CHAOS CLARIFIED – ZIMBABWE’S “NEW” INDIGENISATION FRAMEWORK

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Executive Summary

From the outset of the promulgation of the Indigenisation and Economic Empowerment Act, the Research and Advocacy Unit (RAU) has been providing analyses and commentary of the implementation of the Act and all subsequent regulations. These analyses have demonstrated the considerable legal difficulties, let alone the economic and political difficulties, that the legislation and the subsequent regulations have created for both government and investors.

It is worth pointing out here that virtually all parties, apart from the Zimbabwe government, state that the policy on indigenization is a serious impediment to Foreign Direct Investment (FDI) in Zimbabwe, and there are repeated calls for both foreign governments and investors for greater clarity on the policy and its implementation. As RAU puts it in the current policy analysis:

“The source of the “lack of clarity” arises from the disjunctures between the Act as it is, the Act as various government officials think it ought to be and the implementation of the law, or its conceptualisation, in practice.”

Too often the debate about “indigenisation” is carried out in ignorance of what the law actually says, whether the regulations actually conform to the enabling Act, and whether those tasked with implementing the Act actually have the power to do what they say will do. It was for these reasons that RAU has continuously tried provide light in the midst of all the heat. This is yet another attempt to put clarity where little exists.

The current report points out that the beginning of all understanding must be to examine what the Act actually says. This is a brief summary of previous very detailed analyses. Critical to an understanding is the point that the Act refers to a restricted domain: what it does seek to do, is to proscribe specified share transactions. The specified share transactions are as follows:

a) any merger or restructuring of the shareholding of two or more companies, or acquisition of a controlling share in a company, which falls within the ambit of the Competition Act, Chapter 14:28.

b) any de-merger or unbundling of a business with a resultant value of or above a prescribed amount.

c) any relinquishment of a controlling share in a business above a prescribed amount.

Matyszak, D (2010), *Everything you ever wanted to know (and then some) about Zimbabwe’s Indigenisation and Economic Empowerment Legislation, But (quite rightly) were too afraid to ask*. April 2010. Harare: Research & Advocacy Unit; Matyszak, D (2010), *Some Comments on the New Indigenisation Regulations*. July 2010, Harare: Research & Advocacy Unit; Matyszak, D (2011), *Everything you ever wanted to know (and then some) about Zimbabwe’s Indigenisation and Economic Empowerment Legislation, But (quite rightly) were too afraid to ask* [Second Edition, May 2011]. Harare: Research & Advocacy Unit;
d) any proposed foreign investment requiring a licence under the Zimbabwe Investment Authority Act, Chapter 14:30.

This is the crux of the problem, and, as all subsequent analyses by RAU have shown, ALL regulations and policy pronouncements that do not reflect this are ultra vires the Act itself.³

An additional problem arises from the policy statements made by members of the Zimbabwe government, including those of the President, Robert Mugabe. This report examines these statements, pointing out the ways in which various statements conflict with each other, as well as the ways in which they are in conflict with the legislation itself.

The report covers a number of issues that are necessary for the elaboration of a proper “clarificatory” framework, as follows:

- **Conceptual problems with the Act and the regulations:**
- **Can there be a less than 51% equity threshold?**
- **The Indigenisation Levy and its legality;**
- **Payment against compliance with the law.**
- **The submission of Indigenisation Plans.**

As the report concludes, it is readily apparent that the legislative chaos and confusion around indigenisation arises from Regulations which do not conform to the Act, General Notices which do not conform to the Regulations, and actions by successive Ministers and their underlings which do not conform to all three. Zimbabwe’s indigenisation requirements appear to depend upon statements by the President, his choice of Indigenisation Minister (determined by ZANU PF’s factional politics and not the particular Minister’s approach to his or her portfolio), that particular Minister’s whims, and whether an election is pending. The “Framework, Procedures and Guidelines for Implementing the Indigenisation and Economic Empowerment Act” does nothing to attenuate the bedlam around indigenisation and further obfuscates an already obscure process. The only thing made apparent and clear is that the entire process remains chaotic. It certainly does not encourage private sector investment, remove Ministerial discretion in its implementation or provide clarity as to the requirements. The British Embassy lauded these ostensible intentions behind the Notice, tactfully refraining from commenting upon whether the intentions had been fulfilled other than, with true diplomacy, to state that, perhaps, “further elaboration of the law” appears to be required.⁴ A better approach than this probably comes to the mind of most.

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⁴ The Embassy’s statement is quoted in Zimbabwe’s Bid to Clarify Local Ownership Law Welcome, but Still not Clear Enough – UK Zimbabwe Mail 19.01.16.
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Introduction

“Everyone should make sure that by the end of October this year whatever they will be saying about indigenisation is fully informed by what the law says because I for one will not hesitate to publicly correct such a person. We no longer want any more mispronouncements on the indigenisation law.” – Indigenisation Minister, Patrick Zhuwao.

Zimbabwe is clearly an extremely unattractive destination for foreign investment. Yet such investment is thought by many as the only means by which the country might halt its continued and steep economic decline. Zimbabwe is presently listed at number 155 out of 189 countries by the World Bank on the ease of doing business index and the inflows in the form of FDI (Foreign Direct Investment) are a small fraction of those of its neighbours and regional competitors in this regard. The fingers of blame, including, increasingly, some ZANU PF ones, point towards the government’s stated objective of “indigenising” the economy and, as section 3(1)(a) of the Indigenisation and Economic Empowerment Act puts it, through various laws “to secure that at least fifty-one per centum of the shares of every public company and any other business shall be owned by indigenous Zimbabweans.”

Rather than putting the blame for the negative investment climate upon the manner in which indigenisation has been conceptualised, critics have, generally claimed to support the idea, but maintain that “clarification” as to government’s intentions is required. The following excerpt from a June 2015 interview by a Newsday journalist with the then American Ambassador to Zimbabwe, Bruce Wharton, is illustrative:

ND: Any particular concerns from US business leaders regarding Zimbabwe?

BW: They want an investment environment that is clear, rules that are understood and predictable. The rules tend to change from week to week and month to month. Clarity and predictability are the two greatest needs of American investors.

ND: Clarity of rules, can you specify?

BW: Indigenisation is a good example of the rules because they seem to change from time to time, depending on who you are talking to. Over the years, the rules of

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5 Indigenisation: Minister Warns Govt officials…Speak the Truth or Shut up, Says Zhuwao The Herald 30.09.15.
6 But not, importantly, by the current Minister responsible for indigenisation – see below.
8 In 2014 Zimbabwe received $0.54 billion in FDI. By comparison, Zimbabwe’s neighbours, Zambia received US$3 billion; Angola, $16 billion; Mozambique, $8.8 billion and South Africa US$3.8 billion - FDI into Africa By-Passes Zimbabwe Financial Gazette 26.09.15.
9 The ruling party, the Zimbabwe African National Union – Patriotic Front, see for example ZANU PF MP Blasts Indigenisation Policy Daily News 27.07.14
10 Chapter 14:33.
11 The manner in which successive ZANU PF governments have claimed they wish to implement the policy finds no parallel in the policies of resource nationalism in any other country.
Indigenisation have shifted somewhat, American investors have specifically told me that they need that framework clarified. Indigenisation makes sense philosophically as a way of protecting citizens economically. The US does it, Zambia and South Africa have these, but these need to be very clear and predictable and then businesspeople can decide whether to come in or not. The future lies in Zimbabweans’ hands.\(^{12}\)

The source of the “lack of clarity” arises from the disjunctures between the Act as it is, the Act as various government officials think it ought to be and the implementation of the law, or its conceptualisation, in practice.

The most fundamental of many misconceptions which causes much of the confusion is the perception that the Indigenisation Act requires all “non-indigenous” (read “white” or “foreign”) businesses to dispose of 51% of “their” shares to black Zimbabweans. This is not, in fact, a requirement of the Act. A company does not own the shares it issues, shareholders do. A law cannot compel companies to dispose of that which they do not own. To try to apply this law to shareholders themselves is generally so impractical as to be unenforceable – after all, which of the thousands of shareholders in some of the larger corporations are to be the ones compelled to dispose of their shares to ensure the 51% indigenous holding?

**The Limited Ambit of the Act**

The Act, therefore, does not seek to legislate the unlegislatable: it does not require that companies dispose of “their” shares or that shareholders do so. What it does seek to do, is to proscribe specified share transactions, which is entirely feasible. The specified share transactions are as follows:

- a) any merger or restructuring of the shareholding of two or more companies, or acquisition of a controlling share in a company, which falls within the ambit of the Competition Act, Chapter 14:28.\(^{13}\)
- b) any de-merger or unbundling of a business with a resultant value of or above a prescribed amount\(^{14}\).
- c) any relinquishment of a controlling share in a business above a prescribed amount.\(^{15}\)
- d) any proposed foreign investment requiring a licence under the Zimbabwe Investment Authority Act, Chapter 14:30.\(^{16}\)

\(^{12}\) The Future Lies in Zimbabwe’s Hands: Wharton Newsday 17.06.15. See also, as one of many other examples, IMF: Zimbabwe Needs to Clarify Indigenisation Laws Newzimbabwe.com 03.11.2014.

\(^{13}\) Section 3(1)(b). The Competition Act requires that notice of a proposed merger be given to the Competition Commission by companies with assets or a turnover above a prescribed threshold. However, the threshold does not appear to have been gazetted, the previous amount having been gazetted in defunct Zimbabwe dollars.

\(^{14}\) Section 3(1)(c). The threshold is set at $500 000 by virtue of section 4 of the Indigenisation and Economic Empowerment (General) Regulations, 2010.

\(^{15}\) 3(1)(d). This does not apply where the shares are relinquished to a family member or another partner or shareholder in the business. The threshold is set at $500 000 by virtue of section 4 of the Indigenisation and Economic Empowerment (General) Regulations, 2010.

\(^{16}\) 3(1)(e). There is no *requirement* to obtain a licence under this Act, but foreign companies may do so at their discretion to avail the advantages of so doing.
The proscription is that these transactions shall not be approved unless:

_fifty-one per centum (or such lesser share as may be temporarily prescribed...) in
the merged or restructured business is held by indigenous Zimbabweans._

It is important to note that the four prescriptions arise from the transactions set out in subsections 3(1)(b), 3(1)(c), 3(1)(d) and 3(1)(e) of the Act which will be referred to repeatedly in what follows.

These are the only means by which the Act intends that the majority shareholdings of all businesses should come to be held by indigenous Zimbabweans. The Memorandum to the Bill, explaining the provisions of the intended Act, also indicates that section 3 of the Act, the “indigenising provisions”, encompasses these transactions alone and no other. It also seems that the provisions are only intended to apply to companies, or possibly partnerships and the like, where a stake in the business can be expressed as a share or percentage of the concern. These provisions, however, mean that there is a crucial distinction between extant non-indigenous businesses and new investments. The Act cannot, and does not, apply to the former, unless there is a transaction involving the stock of the enterprise. The Act can, however, and does, apply to most new investments in the country.

**The Broader Ambit of the Regulations**

Notwithstanding the fact that the Act limits indigenisation to these specific share transactions, in 2010, the Minister then charged with the responsibility for the Act, Saviour Kasukuwere, made Regulations:

“framed with the general objective that every business of or above the prescribed value threshold must...dispose of a controlling interest of not less than fifty-one per centum of the shares or interests therein to indigenous Zimbabweans”.

In so doing the Minister no doubt placed reliance upon the unwisely drafted section 3(1)(a) of the Act which states the purpose of the other provisions of the Act as being “to secure that at least fifty-one per centum of the shares of every public company and any other business shall be owned by indigenous Zimbabweans.” It was not prudent to place the policy motivating subsequent sections of

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17 The memorandum explains clause 3 as follows: Clause 3 outlines the objectives and measures that the Government will put in place in order to ensure that its goals and policies in pursuance of indigenisation will be met. The clause sets out mandatory indigenous shareholding thresholds of 51% in every business that is being transferred, merged, restructured, unbundled or demerged and in any new investments of a prescribed value. Such transactions must be referred to the Minister for approval, and any transaction that fails to meet the required minimum shareholding percentage will not be approved. The Minister will however exercise his or her discretion and prescribe a lesser percentage depending on the circumstances of each case subject to a set the time-frame within which the 51% share or controlling interest must eventually be attained.

18 This latter possibility arises from definition of a controlling interest, which the Act contemplates may be held other than in the form of shares in a company. The main thrust of the Act is clearly in regard to shareholdings in a company, however.
the Act as a section itself in the legislation.\(^9\) This led the Minister to believe that he could now make the necessary law to give effect to the policy, rather than be confined to making regulations to give effect to the laws already made by Parliament and which appeared in the Act. If the manner in which the Minister interpreted section 3(1)(a) were correct – that he could make law to give effect to policy – this would suggest the delegation of Parliament’s primary law-making power to the Minister, which is not permitted by Zimbabwe’s Constitution.\(^20\) As will be seen, where the Act specifically refers to the Minister’s Regulatory powers in the Act, it confines the power to the four share transactions referred to in subsections 3(1)(b), 3(1)(c), 3(1)(d) and 3(1) (e). It is through these transactions that the Act intended the policy set out in 3(1)(a) to be fulfilled. However, on the basis of the general policy statement of section 3(1)(a), and on this basis alone, the Minister made regulations which ignored the need for a share transaction to take place before the Act applied. The fact that the Act did not apply to extant companies, unless the share transactions referred to in the first three subsections cited above took place, was ignored.

Mr. Kasukuwere thus decided that he had the power to compel every business to dispose of shares they do not possess, so that indigenous Zimbabweans held the majority of the equity in every business in Zimbabwe. This was not legally possible, and thus the solution was to require that every non-indigenous company (when called upon to do so) was to submit an indigenisation plan to the Minister describing how it intended to accomplish this feat. So the actual law is not the compulsory disposal of shares as frequently and wrongly stated, but the submission of indigenisation plans.\(^21\) Such submission\(^22\) is sufficient for compliance with the Regulations and thus, if the Regulations were valid in this aspect (which is highly unlikely), the Act.

### The Ensuing Chaos

As with the “Zimbabwe is under unlawful sanctions” mantra, repetition turned the notion that every non-indigenous company in Zimbabwe had to dispose of 51% of its shares to black Zimbabweans into an established truth. The fact that no section of any legislation could ever be sensibly cited in support of the claim did not seem to concern anyone, including, surprisingly, several lawyers.\(^23\)

However, on the back of this exposition of “the law”, a further flurry of invalid Regulations and General Notices followed.\(^24\) More importantly, since the misconception of the law held by the Minister of Indigenisation was left unchallenged, it became “the law” as a matter of practice and was absorbed into policy by various government departments. Thus the Zimbabwe Investment Authority website advises would-be investors that no investment licences and no work permits for

\(^{19}\) This should rather have appeared as the Memorandum to the Bill or in the Preamble to the Act. Unfortunately the standard of drafting at the Attorney-General’s office has deteriorated markedly since 2000.

\(^{20}\) Section 134(a).

\(^{21}\) See D. Matyszak, Madness and Indigenisation: a History of Insanity in the Age of Lawlessness (“Lawlessness and Indigenisation”) RAU, August 2014.

\(^{22}\) The submission is not an “application” as wrongly stated by Minister Zhuwao in paragraph 34 of the Notice.

\(^{23}\) See as a recent example, Alex Magaisa, The Trouble with Zimbabwe’s Indigenisation Policy available at [www.alexmagaisa.com](http://www.alexmagaisa.com).

\(^{24}\) The most egregious of these, in a heavily contested field, probably being G.N 114 of 2011.
ex-patriate employees will be issued unless a certificate of compliance (with the misconception of the law) has been issued by the Ministry Youth, Indigenisation and Economic Empowerment.25

Although the notion of compelling the change in the shareholding of extant non-indigenous companies in Zimbabwe in the manner stated is legally unenforceable and impossible, new investments in Zimbabwe are unlikely to take place without a share issue or transaction taking place - for example, through the establishment of a company to act as an investment vehicle, or the equivalent in the form of a joint venture. These share transactions do fall within the ambit of the Act and may feasibly be subject to regulation. Faced with the prospect of investing without a majority shareholding, and thus control of the investment, and observing the Zimbabwe government’s attempts to enforce the legally unenforceable against extant companies,26 most investors could find no reason to enter Zimbabwe and have stayed resolutely away.

Until the elections of 2013 were done and dusted, the ZANU PF government was anything but concerned about the dearth of FDI. Indigenisation became the “centerpiece” of ZANU PF’s elections strategy.27 ZANU PF’s Election Manifesto revealed the leadership’s opinion of the credulousness of their constituents, by cynically claiming that the acquisition of 51% of the shares of all foreign companies (estimated to worth a combined 14 billion) would result in 7.3 billion dollars landing in the hands of Zimbabweans, leading to massive national development projects and the creation of 2.3 million jobs.28

The post-election hangover revealed the depth of the hole ZANU PF had dug for itself through this claim. Having made such a brouhaha about indigenisation and claimed that this would determine economic planning, it could not abandon the policy without considerable political cost and embarrassment, yet to carry on in the same vein, meant the Zimbabwe’s economic trajectory would continue its downward spiral. Since the elections, ZANU PF has thus been divided between those who wish to stop, and those who wish to continue, digging. The result has been a series of contradictory policy announcements by the President and various Ministers.

Immediately after the 2013 elections, government signalled that there would be no change to the indigenisation policy, though the new Minister clearly indicated that he would not follow the hawkish pre-election policies of his predecessor, stating that he regarded indigenous empowerment as best achieved through greater employment.29

However, by April, 2014, President Mugabe believed that he had found the solution to attracting FDI without appearing to “climb down”30 and change the indigenisation laws on which the Party’s

25 References in what follows are to the Ministry or Minister of Indigenisation for the sake of brevity.
26 See “Lawlessness and Indigenisation” for an account of this.
27 A fact cited in paragraph 9 of the General Notice.
28 Pages 12 and 13 of ZANU PF’s Election Manifesto for 2013 entitled “Team ZANU PF 2013”.
29 The Minister stated: “My emphasis is not on indigenisation. I want you to understand that indigenisation is only a small part of the programme. The whole programme is about wealth creation, it is about employment, about Zimbabweans owning, running and creating their own companies. How do we do that, we do that by skills training.” ‘Mining Companies Must Play Ball’ The Herald 15.03.14.
30 When the Sunday Mail published an article suggesting a “climb down” by Government, The Herald immediately published several articles denying that this was the case – see Policy Review Not a Climb Down The Herald 27.05.14.
election manifesto had been based. What was to change was not the law, but everyone’s perception of it. Mugabe stated that ZANU PF had never, claimed 51% ownership of all foreign businesses operating or wishing to set up in Zimbabwe.

“Now in implementing the indigenisation programme, there has been some confusion. We have said where big companies have been established mainly on the basis of our natural resources, in mining, in agriculture, manufacturing, we demand that Zimbabweans — either through the Government or through our people — should have 51 per cent or not less than 51 percent. But if a company is established and is getting raw materials from outside and the raw materials are not Zimbabwean, take the case of aluminium, we don’t have raw materials for it; if the raw materials come from Tanzania, which has it and if a company establishes itself here in Willowvale, we cannot demand 51 percent. You can negotiate with the company in the usual way what percentage we should have and it’s up to the company and yourselves establishing the percentages respectively you should share. But we cannot demand 51 percent (where) we don’t have materials. These materials are coming from outside and the machines are also coming from outside and we have no basis on which we can demand 51 percent except to say the locality of the company is ours.’’

This perception of indigenisation was eagerly taken up by Finance Minister Patrick Chinamasa. The theme was now that the policy was not “cast in stone” and it was erroneous to believe that there was a “one-size-fits-all approach.” Chinamasa, thus in May, 2014, following an article in the Sunday Mail on the subject, advised Parliament that Cabinet was to “clarify” the Indigenisation Act and that Cabinet had identified a “Production Sharing Model (PSM) and the Joint Empowerment Investment Model (JEIM) as the two vehicles through which the indigenisation policy would now be implemented.”

Although the Minister of Indigenisation refuted the claim that there would be any such changes to the Act, his statements a few months later echoed those of Mugabe:

On non-natural resources – assuming an investor wants to set up a hydro-electric plant costing billions of dollars and the law says 51%, we look at the impact of the project and that it is going to empower the country in a big way and we do not become worried about the 51%. All I am saying is that there is no one-size-fits-all in application of the indigenisation law.

The attempt to change the perception of the law failed. The ZANU PF election manifesto had stated unequivocally:

32 Empowerment Policies Flexible fn immediately above.
33 Per an address by Patrick Chinamasa at the National Economic Consultative Forum 23.04.14.
34 Government in Major Climb Down 25.05.14.
35 Chinamasa on Indigenisation The Herald 29.05.14.
36 Indigenisation Law not Cast in Stone: Nhema Newsday 29.08.14
The main objective of this [indigenisation] law as enshrined in Section 3 of the Act is “to endeavour to secure at least 51 percent of the shares (ownership) of every public company and any other business shall be owned by indigenous Zimbabweans”. For the avoidance of any real or mischievous doubt, this law is very clear in its application and thus does not exempt any public company or any other business for any reason whatsoever.37

And:

Only the Indigenisation and People’s Empowerment reform programme can meet the goals of the people. There’s no other alternative. Therefore, Zanu PF will unapologetically intensify the implementation of this programme over the next five years in order to meet the goals of the people.38

When confronted with the suggestion that ZANU PF had thus retreated from the policies enunciated in its Election Manifesto, the response by ZANU PF officialdom was one of either obfuscation or denial, and an insistence that, in accordance with the Manifesto, every company was to be indigenised. This statement was sometimes made in the same breath as the statements that the degree of indigenisation could be negotiated.39

Throughout most of 2015, government officials continued to assert that the 51% was subject to negotiation in all sectors other than mining. Thus, a now new Minister of Indigenisation40 informed the state media:

“The only area where we do not entertain negotiations is mining, because as indigenous Zimbabweans, our contribution is the (mineral) resource. In other sectors, proposals are considered case by case. We are saying to the investors, if you come, your investment is safe, but we encourage you to partner locals.”41

Mugabe also later reiterated the stance he took in April 2014:

“What we say, therefore, is we who are owners of natural resources must at least have 51 percent of the earnings of that company and we allow that company 49 percent where it’s a natural resource. If the resources are brought from outside; you bring your gadgets, you want to manufacture gadgets which we did not have before, well that’s not covered in our 51-49 percent. That’s negotiated.”42

An opinion editorial in The Herald then queried why there should be any continued confusion over the issue, when President Mugabe had stated matters so unambiguously:

37 Election Manifesto p32.
38 Election Manifesto at p31.
39 See, as an exemplary instance, Exclusive Interview with Jonathan Moyo Sunday Mail 25.05.14.
40 Christopher Mushowe.
41 Zimbabwe Relaxes Empowerment Law to Boost Investment Southern Eye 31.08.15.
42 Our Resources are Not Negotiable: President The Herald 09.04.15.
Government policy on indigenisation is clear: the shareholding is 51/49 percent in favour of Zimbabweans on natural resources. In all other areas, foreigners and locals are allowed to negotiate acceptable terms and conditions.\textsuperscript{43}

Much of the problem, of course, lay in the fact that those enunciating government’s position on indigenisation saw nothing wrong in the fact that they alluded to Mugabe’s policy pronouncements in this regard, and not to the law. The paraphrase of the statements by Finance Minister Chinamasa and others on indigenisation made for the benefit of investors was essentially “never mind the law, come and talk to us and we turn will a blind-eye to the law and cut an attractive deal.”\textsuperscript{44}

Amendments made to the Indigenisation Act at the start of 2015 accorded responsibility for indigenisation requirements to the line Ministries of the enterprises concerned.\textsuperscript{45} Each deal would thus be dependent on the individual discretion of the particular Minister. That government would turn a blind-eye to the law was precisely what most investors did not want to hear. The complaint was already that Ministerial discretion around indigenisation opened the door to rent-seeking and corruption. Furthermore, investors were expected to forget that it was but a short while past that it was precisely supposed non-compliance with the law which was used to extort money from “recalcitrant” companies for the benefit of ZANU PF’s election war chest;\textsuperscript{46} that Mugabe had repeatedly threatened to use indigenisation laws to take over western foreign companies in Zimbabwe in retaliation for “sanctions;”\textsuperscript{47} and that agreements signed and sealed with foreign investors were shredded without qualm if suddenly and subsequently perceived to be unfavourable and/or out of kilter with indigenisation requirements.\textsuperscript{48}

Nonetheless, several intrepid entrepreneurs did make investments over this period. The share transactions pertaining to these investments did not comply with the Indigenisation Act and did not accord 51% of the resultant shareholding to indigenous Zimbabweans as required. The doves cited this as proof that Zimbabwe was investor friendly. However, indigenisation hawks such as the Affirmative Action Group put the investors under pressure, calling for some of the deals to be annulled as violating the Indigenisation Act – which they did.

Steps Backwards
This was the state of play when President Mugabe appointed the third Minister for Indigenisation in two years, his nephew Patrick Zhuwao. Zhuwao immediately revealed himself to be an indigenisation hawk intent on pursuing the kind of approach advanced by predecessor, Saviour

\textsuperscript{43} Be Wary of Throwing away the Baby with Bath Water \textit{The Herald} 06.11.15.
\textsuperscript{44} See Investment: Zim is the Place to be \textit{The Herald} 03.04.14 where Chinamasa is quoted as saying to potential investors: “We can sit down and talk if there are any challenges.”
\textsuperscript{45} Now section 3(7) of the Act.
\textsuperscript{46} See generally in this regard “Lawlessness and Indigenisation”.
\textsuperscript{47} Mugabe Threatens to Seize Foreign Firms over Sanctions \textit{Reuters} 20.07.08. Mugabe Threatens to Take over Western Companies \textit{Daily Monitor} 03.04.11.
\textsuperscript{48} The World Bank’s Doing Business in Zimbabwe index ranks Zimbabwe 166 out of 189 countries in regard to the enforcement of contracts.
\textsuperscript{49} Investor could Pull out over AAG Meddling - \textit{NewZimbabwe} 05.11.15, see also Observe Indigenisation Law or Risk Being Shut Out, Investors Told – \textit{Newsday} 06.11.15.
Kasukuwere. The stance appeared to take the country back to the rhetoric around indigenisation which had characterised the pre-election period of 2013. Unfortunately, within the context of ZANU PF factional politics, Patrick Zhuwao was known to be at loggerheads with the Minister of Finance, who had by then established himself as an indigenisation dove. Zhuwao chose to launch a scarcely veiled attack on Chinamasa, in his very first interview as Minister with state media. He hit out at fellow Ministers who advanced the notion that indigenisation was negotiable by stating that he would strictly apply (his interpretation of) the law. He claimed that FDI, so assiduously being sought by Chinamasa, was “jobless” investment and would not solve the country’s economic problems. Such “FDI investment” as Zimbabwe required, the Minister asserted, could come from Zimbabweans in the diaspora, who had, he believed, become quite wealthy since leaving the country.

Zhuwao’s strident approach to indigenisation concentrated on three aspects: the Youth Fund, a proposed empowerment levy, and ensuring that certain sectors of the economy were reserved exclusively for Zimbabweans. Authority for the last of these was assumed by virtue of section 9(3) of the Regulations which stipulates that:

Any investor requiring a licence in terms of the Zimbabwe Investment Authority Act [Chapter 14: 30] cannot invest in the sectors prescribed under the Third Schedule unless that investor gets approval ...

The provision is ultra vires the Act. There is nothing in the Act, which allows the Minister to make regulations reserving sectors of the economy for indigenous Zimbabweans. While the Zimbabwe Investment Authority Act does allow the responsible Minister to reserve sectors for “domestic investors”, no such regulations have been made. Minister Zhuwao proceeded to threaten any business in a reserved sector without a “compliance certificate” issued in terms of the Regulations, that any license that it required to operate would be revoked in terms of the provisions of section 9A(4)(4) of the Regulations:

the Minister may direct any licensing authority to revoke, suspend or cancel the operating licence of a business operating in contravention of subsection 3.

While the requirement to obtain compliance certificates is arguably ultra vires the Act, the power of the Minister to direct licensing authorities to revoke licences under these circumstances most certainly is. The provision presumably claims authority by virtue of section 5(2) of the Act, which allows the Minister to “issue a written order to the licensing authority of any non-compliant business ordering that the licensing authority concerned decline to renew the licence, registration or other authority to operate of the business concerned.” Yet non-compliant businesses are specifically and exclusively defined to mean those businesses which have undertaken one of the share transactions detailed in subsections 3(1)(b), (c), (d) or (e) without authority - as discussed

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50 Without, of course, mentioning that President Mugabe was a prime proponent of this approach.
51 “Indigenisation can Co-exist with FDI” The Herald 19.09.15.
52 Section 25(2)(b) of the Zimbabwe Investment Authority Act, Chapter 14:30.
53 The amendments to the Act effective from 01.01.15 inserted “compliance certificates” into the Act, but exclusively in regard to transactions referred to in subsections 3(1)(b), (c), (d) or (e) - see subsection 4(3) of the amended Act, which cross-references subsection (4)(2)(b) which pertains only to these subsections and associated transactions.
above - and no other. The reason why the Act limited the Minister’s power to direct the revocation of or refusal to renew a licence only to businesses which are non-compliant after the specified share transactions, is simply because the entire Act was only intended to apply to such transactions. The Minister has no power to direct the non-renewal or revocation of licences in sectors, which have (unlawfully) been declared reserved for indigenous Zimbabweans.

Perceptions that Zhuwao’s aggressive approach to indigenisation was linked to factionalism within ZANU PF were strengthened by the Minister’s intemperate outburst against youths on the Mnangagwa/Chinamasa side of the factional divide who approached him to complain about his policies, when he threateningly declared:

You have not been sent by war veterans but by the whites and I want to tell you right now that go back and tell them that I am coming for you with indigenisation. We are not going back with indigenisation and let the foreigners know that you cannot use our youths...So, foreign-owned companies please do not attempt to get involved in the politics of this country because we will know your foot prints and we will deal with you.”

Despite such attacks on Chinamasa and others, at the end of November, 2015, Chinamasa declared to Parliament that:

the Minister of Youth, Indigenisation and Economic Empowerment [Zhuwao] will be announcing and gazetting before Christmas the frameworks’ templates and procedures for implementing the indigenisation policies in a manner that both promotes investment and eliminates discretionary application of the law. Mr Speaker Sir, such measures will contribute immensely towards the ease of doing business in the country, and will render the services sector of our economy conducive for foreign direct investment.”

The “Clarificatory” Framework
Remarkably, although Chinamasa stated that the framework was to be gazetted by Zhuwao, on the 24th December, 2015, a General Notice entitled “Frameworks, Procedures and Guidelines for Implementing the Indigenisation and Economic Empowerment Act” was published. While it was gazetted under the name of Chinamasa, the Notice nonetheless repeated that it was the Minister of Youth Indigenisation and Economic Empowerment who had been mandated to “simply and clarify the guidelines and processes for complying with the country’s Indigenisation and Empowerment laws”. Chinamasa’s Notice purported to be a framework “agreed amongst Minister of Youth Indigenisation and Economic Empowerment, the Minister of Finance and Economic Development

54 There is no other logical reason as to why, if the Act were to apply to businesses generally, as has been claimed by successive Ministers, that the power should be restricted to this limited group.
55 Zhuwao Threatens Seizure of Foreign Companies, Accuses them on (sic) Meddling in Local Politics NewZimbabwe.com 04.11.15.
56 Quoted in Government Backtracks on Indigenisation The Zimbabwe Independent 27.11.15.
57 G.N. 394A of 2015.
58 Paragraph 1 of the Notice.
and the Governor of the Reserve Bank of Zimbabwe”. No explanation was proffered as to why the Notice appeared under Chinamasa’s name, given that Minister Zhuwao had been tasked with developing and gazetting the Framework, and given that the Act under which the General Notice was published, is administered by Zhuwao. 59 Zhuwao responded immediately, convening a press conference on Christmas Day where he stated that, despite Chinamasa’s Notice, businesses were still “required to comply with the law”. He further maintained that Chinamasa’s Notice had not been agreed by Cabinet and that it was “treacherous” for Chinamasa to have published the Notice in Mugabe’s absence. 60 Significantly, Zhuwao made no mention of any aspect of the Chinamasa’s General Notice with which he disagreed or which he believed changed the government’s indigenisation policy. The damage had, however, already been done. The deleterious effect on investment of discord in government over indigenisation had been bemoaned a year previously. 61 The spat made it clear that little had been done to address the issue. 62

By way of damage control, Chinamasa and Zhuwao jointly addressed a press conference on 4th January, 2016, at which they declared that they had agreed on an Indigenisation Framework together, that Chinamasa’s Notice would be withdrawn and a new framework gazetted – which it was, on 8th January, 2016.

Although the press initially presented these events as further evidence of policy discord, there was, in fact, very little difference between Zhuwao’s General Notice and that of Chinamasa. Most of the paragraphs issued by Chinamasa are repeated verbatim, or with a little editing and rearrangement by Zhuwao. The substance remains largely the same, though several proposals are expanded and more detail given. 65 However, the withdrawal of one General Notice and its replacement by another in such a short space of time, could not prevent the impression being created that, far from government’s policy on indigenisation being firm and unequivocal as was intended, it remained fickle and ambiguous. This unfortunate impression is compounded by the fact that both Notices continue and perpetuate the legislative chaos that has characterised Zimbabwe’s indigenisation laws from the outset, as the following analysis indicates.

**Conceptual problems**

The (final?) “Framework, Procedures and Guidelines for Implementing the Indigenisation and economic Empowerment Act” is marked by several jurisprudentially anomalous features. It is obscure as to whether the Notice intends to merely clarify existing provisions or introduce new

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59 This position is not affected by the amendments to the Act allowing line Ministers to govern certain aspects of the Regulations.

60 Mugabe being absent on his regular end of year leave. Zhuwao Says no Changes to Investment Law Deadline, Dismisses ‘treacherous Chinamasa’ NewZimbabwe 25.12.15.

61 Indigenisation Discord Puts Investors off NewZimbabwe 01.07.14; cf Indigenisation Discord Ruinous The Zimbabwe Independent 08.01.16.

62 Indigenisation Rows Unhelpful, Oz Envoy NewZimbabwe 14.01.16.

63 Zhuwao, Chinamasa Agree on Indigenisation Daily News 05.01.16.

64 The most important substantive difference is that Zhuwao appears to revert to a one year period for compliance with the supposed 51% required, where Chinamasa had proposed five years.

65 Chinamasa’s Notice however, specifically quotes point 5 of Mugabe’s “10 point plan” for the economy “Encouraging Private Sector Investment”. Zhuwao, while referring to the 10 Point Plan as a whole, redacts any reference to foreign investment.
ones; it is further obscure in this area whether what is set out are merely proposals or substantive law. Where it purports to be the latter, it repeats the mistake of previous General Notices issued by the Ministry. A General Notice cannot be used to make substantive law or to amend regulations – it may only set the parameters required by previously made laws. Furthermore, the General Notice purports to derive its authority in several paragraphs, not solely from the Act and Regulations as it ought, but from policy pronouncements by the President, which are cited extensively in the Notice.

While there are no significant changes to the extant “law” (albeit that such laws are of dubious legality), there is a significant change in emphasis in two areas – one in relation to the manner in which businesses are required to indigenise, the other in relation to an empowerment levy. The first invokes a part of the Act and Regulations already in place relating to empowerment credits, which have been ignored by successive Ministers to date, the second proposes the introduction of an empowerment levy. The suggested mode of implementation of both is legally defective.

**Less than 51%?**

The Framework is at pains to try to reconcile Mugabe’s policy pronouncements (some of which are quoted in the Notice) with the law, and, in particular, the claim that the 51% equity threshold is “negotiable”, not cast in stone and is flexible in all areas except mining. Unhappily, contrary to Mugabe’s assertions in this regard, the Act does not allow for such flexibility and is, in mosaic fashion, cast in stone. The manner in which the harmonisation is attempted is by reference to section 3(5) of the Act, set out in paragraph 20 of the Notice:

> The Line Minister may prescribe that a lesser share than fifty-one percent or a lesser interest than a controlling interest may be acquired by indigenous Zimbabweans in any business in terms of subsections [3](1)(b)(iii), (1)(c)(i), (1)(d) and (e) in order to achieve compliance with those provisions, but in so doing he or she shall prescribe the general maximum timeframe within which the fifty-one percent or the controlling interest shall be attained.°67

This provision in the Act purported to justify subsections 5(4)(a) and (b) of the Regulations which require the Minister to prescribe a lesser share than the 51% and the timeframe over which it could be held for all sectors of the economy, but adds a further subsection 5(4)(c) providing in so doing the Minister is obliged to gazette:

> what weighting (expressed as a fixed percentage that may be added towards the fulfilment of the minimum indigenisation and empowerment quota) to assign to ... socially and economically desirable objectives in favour of a business operating in a specified sector or subsector of the economy.

The Regulations, initially required the Minister, on the basis of information gathered, to gazette the lesser percentage, the timeframe and the socially and economically desirable objectives within 12 months of the effective date of the Regulations. This was not done. The Regulations were then

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66 See for example, G.N.114 of 2011.
67 Of course, at no time did President Mugabe and others suggest that the negotiated share of less than 51% would be for a limited period only, but the attempted reconciliation seems to expect one to overlook this obvious anomaly.
amended to require the Minister to do this “as soon as practicable”. There was no compliance by the Minister with his own regulations in this regard either. Instead, in 2011 and 2012, the Minister issued General Notices providing time limits within which various sectors were required to relinquish a share greater or equivalent to the 51%. No weightings for socially and economically desirable objectives were gazetted, as was mandatory, rendering all the Notices defective on this account alone. When businesses preparing indigenisation plans enquired of Ministry “Compliance Officers” as to what weighting they could accord to their socially and economically desirable activities and corporate responsibility plans, they were warned not to be “confrontational”.

The Framework, six years after the Regulations came into being, now sets out, for the first time, the required weightings for socially and economically desirable objectives. Minister Chinamasa’s notice implied that a five year timeframe would be allowed to achieve the required 51% which incorporated these weightings, Minister Zhuwao, by citing the previously issued (albeit technically invalid) General Notices specifying “lesser” percentages in his Notice seems to suggest that the shorter timeframe of one year for most sectors is still to apply.

There are two legal problems with the Notice in this regard. The first is that authority to set these parameters now lies with the line Ministers for each sector of the economy and not with Minister Zhuwao (or Chinamasa), but more importantly, and central to the position presented in this paper, the careful reader will have noted that section 5(4) of the Regulations, through which the lesser share and weightings are determined, must fall within the authority to do so provided for in the Act. Although the relevant section of the Act is cited in the Notice, the Minister ignores the fact, that the section is specifically limited to, and thus may only have application to, the share transactions referred to in the what should now be familiar subsections 3(1)(b)(, (1)(c), (1)(d) and (e). In other words, it is only in the case of these transactions that the Minister may allow indigenous Zimbabwe’s to hold a lesser share than 51% for a limited period in an enterprise after one of the specified share transactions has taken place. The Regulations proceed as if this may be done for every business in Zimbabwe, and Minister Zhuwao continues the myth, either through a failure to consider as to what the subsections cited in the section on which he relies refer or in the hope that no one else will. As noted, the reason why the section allows a lesser holding for a limited period to be directed by the Minister only in relation to these share transactions is simply because the Act was only intended to apply to such transactions. The attempt to reconcile Mugabe’s claim that the 51% is negotiable by reference to this provision of the Act, omits mention that the Act allows a lesser percentage than 51% for a limited period only.

**The Indigenisation Levy**

Minister Zhuwao’s proposal for an indigenisation levy is similarly afflicted. The Act does not tie the proposed levy to levels of indigenisation. The intention of section 17 is simply to allow an impost or surcharge (such as that imposed for rural electrification, for example) to be charged against all business, indigenous or not, to facilitate indigenisation and empowerment generally. The

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68 By SI 116 of 2010.
69 General Notice 459 of 2011; General Notice 280 of 2012
70 See “Lawlessness and Indigenisation”.
71 See Paragraph 18 of the Notice.
Notice, however, seeks to tie the quantum of the levy to the degree of indigenisation. The degree of indigenisation will be adjudged on the basis of compliance with the misstatement of the law by successive indigenisation Ministers, and, in particular, adjudged in regard to all businesses, using the weightings as a means to determine the degree of compliance. Yet the use of weightings for compliance is only permissible in relation to business, which have undergone specified share transactions. However, this means of calculating the levy, the Notice advises, will not be allowed for (the unlawfully designated) “reserved sectors” in the economy, where the assessment will be on the basis of equity only. However, the calculation of the degree of compliance on the basis of weightings for businesses in other sectors, which will determine the quantum of the empowerment levy payable, allows ample room for the discretion of line Ministers in assessing the amount – an open invitation for the corrupt.

Payment against compliance with the law.
In regard to all sectors, however, the Notice adopts a novel approach to the rule of law, maintaining that non-indigenous businesses may “decide” whether to comply with the law, or flout the law and pay an increased levy. Clearly regulations cannot enjoin a violation of the law, and the Indigenisation Act in particular, as is proposed. The correct approach would be to amend the law to provide that the result of the specified share transactions must either be the share structure required by the Act, or payment of a levy. The General Notice does not, it may be worth stating, impose any levy. Section 17 of the Act requires that the levy must be in the form of Regulations made with the approval of the Minister of Finance, a draft of which also has been approved by Parliament. If Regulations are in the form proposed by Minister Zhuwao, Parliament’s response will be of some interest.

The submission of Indigenisation Plans
The Notice also provides further “clarification” in relation to the submission of Indigenisation Plans, which is set to cause considerable confusion. Here Zhuwao purports to draw authority in this regard from a statement by President Mugabe made at ZANU PF’s National People’s Conference in December 2015:

...certainly, come January 2016, that stubbornness and resistance, we say, should end in 2015. 2016 we will not accept a company, which refuses and rejects our policy of indigenisation.

The quote is extracted from its context so that it is no longer obvious that Mugabe’s comments on this occasion pertained to the mining industry alone. However, on this basis Zhuwao requires, by way of paragraph 45 of the General Notice, that:

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72 Paragraph 43 of the General Notice.
73 Paragraph 38 of the General Notice.
74 Quoted in paragraph 10 of the General Notice.
75 See No Softening on Indigenisation The Herald 16.12.15. The fuller quote is: There are companies in this country that still refuse to accept our empowerment policy in the mining sector. Well, this is 2015 and, of course, we are in December, the end of year but certainly come January and it’s 2016, that stubbornness and resistance we say should end in 2015. In 2016, we will not accept a company etc.
All companies that have not yet submitted their Indigenisation Implementation Plans as required by the Act should submit their applications through ZIA by the new deadline of 31st March, 2016. [emphasis added]

Matters are not helped by the fact that, by way of Finance (No. 3) Act 2014, effective from the 1st January, 2015, the Minister of Finance took the unusual step of “amending” the Indigenisation Regulations by way of Statute.76 It its most probable that the changes were effected in this way rather than by more amending Regulations as is proper, on account of internal ZANU PF factional politics. The Act is that which devolved certain responsibilities under both the Act and the Regulations away from the Minister of Indigenisation to “line Ministers” mentioned earlier.77 The result is that some and the same aspects of Indigenisation (such as the issuance of compliance certificates) are now covered partly by the Regulations and partly by the Act. The amending statute also states that “for the avoidance of doubt” the Indigenisation Regulations nonetheless remain in force subject to such changes as may be required to bring them into compliance with the amendments.78

Of course, it is a requirement of the Act that there is compliance with regulations made thereunder. Hence when Minister Zhuwao requires Indigenisation Plans to be submitted in terms of the Act, what is referred to is, compliance with both the Act and the Regulations. Businesses are only required in terms of the Regulations to submit Indigenisation Plans when certain conditions have been met. The first step is that enterprises with a net asset value above $500 000 need to submit an IDG01 form to the line Minister, setting out the concern’s structure and value.79 There is no legal penalty for a failure to do so. Such a penalty only applies if a business has failed to complete an IDG01 form after a line Minister has called upon it to so do and served the specific business with the IDG01 form for this purpose.80 There is no legal requirement at this stage to submit an Indigenisation Plan. This requirement only arises after the line Minister has considered the IDG01 form and has decided that on account of the equity structure of the business and value, that an Indigenisation Plan is required and serves notice for the submission of this document. It is then an offence not to submit an Indigenisation Plan within the prescribed 30 days.

Accordingly, it is only businesses that have been served with such a notice by the line Minister that are “required by the Act” as Minister Zhuwao puts it, to submit Indigenisation Plans. The deadline is set at 30 days after receipt of service. Minister Zhuwao cannot reduce or extend this period to the 31st March 2016 by the Notice, as he purports to do.81

It is this process for the submission of Indigenisation Plans that the Minister ought to have set out in the Notice if it is clarity that were sought. However, the Ministry has never followed its own Regulations in this regard and the Notice proceeds to set out a further and different procedure. It is confusing in that it may be read, and invites that it be read, to mean that all businesses are required

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76 Technically the Statute cannot amend Regulations, but rather overrides the provisions therein where they are in conflict or supplements them where they are not.
77 Section what is now section 2(2) of the Indigenisation Act.
78 27(2) of Finance (No.3) Act.
79 Section 4 of the Regulations.
80 Subsection 4(4) of the Regulations.
81 Paragraph 34 of the Notice.
to submit Indigenisation Plans, which is not the case. Secondly, the Notice “clarifies” that the plans are to be submitted to the Zimbabwe Investment Authority (ZIA), in accord with Ministry practice, but not the Regulations. The Act and the Regulations make it clear that such documents are to be submitted to the line Minister. If they are submitted “through” ZIA, and ZIA does not transmit them to the line Minister timeously, what then happens with regard to the regulated time requirements for the receipt of the documents by the line Minister and the time limits set for the Minister to respond?

**Conclusion**

It is readily apparent that the legislative chaos and confusion around indigenisation arises from Regulations which do not conform to the Act, General Notices which do not conform to the Regulations, and actions by successive Ministers and their underlings which do not conform to all three. Zimbabwe’s indigenisation requirements appear to depend upon statements by the President, his choice of Indigenisation Minister (determined by ZANU PF’s factional politics and not the particular Minister’s approach to his or her portfolio), that particular Minister’s whims, and whether an election is pending. The “*Framework, Procedures and Guidelines for Implementing the Indigenisation and Economic Empowerment Act*” does nothing to attenuate the bedlam around indigenisation and further obfuscates an already obscure process. The only thing made apparent and clear is that the entire process remains chaotic. It certainly does not encourage private sector investment, remove Ministerial discretion in its implementation or provide clarity as to the requirements. The British Embassy lauded these ostensible intentions behind the Notice, tactfully refraining from commenting upon whether the intentions had been fulfilled other than, with true diplomacy, to state that, perhaps, “further elaboration of the law” appears to be required.\(^2\) A better approach than this probably comes to the mind of most.

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\(^2\)The Embassy’s statement is quoted in Zimbabwe’s Bid to Clarify Local Ownership Law Welcome, but Still not Clear Enough – UK *Zimbabwe Mail* 19.01.16.