ZIMBABWE LAWYERS FOR HUMAN RIGHTS

SUBMISSIONS ON: THE INDIGENISATION AND ECONOMIC EMPOWERMENT (GENERAL) REGULATIONS, 2010

SUBMITTED TO: PARLIAMENTARY PORTFOLIO COMMITTEE ON BUDGET, FINANCE, ECONOMIC PLANNING AND INVESTMENT and PARLIAMENTARTY LEGAL COMMITTEE

The legal framework for indigenisation marks an intensive and extensive state foray into not only public, but also private enterprise. Such involvement, more particularly in the latter, must ordinarily be limited as the state's role is to regulate and govern and, for the state to get too deeply involved, undermines this role. However, interventions may occur where necessitated by the needs of social and economic justice, but they should be set out in very clear, transparent, and justifiable laws and procedures.

Preliminary Submissions: The Necessity of the Intervention

In principle, it is clear that there is merit in such intervention where the beneficiaries targeted are those who clearly stand to benefit in terms of correcting current and long-standing inequalities in certain sectors resulting from historical imbalances, and in order to create a sustainable development framework that fosters equity and economic and social justice. There is also further merit in specifically targeting traditionally vulnerable and marginalised groups, such as women and youth.

However, this needs to be proven and not merely stated, as does the empowerment action taken need to be justifiable. Therefore the following issues need to be addressed and/or catered for in the legislation:

i. Transparency in Publicly Establishing the Status of Indigenous Ownership

Notably, there appears to never have been a proper empirical research which is publicly available into the economic situation in the country as regards indigenous ownership in various sectors which are covered by the Indigenisation and Empowerment Act [*Chapter 14:33*] (hereafter referred to as "the Act") and the Indigenisation and Economic Empowerment (General) Regulations, SI 21 of 2010 (hereafter referred to as "the Regulations") especially in the more recent past. There has been much economic change in the last decade, and yet there has been no transparency in terms of who, or which company/business, owns what.

Although the Regulations seek to carry out such an exercise to a certain extent, it is not clear enough that **all** companies and businesses operating in Zimbabwe with an asset value

of or above US$ 500,000 need to provide details of their shareholding, whether they are controlled by "indigenous" Zimbabweans or not. Not only would this provide a comprehensive audit and transparent information, but it will also identify the business interests of key "indigenous" Zimbabweans who may seek to further enrich themselves through this legal framework at the expense of those who merit priority.

The fact that the information on shareholding is provided only to the Minister and not made publicly and freely available, except through an individual request to the Minister also needs to be addressed, so that the process is transparent and accountability is maintained in relation to action taken in terms of the Act and Regulations.

Failure to carry out such an exercise runs the risk of consolidating and increasing control of business in the hands of an elite and privileged few "indigenous" Zimbabweans at the expense of the majority, thus undermining the aims and objectives of such legislation and exercise.

Thirty years after Independence and after a decade of acute recession and business flight, there should also have been an empirical attempt to establish and show clearly whether there is such a substantial foreign or "non-indigenous" Zimbabwean ownership of business in the various identified sectors which justifies measures as far-reaching as those set out in the Act and Regulations, and whether the same measures are required in each identified sector, prior to the gazetting of such Regulations.

ii. Transparency in Identifying and Allocating the Proposed Beneficiaries of Indigenisation

Further to point (i) above, it should be the case, as per the objectives of the Act that, not only should the proposed indigenisation benefit "indigenous" Zimbabweans, but also that women and youth be specifically targeted under such programmes. At present, neither the Act nor the Regulations set out a clear process by which these vulnerable and marginalised groups will be identified and targeted.

In addition, the Regulations allow for any "indigenous" person or company to make a claim to the Minister for a stake in a business without providing even the most minimal information about how they continue to be disadvantaged, their current ownership in the public and/or private sector, and indeed whether they can justifiably be said to have expertise in the area they have targeted. In the absence of such information, it remains unclear, discretionary and extremely vague, as to how their claims will be transparently assessed and action justified by the Minister.

In relation to the allocation of beneficiaries under the proposed legal framework, neither the Regulations nor the Act provide for an appeal against a decision taken by the Minister. In this regard, the action and remedies provided fall foul of the Administration of Justice Act and other natural remedies.

iii. Proving Necessity Under the Current Economic Circumstances

It is common cause that since the era of failed structural adjustment, and then following the economic downturn of the last 10 years, there is need to show that the manner in which the indigenisation exercise will be carried out is necessary, or whether its implementation will simply exacerbate the economic downturn and current instability.

There are very many sectors in the Zimbabwean economy and social sectors at present which require investor confidence; such measures as those introduced by the Regulations are sure to impact negatively on such confidence and will also lead to further brain-drain when the skills of all Zimbabweans are most needed to rebuild the nation.

In the event that such proof is not available, then there is need to identify and set out within the Regulations alternative measures which will substantively and substantially achieve progress towards indigenisation and empowerment without adding further strain on the struggling Zimbabwean economy and various business/commercial sectors.

There are groups in Zimbabwe who have added value to the local economy, and who are likely to be adversely affected by the legal framework:

(a) "Non-indigenous" Zimbabweans and foreigners who are highly skilled. They are likely to disinvest in Zimbabwe rather than continue to own and work companies which can be taken over by persons who have made no contribution to them whatsoever.

(b) Talented "indigenous" Zimbabwean businesspeople who have no political connections will also be victims of the legal framework. Zimbabwe has already experienced this in other sectors, and this legal framework merely gives politicians and the well-connected business elite another stranglehold by which ordinary and professional businesspeople can be held subject to them.

(c) Any Zimbabweans with genuine talent, drive and ambition who want to achieve simply through their abilities, but who do not have the start-up capital to embark on their own conceived business endeavours and do not want to piggy-back on the work of others. They are neglected by the state in favour of the short-term measures provided under the current legal framework.

To simply take the approach that foreign investors and 'non-indigenous' Zimbabwean investors should provide investment wealth, expertise, access to markets, usage of intellectual properties, and so forth, and then have others simply grab absolute control over these institutions is simplistic and simply not nuanced enough to deal with the variety of factors that are relevant to the important issue of indigenisation.

What Zimbabwe needs is to ensure capacity-building, i.e. ensure that investment is such that there is a legal framework by which indigenous locals can develop skills in respect of such matters as raising capital, management expertise, accessing international markets, protecting and making maximum use of intellectual property etc, rather than just grabbing what currently exists, the effect of which is that economic growth simply ceases,

and the nation as a whole is, at best, left standing still while all else around them (other countries) move forward.

A more nuanced approach is required - one that looks at questions of non-renewable resources separately from questions of participation in manufacturing and service industries etc.

Furthermore, this legislation would be a good opportunity to contain corruption, labour abuse, and environmental degradation within the world of business but instead the opportunity is lost as the little among these that is addressed is relegated to an optional, barely-mentioned National Indigenisation and Empowerment Charter.

iv. Proving that the Regulations Create a Sustainable Development Framework that Fosters Equity and Economic and Social Justice

The Act and Regulations as they currently stand do not foster sustainable gains of any sort, which is (or should be) the primary objective of the legislative action taken – sustainability goals can be met only with and through a system that works at the educational and capacity-building goal, rather than endless 'redistribution'. The fact that the state intervention is occurring at the private market level and not at an educational level (for example, through sponsoring of education and skills-building at the tertiary level, which is no longer happening in any real manner at public universities and other institutions) is anomalous. The legal framework does not provide for any promotion of education, training and capacity-building, and is therefore not consistent with sustainability in any way.

Further, the legal framework as it currently stands provides no real effort and measures to assist start-up enterprises. Closely linked to this is the reality that the economic downturn of the last 10 years has decimated local industry. In light of the current underutilisation of capacity and market opportunities, helping start-up enterprises to take advantage of these and providing methods for education, training and capacity-building in order to empower Zimbabweans through lawful means should surely head up any indigenisation strategy. To impose persons or entities without the relevant skills on those who have worked for years on building sustainable and productive businesses is unlikely to achieve the objectives of the exercise in a sustainable manner.

Whereas the former method has the effect of capacity building which will enable the emerging businesspersons concerned to become players in the national and international business sector and to rise or fall depending on their capacity, the latter method – the one taken in the current legal framework – merely promotes the uplifting of persons who in fact are poor businesspersons by piggy-backing them on those with ability and know-how in order to benefit financially in the short-term, but it does nothing to ensure that they will be in a position to continue to keep that business productive in the long term.

Therefore for the legal framework to say little (if nothing) of entrepreneurship trainings, education and other skills development and capacity-building, and to merely focus on a short-sighted forced redistribution is surely iniquitous, serving to undermine every "indigenous" Zimbabwean who ever worked, or wishes to work and build capacity to

achieve success in business. This apparent contempt of the abilities of Zimbabweans to actually start up their own enterprises and the failure to aid them in this regard in favour of an approach that approximates vulturing of already existing enterprises is extremely short-sighted.

The Constitutionality of the Indigenisation and Economic Empowerment (General) Regulations, SI 21 of 2010

The regulations seek to promote the empowerment of "indigenous" Zimbabweans. The manner in which the definition is laid out has not, however, been correctly drafted, and is open to an interpretation wherein even a non-Zimbabwean who suffered disadvantage prior to 18th April 1980 may claim that they can benefit in terms of the regulations. This flows from the definition of an "indigenous Zimbabwean" being "any **person**" who was disadvantaged prior to 18th April 1980, rather than "any **Zimbabwean**" (our emphasis).

Apart from this drafting error, the definition is most likely to be interpreted to exclude Zimbabweans who are of Asian, bi-racial, multi-racial, Chinese and/or white origin, amongst others.

It is common cause that the Constitution of Zimbabwe in section 23(3)(g) authorises "*the implementation of affirmative action programmes for the protection or advancement of persons or classes of persons who have been previously disadvantaged by unfair discrimination*". Such programmes can therefore be argued not to fall foul of the protection of the fundamental right to be free from unfair discrimination as stipulated in section 23(1) and (2) of the Constitution, whether on grounds of race, tribe, place of origin, political opinions, colour, creed, sex, gender, marital status or physical disability. However, this is only insofar as the action is reasonably justifiable in a democratic society.

The definition as it is currently set out, is too vague and uncertain to ensure that it can encompass groups other than black Zimbabweans who were disadvantaged before 18th April 1980. As such, the manner in which the definition is likely to be interpreted, together with the fact that the provisions of both the Indigenisation and Empowerment Act and regulations are not comprehensive enough to ensure that groups other than black Zimbabweans may be considered to have been disadvantaged, renders the target group open to legal and constitutional challenge, and to nullification.

In addition, the fact that no time-scale is provided in relation to how long, from 18th April 1980, the individual or group will be considered to be disadvantaged, also renders it vague and subject to challenge.

Added to this is the fact that there is no procedure (either in the Act or the regulations) to show how the test of disadvantage will be carried out and scrutinised, leaving it completely in the discretion of the Minister, which will also be subject to challenge on the basis of this over-reaching uncertainty.

Further, such regulations – providing as they do for the imposition of certain persons or companies on existing companies without their prior consultation or input, and which fall

within the purview of the Act and Regulations - will fall foul of section 21 of the Constitution of Zimbabwe which protects the fundamental right to freedom of association.

Other Irregularities and Illegalities

The provisions in the Statutory Instrument provide the Minister with far-reaching and extremely discretionary powers, which could not have been envisaged by the primary legislation, being the Indigenisation and Empowerment Act. The Regulations are, in a number of instances, *ultra vires* the Act, and there are strong and persuasive legal arguments to indicate that there has been unlawful delegation of the legislative function to the Minister.

For example, virtually everything, including basic procedural elements, is criminalised in the Regulations, with criminal liability being imposed in just about every case of failure to adhere to the provisions in the Regulations, and the maximum penalty being imposed. The Minister is empowered through the Regulations to apply these criminal sanctions at his whim, even for the most simple and unintentional breaches of certain procedural provisions, and clearly this can only lead to an abuse of powers with impunity. Indeed, one is left with a vague discomfort about what appears to be an abuse of broad principle to achieve something other than social justice through the promulgation of the Regulations.

The rights and liberties of individuals are, through this process, unduly dependent on administrative decisions by the Minister, and therefore *ultra vires*, particularly as there is no method of appeal set out in terms of the Regulations and that in the main Act can arguably not be relied upon by someone affected by the Minister's action via the Regulations.

Further, the fact that action which has serious and fundamental consequences on the economy and financial well-being and sustainability of the nation has been left to the discretion of the Minister and included in the Regulations, rather than being subjected to scrutiny and vigorous debate in Parliament, is a further unlawful delegation by the Minister of the functions best exercised by Parliament.

The objectives in the Regulations differ markedly from those in the Act and this again shows that they are *ultra vires* the Act.

Some General Submissions on the Regulations

These Regulations exemplify in particular the complaint that the Minister has too much discretion and excessive power, which is not even contained, envisaged, and/or monitored through the primary legislation.

Although the companies bound are delimited in terms of asset value, the term 'asset value' is not defined. Thus it is unclear whether e.g. it means net assets, issued share capital or nominal.

Two core issues arise in relation to the procedure set out in the Regulations. Strict time limits are established for businesses to submit an indigenisation plan. Due regard must be had to the fact that it is larger companies with a share value of US$500 000 and above that are affected by the regulations – can a plan be made for the changing of the entire shareholding structure in less than 2 months? The Regulations then go on to state that the party is liable to 5 years in prison if they do not produce the plan after 30 days notice by the Minister. On the other hand, one notes that the Minister is quite entitled to take his time in responding and there is no risk of any sanction upon him. These provisions are grossly unfair and this needs to be addressed.

Second, the Regulations are particularly economically devastating. Suddenly all companies are expected to deal with the questions under the same pressure at the very same time. It is also almost as though a current crop of connected businesspeople are being pushed into the hands of businesses by their being forced to act all at the same time. This is not consistent with the dictates of equity and sustainable development – rather it seems to seek out quick benefits for the lucky and well-connected. This is not a plan, it is a travesty to all Zimbabweans, 'indigenous' or otherwise. It almost seems as though there is an intention to not only cause general instability in the economy, but also to cause maximum harm.

There is no timescale and there are no evaluation procedures to check whether the legal framework has achieved its objectives.

Concluding Remarks and Suggestions

The legal framework looks only at equity ownership. It does not deal sensibly with management representation in a capacity-building manner; neither does it deal sensibly with skills development, preferential procurement, enterprise development and socio-economic development. And there is certainly no holistic approach to these issues. Indigenisation and economic empowerment should be part of a comprehensive economic growth strategy, not a mere transfer of property from one race group to another. The issue should not be merely taking wealth from one group and giving it to another, as this is self-destructive and unsustainable. The South African system of Black Economic Empowerment - the basics of which are set out below - provides a relatively decent example in respect of a holistic approach in this regard, and should be considered in revising the current Regulations:

Black economic empowerment is driven by legislation and regulation. An integral part of the BEE Act of 2003 is a sector-wide generic scorecard, which measures companies' empowerment progress in four areas:

- Direct empowerment through ownership and control of enterprises and assets.
- Management at senior level.
- Human resource development and employment equity.
- Indirect empowerment through:
    - preferential procurement,
    - enterprise development, and

- corporate social investment (a residual and open-ended category).

This scorecard, as well as a scorecard for multinational companies, is defined and elaborated in the BEE codes of good practice. The codes of good practice, which govern how companies do business in South Africa, allow global and multinational companies some flexibility in how they structure their empowerment deals. For example, representation does not only have to be at ownership level. The codes are binding on all state bodies and public companies, and the government is required to apply them when making economic decisions on:

- procurement,
- licensing and concessions,
- public-private partnerships, and
- the sale of state-owned assets or businesses.

Private companies must apply the codes if they want to do business with any government enterprise or organ of state - that is, to tender for business, apply for licences and concessions, enter into public-private partnerships, or buy state-owned assets. Companies are also encouraged to apply the codes in their interactions with one another, since preferential procurement will affect most private companies throughout the supply chain. Different industries are required to draw up their own charters on BEE, so that all sectors can adopt a uniform approach to empowerment and how it is measured.

Clearly, this is a more nuanced approach to this issue rather than the simplistic approach taken by Zimbabwe's Act and Regulations.

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