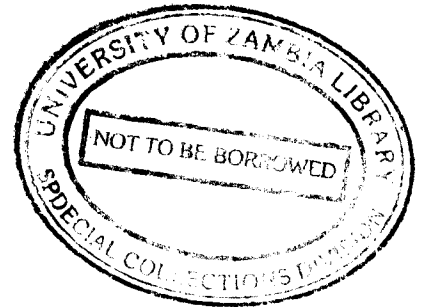


A CRITICAL ANALYSIS OF THE REGULATION OF
INVESTORS IN ZAMBIA. "WHAT ROLE DO IMMIGRATION
AUTHORITIES PLAY IN THE REGULATION OF
INVESTORS?"



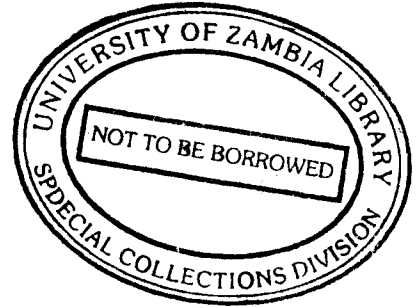
BY

ENOS CHIBOMBE

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2008

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A CRITICAL ANALYSIS OF THE REGULATION OF INVESTORS IN ZAMBIA.
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OF INVESTORS?"

BY

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2008

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OBLIGATORY ESSAY

Submitted in partial satisfaction of the requirements for the award of the Degree
of Bachelor of laws (LL.B)

University of Zambia


February, 2008

DECLARATION

I, Enos Chibombe, computer number 22100776 hereby declare that I am the author of this directed research paper entitled "A CRITICAL ANALYSIS OF THE REGULATION OF INVESTORS IN ZAMBIA. WHAT ROLE DO IMMIGRATION AUTHORITIES PLAY IN THE REGULATION OF INVESTORS?" And that it is a creation of my own ingenuity, due acknowledgement has been given where other scholars' works have been used or cited. I truly believe that this paper has not been presented in the Law School for any academic work.

I remain accountable for any shortcomings in the work.

Student's Name: ENOS CHIBOMBE

Signature: 

Dated this 6th day of February, 2008

DEDICATION

To my dear wife Doris, without whose vision this dream never would have become a reality.

ACKNOWLEDGEMENT

My heartfelt appreciation, love and gratitude to my wife Doris Chibombe, for her contribution to this entire research, for the purpose of contributing to the legal change in the Department of Immigration.

To all my children, you kept me writing, I also give a great debt of gratitude to dear, colleagues- Precious B. Mweemba and Bester M. Banda whose enthusiasm for the ideas of the manuscript did not make them blind to its deficiencies without their input the manuscript might never have made it into print. I am greatly indebted to Mr. FREDRICK MUDENDA, my Supervisor, for the red ink which kept me alive to study this research, valuable critique, for taking time to go through all the scripts submitted to him but also for paying attention to every detail there by giving the study substance and form.

My special thanks to my friends Gabriel, Lesa, Tentani Banda, Dickson Jere, Evans Sodala and all my classmates in the law faculty, for genuine relationship in the work of study and the moment we shared as colleagues. So to everyone of you who has not only stood with me, but also mean an integral and necessary part of this research, I give you my deepest and warmest heart felt thanks. Most of all thank you to the Lord Jesus, through whom everything is possible, God bless us all.

“He is before all things, and in him all things hold together” Col.1.7 New International Version”.

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CHAPTER ONE

1.1 INTRODUCTION

In this study an Investor shall be looked at as a foreigner who has come to invest in Zambia and not an Investor as perceived by the definition provided by the Zambia Development Agency Act No 11 of 2006. Which defines an Investor as any person natural or Juristic whether as a citizen of Zambia or not, investing in Zambia in accordance with the Act and includes a micro or small business enterprise and rural enterprise.

An Investor in this case is one who is a foreigner coming to invest in Zambia who is supposed to be regulated by the immigration authorities at the time of entering Zambia upto the time when he has acquired an employment permit and also in due course of his being on that status. The Immigration authorities exist by virtue of the Act that prescribes their appointments and the kind of powers they exercise on an investor while he is on the Zambian soil. The Immigration and Deportation Act Chapter 123 of the laws of Zambia whose purpose is to regulate the entry into and the remaining within Zambia of Immigrants as arrivals; to provide for the removal of criminals and other specified persons; and to make provisions for matters incidental to the foregoing. These investors are supposed to be regulated in a certain way so as to ensure that they abide by the conditions that are attached to the Self Employment permit which is the permit given to investors. For instance a Self Employment is issued for a specific sector of investment for example manufacturing sector an investor is supposed to ensure that he abides by

that condition so stated in the permit as failure to do so will amount to contravening the provision of that Act which requires that an investor varies his permit by including another category or additional investment by paying a certain fee applicable which application is supposed to be considered before an employment permit committee.

Furthermore regulation of Investors is done to ensure that only an Investor who meets a minimum investment threshold of upto US\$250,000 qualifies to be considered for Investor permit and which money should come from an offshore account or in form of capital equipment which should be properly cleared by the Zambia Revenue Authority. And if would be Investor does not meet the set minimum threshold then the Immigration Authorities reserves the right under the law to declare such a person as a prohibited immigrant and must be declared to leave Zambia.

Given the above situation it is therefore imperative that an Investor should be regulated with an approach that he is not seen to an enemy of those regulating him but as one who is going to add value to the economy of the country. Therefore the essence of this study is to establish the legal backing of the regulatory works of the immigration authorities on the Investors.

1.2 STATEMENT OF THE PROBLEM

The proposed study is intended to be a critical analysis of the regulation of Investors in Zambia and the role of immigration authorities play in the regulation of these Investors. The Immigration and Deportation Act Chapter 123 of the laws of Zambia confers in Sections 4 – 7 the appointment of the Chief Immigration officer

Section 5 deals with Delegation of powers of Chief immigration officer

Section 6 deals with Powers of arrests of Immigration Assistants.

Section 7 deals with Powers of search and the only time when the Act prescribes powers to regulate is in Section 31 which powers lies in the hands of the Minister of Home Affairs by Statutory Instrument, make regulations for the better carrying out of the provisions of the Act, which regulations ought to make provisions for among other things.

- (a) Anything which is to be or which may be prescribed under this Act.
- (b)
- (c) The fees to be paid for any permit.

Therefore, the study will endeavour to look at the regulatory powers of the Immigration authorities, the power of the Minister of Home Affairs under the

Immigration and Deportation Act and the extent of these powers in relation to the fixing of minimum Investment threshold from time to time more especially the recent ones where the minimum threshold was revised from US\$50,000 to US\$250,000.

Visa-vir the position of the Zambia Development Agency No. 11 of 2006 Section 65 (1) provides that notwithstanding the Immigration and Deportation Act Cap 123 an Investor who invests a minimum of two hundred and fifty thousand United States Dollars or equivalent in coverable currency and who employs a minimum of two hundred persons shall be entitled to a Self Employment or resident permit which Self Employment does not exist in the Immigration and Deportation Act Cap 123, furthermore, the regulation of Investors in some other Jurisdiction in particular TANZANIA and SOUTH AFRICA.

1.3 OBJECTIVE OF THE STUDY

The broad objective of this study is to critically analyses the regulation of Investors in Zambia and to establish the role that Immigration Authorities play in the regulation of the Investors.

1.4 SIGNIFICANCE AND RATIONALE OF STUDY

The study is important because it will greatly bring out the lacunas in the Immigration and Deportation Act more especially on the regulatory role of Investors and seize up the need for legal transformation to enable the policies to

conform to the law or transform the law to meet the requirements of the regulatory frame work necessary to regulate the Investors without fear of challenge from Investors who may take advantage of the lacunas. The study will make recommendations which will help strengthen the regulatory role of the Immigration authorities when it comes to dealing with foreigners in particular Investors, hence uphold the dignity and appreciate the authorities' role in regulating Investors as well as to bring harmony between the immigration regulatory roles to that of Zambia Development Agency.

1.5 LITERATURE REVIEW

Not so much research has been done with specific reference to the subject matter of the study that is the critical analysis of the regulation of Investors and the role that Immigration Authorities play in the regulation of Investors. Most of the studies that have been done, and comments that have been made in bulletins, scholarly writings, Dissertations have generally focused on investment in general and regulation of foreign investment.

1. **KALUBA GLORIA KAULONGOMBE** of the University of Zambia in the Year 2004 undertook the study on the "CRITICAL STUDY OF THE REGULATORY REGIME OR INVESTMENT IN ZAMBIA." This study revealed that various foreign investors have merely ravaged the economy, taken their root and left it almost for the dead, with emphasis

that private investment brought about national development as it was intended to.

2. **CHRISTOPHER MUMBA** of the University of Zambia in 2004 undertook a study on “THE ROLE OF THE LAW IN ATTRACTING FOREIGN INVESTMENT IN ZAMBIA.” He came to a conclusion that it was a well settled matter that Foreign Direct Investment (FDI) was the answer to the Zambia’s Economic Ills.

3. **UNITED NATIONS CONFERENCE** on Trade and Development in 2006 did a review of Investment in a document entitled “INVESTMENT POLICY REVIEW IN ZAMBIA – This review brought out that FDI contributed to the long-term policy objective of Zambia, the document intimated the need for Zambia to diversify its production and export base from mining to other products and services. On the lower side the review came to the conclusion that the performance of the *Zambian* private sector has been poor due largely to the high cost of capital and domestic inputs for local production.

4. **VICTOR CHIBULO MUSABULA** of the University of Zambia in 2004 undertook a study on “THE LEGAL EFFECTIVENESS OF THE EXPORT PROCESSING ZONE AS A MEANS OF ATTRACTING FOREIGN DIRECT INVESTMENTS INTO ZAMBIA.” The study

revealed that the export processing zone made for centuries made no impact as a means of attracting Foreign Direct Investment.

5. **MULENGA IVEN KUNDA** of University of Zambia in 2003 undertook a study on “THE ROLE OF THE LEGAL FACTOR IN REALISING THE BENEFITS OF FOREIGN INVESTMENT. This study revealed that the law alone is not enough when it comes to attracting foreign investment nor is it enough in realising the benefits there from.

Although a number of people and scholars have conducted various research studies on investment and investors, my focus is centered on the role of Immigration authorities in regulating Investors in the country. Thus, this study will look at the powers of the Immigration officers in terms of regulation, the extent of these regulatory powers and the legal backing required in the regulation of investors by these authorities, visa-vir other regulatory institutions.

1.6 **METHOLODY**

The methodology for the proposed study will be essentially in two folds.

- (i) The first being desk research which will similarly involve examination of published and unpublished works on regulation of investors.

(ii) The second method will be semi structured interviews with people or experts such as

- Some selected staff from Immigration Department.
- Officers from the Zambia Development Agency.
- Any other re-known scholar in the field of investment.

1.7 SPECIFIC OBJECTIVES

This research is an analysis of the regulation of the investors and the role that Immigration authorities play in the regulation of investors. There contention seems to be that there is no so much legal frame work that allows the Immigration authority to cast the net so wider when it comes to regulating these foreign Investors, hence rendering their regulation inconsistent and contrary to the provision of the Act. The study will progress as follows:-

CHAPTER ONE : INTRODUCTION

- Who is an Immigration Officer and his powers.
- The powers of the Minister under the Immigration and Deportation Act.

CHAPTER TWO: An Investor and how he is regulated in Zambia.

- The legal frame work regulating the Investors.
- From the Zambia Development Agency Point of view.

CHAPTER THREE: Regulation of Foreign Investor from Immigration Perspective.

- Company formation, categories/ sector
- Effects of the regulation of investors in general.
- The negative effects of regulating them.
- Positive effects of regulating them.

CHAPTER FOUR: - Comparative analysis

- A comparative study of the regulation of Investors in other jurisdictions e.g. Tanzania and South Africa.

CHAPTER FIVE:

- RECOMMENDATION
- CONCLUSION

1.8 **BACKGROUND**

The regulation of foreign investors like is the case elsewhere in the world cardinal in Zambia as well. These investors in Zambia are regulated by the Immigration and Deportation Act Cap. 123 of the Laws of Zambia and the Zambia Development Agency Act No. 11 of 2006.

An investor according to the Zambia Development Agency Act is any person, natural or juristic, whether a citizen of Zambia or not, investing in Zambia in accordance with this Act, and includes a micro or small business enterprise and rural business enterprise, section 3 of the Zambia Development Act refers. For the purpose of this research we are looking at foreign investor as one coming to invest in Zambia whom the immigration authorities so regulate at the time of entering Zambia until he has been granted with the permanent residence, issued with the business permit called a Self Employment, a permit which is given to foreign investors to enable them conduct their business in Zambia legally. The immigration and Deportation Act Chapter 123 of the Laws of Zambia, prescribes the appointment of immigration officers. The Immigration and Deportation Act's principle function, as per preamble, is to regulate the entry into and the remaining within Zambia of Immigrants and visitors; to provide for the removal of criminals and other specified persons; and to make provisions for matters incidental to the foregoing.¹

¹ Cap. 123 of the Laws of Zambia

Foreign investors are supposed to be regulated in a certain way so as to ensure that they abide by the conditions that are attached to the Self Employment Permit, which is the only permit given to investors. When a Self Employment is issued for a specific sector of investment, the investor ought to abide by the conditions so stated on that permit as failure to observe these conditions will amount to contravening the provision of the Act which requires that an investor varies his permit by including another category or additional investment by paying a certain fee applicable, which application has to be tabled before a competent committee for consideration.

Furthermore, regulation of investors is done to ensure that only an investor who meets a minimum investment threshold of up to U\$250,000 qualifies to be considered for an investor permit,² and this money should have come from an offshore account or in form of machinery or equipment which should be properly cleared by the Zambia Revenue Authority officers. And if the foreign investor does not meet the required minimum threshold as provided by law, the Immigration Authorities reserves the right under sec. 23(1) of the Immigration and Deportation Act to declare such a person as a prohibited immigrant³ and is required to leave Zambia.

² Act No. 11 of 2006 – Sec. 65(1).

³ Cap. 123 of the Laws of Zambia, Sec. 23(1).

1.9 WHO IS AN IMMIGRATION OFFICER AND HIS POWERS

An immigration officer is a public officer who is stationed at every point of entry into Zambia to check and monitor people who are arriving and leaving Zambia, these officers check the landing cards of people making entry and establish their purpose of visit and also the length of stay.

When an officer decides to allow entry to the country they check and endorse passports and any documents relating to working in this country, and ensure that any other forms that may be required are completed.

An immigration officer in Zambia is one who is appointed in accordance with Section 4(1) of the Immigration and Deportation Act. The said section states;

“There shall be appointed as public officers a Chief Immigration Officer and such Immigration Officers and Immigration Assistants as shall be necessary for the proper administration of this Act.”⁴

An immigration officer performs a lot of functions as provided by the Act in part 3 of the Immigration and Deportation Act. He deals with the examination of persons entering and leaving Zambia and an investor is no exception to this process, every entrant according to section 9 of the Act should appear before an immigration officer so as to ascertain his identity, object of his entry into Zambia’, nature of the claim to remain in Zambia and whether he is a prohibited immigrant.

⁴ Chapter 123 of the Laws, Sec. 4(1).

An immigration officer has powers over a foreign investor which powers are legally provided by the Act in Section 5(1), where the Chief Immigration Officer may, in writing and subject to such restrictions, reservations, exceptions and conditions as he may think fit, delegate to an immigration officer all or any of the powers conferred upon him by or under this Act.⁵ And also the powers of arrest of Immigration Assistants as provided by section 6(1) of the Act where an Immigration Assistants may without warrant arrest any person whom he reasonably suspects to be a prohibited immigrant or to have contravened or about to contravene any provision of the Act. The above powers are the powers that immigration authorities in most cases will use when it comes to regulating an investor who comes to Zambia. For example when an investor has been granted conditions in that permit to be involved in manufacturing of shoes, and the investor is supposed to be manufacturing shoes, later on starts importing and trading in shoes contrary to the conditions given in the permit, such an investor would have contravened the condition given to him on his self employment and the immigration officers will exercise both the powers of arrest under section 6(1) of the Act as well as the powers in section 5(2) where such a given permit may be revoked if it is satisfied that such a foreign investor has contravened any provision of the Act or regulation made there under.

⁵ Cap 123 of the Laws of Zambia Sec. 5(1).

1.10 **POWERS OF THE MINISTER UNDER THE IMMIGRATION AND DEPORTATION ACT**

The Minister of Home Affairs has a range of powers under the Immigration and Deportation Act. These powers include powers of Deportation, directive powers and regulatory powers.

Under section 4(2) of the Act the Minister has the power to order confer any or all of his powers and impose all or any of the duties of an immigration officer under the Act upon any public officer or class of public officers. In so doing such a public officer performs as though he was an immigration officer for the purpose of the Act, and will do any work that a trained immigration officer does.

The Minister in exercising his directive powers can direct the Chief Immigration Officer to issue an employment permit to any person within Zambia who is eligible under subsection (1) for such a person if he were outside Zambia.⁶ It is the requirement that the applicant for employment is required to be outside the country before his application is processed. However the Minister has the power under the Act to direct the Chief Immigration Officer to issue a permit to any one who qualifies for it and this includes foreign investors regardless of whether this applicant is in the country or not and upon issuance it shall be deemed as if he was in the country.

⁶ Cap. 123 of the Laws of Zambia, Sec.18(2)

The minister also has powers to deport any foreigner who in the Minister's view has become inimical to the public interest. This power is vested in the Minister by virtue of Section 22(2) of the Act which states:-

“Any person, whose presence in Zambia is declared in writing by the Minister to be inimical to the public interest shall be prohibited immigrant in relation to Zambia.”

This is the power that the Minister exercises in dealing with foreign investors, who do business contrary to either public morality or public policy. If such an investor is found to be doing his business contrary to the law, the Minister can use his powers under the Act to have such a foreign investor deported out of Zambia regardless of how huge his investment may be, this is there to ensure that those investors who have intentions of engaging in illegal businesses are dealt with.

The Minister also enjoys regulatory powers under Section 31 of the Act, which powers are there to ensure the better carrying out of the functions of the officers and the smooth running of the Department, more so to ensure that the running of the affairs of the foreign investors by the authorities is current and consistent with the trends in a global society where Zambia is no exception. In so doing the nature of powers are tailored to give room to changes happening in the global society. The Minister may, by statutory instrument, make regulations for the better carrying out of the provisions of the immigration Act and without prejudice to generality of the foregoing, such regulations may make for:

- (a) Anything which is to be or may be prescribed under this Act;⁷

These are powers that the Minister uses to bring about administrative and policy measures to ensure that officers uphold the law to the required standards and also to make policy changes to ensure the better carrying out of provision of the Act in general. It is in this power that the Minister makes changes in minimum threshold of what an investor is required to bring to Zambia before a self employment permit is issued, like in the recent case where the Minister of House Affairs directed Immigration Authorities to review the minimum threshold from US\$50,000 to US\$250,000 so as to bring it in harmony with that provided for under the Zambia Development Agency Act under section 65 (1) “Notwithstanding the Immigration Deportation Act; an investor who invests the minimum of two hundred and fifty thousand dollars or the equivalent in convertible currency and who employs a minimum of two hundred persons shall be entitled to a self employment permit or resident permit”. He further gives policy directives to officers to ensure that they stop issuing self-employment permits in trading sectors which has been reserved for the local people. This is done to ensure that certain areas of business are left to local people so as to enable them not to compete with foreign investors who are generally financially strong and stable in most cases than the locals.

⁷ Cap 123 of the laws of Zambia, Sec. 31(a).

In entirety, the minister of Home Affairs and the Immigration Authorities are there to ensure that only genuine foreign investors are allowed to remain in Zambia and those who do not respect the laws of the land regardless of the level of investment that they have committed to this country will be dealt with within the powers so provided by the Act which will warrant an arrest without a warrant by an immigration officer or deportation by the Minister of Home Affairs. Though, it must be noted that the Minister does not in most cases initiate the exercise of these powers, but takes action upon recommendations being made to him by the authorities who are usually in constant interaction with these investors. Furthermore, he will exercise his powers under the Act in constant consultation with the immigration authorities, as well as to harmonise his function as a Minister and that of the Immigration Authorities to avoid duplication of responsibilities and not to be seen to be interfering in the duties of the mandated authorities.

CHAPTER TWO

2.1 AN INVESTOR AND HOW HE IS REGULATED IN ZAMBIA

The creation of Zambia as an attractive foreign investment destination largely depends on a good legal framework. Having dealt with the powers of an Immigration Officer and that of the Minister under the Immigration and Deportation Act, it is clear that foreign investors can only be regulated through law and good legislation. One can quote from Professor **Muna Ndulo** who wrote,

“a legal framework is required for most human endeavors, whether it be to apply justice, to establish codes of public conduct of social or economic life by regulating and enabling them to be carried on in an orderly manner”.⁸

A well functioning legal framework is therefore necessary or imperative to the creation of an attractive foreign investment. Important aspects of business legislation, such as regulation of investors' law, company registration law, tax law, foreign exchange control law. Though one thing that needs realization is the fact that no branch of law in the world is the only one appropriate for regulating foreign investors. Just like different organs of the body play a vital role in the normal functioning of the human body, so is every branch of the law to some extent important in the regulation of foreign investors in Zambia. In other words, cohesive interaction is a critical element in the regulation of these foreign investors.

⁸ Muna Ndulo (1976) *Mining Rights in Zambia*. A thesis for the Degree of Doctor of Philosophy to the board of faculty of law in the University of Oxford, Trinity College. P.16.

The focus of this chapter is to concentrate on how the foreign investor gets regulated from the Zambia Development Agency perspective as provided in section 5[1] which states,

“the functions of the agency shall be to further the economic development of Zambia by promoting efficiency investment and competitiveness in business and promoting exports from Zambia”

This Act was enacted to revise the law regulating investment in general in Zambia, so as to provide a comprehensive legal frame work for investment in the country; to repeal the Investment Act of 1996 and to provide for matters connected with or incidental to the foregoing.⁹

The Act under section 4 establishes the Zambia Development Agency, which is a body corporate with perpetual succession and a common seal, capable of suing and of being sued in its corporate name and with power, subject to this Act to do all such acts and things as the board corporate may by law do or perform.¹⁰ By the Act establishing the agency and giving it the authority necessary to function while doing all that it is supposed to do as long as the law is followed entails that an investor who comes to Zambia will have to adhere to the law regulating investors in Zambia including foreign investors. The Act gives the agency various functions to carry out in section 5, but for the purpose of this research emphasis will be on the primary function which is to promote and co-ordinate

⁹ Preamble, Zambia Development Agency Act.

¹⁰ Section 4 Zambia Development Agency Act.

government policies on and facilitate investment in Zambia, with the view of providing a one stop-support facility to investors.

2.2 REGULATION THROUGH CO-ORDINATING GOVERNMENT POLICIES

The Zambia Development Agency in an effort to regulate foreign investors is empowered by law to do so by way of co-coordinating the various government policies. In order for a foreign investor to acquire various licenses, permits and certificates of registration the agency ensures that they provide guidance and makes available the information to these foreign investors and ensure that only those who meet the required minimum standards applicable are facilitated with the intended permits, thereby co-coordinating policies of the government in other institutions, that may in the process deal with this foreign investor.

Under section 67 of the Act the Board assist investors in obtaining any license permit or certificate of registration or other authorization for the purpose of commencing or operating business enterprise The foreign investor who in this case may be assisted is the one who has made himself available to the control of the Agency through the issuance of an investment certificate which has the conditions to be followed failure to which the Agency is empowered under section 77(1) of the Act to revoke such a permit. The Act under section 77(1) provides that,

“The board may suspend or revoke a license, permit or certificate of registration, after due investigation where the investor is given an

opportunity to be heard, if the investor- breaches or fails to comply with any terms or condition of the license, permit or certificate of registration”.¹¹

In the event of failure to comply with the conditions stated in the investment certificate or investment permit, by way of co-coordinating government policies the Agency through its board will make recommendations to other Government Institutions such as the Department of Immigration for further revocation of his self employment permit and to have his company closed by notifying the registrar of companies that such a foreign investor ceases to be an investor in Zambia from the Zambia Development Agency point of view, and consequently the other institution that regulate this foreign investor may deal with him appropriately.

In an interview carried on 11th August, 2007 at Zambia Investment Centre with Ms. Matimba Changala who is the Marketing and Investment promotion officer, she stated that regulation of foreign investors by the institution is done through issuance of investment certificate, which have preconditions to be met before the issuance can be done. She stated that an investor has to show from the outset his convincing business plan, evidence of capability to finance the proposed project plan which money is shown by way of bank statement or letter of guarantee from any re-known financial institutions and also ensuring that the investor complies with the object of his business plan. She further alluded that there other administrative mechanism which are used such as, the carrying out of business

¹¹ Sec. 77(1) supra.

premises inspections, random checks to ensure that the investor does not depart from his proposed business plan on which basis the certificate was issued. The essence of carrying out these business inspections and random checks is there to ensure compliance and also to deter those with the intentions of abandoning projects without notifying the Agency and thereby bring about consistence in the business that these foreign investors pledge to the Agency.

2.3 REGULATION THROUGH INVESTMENT FACILITATION

A foreign investor is further regulated by the Agency through facilitation of acquisition of work permits, which will be tied to the amount of investment that an investor brings to the country. Section 65(1) of the Act provides:-

“Notwithstanding the Immigration and Deportation Act; an investor who invests a minimum of two hundred and fifty thousand dollars or the equivalent in convertible currency and who employs a minimum of two hundred persons shall be entitled to a self employment or resident permit;”

Section 65(2) of the Act provides:-

“The board shall assist an investor, who meets requirements of subsection (1), to obtain work permits for up to five expatriate employees.”

While the Agency has the power to facilitate an investor with the permits, it has to do that through a certain criteria such as the requirement to invest in the country a minimum of US\$250,000 and also employ a minimum of two hundred local employees, only then shall the Agency through its board facilitate the work

permits for the foreign investor's experts with the Department of Immigration. This further demonstrates how the Agency intends to ensure that only certain classes of foreign investors are allowed to be facilitated with certain incentives under the Act.

It is also of interest to note that even some the previous legislation, the Zambia's investment Act of 1986, Zambia's investment Act of 1990, and the Zambia's investment Act of 1993, analyzed by Kenneth Kaoma Mwenda in his book "Contemporary issues in corporate finance and investment law," can confirm the need for the investor and his investment to be regulated, and there has been institutions mandated to carry out such functions on the foreign investors. The repealed investments Acts of 1991, 1993 as amended in 1996 also had the mandate to regulate the foreign investment through investment centre which had a role more less like that of the Zambia Development Agency today. The Investment Centre, in contrast to the investment board, promoted and co-ordinated government policies on investment in Zambia. In promoting and co-ordinating investment in Zambia, the investment centre was required to monitor the performance of enterprises approved by it and enforce compliance with the terms and conditions of investment certificates approved under Investment Act 1993.¹² This demonstrates how cardinal it is to regulate these investors such that even the previous legislations as shown above were emphatic on the need to have regulation in place, which will enable to strike a balance between the need to have investors and the need to have the same investors get regulated so as to ensure

¹² Kenneth Kaoma Mwenda, Contemporary issues in corporate finance and investment law p.4-5.

that only genuine investors are allowed in Zambia and comply with the relevant laws and policies that regulate investment and investors in the country.

2.4 **PRELIMINARY CONCLUSION**

The Zambia Development Agency is the institution mandated to regulate the foreign investors. However, the legal framework in its current form should be reviewed to harmonize the other regulating institutions such as the Department of Immigration to avoid conflicts and duplicity which cast doubts on an investor. In situations where ZDA issues an investment certificate and when the same is presented to immigration Authorities for the purposes of self Employment acquisition, the immigration authorities can reject such an application which the ZDA Authorities may have recommended for issuance. While it is necessary to regulate these foreign investors, the legal frame work underpinning them should be conscious of their liberties, in a democratic society so as to avoid making them feel victimized. It is therefore important that the Act adopts a more liberal approach to investor screening and certificate approval, which is the major regulating tool. It must also be noted that the way an investor will be regulated will have an impact on what kind of investment the country will have, as over regulation may result in bureaucracy and delay the flow of investment to Zambia as some investors may start looking else where for their investment. Furthermore, as a consequence of duplicity and avoid conflicts, a co-coordinated approach is necessary to avoid legal inconsistencies and subsequent uncertainty for the investor and the other institutions responsible for administering these regulatory laws.

CHAPTER THREE

3.1 REGULATION OF INVESTORS FROM IMMIGRATION PERSPECTIVE

The preceding chapter looked at the regulation of foreign investors from the Zambia Development Agency's perspective. The focus of this chapter is on how an investor is regulated from the Immigration Department's perspective, looking at the proof of company formation including the restrictions given with regards to the sector or category of investment, and the negative effects of regulating the foreign investor as well as the positive effect of regulating these foreign investors in Zambia.

3.2 REGULATION OF FOREIGN INVESTORS FROM IMMIGRATION DEPARTMENT'S PERSPECTIVE

Just like the Zambia Development Agency Act gives the mandate to the Zambia Development Agency to regulate the investment and foreign investors coming to Zambia, Immigration Authorities are also empowered by the Immigration and Deportation Act under part three where they deal with the examination of persons entering and leaving Zambia and also under part four where they deal with issuance of permits and revocation of permits to foreign investors to ensure that only genuine foreign investors are allowed to come and remain in Zambia for specified period of time. The powers of an immigration officer have been extensively discussed in chapter one, hence leaving the focus of this chapter to how these immigration authorities regulate the foreign investors. It must, be

noted from the on set that some regulations are provided in the Immigration and Deportation Act while some are not because there are merely administrative policies which are meant to deal with a specific situation at the time.

These regulations start at the point of entry. Part III of the Immigration and Deportation Act in section 9 states that, “examination of persons entering and leaving Zambia”, the Immigration and Deportation Act provides for the examination of person entering and leaving Zambia. Every entrant according to section 9 should appear before an immigration officer so as to ascertain his identity, object of entry to Zambia, nature of claim to remain in Zambia or whether he is a prohibited immigrant in Zambia.

The essence of ensuring that every entrant appears before immigration authorities is there to make sure that only those foreign investors who hold valid investor’s permits are allowed to come to Zambia. Furthermore, to deter those whose permits may have been revoked before, for failing to comply with the conditions of being in the country or if they were declared prohibited immigrants before and are not allowed to re-enter Zambia. Such people shall not be allowed entry into the country unless the Minister of Home Affairs has exempted such a prohibited immigrant by way of issuing an exemption certificate provided under section 22(5) which states:-

“Notwithstanding the provisions of subsection (2), the Minister may in the prescribed manner exempt any person or any of these classes set in the second schedule and, unless and until such an exemption is

in like manner revoked, such a person shall be deemed not to belong such a class or classes”¹³

The second schedule under section 22 provides the classes of prohibited immigrant, Class (c) provides as follows:-

“Any person who is under any law in force at the time has been deported or removed from, required to leave, or prohibited from entering into or remaining within Zambia”¹⁴.

This kind of regulation at the point of entry is cardinal as it is the starting point of regulation to ensure that only those investors who are allowed to be and remain in Zambia are allowed entry.

The other aspect of regulation is done when an investor is issued with a self employment permit; this is the only permit which is issued to a foreign investor to legalize his stay in the country and also to allow him to conduct his business from the immigration point of view in the country. It is interesting to note that despite this being the only permit given to an investor, the Immigration and Deportation Act does not provide for the existence of this permit, and it is a subject of criticism in the coming chapter which is a comparative analysis of the regulation of investors in some jurisdiction. However, when this permit is issued it is subject to certain conditions that the investor ought to comply with; cardinal among them includes the following;

¹³ Sect 22(5) Chapter 123 of the Laws of Zambia.

¹⁴ Ibid.

1. The holder of the permit shall comply with the conditions of this permit and among the conditions stated includes the following:
 - (i) no alterations shall be made by the holder .
 - (ii) the holder shall be restricted to the nature of business stated in the permit e.g. manufacturing, mining, farming e.t.c.
 - (iii) the permit ceases to be valid upon the expiry of the period endorsed.
2. Failure to comply with the conditions stated in the permit automatically renders the foreign investor a prohibited immigrant and liable for deportation without any notice.

Though this permit is not provided for in the Act, It is a desirable regulatory instrument by the immigration authorities as it comes to fall within the ambit of section 21(1) of the Immigration and Deportation Act which provides as follows:-

“The Chief Immigration Officer may by notice in writing revoke any permit issued under this Act if he is satisfied that the holder;

- (a) Has contravened any provision of this Act or regulations there under or has failed to comply with any requirement made under this Act or such regulations;**
- (b) Obtained such as permit by means of any representation which was false in any material particular or by means of any concealment of any material information;**
- (c) Has failed to observe any condition specified in such a permit;**

(d) Has become or likely to become a charge on the Republic in consequence of his failure to support himself and such of his dependants as may be in Zambia”.¹⁵

In an interview conducted with MULAKO MBANGWETA the Immigration Department's spokesperson person on 18th August 2007 at Immigration Headquarters alluded to the fact that in so far as the Act provides for the general regulation of foreign investors it does not categorically state the permit an investor should hold, though she was quick to indicate that the Act was under review. She further stated that most of the regulations are in form of policies which are made to respond to current developments in other institutions, she went on to state that the current pronouncement by the Minister of Home Affairs in reviewing of the minimum threshold from US\$50,000 as one such policies to cope with the unfolding developments in the Zambia Development Agency Act which provides in section 65 (1) that the Minimum Investment should be US\$250,000.

She further stated that some regulations are also done through routine checks, bank follow ups on the declared amounts as proof of investments, also verification of proof investment which is in machinery form to establish the availability of these capital machines which is done in liaison with the Zambia Revenue Authority Customs Division and the carrying out joint inspections by the Immigration Authorities and other security wings such as the Zambia police, office of the President, Anti-Corruption Commission, Drug Enforcement

¹⁵ Section 21(1) of Chapter 123.

Commission and the Ministry of Labour Officials which is done a year after the self employment permit is issued to ascertain the investor's business' viability before an extension of the self employment is considered.¹⁶

3.3 **REGULATION THROUGH COMPANY REGISTRATION**

The Immigration Department through its office co-ordinates the policies of other government institutions, this is done before issuance of this self-employment, which is the policy of the Department of Immigration when it comes to regulating foreign investors.

The Immigration Authorities before issuing the self employment will ask the foreign investor to show proof of company registration, where there supposed to provided the following:-

- (i) The list of directors
- (ii) Certificate of incorporation
- (iii) Certificate of share capital

In providing the above three documents the department would have established the number of directors in the company and also ascertain as to which of the director have already been issued with permits and also the category of business in which the investor intends to invest in. If it is established that the investor is investing in the saturated sector such as TRADING, the authorities may not issue such an investor with the permit by policy direction as trading is reserved for the

¹⁶ An interview with Ms. Mulako Mbangweta Immigration Department Public Relations Officer.

local people and also as way of encouraging investors to invest in certain areas not fully exploited and where the locals may not have sufficient capital to venture in such activities as commercial Agriculture, mining, manufacturing e.t.c.

3.4 **THE EFFECTS OF REGULATING FOREIGN INVESTORS**

The effects of regulating investors may generally be in twofold in the sense that in regulating these foreign investors bureaucracy is at play hence delay the investors intention to invest in a bureaucratic country and may look elsewhere and result in a detriment to the regulating country. In the same vein regulation is cardinal for the receiving country for security reason and ensure that only genuine investors are allowed to come to Zambia, more especially that the world is under the threat of terrorism.

3.31 **Negative Effects Of Regulating Foreign Investors**

The negative effects that come with the regulating of investors may be detrimental to the country, which will render the investment flow to reduce hence an effect on tax base and the economy at large.

3.3.2 **Positive Effects Of Regulation Of Foreign Investors**

The positive effects of regulating these investors is that only genuine investors will be allowed to the investment climate, as result you have honest but few honest investors who will in return genuinely contribute to the economy of the country and also have a country secured security wise and also avoid your country being used as a heaven for drug dealers

because of having a proper screening process. The country will benefit in form of enhanced tax base as well as job creation for the local people.

3.5 **PRELIMINARY CONCLUSION**

Although there is no concrete conclusion on the effects of regulating foreign investors in Zambia, It still remains an important factor that the country through various mandated agencies ensure that the regulation of foreign investors take a twofold approach: deter non serious investors to come to Zambia, and also to encourage serious investors to invest in the country due to the nature of law on regulation, such law and policy should Endeavour to legitimize foreign participants in the local economy and to simultaneously protect the Government policy on regulation of foreign investors must be, therefore, to scrutinize foreign investors entry and stay in the country.

The gist of the preceding chapter is to provide the available means by the Immigration Authorities to regulate foreign investors as well as to protect the interest of the citizenry from experiencing the pervasive effects of foreign investors. In this vein the next chapter shall proceed to make a comparative analysis of the regulation of investors in some other jurisdiction such as Tanzania and South Africa.

CHAPTER FOUR

4.1 COMPARATIVE ANALYSIS OF REGULATION OF FOREIGN INVESTORS IN TANZANIA AND SOUTH AFRICA as Provided IN THEIR IMMIGRATION LAWS

The preceding chapters were based on the regulation of foreign investors by the Investment Agency of the Zambia Development Agency and also by Immigration Authorities in Zambia. In this chapter an attempt is being made to undertake a comparative study on how the foreign investors are regulated in TANZANIA and SOUTH AFRICA by looking at their immigration laws respectively and identify certain areas of their law which may be of good use to this country which will be subject to recommendation in the next chapter of this research.

Regulation of foreign investors in Zambia by the immigration authorities is done through the powers given under the Immigration and Deportation Act Chapter 123 of the laws of Zambia. The Salient Sections in this Act with regards to the regulation of foreign investors inter alia; includes the following;

1. Part three of the Immigration and Deportation Act provides for examination of all persons entering and leaving Zambia.

2. Section 21(1) of the immigration and Deportation Act deals with the powers of the Chief Immigration officer to revoke the permit from any foreign investor who has contravened any of the provisions of the Immigration and Deportation Act.

3. Regulation through issuance of exemption certificates sanctioned by the Minister is provided in section 22(5) which states that:

“notwithstanding the provisions of subsection (i) the minister may in a prescribed manner exempt any person from all or any of these classes set out in the second schedule and, unless and until such an exemption is in like manner revoked, such a person shall be deemed not to belong to a class or classes of prohibited immigrant.”

4. Regulation through issuances of self Employment permit, the only permit which is issued to a foreign investor which stipulates the conditions to be followed by the holder as failure to comply risks having the same permit revoked by the authorities by applying the powers in (2) above.

4.2 **THE ANALYSIS OF THE IMMIGRATION ACT OF SOUTH AFRICA**

The Immigration Act no. 19 of 2004: The Immigration Amendment Act 2004, provides in its preamble as follows “in providing for the regulation of admission of foreigners to, their residence in, and their departure from the Republic and for

matters connected there with, the Immigration Act aims at setting in place a new system of immigration control which ensures that:-

- (a) Temporary and permanent residence permits are issued as expeditiously as possible and on the basis of simplified procedures and objective, predictable and reasonable requirements and criteria, and without consuming excessive administrative capacity;
- (b) Security considerations are fully satisfied and the state retains control (on) over the immigration of foreigners to the republic.
- (c) Interdepartmental Co-ordination (constantly enriches) and public consultations enrich the functions of immigration controls (and that a constant flow of public inputs is present in further stages of policy formulation, including regulation making).
- (1) Immigration control is performed within the highest applicable standards of human rights protection.¹⁷

The Act in section 2, which is an interpretation section, has provided a thoughtfully definition which among others includes the following:-

¹⁷ Preamble. Amendment Act No. 19 of 2004, Immigration Act Republic of South Africa

- (i) Deport or Deportation means the action or procedure aimed at causing an illegal foreigner to leave the Republic (involuntarily or under detention) in terms of this Act.

- (ii) Immigration officer means an officer [of the Department or another person having the prescribed requirements, appointed as such from time to time by the Department and, for purposes of this Act includes the person employed in, or contracted by, the Department who has been authorized by the Department to exercise certain powers and perform certain functions in the name of and on behalf of the Department.¹⁸

The Act further in section 5 creates the Immigration Board which comprises of the following; and gives it, its functions which states that, “functions of the Board shall (a) advise the Minister in respect of:-

- (i) the contents of regulations that may be made in terms of this Act;
- (ii) the formulation of policy pertaining to Immigration matter;
- (iii) Any other matter relating to this Act on which the Minister may request; and serve as the interdepartmental cooperation forum for all immigration matters.¹⁹

¹⁸ Section 2 of Act no. 19 of 2004 Immigration Act of Republic of South Africa

¹⁹ Section 5 of Act No. 19 of 2004, laws of the Republic of South Africa.

The Act also gives regulatory powers to the Minister in Section 7 which states that "the Minister may, after consultation with the Board, make regulations relating to:-

- (a) the powers and duties of Immigration Officers;
- (b) the steps to be taken to prevent the Entry of illegal foreigners;
- (c) the procedures regulating the Entry into and departure from the Republic of persons at the port of Entry and the requirements and conditions to be complied with at such a port;
- (d) the times and places of and manner of conducting an inquiry relation to, or the examination of person entering or desiring to enter the republic.
- (e) the permit and the certificates which may be issued under this Act, the requirements for the issuing of permits and certificates and the conditions to which such permits or certificates may be subjected, and the circumstances under which such permits or certificates may be cancelled or withdrawn;
- (f) the conditions upon which prohibited persons may be allowed to pass through the Republic while journeying or being conveyed to a place outside the Republic;

- (g) the forms of warrants, permits, certificates or other documents to be issued or used, or of declarations to be made, or of registers to be kept, for the purposes of this Act, and the particulars to be provided on or inserted in any such document, declaration or register;
- (h) the fees that may be charged in respect of overtime services required to be performed by immigration officers;
- (i) the fees that may be charged in respect of the application for and issuing of visas, permits and certificates and other services rendered in terms of this Act;
- (j) the steps to be taken to prevent the departure from the Republic of a person not in possession of a passport or other appropriate documentation;
- (k) the requirements and conditions which should be complied with by any person who, on behalf of any other person, applied for a permit referred to in sections 11 and 25 to 27, and the registration of an immigration practitioner contemplated in section 46;
- (l) the manner in which payment of a deposit contemplated in section 34(3) may be enforced;

- (m) the steps to be taken to ensure proper exploitation of the local labor market before a work permit is issued in terms of section 19;
 - (n) the circumstances where under and the manner in which a penalty shall be incurred by and recovered from the owner, agent, charterer or person in control of a conveyance and who conveyed a foreigner contemplated in section 35&7) to the Republic;
 - (o) any matter that may be prescribed under this Act; and
 - (p) generally, any matter required for the better achievement of the objects and purposes of this Act.
- (2) Different regulations may be made under subsection (1)(c) in respect of different ports of entry, and the forms of warrants, permits, certificates, documents, declarations or registers prescribed under subsection (1)(g) may differ in respect of different categories of persons.
- (3) A regulation made under subsection (1) may provide that any person who contravenes a provision thereof or fails to comply therewith shall be guilty of an offence and on conviction be liable to a fine, or to imprisonment for a period not exceeding 12 months.

- (4) The Minister may -
- (a) exempt a person or category of persons from paying fees prescribed under subsection (1)(h); and
 - (b) withdraw an exemption granted to a person or a category of persons under paragraph (a).
- (5) Any fee which may be prescribed under subsection (1) shall be prescribed by the Minister with the concurrence of the Minister of Finance.”

The Immigration Act of South Africa in section 15 provides the existence of a business permit which is the permit given to foreigners in that country. It stipulates the requirements necessary and conditions there in. Section 15(1) states that:-

“A business permit may be issued by the Department’s Director General to a foreigner extending to establish or invest in, or who has established or invested in a business in the Republic in which her or she may be Employed, and an appropriate permit for the duration of the business permit to the members of such foreigner’s immediate family;²⁰

²⁰ Section 15(1) of Act No. 19 of Republic of South Africa

Provide that:

- (a) Such a foreigner invests the prescribed financial capital or capital contribution in such a business
- (b) the contribution referred to in paragraph (a) [be] forms part of the intended book value of such business and
- (c) Such a foreigner has undertaken to comply with any relevant registration set out in any law by the South African Revenue Services.²¹

When this permit is issued to a foreign investor in the Republic of South Africa, it is expected that this permit holder will satisfy certain requirements which give him an opportunity to enjoy certain privileges if necessary. More so to ensure that he complies with any of the conditions so attached.

The business permit in Section 15(2) of the Act of No. 19 of 2004 gives conditions to the holder, it states that:-

“The holder of the business permit may not conduct work other than work related to the business in respect of which the permit was issued”.

This restriction is a control mechanism to ensure compliance to the conditions stated in the business permit, which the foreign investor has to observe.

²¹ Ibid Section 15(1).

The Director General of the Department of Immigration may reduce or waive the capitalization requirements, for business which are prescribed to be in the national interest or when so requested by the Department of Trade and Industry.²² Therefore when an investor is issued with this business permit he is subject to control by the authorities, thus done by way of causing certification as provided in section 15(4) of the Act No. 19 of 2004, which states:-

“The holder of a business permit shall submit proof to the satisfaction of the Director General that he or she has fulfilled the requirements contemplated in section (1)(a) within 24 months of the issuance of the permit, and within every two years thereafter”.²³

The other regulatory approach to a foreign investor as provided in the South African Immigration Act comes when this foreign investor has been given the permit. e.g resident permit and fails to comply with the conditions given, the authorities have the power to revoke this resident permit as provided in section 29 of the Act which states “Withdrawal of permanent residence permit to the foreigner; who has failed to comply with the terms and conditions of his or her permit.”²⁴

The Act further provides the mechanism for reviewing the above decision by giving powers to the Minister who on recommendation from the Director General may grant an exemption from the requirement of residence permit in respect of certain residents or class of residents.²⁵ The whole rationale for the control

²² Section 15(2) Act No. 19 of 2004 Republic of South Africa

²³ Section 15(3) Act No. 19 of 2004 Republic of South Africa

²⁴ Section 14(4) Act No. 19 of 2004 Republic of South Africa

²⁵ Section 29 of Act No. 19 of 2004 Laws of Republic of South Africa

mechanism is basically to ensure compliance, consistence and above all else enhances regulation of the foreign investors.

4.3 **THE ANALYSIS OF THE IMMIGRATION ACT OF TANZANIA**

The Immigration Act of 1995, Act No. 7 of 1995 provides controlling of immigration in Tanzania and for matters incidental to or connected with immigration.²⁶ The Act gives power to the Minister, which he uses when directing the Director of immigration, if so directed by the Minister under Section 5(1) which states:-

“subject to any general or specific directions given by the Minister in that behalf, the Director may, in writing and subject to such restrictions, reservation, exceptions or conditions as he may impose, delegate to any immigration officer all or any of the powers conferred upon him by or under this Act; but no such delegation shall prevent the exercise by the Director of any power so directed.”²⁷

In the exercise of this regulatory role of foreigners and with no exception to foreign investors the immigration authorities are empowered under section 8(1) which states:-

“Any immigration officer may without a warrant, arrest any person who is reasonably suspected to be a prohibited immigrant or to have contravened or about to contravene any of the provisions of the Act.”

²⁶ Ibid

²⁷ Preamble, Act No. 7 of 1995 Laws of the Republic of Tanzania

Furthermore the Director of Immigration who is the Chief Executive of the Immigration Department, other than either than being answerable to the Minister is answerable to the Aliens Immigrant board, which is established under Section 17(1). The board has functions as provided in Section 17(3) of the Act which states “the functions of the board to be: -

- (a) to advise the Director and other relevant authorities on factors to be considered before the Director or the authority concerned, makes a decision to issue work permits, business licenses or class B residence permits to alien immigrants;
- (b) to advise the Director and other relevant authorities on conditions for, and ways of controlling and monitoring entry, residence or mobility of any alien immigrant who applies for and is issued with work permit, business license or Class B resident permit.²⁸

Suffice to say, these foreign investors called aliens in Tanzania are regulated in most cases through issuance of various permits and particularly for the investor s/he is issued with a Class A permit on certain conditionalities as the law so requires in Section 19(1) which provides as follows

“A person, other than prohibited Immigrant, who intends to enter or remain in Tanzania and engage in trade, business, profession, Agriculture, animal husbandry, prospecting of

²⁸ Section 5(1) Act No. 7 of 1995 Laws of the Republic of Tanzania

minerals or manufacture may, if the Director thinks fit, be granted a Class A permit if:-

- (a) such a person or some other person on his behalf furnished security by depositing with an immigration officer such a sum as in the opinion of the immigration officer is sufficient to cover the cost.
- (b) he furnished security by entering into a bond with one or more sureties to be approved by the immigration officer for an amount calculated in accordance with (a) above.²⁹

When the above have been satisfied by an investor and s/he is consequently issued with Class A permit to enable him do business in Tanzania, he is further subjected to other regulatory conditions appropriate to the nature of business and class of permit so issued. The Act in section 19(2) stipulates the conditions which this holder of the permit has to comply with. Section 19(2) which states that:-
“A person to whom class A permit has been granted shall be permitted to enter or remain in Tanzania subject to such conditions relating to:-

- (a) the area in which he may reside;
- (b) the kind of occupation or business (If any) in which he may engage, and the restrictions prohibitions or limitation subject to which he may engage

²⁹ Section 17(3) Act No 7 of 1995 of the laws of the Republic of Tanzania

therein³⁰, and it will further given functions to be followed in the even that the holder fails to observe the conditions so stipulated in the permit. If the person granted with a class A permit fails to comply or observe the conditions so given punitive action may be taken against him as provided in section 19(3) of the Act which states that “where any person to whom class A permit has been granted.

- (c) fails or ceases to be engaged in the trade, business, profession or other occupation specified in the permit or engages on any terms, in any trade, business, profession other than that specified in the permit shall immediately cease to be valid and the presence of that person in Tanzania shall be unlawful.³¹ This entails that even if you have been given a permit, which may grant permanent residence, you are required to observe the conditions upon which you were granted that permit. Clearly the conditions stipulated in the permit a foreign investor holds is a regulatory mechanism to ensure compliance with the view of attaining the very essence of the objective of the law regarding the regulation of foreign investors.

Furthermore, in the event of failure to observe the conditions stipulated in the permit by the permit holder and consequently his stay in Tanzania being unlawful, the Director of Immigration service under the Act can take further steps and

³⁰ Section 19(1)(a) and (b), Act No. 7 of 1995 laws of Republic of Tanzania.

³¹ Section 19(2) Act No. 7 of 1995, laws of the Republic of Tanzania

revoke such a permit as provided in section 27(1) which states that, “the Director may by a written notice under his hand, revoke any permit issued under this Act if he is satisfied that the holder:-

- (a) has contravened any of the provisions of this Act or has failed to comply with any requirement made under this Act.³²
- (b) obtained any permit by means of any representation which was false in any material particular or by means of concealment of any material information.³³
- (c) has failed to observe any conditions specified in the permit³⁴.

The above illustrates the salient features for both South Africa and Tanzania Immigration laws pertaining to the regulation of foreign investors by immigration authorities in the highlighted jurisdictions.

It must be noted that the regulations of foreign investors in these three jurisdiction, Zambia, South Africa and Tanzania seem to be similar to a larger extent, more especially when it comes to the powers that the various Acts gives to the immigration officers such as the power vested in the Chief Executives to delegate some of or all the powers to any immigration officers in the exercise of their duties. The provisions of the boards in the case of South Africa and

³² Section 19(3) Act No. 7 of 1995, laws of the Republic of Tanzania.

³³ Section 27(1)(b) Act No. 7 of 1995 laws of the Republic of Tanzania

³⁴ Section 27(1)(c) Act No. 7 of 1995 laws of the Republic of Tanzania

Tanzania, in Tanzania it is called the 'Aliens Immigrant Board' which spells out the functions of the chief executives and their subordinates on how their supposed to function under the law.

What is more prevalent in all the three immigration laws in these three jurisdictions is the issuance of various business permits to the foreign investors which is called self Employment in Zambia, Business permit in South Africa and Class A permit in Tanzania.

After these permits have been issued to foreign investors there subjected to regulatory conditions which the holders are required to fulfill, while there are in possession of the permits, in all circumstances failure to observe the conditions stipulated in these permits will render the holder liable for deportation in all instances. Other than deportation, if the foreign investor fails to comply with the conditions attached to the permit. The three Immigration Acts in the three jurisdictions provides for the provision for revocations as can be seen the case of the Zambian Immigration Act, it is provided for in section 21(1) of the Act, in the case of South Africa it is provided for under Section 49 (16) (a) of Act No. 19 of 2004, of Immigration Amendment Act of the Republic of South Africa, while in the case of Tanzania it is provided under Section 27(1) of the Tanzania Immigration Act, of 1995.

Furthermore, the laws in all the three jurisdictions provide for mechanisms for deportation and clearly define deportation in all aspects as to mean the action or procedure aimed at causing an illegal foreigner to leave the country voluntarily or by detention. This is a regulatory mechanism provided in the Immigration laws in all the three jurisdiction to deal with those foreign investors who in the interest of the nation have become undesirable to the state. This is provided under section 26(1) of the Immigration and Deportation Act. In South Africa, Section 2(XII) clearly states what amounts to a deportation while in Tanzania it is provided under section 14(1) of the Immigration Act of 1995.

However, in contradistinction though the three immigration laws have most of the things in common in their approach to the regulation of foreign investors, there is a handicap in the case of the Zambian situation more especially when it comes to the permit, which is given to these foreign investors. In the case of immigration and Deportation Act, there is no where in the Act where there is a provision for self-employment and the conditions required when it comes to observing the same permit. The self-employment permit has existed as a matter of administrative policy and not as a matter of law for a long time which legally poses a danger in the case of any legal conflict between the immigration authorities and the foreign investor. Though of not much value, the Immigration and Deportation Act does not provide for the establishment of the board for the seek of transparency, which ordinarily must give functions to the Chief Executive and his subordinates and also ensure consistence in decision making. Transparency is important in a

democratic society more especially when it comes to issuance of work permits to these foreign investors. The immigration laws in Tanzania and South Africa provide for the existence of the boards and their laws clearly provides for the permit which is issued to foreign investors and the pre-conditions required before issuance of the permits is done by the authorities. Section 5(1) of the immigration Amendment Act of South Africa provides for the existence of the board whose functions are spelt out in Section 5(2).

Under section 5(1) is a provision for a Business permit and section 15(1)³⁵ states that “A business permit may be issued by the Director General to a foreigner intending to invest in South Africa.” In the case of Tanzania the board exists by virtue of section 17(1) and functions provided in section 17(2) of Immigration Act of 1995 of Tanzania and the provision for Class A residence permit is provided under 19(1) (a) and (b) and conditions attached in section 19(2) of the same Act.

³⁵ Section 15(1) of Act No. 19 of 2004. Laws of the Republic of South Africa

CHAPTER FIVE

5.1 CONCLUSION

In the preceding chapters, chapter one to chapter five it is evident that there is a significant role that the Immigration authorities play in the regulation of foreign investors in Zambia. However, there are serious lapses in the law governing these regulations cardinal among others is the failure by immigration authorities to make recommendations to the relevant authorities to reform the law to be responsive to the needs befitting the requirements of Zambia being part of a global society, more so taking recognizance that the law other than being regulatory ought to attract more foreign investors as opposed to the current status.

This is evident in the research carried by Foreign Investment advisory service, a joint service of the international finance corporation and The World Bank which report I agree with in totality. The Analysis of the Legal and Regulatory Framework Underpinning Investment Environment of October, 2004 prepare by the Foreign Investment Advisory Service a joint service of the International Finance Corporation and the World Bank.

The foreign investor entry procedures consist of the requirements for foreigners to obtain self Employment permit.³⁶ This is also evident in the Mother Ministry,

³⁶ Analysis of the legal and Regulatory frame work underpinning investment environment, foreign

the Ministry of Home Affairs in the attempt to review the Immigration and Deportation Act, where Proposals for changes were discussed with various stakeholders and the donor community in the report by the Foreign Investment Advisory Service called ANALYSIS OF THE LEGAL AND REGULATORY FRAMEWORK UNDERPINNING INVESTMENT ENVIRONMENT. Which states that: “The immigration authorities intimated that proposals for changes were inevitable, cardinal among them were in an official summary”

An official summarized the planned changes as follows:-

- (i) introduction of a definition of the term” investor;”
- (ii) Investor-friendly Immigration rules open the economy for foreign investment;
- (iii) Family members of a foreign investor to be allowed to enter the country and stay. They are not automatically issued a work permit though;
- (iv) Foreign investors receive the automatic right to stay in the country provided that he/she invests a certain amount of money;
- (v) The draft will acknowledge and accept the COMESA rules for cross-boarder traders;
- (vi) Applicant to have the rights to apply from inside the country.³⁷

Investment Advisory Service 2004 P. 4. <http://www.worldbank.org>

³⁷ I bid. Page 4

It is further concluded that though the Act does not provide for the existence of the self-employment permit, it is one of the most cardinal tool necessary in the regulation of investors in Zambia, but admittedly in its administrative current form. A self-employment permit is difficult to obtain and the procedures particularly for renewal, are seen as lengthy, cumbersome and unpredictable. There is a significant discrepancy between the length procedures cited by the immigration authorities.

Further more, contrary to sentiments in the interviews carried from both Zambia Development Agency and Immigration Department itself; it is the policy guideline to allow self-employment permits only in four sectors (Commercial Agriculture, Manufacturing, Tourism and Mining). This narrow application of the Self Employment permit is an impediment to foreign investment, and certainly to foreign investment in other sectors such as services, where international experience suggests substantial benefits can be secured by allowing foreign investment.

The procedure to obtain a self-employment permit appears to be based on the premise that an investor will be allowed to do business only if it is considered by the immigration committee/Department to be of benefit to the country. This test is too **reign** and gives the authority wide discretionary powers. Also the requirements for obtaining a self Employment permit are not

in line with the immigration and Deportation Act since there are not provided for in the Act.

5.2 RECOMMENDATION

In order for the regulation of foreign investors to be effective and meaningful to Zambia as well as to the foreign investors whom the immigration authorities target and also for the purpose of increasing the attractiveness of Zambia as a business location for foreign investors, it is recommended that both the law and policies governing the regulation of foreign investors be reviewed. The objective of review should be to establish a system that implements a good Immigration and Deportation Act. The general approach to be recommended is in the cardinal permit which is issued to the foreign investors, that is a self-employment permit should be issued and renewed to foreign investors. More so the objective of the review should be able to capture as much as possible the desire of the global society where Zambia is no exception and also to avoid unnecessary criticism from those who would perceive the regulation as just as demonstrated in the case of ZAMBIA GAMEFIELDS INVESTMENT JOURNAL issue of Monday, July 16, 2007 AN OVERVIEW OF THE ZAMBIAN INVESTMENT CLIMATE FOR TOURISM, CONSERVATION AND RURAL DEVELOPMENT by I.P.A MANNING Address to the Zambia Business Forum Conference on the Zambia Development Agency Act of 2006, held in Lusaka on the 19th June, 2007 in his presentation Mr. Manning States:-

“The dissembling and examination of the ZDA Act in isolation will certainly not solve the Zambian Investment problem –

and there obviously is a problem. We must take the holistic view. The Act is but one bird in a mortally flock of bills, Acts, statutory investments and policy, many of which by Stealth and the total absence of consultation swoop upon civil society, published or unpublished, contradictory or not. Investors most of the people in the country after all not just the English man in baggy tweeds, cigar clamped in jaw in his luxurious tourist lodge or a China man flogging fish in Kamwala Market, where be his investment certificate I may ask,”³⁸.

He further alludes in the same journal, “the ZDA Act and the Immigration and Deportation Act appear to have arrived here from different planets. The now repealed investment Act – under which most of the investors were ushered in, confirms that an investor who brings in a minimum of fifty thousand United States Dollars shall be entitled to a self-employment or resident permit. In actual fact what one receives is a self-employment permit which has to be renewed annually to be renewed following an inspection of he business premises by a cable of six representatives – all

Government, drawn from the Zambia investment centre, Anti Corruption Commission, the police, immigration and so on, who have to be collected from their scattered hide-outs and transported to where ever one is³⁹ He goes to conclude that” “it is our understanding that the current minimum threshold for investor status is an investment of US\$50,000. The higher threshold mentioned above are understood to simply add further incentives, with affecting this

³⁸ Zambia Gamefields investment journal by I.P.A Manning Monday, July 16,2007

³⁹ Supra

minimum threshold. However, it appears that there is confusion over this matter, as well as over the difference between the US\$250,000 and US\$500,000 thresholds. The confusion appears to be affecting the way applications are being handled.⁴⁰ It has come to our notice that various foreign investors are apparently being required to show proof of a minimum of investment of US\$500,000 as a condition for obtaining self-employment status and that government has in fact stopped issuing self-employment permits and extending residence permits to companies that are unable to meet or comply with this regulation”.⁴¹

In the light of such developments as perpetuated by Mr. Manning in his Journal, it is recommended that a holistic approach inclusiveness and wide consultation should be taken in reviewing the law regulation investors to avoid room for speculation. It is further recommended that section 2 (Interpretation) need to be amended to provide for meaningful definitions for ‘investors’ and “Deportation” and sections 14 to 21 (Issue, variation and revocation of permits) and the first schedule of the Immigration and Deportation Act chapter 123 need to be amended particularly sections 14 and 18 and the first schedule (Class A) should carry most changes implementing regulations to the Immigration and Deportation Act should be adopted to set out clearly the requirements for obtaining a self Employment permit.

⁴⁰ Ibid

⁴¹ Supra

The Act when reviewed should include new provisions providing the basis for a separate procedure for foreign investors to obtain a self-employment permit. This provision should include the definition of the term "foreign investor," the entitlement of a self-employment like in the case of Tanzania and South Africa where terms investor is clearly defined and the requirements of the business permit are outlined clearly. The new rules as recommended to the Immigration and Deportation Act have to be harmonised with the Zambia Development Agency Act and any other law relevant in the regulation of investors. Unlike the current situation where an investment certificate can be issued but of no impact to the process of self-employment issuance from Immigration perspective as it is taken as a mere pledge.

It is also important to include conditions that do not give discretion to the deciding officials. Another way of addressing the issuance of self employment procedures is a reference to the investment law stating that foreign investors who have obtained investment certificates are automatically considered for self-employment permit to stay or invest in the country, this approach may ensure consistency with investment law and reduce bureaucracy.

Finally, the main legislative changes in the two regulating Acts the Immigration and Deportation Act and the Zambia Development Agency Act needs to adopt a more liberal approach in dealing with foreign investors, in particular the investment law should adopt a more liberal approach to investment screening and approach. Consequently, a

coordinated approach is necessary to avoid legal inconsistencies and subsequent uncertainty for the business community and the other institutions responsible for administering the law. A public – private consultation process is the most recommended to secure the best results.