sup>120</sup> The Local Governance Institutions are creatures of statute and as such they must be seen to act in the confines and parameters of the laws which created them in order for law and order to prevail under the purview of mineral law governance in the Zimbabwean context for the betterment of the society and economic upliftment of the country.

#### **3.4.5 Traditional Leaders**

Traditional Leaders are recognized under Chapter 15 of The Zimbabwean Constitution as an institution whose role emanates under customary law.<sup>121</sup> The Traditional leaders as an institution are tasked to perform the cultural, customary rites and such related functions that are conducted by Chiefs.<sup>122</sup> The functions of traditional leaders involves among other things to preserve, promote and uphold the cultural values of their communities and the preservation of cultural heritage, history, traditions as well as sacred shrines.<sup>123</sup> Another important function of the traditional leaders involves the facilitation of development and most importantly

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<sup>120</sup> Section 281 (1) c

<sup>121</sup> Section 280 (1) supra

<sup>122</sup> Section 281 (2) supra

<sup>123</sup> Section 282

the administration of Communal land and protection of the environment. The functions bestowed upon the traditional leaders is a sufficient enough to show that their role in the fabric of society and economic upliftment cannot be underestimated as they form an important cog in the administration of justice and social impact of the livelihood of the people of Zimbabwe.

In terms of section 282 (e) of the Zimbabwean Constitution the traditional leaders are given the functionary powers of resolving disputes among its people in their respective communities utilizing the dictates of customary law.<sup>124</sup> This seems to be the most important role with regards to the closeness of such function with the prime objective of this thesis. It is important to note that under the Lancaster House Constitution such a provision which granted and bestowed traditional leaders with adjudicatory powers of disputes was not part of the supreme law or any law at all.

It is not clear under this provision whether the function to resolve disputes by traditional leaders extends to that of adjudicating disputes under the farmer and miner conflicts. There is little if any related matter that has been dealt by a traditional leader since the inception or coming into effect of the 2013 Zimbabwe Constitution Amendment Number 20. There is currently no judicial pronouncement that has made a ruling or judgment of such a nature which has had the effect on giving constitutional interpretation on the applicability of the provision of the scope which traditional leaders are permitted to exercise their adjudicatory prowess and function. One may decipher that the scope of traditional leaders in the dispute resolution mechanism under the Constitution of Zimbabwe is limited to their communities as they are implored to apply customary law in the adjudication process of such disputes.

On the other side of the spectrum another plausible possibility would be that the adjudicatory functions of the traditional leaders extends to those disputes that are contemplated under the parameters and confines of this thesis. The question would be whether or not the traditional leaders have the requisite capacity under

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<sup>124</sup> Section 282 (e) *supra*

the Constitution of Zimbabwe to resolve disputes between local communities and the investors in the mining sector. The Constitutional provision does not explicitly or expressly state the nature of disputes that the traditional leaders are empowered to adjudicate. A strict and rigid interpretation of the law will restrict the scope of powers by traditional leaders to here and determine disputes solely to their communities. This line of interpretation will mean that the traditional leaders do not have the necessary power to hear disputes under the community and foreign investor mining consortium. The applicability of the choice of law which is customary law under a dispute between a foreign investor and local community may be a hindrance as the Chiefs are mandated to apply customary law in resolution of disputes. There is yet to have a clear authority which will advance this point and provide light as to the interpretation of the said constitutional provisions on traditional leaders.

The purposive interpretation of the provision on traditional leaders under section 46 (2) which will be in the spirit and purport of the supreme law will have a different interpretation altogether on the impact of the role and function of chiefs under the governance of mineral resources in Zimbabwe.<sup>125</sup> The robust interpretation will safeguard the interests of the local community as the chiefs will have the power to adjudicate matters between investors and the former.

#### **3.4.6 Local Authorities (RDC)**

The establishment, nature and membership of Rural District Councils in Zimbabwe is premised under section 8 of The Rural District Councils Act.<sup>126</sup> The coming into effect of a Rural District Council is at the pleasure of the President of Zimbabwe as he is given the prerogative by the piece of legislation to come up with such through issuing in the gazette the establishment of the RDC.<sup>127</sup> It is pertinently clear that for the RDC to come into being it must have been activated and proclaimed by the executive powers of the President as envisaged in the Act. The desirability of the executive powers is the major foundation of establishing an RDC in any area where the President sees fit that it has to be established. The powers

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<sup>125</sup> Section 46 supra

<sup>126</sup> Chapter 29:13]

<sup>127</sup> Section 8 (1) supra

that the executive authority gives to the said RDC's gives them authority to charge inspection fees as well as other levies that are paid by communities and other mining investors.<sup>128</sup>

The RDCs were said to be abusing their function and roles by a survey that was randomly conducted by the secretariat of the Zimbabwe Mining Federation (ZMF).<sup>129</sup> The Bindura and the Mazowe RDCs were reported to have been charging exorbitant fees meant for annual inspection fees which were way above the prescribed charges by the responsible Ministry of Mines in Zimbabwe. It is imperative to note that the RDCs are resorting to extortionate practices as they do not have the functions of arbiters of resolving disputes that are taking place in their areas between the local communities and the mining organizations in Zimbabwe whether of local or foreign investors.<sup>130</sup> In terms of section 71 of the RDC Act the councillors scope of power seem not be extend that of resolving conflicts between the domestic farmers and the mining entities.<sup>131</sup> This therefore limited their participation in the space of conflict resolution by the dominant actors.

The RDCs in Zimbabwe can be a major and important source of resolving disputes and conflicts that are at the centre of this thesis. The RDCs have financial challenges and the lack of funding hence they resort to unscrupulous and nefarious practices in the conducting of their duties and obligations as councillors.<sup>132</sup> The provisions under the legal instrument which establishes and provides the powers of the RDCs seem to the silent on their role as adjudicatory bodies from a Rural District perspective and on this basis alone their purview of handling such matters is thwarted.<sup>133</sup> The dispute resolution mechanism which is currently endowed to the RDCs is more than fixated on a plastic surgery approach which does not sufficiently cure the problems that are apparent between the competing interests

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<sup>128</sup> PART XII *supra*

<sup>129</sup> [www.miningindex.co.zw](http://www.miningindex.co.zw)

<sup>130</sup> PART X *supra*

<sup>131</sup> Section 71-87 *supra*

<sup>132</sup> Corporate Governance Practices by Rural District Councils in Zimbabwe. A Review of Related Literature, December 31 2007

<sup>133</sup> Diverse Journal of Multidisciplinary Research, Issue 7, Volume Number 3

of the local community and the investor community under the Zimbabwean context mineral resource governance.

### **3.4.7 THE POLICE (UNIT ON FLAURA AND FAUNA)**

In Zimbabwe the police are an arm of the executive and their role and duties stretch to the enforcement of the law and ensure that there is adherence to such dictates of the law. The police is divided in divergent forces and units which are mandated to supervise the enforcement of the law in different sectors of the economy and the society in general. The mining sector has its very own special unit assigned to investigate and supervise crimes and violations that take place under the mineral resource governance in Zimbabwe.<sup>134</sup> The unit was established as a special division in the police department under the Crime Investigation Department in order to bring sanity in the mining industry as lawlessness was apparent.<sup>135</sup>

The unit plays an important role in nabbing and bringing to book those violators of the law related to the mining discourse and ensure that they are prosecuted for their violations to provisions of the legal instruments such as the Mines and Minerals Act, Gold Trade Act and Precious Stones Act.<sup>136</sup> It is imperative to note that there is strife and a significant rise in the conflicts and disputes taking place between the investors under the mining space and the local communities. In the midst of such upheaval in the mining sector there is an urgent need by the unit to be robust and enforce its law and have those who violate environmental laws and mining related violations brought to book. However it seems the unit is not acting with the urgent need to bring a halt to such conflicts and arrest those offenders who in a number of cases are the investors who will be operating in flagrant disregard to the environmental laws and the mining laws in Zimbabwe. The investors use their abundant financial resources to bribe the said officials and hence the latter do not end up performing their duties as mandated by the law. The Special Unit on Flora and Fauna is an important cog in the mineral resource governance of Zimbabwe as it has the powers similar to peace officers of arresting

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<sup>134</sup> CID Minerals Flora and Fauna Unit

<sup>135</sup> [www.newsday.co.zw](http://www.newsday.co.zw) accessed on 20 July 2022

<sup>136</sup> supra

as prescribed under the Criminal Procedure and Evidence Act.<sup>137</sup> The predicament of the unit seems to be that it has no SI which regulates its conduct.

In the case of **S v Gewiro and Another**<sup>138</sup> wherein two members of the special unit of flora and fauna were criminally charged with abuse of office by the Magistrates Court in Chiredzi.<sup>139</sup> The gravamen of the charges that the two offices faced were that they had unilaterally released suspects who had been found in possession of dagga at Masekesa Business Centre in Chiredzi. It was reported that the two police officers under the special unit had been bribed by the suspects and hence released them at their own will as a result of that bribe in the form of payment the two had received. This case shows that ills that exist in society where even the custodians of law and order are being the perpetrators of corrupt activities.

In another case of **S v Chauke**<sup>140</sup> the FFU was seen to be proactive and utilized their arresting powers and were tipped to the effect that there were individuals who were dealing and trading in precious stones and gold without the necessary permits and licenses in Zimbabwe. The two who were at large were apprehended by members of the FFU and brought to book for the alleged offences under the Mines and Minerals Act. This approach and conduct from the FFU must be lauded as they were not swayed and way laid by bribes from the suspects and therefore acted as diligent and ethical law enforcement agents in enforcing the law and not averting justice.

## Conclusion

The stakeholders and institutional frameworks which have a direct connection on the governance of mineral resources in Zimbabwe are many. The laws which govern the roles, duties and functions of these institutions seem not to have an intrinsic or explicit provision on their impact on the resolution of disputes or conflicts between investor community and the host community. The Constitutional provisions seem to have a more robust and cogent impact in terms of providing a

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<sup>137</sup> Chapter 9:07

<sup>138</sup> ZWMSV HC 1/22

<sup>139</sup> FFU acronym for the Special Unit on Flora and Fauna

<sup>140</sup> HH 16/21



supreme legal framework for managing the dispute resolution mechanism under the import of the thesis. It is critical for the institutions that govern mineral resource related disputes to be proactive and abide by the current extractive laws.

## CHAPTER FOUR

### BEST PRACTICES

#### 4.1 INTRODUCTION

This chapter will undertake a comparative study of other jurisdictions on their stance on mining conflicts and legal mechanisms that are available. This chapter will look at international and regional best practices methods that are adopted by other countries to bring sanity in the extractive sector as well as to ensure that the mining activities are benefiting the local communities. The chapter will also make an assessment of the compensation packages that were offered to Project Affected Families (PFAs). It is also imperative to consider the various modes of compensatory packages of those communities displaced by mining induced activities in this chapter of the thesis. The approaches adopted by other countries should be matched by Zimbabwe so that it seeks to add value and give meaningful development for the mining activities.

The bulk of current literature has shown an indication that families or communities affected by mining induced-displacement vis-a-vis compensation, there has been a disproportionate compensation towards those families in particular from the developing countries.<sup>141</sup> The recent scholars who have written extensively on this subject have propagated for the affected communities' voices to be heard in the compensation process and further, the inclusion of monetary compensation, livelihood restoration, prevention of homelessness, social capital among other things.<sup>142</sup> The carrying out of mining activities in a particular region or area can reap economic benefits if and only if the anticipated mining project has been implemented and done in a transparent and proper manner. On the other side of the spectrum the said project can wrack havoc such as land degradation, water

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<sup>141</sup> Debasree, D., 2015. Development-induced displacement: impact on advasi women of Odisha. *Community Dev. J.* 50, 448-462 <https://doi.org/10.1093/edj/bsu053>.

<sup>142</sup> Adonteng-Kissi, O., 2017. Poverty and mine's compensation package: experiences of local farmers in Prestea mining community. *Resource. Pol.* 52, 226-234. <https://doi.org/10.1016/j.resoulpol.2017.03.007>.

contamination, deforestation, loss of land and breaks social networks inter alia.<sup>143</sup> It is patently clear that the activity of mining involves the expropriation of land which inescapably leads to the fact of having communities being exposed to the quagmire of poverty, lack and destitution as a result of under-compensation.<sup>144</sup>

## 4.2 Case of Afghanistan, Aynak Copper Project

In the Aynak copper project case an entire village was involuntarily displaced and several households in the copper mining region were earmarked for replacement and resettlement only when the issue of the appropriate compensation was resolved.<sup>145</sup> The families or the community which was affected by the mining activities at the Aynak copper project were reluctant to accept the compensation package as they deemed it unsatisfactory. In the year 2011 the communities land was already displaced by the mining company and the community did not receive any compensation of their land till December 2020.<sup>146</sup> This to the writer is a case of injustice on the affected community as the mining activity was earmarked to boost economic and on the other hand to further the interest of the PAF's so that they enjoy an alternative land which would be fair, democratic and justifiable for both actors. It was significantly noted that there was a reduction in the income which was generated by the communities who were eventually relocated to other areas after a long period of homelessness and devastation. The cash that was subsequently received from the affected communities was greatly insignificant as it could not cater for the welfare of the people and was not enough to build new structures which would provide a habitable accommodation to the people.<sup>147</sup> It is contended that the lack of adequate and delay in compensation which was also insufficient would without doubt cause hardships on the affected communities as

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<sup>143</sup> Adonteng-Kissi et al, 2016; Hilson, 2002; Shackelton. 2020.

<sup>144</sup> Alaka, I.N., Nnametu. J.N., 2015. Compensation deficits: public land acquisition experiences in sub-eastern Nigeria (No. afres2015\_109). In Real Estate Markets Development: Meeting the Challenge, Making the Difference - the 15<sup>th</sup> African Real Estate Society Conference. African Real Estate Society (AfRES). Kumasi, Ghana, pp. 112-127.

<sup>145</sup> Dastgir, G., Kawata, K., Yoshida, Y., 2018. Effect of forced relocation on household income and consumption patterns: evidence from the Aynak copper mine project in Afghanistan. J. Dev. Stud. 54, 2061-2077. <https://doi.org/10.1080/0220388.2017.1385767>.

<sup>146</sup> (Dastgir et al., 2018).

<sup>147</sup> Downing, TF., 2002. Avoiding New Poverty: Mining induced Displacement and Resettlement. International institute for Environment and Development, London, UK.

they would experience lack of access to food, basic health care and other important amenities for the betterment of their livelihoods.

The community which was affected by the displacement at Aynak was placed across different locations as alternative measures of resettlement and this created a miserable state of affairs which stirred resistance from the nearby communities as they witnessed injustice and unfair resettlement practices. The other batch of the community started resisting forfeiting their hard worked assets and social capital loss by the delayed relocation.<sup>148</sup> The issue of having the compensation unresolved for over a decade is without doubt a cause for concern. This tramps upon the rights of those displaced as shall be discussed in this paper from the various legal instruments which makes provision for the displaced communities.<sup>149</sup> It is argued that land expropriation, stakeholder engagement and compensation are key issues for consideration when dealing with communities that are displaced as a result of mining activities. This paper will make an aim to answer the question of what is the most desirable compensation package for the Project Affected Families and further if that desirable compensation package will bring satisfaction to the recipients who are the affected communities.

#### 4.3 COMPENSATION PACKAGES

There is little empirical estimation of the desirable compensation utilizing a problem-solving and stakeholder-oriented approach.<sup>150</sup> In this paper the desirable compensation package will be measured using the Aynak copper mine preferences by the affected communities or the PFA's. Additionally, the measures of welfare gains from the estimated package will be closely looked at to ascertain the appropriate compensatory package. The bulk of information and survey from the affected communities will help the policy makers to make a better mediation regarding future negotiations amongst the miners and the affected PFA's. The

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<sup>148</sup> <https://creativecommons.org/licenses/by/4.0/>

<sup>149</sup> Cernea, M.M., 2008. Compensation and benefit sharing: why resettlement policies and practices must be reformed. *Water Sci. Eng.* 1, 89–120.

<sup>150</sup> Cao, Y., Dallimer, M., Stringer, L.C., Bai, Z., Siu, Y.L., 2018. Land expropriation compensation among multiple stakeholders in a mining area: explaining “skeleton house” compensation. *Land Use Pol.* 74, 97–110. <https://doi.org/10.1016/j.landusepol.2017.09.003>.

compensation policy will be a determinant factor on the acceptance probability amongst the various communities and families to be affected by the mining project at a particular area.

#### 4.4 CASH AS A COMPENSATION PACKAGE

The research on mining induced displacement and resettlement as defined by Downing (2002),<sup>151</sup> shows empirical evidence that the mining sector, as it currently stands, is not socially sustainable and therefore creates major displacement problems. It is manifestly clear that when a mineral is being extracted it is found and the land thereat is acquired to further access that mineral and gain control over the mine. The PFA's deserve a cash package as a means of compensatory relief to enable them to have a better living and provide essential needs for their affected families. The acquiring of land of the PFA's leads to the displacement affects such as loss of homes, loss of productive land, income and other personal resources which culminates in suffering and poverty (Benett and McDowell, 2012).<sup>152</sup>

The PFA's will be financial crippled when their land has been acquired by the mining companies and as such they require monetary compensation to financially improve their welfare. A hypothetical cash compensation survey was undertaken at the Aynak copper mine project for those affected families in order to determine those families who preferred cash as a compensation package and the amount involved or preferred.<sup>153</sup> A data collection and a survey was conducted in the Aynak copper mine project from the affected families. The interviews were conducted in 280 households in the affected villages the respondents were either the head or the representative of the household.<sup>154</sup> The survey was conducted for

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<sup>151</sup> Downing, T.E., 2002. *Avoiding New Poverty: Mining-Induced Displacement and Resettlement*. International Institute for Environment and Development, London, UK.

<sup>152</sup> Bennett, O., McDowell, C., 2012. Our fields are gone, our lifestyle has changed: coal mining in India. In: Bennett, O., McDowell, C. (Eds.), *Displaced: The Human Cost of Development and Resettlement*. Palgrave Macmillan, New York, NY, pp. 123–150.

<sup>153</sup> Mahalingam, A., Vyas, A., 2011. Comparative evaluation of land acquisition and compensation processes across the world. *Econ. Polit. Wkly.* 46, 94–102.

<sup>154</sup> Cernea, M.M., 2000. Risks, safeguards and reconstruction: a model for population displacement and resettlement. *Econ. Polit. Wkly.* 35, 3659–3678.

at least 40 minutes and the participation was voluntary. The purpose of the interviews and questionnaire was to see the perceptions of the community regarding resettlement and compensation issues. The Table below shows the attitudes of the Aynak community towards cash compensation vis-à-vis quantity.

Table 1

Attributes of Compensation	Level 1	Level 2	Level 3	Level 4
US\$ 2 000 plus additional loan compensation for house	7%	13%	63%	17%
US\$ 4 000 only	4%	10%	26%	60%
US\$ 8 000 only	5%	10%	35%	50%
US\$ 16 000 additional loan for relocation to PAF's	10%	15%	20%	55%

The statistics from the above Table 1 showed that the large cash component with additional loan for relocation was the best preferred mode of package by the affected communities.<sup>155</sup> The main source of income for these affected households was wage-based labor work, farming and livestock, whilst the few individuals had government jobs.<sup>156</sup> This best explains why the Aynak community preferred cash compounded by additional loans to supplement their lifestyle as they were not in a state of impoverishment prior to the mining project being orchestrated. The level of willingness to accept monetary compensation was therefore predicated on the sufficiency of the quantity of money as evidenced by the group of people who were placed under level 4 on the Table.

#### 4.5 LAND AS A COMPENSATION PACKAGE

It is vehemently argued in this paper that land should and must be a means and a consideration factor for resettlement and compensation for the PFA's as it is the bedrock of an economy if managed properly. In particularly the developing countries land is an asset which provides income, food and shelter to the villagers of community utilizing such land.<sup>157</sup> It is argued that the proposed land for

<sup>155</sup> Table sourced from the Resources Policy 74 (2021) 102285.

<sup>156</sup> Dastgir, G., Kawata, K., Yoshida, Y., 2018 et al.

<sup>157</sup> Hninn, S.T., Kawata, K., Kaneko, S., Yoshida, Y., 2016. A Nonparametric Welfare Analysis on Water Quality Improvement of the Floating People on Inlay Lake via a Randomized Conjoint Field Experiment. Hiroshima University, Graduate School for International Development and Cooperation (IDEC), Higashihiroshima, Japan.

relocation must not only be a relief package to the affected community but must give security of tenure to the people. The security of tenure will protect the rights of the underprivileged and give them prerogative over their land so that they will not be evicted willy-nilly by other malicious land grabbers without any justifiable cause.

Furthermore, the proposed land for relocation and resettlement must not only be large or vast but has to be productive land which is suitable for the growing of crops and production of other agricultural activities.<sup>158</sup> In accordance with the literature and case of the Aynak community a sole compensatory package was insufficient to meet their demands especially monetary compensation.<sup>159</sup> It was encouraged by the government that the resettlement areas must accommodate those extended families so that they remain attached to each other and maintain their family ties. The Aynak tribe was more concerned by marginalization as they respected their culture and family relations. It was therefore incumbent that the mining company and government had to involve the Aynak people as part of the deliberations on the best possible avenue for relocation and resettlement. The involuntary relocation and lack of consultation resulted in divided households among the Aynak community.<sup>160</sup>

It is contended that land must be at the top priorities as part of the compensation package for those who have been affected by mining induced displacements. Physical displacement, resettlement and relocation are widely known as posing risks to project affected families or people. For over four decades, scholars, campaigners and the affected people themselves have made frantic efforts to highlight and advocate the alleviation of poverty and impoverishment as a result of mining induced displacement.<sup>161</sup> This approach is in tandem with best practices

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<sup>158</sup> Kaur, H., 2012. Resettlement Action Plan. Ministry of Mines and Petroleum, Kabul, Afghanistan.

<sup>159</sup> Mahalingam, A., Vyas, A., 2011. Comparative evaluation of land acquisition and compensation processes across the world. *Econ. Polit. Wkly.* 46, 94–102.

<sup>160</sup> Owen, J.R., Kemp, D., 2015. Mining-induced displacement and resettlement: a critical appraisal. *J. Clean. Prod.* 87, 478–488.

<sup>161</sup> Adonteng-Kissi 2018 et al.

provided for under the AMV, EITI and Basic Principles and Guidelines on Development Based Evictions and Displacement.<sup>162</sup>

#### 4.6 THE ZAMBIAN CASE STUDY

Zambia has been implementing dictates of the Extractive Industry Transparency Initiative (EITI) since 2009. There are lessons and problems that can be drawn from the implementation of this international initiative. This case study give profiles the major reason why Zambia joined the EITI initiative which include benefit to the communities, opportunities to the locals, successes and among other developmental agendas. The objective is to document lessons for Zimbabwe to understand how the EITI can accrue benefits that can help it to optimize value from its mineral resources by addressing corruption and promoting transparency and accountability which are key challenges in Zimbabwe's mining sector. The country utilized a mixed bag of various methods approach which includes use of secondary research in order to leverage on existing local resources.

Mining in Zambia has always played a pivotal and important role in its economy. The country has been abundantly and richly endowed with mineral resources hence it is one the biggest producers and exporters of copper in the whole of Africa. Copper has been mined for over 56 years. The mining sector contributes about 10% to the Gross Domestic Product and further contributes to over 75% of all exports. Zambia is the eighth largest copper producer in the whole world. The United States Geological Survey (USGS) made its assessments and estimated that the potential for undiscovered copper deposits in Zambia is larger than one can thought<sup>1</sup>. The country is a producer of cement and lime products, crude steel from scrap, precious and semiprecious gemstones and gold. The concentration of mining activities in Zambia has recently diversified out of the Copperbelt Province into virtually all the other nine provinces but mainly the North-Western Province (largely viewed as 'the new Copperbelt'), Southern Province, Luapula Province, Central Province and Eastern Province. See below picture of mining occurrences in the country. The country has tapped into its resource and it has increasingly

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<sup>162</sup> United Nations. Annex 1 of The report of The Special Rapporteur on adequate housing as a component of the right to an adequate standard of living. A/HRC 4/8



benefited the both the investors and local villagers or community as the case may be.

#### 4.7 THE ADOPTION OF THE EITI

EITI is a global standard for the good governance of oil, gas and mineral resources.<sup>163</sup> It involves the reconciliation of company payments with government receipts by an independent administrator and the disclosure of that information to the public. In the last decades, there has been a growing awareness that improved transparency and accountability for revenues generated by oil, gas, and mineral industries is vital to improving their use in reducing poverty and generating economic growth. The launch of the Extractive Industries Transparency Initiative (EITI) in September 2002 reflected this shared agenda. The EITI is a “world first” in which governments, civil society, companies, and investors are all directly involved in the development and governance of the initiative with the technical and financial support of international financial institutions (IFIs).<sup>164</sup> The objective of the EITI generally is to confirm that accurate audited figures about revenues are publicly available. Specifically, it will identify potential discrepancies between payments and receipts, and investigate and address the underlying causes of conflict under the mineral extractive.

#### 4.8 SOUTH AFRICAN JURISPRUDENCE ON MINING

There is rich jurisprudence in South Africa which deals with the likely conflicts that are apparent in the mining discourse especially the land owners and the mining firms. The legal authority in the case of *Rocher v Registrar of Deeds* is authority for the principle that at common law the owner of the land was the owner of all minerals within it.<sup>23</sup> The South African common law has in the past supported the principle of *cuius est. solum*. In the *Trojan Exploration case* the court opined

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<sup>163</sup> <https://eiti.org> accessed on 14 July 2022

<sup>164</sup> 2010 EITI reconciliation report, page 35

that the maxim affords the landowner the right to the surface and to what lies beneath it, in 'all its fullness that the common law applies'.<sup>165</sup> However an interesting issue arose in the matter. Of concern was whether two separate persons can have title over different mineral deposits in a similar location. The court answered in the affirmative. The common law position of full dominium was curtailed statutorily under the British Colonial rule under the notion of severance.

According to Mostert, severance entailed that the mineral rights in respect of land could be separated from the title of and to the land, which could be alienated or dealt with separately.<sup>166</sup> The implication of this position is that mineral rights and title thereof derives from and through obtaining registration of a specific mining right.

The case of *Hudson v Mann* is a slight shift was the fact that the landowner who alienated mineral rights to another was denuded of any entitlement regarding extraction of and disposal over such minerals.<sup>167</sup> In the case of *Witwatersrand Gold Mining co ltd v Municipality of Germistone*.<sup>168</sup> As a matter of principle, all that the owner of land possesses is such rights as are conferred upon him by 'Gold law'. In *West Driefontein Gold Mining v Brink*<sup>169</sup> the court pointed out that the effect of gold law was a 'legal metamorphosis in the ordinary proprietary rights relating to land'.<sup>170</sup> Thus statutory law has the effect of amending the common law, if it says so, where there is an ambiguity in law relating to disputes surrounding ownership

and possession of land and mineral rights. The position of the law in South Africa tends to create a ground which protects the landowners as this will create a buffer of protection towards them as the miners who will be investors will not be left to abuse and enforce their mining claims on owners of land. The tenure system in South Africa is more secure and strikes a balance between the converging interests.

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<sup>165</sup> (609/94) [1996] ZASCA 74; 1996 (4) SA 499 (SCA); [1996] 4 All SA 121 (A); (31 May 1996)

<sup>166</sup> OPCIT 17 @ pp 7

<sup>167</sup> H. Mostert, *Mineral law Principles and Policies in Perspective*, Juta, Capetown pp 7

<sup>168</sup> 1963 (1) SA 311 (T)

<sup>169</sup> 1963 (1) SA 301 (W)

<sup>170</sup> Ibid 28

#### 4.9 THE NAMIBIAN MINING POLICY & LEGAL FRAMEWORK

The process of all mining and quarrying activities in Namibia require an ECC, as per the Environmental Management Act.<sup>171</sup> Permits cannot be granted without this ECC in place, and as such applicants must assess the environmental impacts of their proposed activities in their permit application, whether through a scoping report or a more detailed and comprehensive environmental impact assessment (EIA).<sup>172</sup> As part of this process, they must record baseline environmental conditions and expected environment and social impacts of their activities, as well as any corresponding mitigation and prevention efforts that will be taken. An environmental management plan is required for both the scoping and EIA levels of assessment. Prior to granting a licence, the commissioner must be satisfied that the applicant will take appropriate measures to minimize or prevent any pollution of the environment prior to the approval of the application. For most permits, the applicant must also demonstrate that they have the technical knowledge and financial resources required to operate a mine.<sup>173</sup> Ministry staff (and their spouses) are prohibited from holding mining licences or shares in a mining company.

Mining activities should only proceed with the consent of the landowner, and claims must be clearly demarcated. The licence or claim holder must carry out mining operations or prospecting operations in the area in accordance with good mining or prospecting practices; must prevent or minimize pollution of the environment; minimize impacts to the community and participate in meaningful community engagement; and must secure the safety, welfare and health of persons employed in the claim area.

There is a clear reporting requirements are listed in the Minerals Act (including the required contents of yearly and closing reports), and permits can be cancelled due to a lack of compliance on the part of the holder.<sup>174</sup> While the holder of a licence or claim is required to rehabilitate a site following their exploration or mining activities, limited language is contained in the Act on how this should be

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<sup>171</sup> EMA Act of 2007 Namibia

<sup>172</sup> EIA Regulations of 2007

<sup>173</sup> Minerals Policy of Namibia 2003

<sup>174</sup> Ibid 30

undertaken, nor how it should be paid for. Mining is allowed in protected areas; however, the minister has the authority to restrict mining from certain areas on environmental grounds, allowing it only if special conditions or terms are met. Additional conditions are applied by the MME to both prospecting (EPLs) and mining licences.<sup>175</sup> For EPLs, conditions include the stipulation that a minimum 20 per cent of the applicant company's management structure represent historically disadvantaged Namibians; that at least 5 % of the company be owned by Namibians or a company wholly owned by Namibians; and that the proposed project help address the government's objective of poverty eradication, with a particular focus on benefitting youth and women. The minister is empowered to suggest amendments to the proposal should the application not meet these requirements. For mining licences, additional conditions include those on management, ownership and poverty eradication as listed for EPLs, as well as conditions on value addition: where value addition projects exist locally, the applicant should ensure that 30 per cent of the final product from the mine is locally added value. Where such projects do not exist locally, the applicant should establish such a value-addition facility in Namibia.

#### **4.9.1 Strengths under the Namibian system**

- The Minerals (Prospecting and Mining) Act contains some text on mine closure and rehabilitation, including provisions on the polluter pays principle.
- In the absence of extensive text on closure in the act, the Namibia Chamber of Mines has produced a framework for mine closure for its members. The framework is guided by the Chamber's Code of Ethics, and has been endorsed by its members. This adopted framework is, however, non-binding for members and not applicable to non-members. It does represent a desire from industry to support the implementation of the Minerals Policy, which stipulates that the government will develop guidelines on closure and will monitor compliance with this guidance. The Minerals Policy is currently under review, and these guidelines will be developed once the policy has been adopted. The CoM mine

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<sup>175</sup> Minerals (Prospecting and Mining Act), 1992

closure framework does not prescribe how financial provisions for closure should be implemented; determining how to allocate closure funds is left to the members themselves.

- It is expected that mine closure plans that incorporate both rehabilitation and socioeconomic issues are required as part of the EIA process: the environmental management plans (EMPs) generated as part of the EIA process address mine closure at a high level, though they are not detailed enough. While EIAs are developed through a highly consultative process, mining entities are not required to engage with stakeholders on closure plans once the EIA is approved.
- The Environmental Management Act (EMA) and the Minerals Policy are aligned with a number of modern legislative trends on mine rehabilitation and closure. These include adherence to the polluter pays principle; the inherent need to incorporate adequate provisions to achieve “reduction-at-source” in the areas of pollution control and waste management; and the need to consider alternatives and to avoid or minimize negative impacts wherever possible.
- The Minerals Policy stipulates that mine closure is planned for and that it forms part of an integrated land-use strategy involving communities. The policy states that before a mining licence is granted, there should be a final mine closure plan that describes how the company will deal with matters like groundwater pollution, soil degradation, wind pollution and infrastructure. A mechanism for funding closure and rehabilitation should also be established. The Minerals Policy further also incorporates the polluter pays principle to ensure that mining companies are held liable for rehabilitation costs. Companies will also have to establish a guarantee to cover the full costs of environmental rehabilitation.

The legal framework and policy of the Namibian system is skewed in favour of progressive development among the mining sector as there are positive provisions that shun or stifle the prevalence of disputes between the mining community and the local community.

#### **4.9.2 REGIONAL PROTECTION OF COMMUNAL LAND RIGHTS**

It is astounding that security of tenure of communities is increasingly becoming an issue on the agenda of many African constitutional democracies and not limited to the Southern African region. The broad continental challenge in ensuring security of tenure of communities requires that consideration is given to the broad perspective in ensuring that such vulnerable communities' land use rights are not further violated by the state and its strong business partners. This is envisaged in the African Commission for Human and Peoples' Rights (ACHPR) that seeks to ensure the protection of communities' rights to land. The ACHPR provides opportunities upon which communities can protect their land rights given that the SADC tribunal will now only be able to hear cases between nations.<sup>176</sup>

A typical case that the ACHPR decided in relation to community land rights was in 2010 involving the Endorois community from Kenya in **Centre for Minority Rights Development (CEMIRIDE) v Kenya**.<sup>177</sup> The applicants challenged the action of the state in converting the Endorois community land to a game reserve as such action had consequently led to the relocation of nearly four hundred families.<sup>178</sup> The communities asserted that such relocation 'not only eroded their property rights but that their spiritual, cultural and economic ties to the land were severed'.<sup>179</sup> The government's action in using the powers of eminent domain effectively went beyond affecting the communities' economic well-being but their human rights as well. The court held that the Kenyan government action in relocating the community violated Article 8 (free practice of religion); article 14 (property), article 17(culture), article 21 (right to free disposition of natural resources, and restitution and compensation for dispossessed peoples) and article 22 (development), as guaranteed in the ACHPR and the Kampala Convention.<sup>180</sup>

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<sup>176</sup> SADC Tribunal available at <http://www.sadc.int/about-sadc/sadc-institutions/tribun/> (Accessed:11 July 2022)

<sup>177</sup> Centre for Minority Rights Development (CEMIRIDE) on behalf of the Endorois Community v Kenya, Comm'n No 276/2003, African Commission on Human & Peoples Rights (2006) (hereafter the Endorois case).

<sup>178</sup> G Lynch 'Becoming indigenous in the pursuit of justice: The African Commission on Human and People's Rights and the Endorois' (2011) 111 Afr Affairs 24

<sup>179</sup> Ibid note 36

<sup>180</sup> Kampala Convention

In reaching this decision, the ACHPR took into account a number of issues such as the definition of property. The Endorois community asserted that the Trust Land Act gave them traditional rights, interests and benefits from the land that concerned, a situation akin to the one in Zimbabwe under the Communal Land Act. The court also referred to the previous case of **Malawi African Association v Mauritania**<sup>181</sup> whereupon it stated that one's right to property does indeed include the use and access to the property to which states under article 14 have a duty not only to respect but protect as well.

Furthermore, consideration was given to the Pinheiro Principles with regards to compensation. In cases that one approaches the courts for a remedy, there should be given an 'appropriate remedy'. Further, in cases where property is destroyed, one such remedy should be compensation for the property concerned.<sup>182</sup>

The Pinheiro Principles advance restitution before compensation also indicate that compensation should be paid in cases where restitution cannot be undertaken. The issue of providing compensation is also explicitly provided within the United Nations Declaration of Rights on the Rights of Indigenous Peoples (UNDRIP).<sup>183</sup> The UNDRIP provides that 'indigenous peoples have the right to restitution of the lands, territories, and resources which they have traditionally owned or otherwise occupied or used and which have been confiscated, occupied, used or damaged without free and informed consent'.<sup>184</sup> These international principles and provisions are important especially in previous cases where communities such as those from Marange are still to receive their compensation. The mere payment of a disturbance allowance does not amount to compensation and at most lies 'in the face of common sense and fairness'.<sup>185</sup>

The Pinheiro Principles reiterate what is now already contained within the Constitution and therefore the need to enforce such provisions is imperative. The Endorois community case highlights the need for the state to balance the need for

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<sup>181</sup> Comm Nos 54/91, 61/91, 164/97

<sup>182</sup> The Pinheiro Principles available at <https://2001-2009.state.gov/documents/organization/99774.pdf>

<sup>183</sup> Ibid note 41

<sup>184</sup> UN Declaration on the Rights of Indigenous Peoples E/CN 4/Sub 2/1994/2/Add1 (1994) preambular par

<sup>185</sup> Ibid note 40

development, interests and rights of communities. Since land forms the foundation to the communities' livelihoods, only a secure and respectful rights system is able to ensure sustainable development. Further, such a system can reduce conflict and risk once the developmental projects are established.<sup>186</sup> Governments, as they seek to establish developmental projects, should pause and reflect to see if the project fulfils the five criteria that are equitable, non-discriminatory, participatory, accountable, and transparent.<sup>187</sup>

#### **4.9.3 The Six Leading Policies**

There are six international and regional principles that are provided under the mining sector regimes as important for the proper management and administration of mineral resources.<sup>188</sup> The principles include:-inclusive stakeholder engagement, mining related investment strategies, strategic land use planning, progressive fiscal frameworks and appropriate revenue management, transparency in governing institutions and lastly comprehensive legal and policy framework. The adoption of these principles that are not per se mutually exclusive are key under the mineral resource governance sector.

#### **4.9.4 CONCLUSION**

This chapter in this thesis has given practical examples of best practices and mechanisms that are apparent in other jurisdictions such as South Africa, Afghanistan, Namibia among others. There are several take offs which Zimbabwe can adopt from the regional and international benchmark practices including the EITI which was largely adopted by the Zambian government under its mineral resource legislation and the successes celebrated are instrumental towards development and have a greater impact on tackling community and investor related conflicts on a greater magnitude.

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<sup>186</sup> L Juma Protection of development-induced internally displaced persons under the African Charter: The case of the Endorois community of Northern Kenya.

<sup>187</sup> UN Declaration on the Right to Development, UN GAOR, 41st Session Doc A/RES/41/128 (1986), which states that right to development includes, 'active, free and meaningful participation in development'.

<sup>188</sup> Mining Forum. Building a sustainable mining sector. The Western Australia Experience. Presentation at Australian Embassy (2016)



## **CHAPTER FIVE**

### **Conclusion and Recommendations**

#### **5.1 Introduction**

The thrust of this thesis has been anchored on exploring the legal regime of conflicts that take place between investors who are predominantly mining companies and local communities in Zimbabwe who are on the other side of the spectrum farmers relying on agricultural activities for upkeep and livelihood. The introductory thrust has been to bring to light the background of the contested resource called land as it dates back to the colonial era and therefore has a bearing negative or positive if any on the post-colonial era in Zimbabwe. The second thrust has been to identify the forms and nature of disputes and conflicts that takes place among the two groups of people who are major contributors to the Gross Domestic Product (GDP) and the socio-economic fibre of Zimbabwe as a country seeking to sustain its people.<sup>189</sup> The other thrust of the thesis has been to give a comparative study of a benchmark and best practice approach in other jurisdictions that similarly have land as a resource and where the counterparties including farmers and mining entities converge to utilize and control resources for various reasons chief among them profit making, beneficiation, value addition, contribution to the global market among other factors. It seems the legal regime which provides for dispute and conflict resolution mechanisms in Zimbabwe requires a further review and or policy, legislative and administrative consciousness to achieve a progressive realization of land as a natural resource and create a more conducive avenue for conflict resolution.

#### **5.2 Summary of Major Arguments**

The major arguments in this thesis have been the adequacy of the legal framework in Zimbabwe in curbing conflicts under the umbrella of investor and community towards the control and possession of land as a natural resource being utilized by both parties. It has been stressed in the thesis that both activities which are mining and agriculture are critical and form the bone of economic supremacy

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<sup>189</sup> <https://www.afdb.org>

necessary for advancing the social and economic sphere of Zimbabwe as a whole. The other major argument has been on the efficacy and adequacy of the institutional bodies that are responsible for manning and administering the affairs of land as a natural resource in Zimbabwe. It has been clear that there is evidence of ineptitude from such institutions as well as the scourge of corruption which has resulted in the lack of patriotism on the responsible institutional platforms. The issue of lethargy on the part of those institutional frameworks has been necessitated by lack of proper funding and hence affecting performance by the entities in question.

The Mining Commissioners must be seen to be upholding the law and shun nebulous practices such as engaging in politics and using such political muscle to thwart the rights and interests of the owners of land in lieu of mining companies. The Mining Affairs Board which ought to be a watchdog in preventing conflicts under the mining space between miners and owners of land must act without bias, favouritism and malice towards the farm owners. It will be prudent for the Mining Affairs Board to work hands on deck with land related platforms such as the Land Commission and attempt to create a rapport between the major contenders of land.

The other major drawback under the discourse is the lack of administrative enforcement of the proposed policy and laws to bring sanity and good cooperate governance under the mining sector as well as aligning our land related policies in line with the supreme law which is the Constitution of Zimbabwe. It is argued that the proper implementation of policy and law will go a long way in curbing and bringing harmony under this discourse which has wracked havoc in the governance of resources and the control of land use patterns in Zimbabwe. The right of ownership of private property must remain sacrosanct and sacred to maintain and preserve the rule of law which is manifestly enshrined under the supreme law of Zimbabwe. The rule of law which is the cornerstone of a democratic society must not be trampled upon in favour of sanitizing investor confidence. A balance must be struck which will enable both community dwellers and the investors in the mining field to co-exist in peace and harmony fostering economic growth in line

with the mantra of vision 2030 and the NDS1 which makes clear provisions on sustainable economic practices which will enhance growth.<sup>190</sup>

Another major argument in this thesis is strengthening the legal framework on mining and adhere to best practices in other countries that have successfully implemented laws and policies that spearhead development and stirs asunder disputes and conflicts to a halt. This approach will be lauded in so far as it will bring proper regulation practices between farmer and miners and further provide for appropriate remedies for the realization of best approaches under the mining sector in Zimbabwe.

### **5.3 Summary of Main Findings**

The main findings under this thesis have been that the bulk of the laws that govern mining in Zimbabwe is predicated on colonial laws and such laws are of an extractivism character. It is undisputed that mining is capital intensive however this must be complemented by the end product of the mining shaping the social and economic social structure of the people who are central to the development of Zimbabwe on a broader scale. The laws on mining require a serious revisit as has been done under the Mines and Minerals Bill which should be applauded as a progressive piece of legislation under the mining discourse.

It must be stressed that another major finding in this thesis centres upon malpractices in the mining sector which include but are not limited to illicit financial flows, corruption amongst the executive, smuggling, mismanagement, opaqueness in the extractive sector among other ills that are apparent and are hampering development and contributing to stagnancy in the sector. There is need for bringing transparency and openness in the mining sector as it has been proved clear that it is the sector that contributes to these conflicts between investors and the community involved. In a plethora of disputes what has been evident is that mining conglomerates, entities, franchises or consortiums are the

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<sup>190</sup> <http://www.zimtreasury.gov.zw>

major causes which creates disputes with the land dwellers who would have been enjoying unfettered rights and occupational use rights over the land with farming and livestock rearing.

Another major finding in this thesis is that there is failure on the part of the mining sector to herald and promote corporate social responsibility approaches as a means to better the lives of communities who would have been affected by a mining induced displacement and rendered homeless as a result of such activities. It is imperative that the Community Share Ownership Trusts or Schemes be implemented and properly managed so that they are not done in vain and disadvantaging the affected groups.<sup>191</sup> It is vehemently contended that the CSOTs initiative must be predicated on the two foundations to have meaningful effect on the community. Firstly, it must strive and optimize the natural resources with the involvement of communities and the respective Rural District Councils as envisaged under the constitution of Zimbabwe.<sup>192</sup> Secondly, and most importantly the programs must be benevolent in nature and therefore ought to be legitimized by the consultation of traditional leaders as these are the custodians of culture and further the consultation of the people concerned and ensure they attain reasonable revenue for the exploitation of the mineral resources.

## **5.4 Recommendations**

### **Collaborative efforts from stakeholders**

There must be collaboration between the Ministry of Mines and Development with the Ministry of Lands, Agriculture, Fisheries and Water in curbing conflict between miners and farmers and therefore creating a platform for the coherent and proper implementation of master plans for successful development.<sup>193</sup>

### **Capacitation of RDCs**

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<sup>191</sup> CSOTs emanated from the Indigenization and Economic Empowerment (General) regulations 21 of 2010

<sup>192</sup> [Chapter 29:13]

<sup>193</sup> <https://www.trade.gov/country-commercial-guides/zimbabwe-mining-and-minerals>

There is an urgent need to capacitate the Rural District Councils on the land use and planning patterns as this will ensure that such institutional and administrative offices are not way laid by corrupt practices of mining companies.<sup>194</sup>

### **Review Mines Law**

The laws and policies under the mining framework must be reviewed and most importantly be aligned with the Constitution of Zimbabwe and be consistent with it as this will be key in the implementation of such law and policy strongly backed by constitutional validity.

### **Install the Cadastre system**

There must be finality to the Mines and Minerals Bill as it encompasses provisions which specifically and explicitly tackle farmer and miner conflicts. Further they address the aspect of (FPIC) free prior and informed consent.<sup>195</sup>

### **Promulgate the MMAB**

There must further be finality of the mining cadastre system as this will address the challenges of opaqueness in mining claims and allocation problems that are currently being experienced by miners and hence increasing disputes under the auspices of miner and farmers.<sup>196</sup> The coming into effect of the proposed Bill which has taken forever to be passed into law will provide better mining approach.

### **Legalise CSOTs**

The Mines Bill must in addition incorporate some of the following. It is recommended for the Mines and Minerals Bill to provide mandatory and peremptory provisions which make the mining entities to remit shares to Community Share Ownership Trusts to add value to the local community. The legalizing of CSOT's will be celebrated and lauded under this discourse of mining.

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<sup>194</sup> [https://www.veritas.net/sites/veritas\\_d/files/NDS.pdf](https://www.veritas.net/sites/veritas_d/files/NDS.pdf)

<sup>195</sup> <https://core.ac.uk/download/pdf/234646936>

<sup>196</sup> <https://www.environmentandsociety.org/mml/contestation-over-resources-farmer-miner-dispute-colonial-zimbabwe-1903-1939>

### **Stipulate Minimum Compensation Packages**

It would be prudent for the Bill to have legal safeguards which seeks to provide adequate mechanisms for compensation packages of those families affected by mining induced activities as this will create an avenue that will sanitize and bring parity between the mining companies and the affected Project Affected Families (PAFs).

### **Adopt HRIA**

The Bill must be seen to provide a Human Rights Impact Approach (HRIA) as this has a major bearing on the respect of human rights which are fundamental for the realization of social, economic and cultural rights. This will further strengthen accountability and is instrumental in preempting disputes in mining affairs.

### **One stop shop approach**

The Mines Bill must create a one stop shop which will encompass adequate mineral governance in Zimbabwe and thwart the inconsistencies in the laws and policy. This will create an environment that is free from mineral plumage, plunder and porosity in the mining sector as a whole.

### **Gender parity in Mine governance**

The Bill must further advocate for the incorporation of gender parity and vulnerable groups in mining development. This will be imperative to aid the vulnerable communities who have a rich mineral resource to be upgraded and proceeds of mining activities be utilized for their beneficial interest and welfare.

### **Adopt EITI**

Lastly, the mining governance in Zimbabwe must strive to be in sync and in conjunction with best practices benchmarks under the Extractive Industry Transparency Initiative (EITI). This will ensure that the policy and laws of Zimbabwe are shaped and in a trajectory of good practices across the board. This will further promote sustainable practices in the extractive mineral sector.

### **Transparency and Accountability**

It is key for the local value chain under the mineral resource governance of Zimbabwe to be transparent and accountable for the industry to be more viable. This will promote good negotiations in mining contracts and compensation packages to the PFAs and local communities.

## **5.5 Conclusion**

In summation the thesis has gone a long way in detailing the challenges being experienced in the utilization of land as a natural resource and the scope has been primarily limited on the investor and community conflicts which partake as a result of the possession and control of such a phenomenal resource not only in the region but the world at large. It is not disputed that Zimbabwe has been endowed with large deposits of natural and mineral resources and these must be maximized and optimized for the greater good of the people who are the primary benefactors of the resource. The nature of conflicts are myriad as has been exemplified but these can be curtailed by the addressing loopholes and gaps in predominantly our mineral law legislation and most of all shunning corruption and effectively implementing our policy and law at an administrative level and bring to reality and fruition the end product of mining for the benefit of both the miner and the community in tandem with constitutional values and principles enshrined.

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