

ADVERSE REPORT

OF THE

PARLIAMENTARY LEGAL COMMITTEE

ON

THE MINES AND MINERALS

AMENDMENT BILL [H.B. 10, 2022.]

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In pursuit of its Constitutional mandate as provided for in Section 152(3)(a) of the Constitution, the Parliamentary Legal Committee (hereinafter referred to as “the Committee”), on the 31st March to 1st of April and 3rd of May, 2023 met to consider the Mines and Minerals Amendment Bill [H.B. 10, 2022]. The Committee also engaged the Minister responsible for the Bill through a letter raising the constitutional violations as observed by the Committee. After deliberations, the Committee unanimously resolved that an adverse report be issued in respect of the Bill.

In compliance with Standing Order 32 (3), all the five (5) Members of the Committee who are qualified to practice in Zimbabwe as legal practitioners as envisaged by section 152(2) of the Constitution unanimously agreed (present were Honourables Samkange, Mataranyika, Mpame, Mavhunga and Ndebele) the Bill contained provisions that, if enacted would violate the Constitution. The adverse report was issued due to the following considerations:—

- 1. Clause 6 (4) (a) (ii)** provides that any person who wishes to mine a strategic mineral shall satisfy the Minister that he or she has the capacity to invest a sum equivalent to or at least one hundred million United States dollars. The clause gives the Minister the discretion to prescribe lesser or greater sums generally or in relation to a specific declaration of a strategic mineral. The benchmark of the one hundred million dollars is on the high side and appears to be a thumb suck figure such that the majority of ordinary citizens will be unable to mine strategic minerals. This will also affect local companies that cannot afford to invest that amount. This clause allows monopolisation of mining by foreign companies who are able to afford the stipulated figure. This clause is in violation of section 56 (3) of the Constitution which prohibits discrimination on the basis of economic status for one to acquire equal opportunities in mining. As a rule, laws should apply generally and not just to particular individuals or classes of people. The clause also defeats the national objectives set out in Chapter 2 of the Constitution in

particular section 13 which advocates for local communities to benefit from the resources in their areas and the empowerment of the Zimbabwean citizens through involving them in national development projects. It violates the principles of equity and inclusiveness by setting a figure that excludes other classes of the society on the basis of economic status.

In addition, the discretion of the Minister to increase or decrease the amount defeats the tenets of the rule of law principles that state that laws must be certain, objective and unambiguous. Laws passed by Parliament must leave no discretion to the persons who are to apply them as this gives room of abuse. Section 3 (b) of the Constitution states that Zimbabwe is founded on the principles of the rule of law.

- 2. Clauses 8, 9, 10, 11 and 12** are in violation of section 2 (h) and section 9 of the Constitution which advocate for legislation that develops efficiency, competence, accountability, transparency, personal integrity and financial probity in all institutions and agencies of government at every level and in every public institution. The Constitution provides that measures must be taken to expose, combat and eradicate all forms of corruption and abuse of power by those holding public offices. Clause 8 (3) (a) of the Bill states that a member appointed to the Board shall hold office for an indefinite period. This gives rise to the question of impartiality and fairness and creates a breeding ground for corruption and nepotism. It is good practice that positions on any Board are given a known fixed term in compliance with good governance principles. No office on any Board can be allowed to run in perpetuity if good governance is to be achieved and further more composition of the Board must be representative of all stakeholders that stand to be affected by the provisions of the Bill. The fact that members of the Board will be constituted largely by the members of the Ministry in charge of the Bill may promote inefficiency and corruption.

- 3. Clause 12** violates section 169 of the Constitution by making the Supreme Court a court of first instance instead of the High Court. The Supreme Court is the final

court of appeal in Zimbabwe except in matters over which the Constitutional Court has jurisdiction.

4. **Clause 35 (4)** is in violation of section 71(2) and (3) of the Constitution which provides for property rights and compensation for compulsory deprivation of land. This clause provides that if a landholder or Rural District Council withholds consent to a person seeking to exercise their rights under any exclusive prospecting licence, exclusive exploration licence or any special grant, he or she may not be a beneficial owner directly or indirectly by obtaining any mining right or title over the ground (surface rights) in respect of which consent was withheld for a period of 10 years.

This has a negative impact on the rights of landowner, the landholder or Rural District Council concerned should not be penalised for withholding consent. Both the landholder and the miner have the right to apply for mining title. The landowner should be offered first preference if the mineral is occurring on their land. This clause is also in violation of section 194(d) which provides that public administration in all tiers of government including institutions and agencies of the state and government-controlled entities and other public enterprises must be governed by the democratic values and principles enshrined in the constitution including the principle that services must be provided impartially, fairly, equitably and without bias. The majority of citizens expect to see equity between miner and the villager.

The land holder's rights and miners are equal, no right is superior to the other. It is recommended that consent of the land holder or occupier must be obtained prior to the application of the Exclusive Prospecting License hereinafter referred to as EPL as is the position in Kenya. The clause provides that an applicant makes an application to the Provincial Mining Director hereinafter referred to as PMD, the PMD does not have the appropriate capacity to determine the viability of the application. Therefore, it should be determined by the Board. In addition, there is no compensation given to the landowner who has agreed to prospect

considering the degradation of land that would have taken place. The Kenyan position should be considered as no right is superior to the other. It is important to balance the rights of the miner and the landowner.

5. **Clause 37** disadvantages the communities in that the villagers have to register their pastoral and arable land with the PMD yet it is the prerogative of the Lands Ministry to administer issues relating to land allocation and use. To require communities to register pastoral and arable land with the PMD will be affirming the notion that mining rights supersede farming or land rights. The PMD usurps the powers of the Minister of Lands, Agriculture, Fisheries, Water and Rural Development. This is in contravention of section 194(1)(g) of the Constitution which stipulates that institutions and agencies of government at all levels must cooperate with each other. It breeds inefficiency and creates conflicts amongst government ministries.

6. **Clause 59** stipulates that if the PMD suspects deception on the part of how many blocks exceed the number registered, he or she may cause a mining surveyor to survey the area in question. If it is true, the holder is to pay to the PMD for the number of the blocks outstanding. These powers must be exercised by the Board to curb the powers of the PMD. Throughout the Bill, the PMD has been given too many powers and responsibilities that may cause corruption and inefficiency. The fact that the PMD has to determine deception and at the same time receive money for outstanding blocks does not advance the principles of good governance as he may make biased determinations just to get money. Determination must be done by another person and not the PMD so as to promote transparency, accountability and fairness. This clause is in violation of section 3(2) (g) of the Constitution which provides for the principles of transparency, justice, accountability and responsiveness and section 9(1)(b) of the Constitution which obliges the state, institutions and all government agencies to put measures to expose, combat and eradicate all forms of corruption and

abuse of power by those holding political and public offices. Furthermore, section 194(1) (h) of the Constitution provides that public administration in all tiers of government including institutions and agencies of the state and government-controlled entities and other public enterprises must be governed by the democratic values and principles enshrined in the constitution including the principle that transparency must be fostered by providing the public with timely, accessible and accurate information. The provisions of the clause show that the office of the PMD is prone to abuse of power.

7. **Clause 72 (8) and Clause 111.** Clause 72(8) provides that there shall be no appeal against the grant or refusal by the board of an application for an authority to prospect or authority for more extensive prospecting operations. **Clause 111** also stipulates that there shall be no appeal against the Minister's decision. The tenets of the rule of law stipulate that all administrative decisions are subject to the jurisdiction of the courts. These clauses are in violation of section 68 of the Constitution which aptly provides for the right to administrative and advocates for administrative conduct that is impartial, substantively and procedurally fair and subject to review by a court or independent and impartial tribunal. The Board's and the Minister's decisions cannot be absolute in issues concerning dispute resolution. The principle of equality as a component of the rule of law states everyone is equal before the law and is equally entitled to be protected by the law.

In addition, Clause 72 (8) of the Bill is misplaced as it renders the whole clause inconsistent. Sub clause (7) refers to the Administrative Court dealing with the registration of an order for a granted application. Sub clause (9) also deals with the review of a decision of the Administrative Court by the Supreme Court. This renders sub clause (8) misplaced as it refers to appeals against the grant or refusal by the Board of an application under section 68 or 70 of the Bill.

Sub-clause (9) of clause 78 is unconstitutional as it gives the Supreme Court powers of reviews. The Supreme Court is the final court of appeal except in matters that fall under jurisdiction of the Constitutional Court.

8. Clause 130 and 131. Clause 130 provides for the cancellation of certificates of registration in respect of all mining locations situated in the area covered by the mining lease. This clause affects the rights of those that already had certificates of registration in areas covered by a mining lease. It violates section 71 (3) of the Constitution which provides that no person may be deprived of property unless certain conditions have been satisfied. The Constitution further requires any person acquiring property that affects the rights or interest of another person in property to give reasonable notice. This clause does not mention any notice being given as required by section 71(3) of the Constitution, the certificates are just deemed to have been cancelled. This also violates section 68(2) of the Constitution which state that any person whose rights, freedom, interest or legitimate expectation has been adversely affected by an administrative conduct be given reasons in writing. Section 11 of the Constitution stipulates that the State must take all practical measures to protect the fundamental rights and freedoms enshrined in Chapter 4 and to promote their full realisation and fulfilment. It is clear that all institutions of government must promote constitutional rights and their full realisation and this is not what is obtaining with clause 130 as holders of certificates of registration can have those certificates cancelled unilaterally.

Clause 131 prohibits any person from disputing the title of the lease holder to any ground covered by the lease. It creates potential conflict with those who had certificates of registration as it seems to suggest that a mining lease supersedes a registration certificate, taking into account clause 130 of the Bill which provides for the cancellation of certificates of registration in respect of all mining locations situated in the area covered by the mining lease. Those who had certificates for mining locations in an area covered by a mining lease should be accorded the

right to challenge the cancellation of their certificates in terms of section 68 of the Constitution. Section 68 (2) of the Constitution provides that any person whose right, freedom, interest or legitimate expectation has been adversely affected by administrative conduct has the right to be given promptly and in writing the reasons for the conduct.

9. Clause 246 provides for the definition of expropriated location. The definition of expropriated location must provide for the transfer of mining locations to the State and not the Minister. The land must be transferred to the State and not the Minister in his or her own name in accordance with section 72 (4) of the Constitution that vest all land ownership to the State. As it is the definition is in violation of section 72 (4) of the Constitution.

10. Clause 259(6) provides that in any criminal proceedings or disciplinary proceedings involving an official, the official bears the burden of proving on a balance of probabilities that he or she did not act in his or her interest to the detriment of his or her duties as an official of the Ministry. The provision is unconstitutional in that the burden of proof lies on the State and not the accused. Also, in criminal proceedings the burden of proof is beyond the reasonable doubt and not proof on balance of probabilities.

11. Clause 298 provides that any person who discovers any precious stones, shall within ten days give notice of such discovery failure of which they shall be guilty of an offence and liable to a fine not exceeding level 4, or to imprisonment for a period not exceeding three months, or both. The provision is unconstitutional as it criminalises failure to disclose discovery of any precious stones which violates section 11 of the Constitution which stipulates that the State must take all practical measures to protect the fundamental rights and freedoms enshrined in chapter 4 and to promote their full realisation and fulfillment. The clause can be seen to impose strict liability on non-disclosure of discovery of precious stones. It is trite that strict liability applies where the conduct of the offender creates danger to an individual or society. This is not the case with the offence being created by the

clause. Non-disclosure with no intention to derive a benefit from exploitation of that which has been discovered does not create a danger that warrants the imposition of criminal penalties.

In ***Chief Lesapo v North West Agricultural Bank 2000 (1) 409 (CC)*** the court held that it is a requirement of the rule of law that the exercise of public power by the executive or other State functionaries should not be arbitrary. Failure to disclose discovery of precious stones alone should not constitute a crime but if the person decides to act on the discovery for his or her own gain without disclosures then criminal penalties may be warranted. It should be noted that majority of citizens in areas within which precious stones occur are not knowledgeable on these precious stones hence one may be penalised for discovery of that which they do not know. This renders the criminalisation of non-disclosure arbitrary as there is lack of intention in the offence created. Establishing the *mens rea* of an offender is usually necessary to prove guilt in a criminal trial. The prosecution typically must prove beyond reasonable doubt that the defendant committed the offense with a culpable state of mind. The offence is ignoring the fact that in criminal prosecution intention (*mens rea*) is a necessary ingredient to prove one's guilt beyond reasonable doubt.

12. Drafting errors, omissions and non-existent clauses

The Committee failed to comprehensively scrutinise the Bill owing to non-existent clauses in the Bill text of clauses 137, 138, 139, and 329, drafting omissions in clauses 141, 153, 180, 181, 184, 185, 187, 189 and 190, drafting errors in clauses 167 (1), 175, 176, 178, 192, 233, 264, 295 and 303 and errors in cross referencing of clauses 64, 223, 251, 254 & 281 of the Bill.

Due to the aforesaid, the Committee resolved on a majority of 5:0 to issue an adverse report on the Bill.

Hon. J. T. Samukange

CHAIRMAN

PARLIAMENTARY LEGAL COMMITTEE