

Preamble My business is explaining Zimbabwe business law in layman's terms. Generally, I do not take account of race – except where the law rests on racial differentiation, perhaps by implication. The legislation on indigenisation is one such area. As the various legal instruments on indigenisation have been gazetted, starting with the **Indigenisation Bill** gazetted for public information in June 2007, I have sent up-to-date subscribers 25 bulletins (a total of 60 pages) over the past 5 years explaining this vexed subject. My layman's explanations are intended to alert businesspeople to important issues, not as a substitute for legal or other specialist advice, which I always advise subscribers to seek when in any doubt. This should be kept in mind when reading what follows.

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Introduction

I begin by drawing a distinction between non-black Zimbabwean citizens (primarily 'whites') and foreign citizens.

- I cannot reassure white Zimbabweans owning businesses in the nine sectors most recently designated for indigenisation within 12 months (by General Notice 280 of 2012 in the *Government Gazette* of 29th June 2012; listed above) that you will not lose the controlling interest in your businesses as a result of the racism embedded in current indigenisation law. But in my view that is unlikely – depending on how you conduct your affairs over the coming year.
- Regarding those holding foreign citizenship, I think there is a greater likelihood that you are looking at the dilution of control, certainly in the medium term. Note I say 'dilution', not 'loss'; and 'medium', not 'short'.
- In both cases, it may come down to managing your shareholders. I will return to this and other suggestions at the end of this paper.

My purpose here is to present facts and perspectives on the indigenisation legislation that may provide some reassurance to these two categories of non-black business owners in Zimbabwe. These are no more than my personal views, except where otherwise indicated.

A Perspective on Indigenisation

In my view indigenisation is –

- (1) Here to stay as a Zimbabwe government policy, regardless of who forms the government; and
- (2) A good thing in principle, i.e. where indigenisation refers to substantial ownership of the economy by Zimbabwean citizens. Note I say 'Zimbabwean', not 'black'.

However, as presently enshrined in the legislation and promoted on a racial basis, I most definitely do not view indigenisation as a good thing in practice.

The concept of Redressive Action – the context for the *Indigenisation & Economic Empowerment Act* – has much to commend it. Having said that, let me also say I have no wish to be an apologist for a piece of ignoble and self-serving legislation that uses a dishonest and spurious definition of 'indigenous' to seek to institutionalize anti-white racial discrimination in perpetuity.

This is an appropriate point at which to reproduce the unifying definitions of 'indigenisation' and 'indigenous Zimbabwean' from section 2 of the Act.

- 'indigenous Zimbabwean means any person who, before the 18th April, 1980, was disadvantaged by unfair discrimination on the grounds of his or her race, and any descendant of such person, and includes any company, association, syndicate or partnership of which indigenous Zimbabweans form the majority of the members or hold the controlling interest.'
- 'indigenisation means a deliberate involvement of indigenous Zimbabweans in the economic activities of the country, *to which hitherto they had no access*, so as to ensure the *equitable* ownership of the nation's resources.'

The draftsman was presumably not anticipating any legal challenges based on loose wording, of which more later. At this point, I just raise two points.

(1) As it stands, the definitions could be interpreted to mean that intended beneficiaries of indigenisation may have to prove (a) how they were disadvantaged on the grounds of race; and (b) their lack of previous access to economic activities.

(2) Since 'equitable' means fair and just, I cannot see how the courts will conclude that using law to force someone to surrender control of his business on the grounds of his racial membership is fair and just.

There can be little doubt that the official view of the party that put the Act through Parliament is that 'historically disadvantaged by unfair racial discrimination' equals 'black'. Yet it is hard to see how a young black person who acquired, say, a Ph.D during 'exile' courtesy of the former colonial power and returned home from his talking war to a ministerial post with all its perks and material access can be considered disadvantaged by colonialism, while a young white person whose education was truncated locally by a civil war and whose career prospects were prejudiced by frequent military call-ups could be considered advantaged by colonialism. This is the dishonesty at the core of the legislation, lumping everyone into racial categories without regard to circumstances. While many blacks were historically disadvantaged, not all were. The failure to grapple with this difficulty – presumably beyond the capabilities of the authorities – raises suspicions that this is just another greedy acquisitive urge by the already wealthy. That suspicion is lent credence by the Minister's reported statement, "There will be a programme for those rich Zimbabweans who already have money to buy shares from foreign companies. There will also be a plan for the common people who will be able to borrow from government to buy the shares." That is an interesting distinction, is it not – between 'rich Zimbabweans' and 'the common people'. And if someone is rich, how is he disadvantaged? Intellectually challenged, perhaps. Morally impoverished, maybe. But not materially disadvantaged, surely?

The reference to 'descendants' is interesting. It means that even someone born after Independence, to, say, the political new rich, with the proverbial silver spoon in his mouth – and given the best university education that unlimited forex can buy in, say, Australia/Britain/USA – is still considered to have been historically disadvantaged and to need legal assistance to succeed in business – until when, the 10th generation? In perpetuity?

No-one, neither president nor pauper, can choose the land in which he is born. The authorities' attempt to put a legal gloss on racial discrimination – so long after opposing it – does not mask the fact that this legislation aims to take from locally-born non-blacks their right to own and run a business of their choice in the country of their birth. And it does so solely because they are not black. That is neither moral nor just. The implication is that racial discrimination is only wrong if it is directed against you personally but it is acceptable if it is directed against others – even the descendants of non-blacks born after Independence. Makes those who opposed racial discrimination in the last century – as a matter of principle rather than self-interest, as we were told by them at the time – and now in power, look like self-centred cry-babies unable to succeed in business, rather than capable persons of principle and integrity.

So what does properly-applied Redressive Action have to commend it, that this racist legislation does not?

Two things –

- In the mid-term, it is not sustainable to have a society where race is identified with economic status. This can happen when an economy is perceived as visibly controlled by an identifiable wealthy ethnic minority while the majority, wearing a different ethnic badge, remain poor. A case study is Malaysia, where the anger of the 55% Malays and other indigenous people involved in traditional peasant agriculture built up over time against the 34% Chinese involved in modern commerce. The race riots and ethnic street killings of May 1969 led to various redistributive and economic expansion programmes. Forty-three years later there is a Malay middle class and certainly many more Malaysian millionaires – but apparently also a trail of failed Malay tycoons and struggling Malay-managed conglomerates.
- The modern corporate world operates on a network of relationships – synergistic, even symbiotic. For that you need communication, certainly in the boardroom, perhaps on the golf course, and especially in the language of

home boys with a shared culture. There are obvious communication benefits in ethnic representativeness. An important factor in the quota-driven affirmative action programmes for ethnic minorities in the US was the realization that communities prefer to be administered and policed by people like themselves, who share their language, culture and sympathies.

How relevant is this to Zimbabwe? On the one hand the white population is estimated to have fallen from 250 000 at Independence to 30 000 (of whom 10 000 are economically active with many of the rest elderly economic prisoners of a failed economy). On the other hand, we have around 12 000 000 blacks, holding the vast majority of managerial positions throughout the economy, dominated by a wealthy black elite which is active in lucrative politics and which owns or has equity in many under-capacitated companies that could be successful if the economy functioned properly. So the economy is certainly no longer dominated by whites. And even a cursory look at the boards of public companies shows ethnic representativeness is well-rooted now.

So why the relatively recent concern about indigenisation and its accelerating pace now? I see at least three impulses at work here.

- Firstly, the wish for black Zimbabweans (the majority of the population, after all) to have a substantial stake in the country's economy. I see the sense of this, while decrying the bully-boy tactics being used.
- Secondly, personal greed by would-be diamond barons not satisfied by earlier rounds of looting national resources, hiding behind sound policy to pursue ignoble self-enrichment.
- Thirdly, pre-election politicking as one political player seeks to endear itself to the electorate. Whether promises of 'empowerment' that don't quickly translate into more money in a voter's pocket will win his vote remains to be seen.

When the next round of elections has passed, the last-mentioned impulse will diminish in intensity. The acquisitive urge will remain. So will the desire for locals to have a greater stake in the ownership of national resources.

INDIGENISATION LAW IN ZIMBABWE

It is important to note certain things from the beginning – the law exists in an Act passed by Parliament (the parent legislation), sets of subsidiary Regulations gazetted by the Minister as statutory instruments, and General Notices published in the *Government Gazette*; some of the subsidiary legislation appears to stray beyond what the parent legislation permits; there are disagreements within the GNU about the methods (and percentages) of indigenisation, but not the principle; non-black Zimbabwean and foreign business owners face legal threats (and extra-legal threats) from the Indigenisation Minister, as well as illegal threats from arbitrary groups. I shall deal with these in turn.

THE ACT – the Indigenisation & Economic Empowerment Act (Chapter 14:33 of the Statute Law of Zimbabwe) Chapter 14 of the Statute Law deals with Commerce & Industry; this is the 33rd Act of Parliament in that series.

The ***Indigenisation & Economic Empowerment Act***, intended to force handover of business ownership from white Zimbabweans and foreigners to black Zimbabweans, was published with the *Government Gazette* on 7th March 2008, as Act No. 14/2007, Chapter 14:33. The Act was to be brought into operation at a future date. Statutory Instrument 63A/2008 did so 6 weeks later with effect from 17th April 2008. The provisions of the Act are intricate.

My original understanding was that the legislation did not empower the authorities to insist on 51% indigenisation – or any other measure of indigenisation – in any circumstances OTHER THAN (1) circumstances where changes involve the anti-monopolies Competition Commission; (2) circumstances where a de-merger/unbundling will result in the value of any resulting business rising above a certain value; (3) relinquishing the controlling interest in a business (except by donation or disposal 'otherwise than for value' to a family member, partner or shareholder in a private company or partnership) where the value of the controlling interest rises above a certain threshold; and (4) circumstances where investment in prescribed sectors requires an investment licence.

However, a closer reading of the legislation reveals that section 3(1)(a) provides, with a few innocuous words, for government to endeavour to secure 51% black ownership of 'any business'.

This is what the relevant parts of section 3 of the Act say. Underlining is to help you focus on the significant bits.

3 'Objectives and measures in pursuance of indigenisation and economic empowerment

(1) The Government shall, through this Act or regulations or other measures under this Act or any other law, endeavour to secure that –

- (a) at least fifty-one per centum of the shares of every public company and any other business shall be owned by indigenous Zimbabweans;
- (b) no –
- (i) merger or restructuring of the shareholding of two or more related or associated businesses; or
 - (ii) acquisition by a person of a controlling interest in a business;
that requires to be notified to the Competition Commission in terms of Part IVA of the Competition Act (Chapter 14:28) shall be approved unless –
 - (iii) fifty-one per centum (or such lesser share as may be temporarily prescribed for the purposes of subsection (5)) in the merged or restructured business is held by indigenous Zimbabweans; and
 - (iv) the indigenous Zimbabweans referred to in subparagraph (iii) are equitably represented in the governing body of the merged or restructured entity;
- (c) no unbundling of a business or demerger of two or more businesses shall, if the value of any business resulting from the unbundling or demerger is at or above a prescribed threshold, be approved unless –
- (i) fifty-one per centum (or such lesser share as may be temporarily prescribed for the purposes of subsection (5)) in any such resulting business is held by indigenous Zimbabweans; and
 - (ii) the indigenous Zimbabweans referred to in subparagraph (i) are equitably represented in the governing body of any such resulting business;
- (d) no relinquishment by a person of a controlling interest in a business, if the value of the controlling interest is at or above a prescribed threshold, shall be approved unless the controlling interest (or such lesser share thereof as may be temporarily prescribed for the purposes of subsection (5)) is relinquished to indigenous Zimbabweans.
- (e) no projected or proposed investment in a prescribed sector of the economy available for investment by domestic or foreign investors for which an investment licence is required in terms of the Zimbabwe Investment Authority Act (Chapter 14:30) shall be approved unless a controlling interest in the investment (or such lesser share thereof as may be temporarily prescribed for the purposes of subsection (5)) is reserved for indigenous Zimbabweans.'
- (f) all Government departments, statutory bodies and local authorities and all companies shall procure at least fifty per cent of their goods and services required to be procured in terms of the Procurement Act (Chapter 22:15; actually, the correct reference is 22:14) from businesses in which a controlling interest is held by indigenous Zimbabweans.'

Sub-section (f) is unclear. In what circumstances would a 'company' (not a 'business', note) procure good/services in terms of the **Procurement Act**, which regulates procurement and tenders by the public sector, not the private sector? Clearly, what this sub-section does not do is require those in business to source from 'indigenous' suppliers.

Section 2 of the Act contains two definitions that need noting here: 'business' and 'controlling interest', as follows –

- 'business means any company, association, syndicate or partnership of persons that has for its object the acquisition of gain by the company, association, syndicate or partnership, or by the individual members thereof, whether the business is registered in terms of the Companies Act (Chapter 24:03) or not'
It appears that sole traders are not included – although a subsequent Statutory Instrument included them and - oddly - required details of 'shareholders in the sole trader' to be disclosed.
- 'controlling interest, in relation to (a) a company, means the majority of voting rights attaching to all classes of shares in the company; (b) any business other than a company, means any interest which enables the holder thereof to exercise, directly or indirectly, any control whatsoever over the activities or assets of the business.'

Other portions of the legislation will be quoted later, where relevant.

THE REGULATIONS

The first set of regulations was gazetted on 29th January 2010 as Statutory Instrument 21/2010, the '**Indigenisation & Economic Empowerment (General) Regulations, 2010**'. The regulations came into effect on 1st March 2010, after which every business with a (net) asset value of US\$500 000+ had up to mid-April 2010 to send the Minister its 5-year proposals to 'cede' 51% controlling interest to indigenous (black) Zimbabweans. In the first of many public disagreements over implementation, the Prime Minister was reported saying the week after the gazetting, "I am in charge of all policy formation in cabinet and neither myself nor the cabinet were shown these regulations before they were gazetted. They were published without due process as detailed in the constitution and are therefore null and void." Next the Parliamentary Legal Committee asked for time to examine such aspects as the constitutionality of the regulations, whether they were outside the terms of the enabling Act, whether they contained matters more appropriate for parliamentary enactment, whether they made the rights and liberties of persons unduly dependent upon administrative decisions not subject to review by a judicial tribunal, and so on. Meanwhile, the 'deadline' to submit proposals was moved several times. Minor changes were made to the principal regulations by SI 95/2010 ('Amendment No. 1'). Among other things, amendment No. 2 (SI 116/2010) replaced 'cede' 51% with 'dispose of'

and inserted a definition of ‘dispose’ (sell, donate or otherwise dispose). The third set of amendments (SI 34/2011) continued the process of closing loopholes and correcting earlier errors in the principal regulations, among others belatedly recognising that those required to submit indigenisation plans (let alone dispose of 51% interest) needed the authority of shareholders (duh!). Finally, the fourth set of amendments gazetted as SI 84/2011 sought to take account of criticisms by the Parliamentary Legal Committee about (1) the excessive penalties threatened for non-compliance, and (2) the legal absurdity of threatening to imprison ‘businesses’. Fines for not submitting plans and for undervaluing assets were reduced. New sections were inserted in an attempt to deal with the impossibility of imprisoning a business. As I understand it, in terms of provisos to section 277 of the **Criminal Law Code** (Chapter 9:23 of the Statute Law) office-bearers will not be liable for a criminal offence committed by their organisation if it is shown they took no part in the offence. Also as I understand it, it is not competent at law to declare an intention to dispose of what you do not own – so any plan declaring such an intention by directors, partners or members of governing bodies (who are not also majority shareholders of the enterprise) will not be worth the paper they are written on.

As remarked earlier, in my view indigenisation as a policy is here to stay. However, this acquisitive race-based rather than citizenship-based variant is on shaky legal grounds, of which more later. First we finish our review of the law by looking at the General Notices that have been gazetted – on indigenisation in mining, then in manufacturing, then in the 9 sectors gazetted two weeks ago, including transport.

GENERAL NOTICES in the Government Gazette

- **The Mining Industry**

General Notice 114/2011 in the *Government Gazette* of 25th March 2011 targeted every mining business not controlled or 51%-owned by ‘indigenous Zimbabweans and whose net asset value was US\$1 or more’, giving every such business 45 days to submit an indigenisation plan and a further 4.5 months to dispose of its shares or interests ‘to designated entities’, i.e. by end of September 2011. These entities were the NIEE Fund, ZMDC, any company incorporated by ZMDC or the Fund ‘for purposes of this notice’, ‘a statutory sovereign wealth fund that may be created by law’, or an employee/management/community share ownership scheme or trust. It was unclear at that stage what the law said about a public notice above the name of a civil servant altering provisions in a statutory instrument issued by a Minister – in this case reducing the \$500 000 NAV threshold to \$1. What was also unclear at the time was that while the Minister might compel a given senior employee, such as a company secretary, to submit a so-called indigenisation plan to dispose of 51% of the shareholders’ business, specific shareholders still had to agree to sell their shares at some point in the future. Why should they? There was no penalty in law for declining to do so and it was hard to see how there ever could be. We return to this later – and to the threats the Minister used; and to the end result.

- **The Manufacturing Sector**

General Notice 459/2011 in the *Government Gazette* of 28th October 2011 – with the name of neither a civil servant nor minister authorising it – was aimed at businesses in the manufacturing sector that were ‘non-indigenous’ (i.e. code for ‘foreign-owned’; or ‘owned by non-black Zimbabweans’), and had a net asset value of \$100 000 or more. Such businesses were given four years to dispose of 51% ownership of the business to ‘indigenous’ (i.e. black) Zimbabweans – 26% in the first year (appearing in the schedule as ‘Lesser share for non-indigenous businesses’, which is unclear to me, at least), rising to 36% in the second year, to 46% in the third year, and to 51% in the fourth year.

- **The Finance, Tourism, Education & Sport, Arts/Entertainment/Culture, Engineering & Construction, Energy, Services, Telecommunications, Transport and Motor Industry**

General Notice 280/2012 in the *Government Gazette* of 29th June 2012 (above the name of a civil servant) basically gives designated businesses, varying according to the specified net asset value, one year to dispose of 51% controlling interest to indigenous Zimbabweans. (The schedule in the notice actually refers to ‘51% lesser share for non-indigenous businesses’. This appears to make no sense and in due course may be clarified to read ‘indigenous’).

If you would like to be sent a copy of the General Notice (which was reproduced in the **BIZ Bulletin July 2012(1)** sent to subscribers on 3rd July), email howard_dean@zim.co.zw saying ‘July Bulletin, please’ and I’ll send it to you.

Perspectives on the legal standing of the indigenisation legislation

The Minister on a number of occasions has stated that indigenisation is in the law and people must obey the law. A crucial question then is whether the law is good law. In this regard, the Parliamentary Legal Committee said about GN 114/2011 that the notice should be repealed because it is not good law. It was bad law in that it violated section 16 ('Protection from deprivation of property'; in this instance, shares) and it violated section 21 ('Protection of freedom of association', in this instance to choose your own indigenous partners) of the Constitution. It was bad law because it was *ultra vires* the provisions of the enabling statutory instrument (in reducing the indigenisation threshold from \$500 000 in the SI to \$1 in the GN).

The law is a tricky area, moreso for non-lawyers. However, it seems to me there are various grounds on which the Act itself is challengeable in the courts. The core definition of 'indigenous' is one, for example. While obviously a laboured attempt to restrict its meaning to black people, the definition is so ambiguous that anyone whose ancestors were 'disadvantaged' on the grounds of race could claim indigenous status – certainly those of mixed race, and Asians, even whites who lost job opportunities to black advancement that gathered momentum (e.g. in the police force) two years before Independence. Time will tell whether a white Zimbabwean with a good store of courage and deep pockets will take the legal route to clarify 'indigenous' and 'disadvantage'. And will each person claiming 'disadvantage by unfair discrimination on grounds of race' have to prove personal disadvantage or can he merely flash the group badge of colour? Another point – does the Minister really have the legal authority, in terms of section 3(1) of the parent Act ('the government shall... endeavour to secure that at least 51% ...' etc) to simply direct certain businesses to make it so?

Scanlen & Holderness senior partner Sternford Moyo, a former president of the Law Society, has spoken on a number of occasions about the indigenisation legislation. The following observations, selected for their particular relevance to non-black Zimbabwe business owners, are extracted or paraphrased from press reports of his remarks.

- Very little attention has been given to possible ways in which to respond to and mitigate the negative effects of the indigenisation legislation. This has been made more difficult by the strong mixture of emotion, suspicion and fear on the issue which (1) deters people from using the law to assert their rights, and (2) makes it difficult for rational discussion on the way forward to take place.
- I have no doubt that many, without the benefit of advice, have submitted indigenisation forms without asserting their right to benefit from the exclusion provided for in the law.
- Very few have questioned the enforceability of the legislation before treating it as an insurmountable obstacle.
- The legislation imposes the obligation to indigenise on the company and its directors. Clearly, a 'company' cannot sell itself. Furthermore, it is not competent at law for non-shareholder directors to make declarations of intention to sell shares that they do not own. The authority for a declaration of intention to dispose of shareholding requires a resolution by shareholders. Thus, despite the fact that the legislation is essentially a shareholder issue, the only business owners having legal obligations placed on them are sole traders and partners in unincorporated partnerships.
- Parliamentarians need to attend to various defects in the indigenisation legislation. The definition of 'indigenous Zimbabwean' is open-ended in that it refers to 'any person', does not specify the nature of the disadvantage caused by unfair discrimination on the grounds of race, and does not state the place of discrimination. (It could even lead to someone who is not Zimbabwean and who suffered discrimination outside the country before 18-4-1980 being classed as an indigenous Zimbabwean.)
- We have all accepted that the long definition of 'indigenous person' is a euphemism for 'black Zimbabwean' without any critical analysis. No white person has come forward to have their status as an indigenous person declared. No company with white shareholders has come forward to have its shareholders declared to be indigenous persons, yet the law as it stands (i.e. if they were disadvantaged on racial grounds) could declare them as indigenous.
- Focusing the benefits of the law on indigenous people is welcome. However, there is a need to recognize, in addition, people who have lived in Zimbabwe for a long time. It does not make sense to treat citizens as if they were foreigners merely because of their ethnic origins.
- To the extent that the Act and Regulations envisage the Minister setting a threshold for indigenisation, which is intended to include and exclude, setting the threshold at \$1 (in the case of mines and other sectors) means there is no threshold at all since every mine is included – so the Minister has not met his legal obligation.
- Where the net asset value of US\$500 000 comes into play, all liabilities including shareholders' loans have to be deducted from the value of the business. It would be interesting to see how many businesses are above the threshold of indigenisation if factors such as the collapse of the economy, the insolvency or near-insolvency of most businesses and the depressed value of assets are taken into account.

- The \$500 000 threshold encourages heavily-gearred businesses, as it then makes sense to shift from shareholding capital to loan capital, possibly in the form of debentures and long-term shareholder loans, deducted from the assets of business to keep the net asset value below the threshold.
- No mechanism is provided for in the legislation to determine the identity of the beneficiaries of shares held by nominee companies and custodial services.
- The concept of a ‘deemed rejection’ of an indigenisation plan, provided for in the regulations, is not enforceable at law. The **Administrative Justice Act** and fundamental principles of natural justice both require that reasons be given for rejection.
- In regard to General Notice 114/2011, requiring mines to dispose of 51% shareholding to state entities in effect converted the indigenisation legislation to state acquisition. The Minister had no statutory power to do this.
- The Minister’s imposition of a 6-month period of compliance against the 5-year maximum contemplated by Parliament resulted in all mining companies being treated the same regardless of individual circumstances. The legislation envisaged the exercise of Ministerial discretion, which imposes an obligation on him to give those affected the right to be heard before a decision adversely affecting their interests was made.
- Another legal difficulty is that the Act gives a business a right to choose its indigenous partner. The GN purports to impose partners on all mines. This is outside the powers granted to the Minister by the Act.

This indicates some of the flaws in the legislation and some grounds on which the legislation could be challenged in the courts. Muza and Nyapadi partner Vote Muza in an article in The Financial Gazette of 10th May 2012 suggested that one option would be to approach the High Court by way of application seeking a declaration of rights and to have the Minister’s action scrutinised and impugned for being illegal. The drama continues to unfold. It is worth following the press for details.

How successful has 51% indigenisation been so far?

Let’s begin with the mining industry, as illustration. The industry chose not to take the route of openly challenging the legal standing of the legislation in open court – but as far as I can see, no mine has ceded 51% of its controlling interest. There have been some concessions – donations of shares (10%) to community share ownership trusts (with a cash donation until dividends can be declared, reportedly after 3 years), and stocks (5%) for employee share ownership schemes, both good things in their own right. Extractive industries of finite natural resources such as minerals are under pressure around the world to put some investment back into the communities where they operate. And employee share ownership, giving workers and managers a stake in the success or otherwise of the business in which they work, has been recognized for decades as a powerful motivational initiative.

Neither are new ideas. For example, in 1974 Rio Tinto donated 10% of its equity shareholding to create the Rio Tinto Foundation; dividend payments were used to build educational institutions, dams and irrigation schemes in the areas where Rio Tinto operated. Old Mutual reportedly has an employee share ownership scheme (9%), as does Schweppes, with other big companies announcing their intention to follow. But none of them as far as I am aware have disposed of a 51% controlling interest – yet.

What of the latest General Notice, about the finance, tourism, private schools, transport etc? There has already been a hasty step-back by the Indigenisation Minister over the schools, another well-executed *faux pas*. Regarding the extent of indigenisation, commentator Eddie Cross in his article headed ‘The Kasukuwere Circus’ on p.15 of The Independent, 13th July 2012 had this to say –

“The (recent) regulations (he means the GN, I think) are clearly illegal, violate the constitution and have not gone through the required procedure to become law. Tsvangirai simply advised the target groups to ignore the regulations and Kasukuwere, and carry on as normal. The reality is that despite all the rhetoric, not a single firm has been indigenised since 2010. One of the main targets, the mining industry, has said the state - or anyone else - can have 51% of all mines tomorrow. They would be delighted to get US\$7 billion in cash and then have the new partners (whoever they are) fund 51% of all new developments, or see their equity stake diminished rapidly. It is all nonsense; we do not have the expertise and technology to run these firms and we certainly do not have the money...”

So while there has not been any disposal of 51% controlling interest yet, as far as I can see, there has been some movement toward indigenisation. How was this achieved? In my view it is a mixture of having a policy that is sound in principle, although clumsily and racistly enshrined in law, coupled with bluster, brinkmanship and bullying. The Minister, accepting he could not compel shareholders to sell their shares, threatened to stop businesses operating by withdrawing licences, prohibiting them from exporting, and so on. In fact, he has no general powers to interfere with business licences, nor with the responsibilities of other ministers. But his tactics did result in some movement, as outlined above.

Let's turn now to the 9 most recently-designated sectors, given 12 months to 'indigenise'. We'll look at some things to avoid, something to consider and some possible courses of action. I reiterate that I cannot reassure you that you will not lose the controlling interest in your business, if you are a non-black Zimbabwean citizen or a foreign citizen. However, I hope the exposition thus far shows that you have other options than simply kow-towing to ministerial directives.

Three things to avoid

- Loose talk about 'closing your business'. There's no point. Your 'indigenous' employees can't bring any pressure to bear to help you with this problem – and probably wouldn't want to; what's in it for them? Such talk could also precipitate the very things you want to avoid.
- Confidence tricksters promising 'to help you avoid indigenisation' for a fee. This is a national policy, however flawed in its application. No-one can guarantee you immunity. Maintain a healthy scepticism and keep your money in your pocket.
- The assumption that a black with a Zimbabwean name holds Zimbabwe citizenship. Of the millions who fled to the Diaspora, hundreds of thousands have probably acquired foreign citizenship. No matter how personable and plausible such persons may be, the various forms in the regulations ask for passport details – and returnees who have taken out foreign citizenship may not be viewed as suitable indigenous partners (if or when you decide to explore that route).

Something to consider

Legal action. Some white Zimbabwean will eventually pursue some of the legal options outlined by Sternford Moyo in the section above headed '**Perspectives on the legal standing of the indigenisation legislation**'. You'd need deep pockets. If you have them, a good store of courage, and an appetite for a fight, start by getting legal advice.

Possible courses of action

The following suggestions are not mutually exclusive. You could follow up more than one, in various combinations – unless you opt for the first one.

- Do nothing. If the controlling interest in your business is held by white Zimbabwean citizens, wait and see what develops. There will very likely be a national election within the year. There may be a new dispensation. However, I believe the indigenisation policy will remain. The sectoral emphasis may shift; the percentages may change; or before then some brave soul may decide to pursue the legal route to clarify whether 'indigenous' equals 'black only'.
- Alternatively, and particularly if the controlling interest in the business is held by foreign citizens, you may want to pursue some of the following ideas during the second half of this year to make a plan, leaving the first half of next year for appropriate action.
- Get professional advice about how to calculate, and possible ways to reduce below the \$500 000 threshold, the Net Asset Value of the business. I realize this may not be possible in large-asset based businesses (such as education, engineering, construction, haulage). However, if as a rule of thumb NAV consists of capital assets (e.g. buildings, machinery, heavy vehicles) plus current assets (stock, cash, debtors) minus current liabilities (creditors, overdraft, bank and other loans, shareholders loans etc), depending on the scale of the business and your vision for its future, you may want to dispose of some capital assets, reduce your stock holdings, chase debtors, re-equip, re-mortgage, increase your creditors/overdraft, etc.
- Investigate employee share ownership (and related) schemes.
I suggest you ask your trade organization (e.g. CZI, Institution of Engineers, CIFOZ, Transport Operators Association – or EMCOZ) to locate specialists to advise in this area, plus source information from companies that have gone down this route already. In my opinion, although the (sometimes suspect) legislation refers to disposing of 51% controlling interest, the mines experience has shown that any movement is viewed – for the moment at least – as a political success. (Of course, in the mining sector the authorities were going eyeball-to-eyeball with enterprises which deal in billions of dollars – about the size of the government of a small country). I have already stated my belief that 'employee share ownership' (not 'controlling interest', note) is a good thing in itself. Of course, no-one really wants to give away, or transfer for a discounted consideration, any of the shares in one's business. That's where expert advice comes in. Shares mean little until dividends are payable. Perhaps there can be some trade-off between annual bonuses and annual dividends? But the ownership must be seen as meaningful, if you want to avoid labour unrest down the road. And of course there are tax implications of share ownership (e.g. withholding tax on dividends; income taxation on the date when allotted shares are taken up by an employee) – hence the need for expert advice.

The first part of the plan could be to consider setting up an employee share ownership trust where your employees in due course could own, say, 20% of the shares in the business and, in terms of section 14 of the principal regulations, if 75% of the employees involved are indigenous, and if at least 50% of those are women/disabled and at least 65% of the 75% are non-managerial, then this 'shall be taken into consideration to the extent of 20% of the minimum indigenisation and empowerment quota' of 51%. That leaves 31% to deal with over the balance of the year.

The second part of the plan could be to consider offering, say, 20% of the shares for sale at market price (to 'indigenous' persons of your choice, I suggest; the regulations provide for any arbitrary person to register an interest in acquiring a controlling interest in a business but I think this is outside the ambit of the parent Act; and this plan does not envisage selling a controlling interest). Change the shareholding structure when equity is paid for (obviously you should retain physical control of your Articles of Association and Memorandum of Agreement). If the legislation forces you down the route of selling equity against your will – not in my lifetime, I hope – you still retain 49% interest and will have to manage your shareholders; not that difficult, really.

The third part of the plan – and remember its only a plan at this stage – is to seek, say, 11% empowerment 'credits' for various good works as outlined in the legislation (i.e. intended development work in the community/beneficiation of raw materials/transfer of new technology/employment of local skills/imparting of new skills/any other desirable objective). Taking the example of the haulage industry, which is mobile and thus not really community-based, this might take the form of a scholarship at the local school where your depot is, or a periodic purchase of books for the school library etc; also good things in themselves).

So there's the 51% plan – employee involvement, sale of equity, and community contribution – but not necessarily surrendering control. And remember that shareholders don't always vote by race but by self-interest. So you will need to manage your shareholders – but hasn't that always been the job of director-shareholders? What I am proposing is the splitting up of the '51% transfer of controlling interest' that I personally find an abhorrent intrusion of government into business life.

- Alternatively, string it out; you may never get to 51% equity – keep looking for the final perfect equity partner/real investor for the final '26%', or whatever.
- What can you do about attempts by arbitrary visitors to business premises seeking to extort money by threatening to 'indigenise' your business unless you pay them a protection fee? Well, one response would be to ask them to bring a letter from whomever they claim to represent (e.g. the provincial office of party ABX), identifying them, stating they are acting with appropriately-delegated authority and setting out their business proposals. Should such a letter arrive, which I deem unlikely given that lesser fleas have bigger fleas, what you do with it thereafter is up to you. I would take it to a lawyer. Make a copy for the police, too.

Although demagogues may nod and wink at extortion, thinking it results in some short-term re-distribution of assets, real indigenisation involves share transfers and, one would expect, investment into the business not merely withdrawals from it. If you don't at least try to formalize any extortionate interaction, and just pay up, who is to say you won't have a different crew on your doorstep the next day?

In my view, unusual pressure justifies unusual responses. I would prevaricate. For example, "I am in discussions with certain connected people, whom obviously I cannot name but I am sure you would know them, who will be very interested in what you have to offer. Give me your details and I'll ask my potential investors if they are willing to talk to you."

Conclusion

One truly sad consequence of this legislation is how it divides us along racial lines. Inevitably, a number of black businesspeople may wonder what personal advantages will accrue to them from forcing white businesspeople to cede majority ownership of their businesses. If faced with that, ask them to imagine the roles reversed, where blacks were forced to cede ownership of their businesses 'because it is the law'. The question is whether it is good law. As outlined above, in my view the policy of local ownership is good but the law is not. At this stage, I would say to those anticipating a windfall (based on their race), 'wait and see what unfolds' – and to those anxious to avoid losing control of their businesses (based on their race), I would say, 'wait and see what unfolds'. Twelve months is not a life-time (although it can be in the survival of a business, as witness 2008) but it is a good long period of time in which to seek legal advice, strategise, set up employee ownership schemes, seek equity partners etc.