Analysis of the Mines and Minerals Amendment Bill

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Introduction

The Ministry of Mines recently published The Minerals Amendment Bill following years of rigorous campaigning by civil society and research institutions who argued that the 1961 Mines and Minerals Act is now archaic and out of sync with the situation prevailing in the mining sector today. For instance when the Mines and Minerals Act (Ch 21:05) was drafted, artisanal mining was not common mainly because unemployment rates were very low – thanks to a thriving industry and agriculture and some minerals such as Platinum Group of Minerals (PGM) had not taken central stage. However, due to the unfavorable macro and micro economic realities, Zimbabwe has witnessed an exponential growth in artisanal mining and a boom in other mineral reserves being discovered.

There are also concerns that the mining sector has remained an enclave economy that has no linkages with other sectors of the economy such as agriculture and manufacturing which has resulted in the mining sector being a major source of undocumented illicit financial flows and capital flight from Zimbabwe. Displacements, violence, pollution and land grabbing are the footprints of extractivism in Zimbabwe. The current economic crisis afflicting Zimbabwe despite a significant rise in mining activities over the past decade is an indictment of the mining sector's failure to generate real economic value to Zimbabwe or failure by the responsible authorities to collect and charnel the revenue to foster sustainable development. Much of the blame lie in the 1961 Mines and Minerals Act that has become a cornucopia of contextual irrelevance.

There was however hope that a new law, or at the very least an amendment to the existing law would bring Zimbabwe's mineral sector up to speed with progressive mining legislations and best practices in the region and the world. However, contrary to public expectations, the draft minerals amendment bill seeks to undermine other state regulatory bodies and ministries by giving too much power to the Permanent Secretary in the Ministry of Mines and the Minister who, if the Bill is passed into law, will now usurp even the power of the Environmental Management Agency to regulate environmental impacts of mining. The Bill proposes a Mining Affairs Board that comprises of Ministry of Mines officials and presided over by the Permanent Secretary instead of creating an independent Board that has power to hold the Minister and the Secretary accountable.

Some may ask why, after so much years of advocacy and activism for a reform of the mining sector, did the Ministry of Mines come up with such a retrogressive amendment. The answer is in the lack of consultation. At no point did the Ministry of Mines seek the input of stakeholders in the mining sector during the drafting of the bill. Contents of the bill are exclusively those of the senior ministry officials and it is no coincidence the proposed amendments promote secrecy and 'sweetheart' appointments in the ministry whilst eliminating any checks and balances from related government ministries and departments such as the Environmental Management Agency. CNRG recommends that parliament rejects the proposed bill as it falls short of the very minimum standards of good corporate governance. There is need for an inclusive multi-stakeholder approach leading to the crafting of a law that ensures the mineral sector spearheads domestic resource mobilization and economic recovery of Zimbabwe.

To that end, the Centre for Natural Resource Governance (CNRG) has done a detailed analysis of the Mines and Minerals Amendment Bill.

Subverting the Power of the Environmental Management Agency and other Govt Ministries

Section 257B(1) declares 'the Minister (Of Mines) shall retain exclusive and original jurisdiction on mining in Zimbabwe', adding in subsection (2) that the Minister through his or her mining experts, shall determine- the best methods of mining to be conducted in any area including rivers, on surface and underground…'. This declaration is in defiance of and a direct response to Statutory Instrument 92 of 2014, Environmental Management (Control of Alluvial Mining) regulation, which bans alluvial mining in river beds, banks, wetlands and any land within 200 metres of naturally defined banks. The Minister of Mines must not be seen to be operating as if he is running a private enterprise or a separate republic where he 'retains exclusive and original jurisdiction' over the mining sector. It must be acknowledged that mining affects land tenure, water quality and availability, health, education, archeological sites etc. Government must not operate in silos and the Ministry of Mines needs to harmonize itself with other ministries.

Section 257B further declares that 'provided that any other body established in terms of the Environmental Management Act *[Chapter 20:27]* shall in consultation and agreement with the relevant officials from the Ministry responsible for mines, monitor that such recommended mining methods are being adhered to...' This section seeks to take away the independence of the Environmental Management Agency to independently monitor environmental violations by mining companies. It is tantamount to vowing 'my child cannot be disciplined by the man next door'. There is virtually no need for EMA to do its regulatory work 'in consultation and agreement with the relevant officials from the ministry responsible for mines'. Currently the Environmental Management Act is the only law that can override the Mines and Minerals Act and if this bill is passed into law it is a major setback to environmental progress Zimbabwe had registered over the years.

Section 257D also lays down new conditions for the protection of the environment and penalties for violations without any reference to the Environmental Management Act. This disregard of the powers of EMA must be rejected as the amendment seeks to create an Act that undermines other state institutions and regulatory agencies. The Ministry of Mines is an interested party in the mining sector and must not be allowed to regulate the environmental impacts of mining.

Section 391 A is incorrectly titled "Prohibition of riverbed mining' when in actual fact it sets aside Statutory Instrument 92 which banned riverbed mining:

> (3) The Government of Zimbabwe through the Ministry responsible for mines and minerals shall reserve the right to carry out mining operations on riverbeds.
>
> (4) For the better exercise of its right to mine along the riverbed the Ministry responsible for mines and minerals may enter into joint ventures with relevant companies and organizations.
>
> (5) The Government may also create special purpose vehicles for the efficient carrying out of its operations.

To sound less controversial, sub section 7 says 'The Environmental Management Agency shall ensure that all riverbed mining operations are done in accordance with the preferred standards outlined in Second Schedule and no damage or pollution is caused.' By creating new standards for environmental monitoring and instructing EMA to be guided accordingly, the Ministry of Mines is unlawfully annulling the Environmental Management Act which was specifically drafted to tackle environmental issues.

Further, asking EMA to monitor riverbed mining according to the so-called second schedule sounds duplicitous because statutory instrument 92 was introduced precisely because riverbed mining had been proven to be contributing to pollution. Pollution is pollution irrespective of who the polluter is – whether its government or private investor or joint venture. Asking EMA to regulate an activity that was outlawed 2 years ago is asking it to violate the law – and thereby disrespectful of EMA

Mining Affairs Board

Section 7 of the Principal Act is amended by the repealing of subsection 1 which states that the Board shall consist of the Secretary or, in his absence, the Deputy Secretary of the Ministry responsible for mines, who shall be the chairman. In the proposed Bill only the Secretary chairs the board and he has no deputy. The composition of the Mining Affairs Board in the amendment bill makes the Secretary susceptible to corruption and conflict of interest. The Secretary is the Chief Executive Officer of the Ministry who heads the secretariat and his presence on the Mining Affairs Board compromises the integrity of the board. Allowing him to chair the Mining Affairs Board, an entity that must oversee policy implementation by him/her and his/her secretariat, reflects bad corporate governance.

The board comprises of 'all Principal Directors in the Ministry; the Director of Geological Survey; and any other two Ministry officials as the Minister may deem expedient to be members of the Board; and six other members appointed by the Minister.' The inclusion of the Permanent secretary and ministry officials on the board is in violation of the National Code on Corporate Governance in Zimbabwe (ZIMCODE) which states that 'no Permanent Secretary should be a member of a public enterprise board' adding that 'ministers should appoint appropriately qualified and experienced officials from their ministries to sit through deliberations of the board in *an ex officio capacity* and report to the parent ministry the gist of the deliberations.' Thus appointing ministry officials to occupy substantive positions on the Board compromises the integrity of the Board and opens avenues for corruption and inefficiency.

There is need for a geographical and sectoral representation on the Board to include representatives from marginalized regions and groups such as the youths, women and disabled. Its however good that the Bill makes mention of the appointment of two female board members. However merely empowering the minister to appoint female board members does not translate to representation of women on the board since the appointees are appointed in their individual capacities. A selection criteria that allows the Ministry of Women's Affairs, Gender and Community Development or Parliamentary Portfolio Committee on Women's Affairs, Gender and Community Development to choose female representatives to the Board is more empowering.

Part 11 Section 6 (2) states that 'the Board shall, in addition, perform such other functions and duties as may from time to time be required of it by the Minister.' The Mining Affairs Board must serve to ensure there is good corporate governance by ministry officials, including the secretary and the minister. As such this Board ought to be independent of the Ministry of Mines and must be given powers and space to make professional decisions without undue influence of the Minister and the Secretary. Due to the centrality of mining to the Zimbabwean economy, board members must be people of high moral and ethical standards. Potential board members must be interviewed by the Parliamentary Portfolio Committee on Mines and Energy and related portfolio committees to ensure appointments are above board.

Artisanal Mining

Artisanal and Small Scale Mining is estimated to provide a direct livelihood to more than a million Zimbabweans and presumed to support several million dependents (PACT, 2015). However following the December 2013 policy proclamation by the Minister of Finance that artisanal mining was going to be decriminalized on 1 January 2014 and the subsequent policy announcement by the Reserve Bank of Zimbabwe's Fidelity Printers and Refineries that it was going to establish gold buying centres to cater for artisanal miners, the amendment was expected to legislate formalization of artisanal and small scale mining. The amendment is out of line with government efforts to ensure that artisanally mined gold is brought into the legitimate chain of custody.

The Bill is not anchored on the Africa Mining Vision (AMV) of whom Zimbabwe is a signatory, which states that the poverty cycle in the artisanal small scale mining sector 'is aggravated by legal and regulatory failures, including failure of governments to recognize and formalize the sub-sector. This means government will continue to wage war against more than one million of its citizens who have resorted to artisanal mining as a livelihood option due to the shrinking economy. The mining sector remains exclusive to the rural and urban poor.

Exploration, Quantification & Valuation of Minerals

The Mines and Minerals Bill does not clearly expand on the issues of exploration, quantification and valuation of minerals. A business approach is required if Zimbabwe is to realize anything substantial from its mineral endowment. As CNRG, we believe good contracts begin with exploration and quantification of the unmined asset before contract negotiation begins. Minerals have value and this value ought to be determined scientifically before contract negotiation. This will help government to declare the value of the mineral as its own contribution to equity capital. Companies must contribute to equity capital at the onset which is different from working capital. Contribution to equity capital will cushion the government in times of price volatility. Mining companies have a tendency of raising billions of dollars on the stock market by merely speculating the value of the unmined asset and when they decide to sell their concessions to another company they earn big and yet government is literally giving away minerals for free. Strategic minerals must be auctioned on stock exchanges after quantification and this will force prospective bidders to reveal the real value of the unmined asset as they compete with rivals for the mining rights. This argument was well articulated by former Deputy Prime Minister of Zimbabwe, professor Arthur Mutambara during the GNU.

Oversight Role of Parliament

There is no oversight role of parliament in contract negotiation and licensing and throughout the mineral value chain in the amendment. This is an anomaly because parliament ought to do its oversight role and ensure there is transparency and integrity in the manner in which contracts are negotiated and implemented. The 2013 report by the Parliamentary Portfolio Committee on Mines and Energy complained that 'during the four year period of the enquiry, the Committee observed with concern that Executive and its officers were generally not willing to be held accountable by Parliament.' Without increasing checks and balances within and outside the Ministry of Mines the mining sector is a lost cause for Zimbabwe. Corruption in awarding of mining contracts and marketing of Zimbabwe's minerals can only be dealt with by ensuring the Ministry of Mines, especially the Secretary and the Minister are held accountable by state institutions such as the Auditor general, Zimbabwe Revenue Authority, Ministry of Finance, Environmental Management Agency and Parliament. It is our concern that the Ministry of Mines is too autonomous to be held accountable by anyone and such power breeds corruption.

Competitive Bidding

The bill is silent on competitive bidding for known mineral resources. Part III Section 19 of the amendment states that where two applications are received on the same business day, the application which is first received on that business day shall be deemed to have priority over any other. This does not in any way promote competitive bidding. Government need a more robust and sophisticated method of identifying investors, especially where strategic minerals are involved.

Access to Information

The Bill is silent on the disclosure of Mining contracts. It is also silent on disclosing beneficial ownership of mining companies. It must be mandatory that all mining contracts be published in the mainstream state and private media for the benefit of the public. Silence on disclosure means lack of transparency. Minerals are public assets that belong to the people, hence nothing should be hidden from the public if everything is done for the public interest and good.

Whilst section 93 compels the Minister to publish an Exclusive Prospecting Licence in a Gazette at the licencee's cost, the same provision is not made in the actual mining licence which is of more public interest than the exploration licence. Whilst contract disclosure is not a panacea for corruption in the extractive sector, it can help citizens in understanding the nature of agreements that government is entering into on their behalf. Denying citizens this right is denying them their fundamental right to know how government is managing national resources.

Decentralization of Decision Making

One of the biggest challenges in the mining sector in Zimbabwe is centralization of decision making in Harare, sometimes in the hands of people who lack appropriate knowledge on the aspirations and priorities of the community in which the mining project will take place. Consequently it is those in the upper echelons of power who stand accused of enjoying the benefits of Zimbabwe's natural resources at the expense of the community and nation at large.

The Bill ought to have decentralized and democratized governance of the mining sector and give more power to local authorities to negotiate mining contracts since they are directly answerable to the communities and better positioned to negotiate deals that promote local development. Concentrating decision making at the Ministry of Mines Head Office is disempowering local authorities who must contend with the effects of mining for many years after the project has ended.

Benefit Sharing

Linked to the foregoing is benefit sharing. It is often said communities pay the cost of mining but do not have a share of the benefits. This is too evident throughout mining communities in Zimbabwe. However, in spite of so much advocacy on this matter, the amendment does not address the fundamental question of how local communities are going to benefit from extractive industries. Lessons from Marange, Mutoko, Hwange etc were not factored in – where mining communities are worse off economically when compared to communities with no natural resources. On the contrary the amendment seeks to empower the miner at the expense of the communities whose rights and privileges over their natural resources are not emphasized.

The Bill does not clearly spell out how companies should invest in local content development – this is important for local business development and for ensuring mining does not remain an enclave economy.

Free, Prior & Informed Consent

The principle of Free, Prior, informed consent has been overlooked. Much emphasis is placed on the satisfaction of the minister and not the views of the community. The bill assumes what is good for the minister is good for the community. There ought to be a social license obtained from the community before mining can take place. If a certain threshold of objections is reached, then the mining project must not proceed.

Gender Equity

Gender equity in the mining cycle has not been emphasized for proper affirmative action for women to participate and benefit from the sector. There ought to be a quota system forcing extractive industries to ensure a certain percentage of their employees are women. Mining Boards rarely have a strong women presence and this also has a direct effect on decision making by mining companies that tend to neglect issues of priority to women.

Transparency & Accountability

The amendment does not create new mechanisms and frameworks for transparency and accountability. There is need to come up with a local initiative for Transparency and accountability- how benefits and mineral revenue are shared fairly.

The world is shifting from reliance on corporate social responsibility to corporate accountability, which can be defined as the ability of those affected by a corporation (in this case mining entity to hold it to account for their operations. Corporate accountability espouses that financial performance should not be a company's only important goal and that shareholders are not the only people a company must be responsible to; stakeholders such as employees and community members also require accountability on issues such as social responsibility, sustainability and environmental performance. For the above to take place the concept, which must be a value within the mining sector, demand fundamental changes to the legal framework in which mining companies operate. To that effect, the Mines and Minerals Bill is silent on the mining companies' method of reporting on non-financial issues for example ESG reporting, which are tools that promote transparency and accountability.