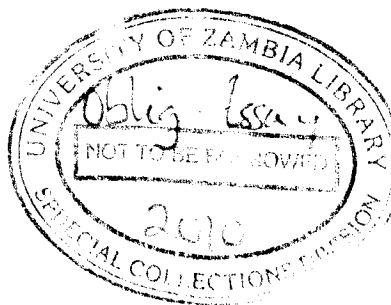


**Title: The Mines and Minerals Development Act No.7 of 2008: Innovations, Potential
Problems and Proposed Solutions**

By

MULENGA, PAUL

(26061589)



A dissertation submitted to the University of Zambia in partial fulfillment of the requirements of
the degree of Bachelor of Laws (LLB).

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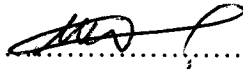
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ABSTRACT

Despite the numerous attempts to diversify the Zambian economy, mining remains the major contributor to the national cake. Due to the shift in political ideology, Zambia's economic policy changed to suit the environment. Consequently, the mining industry was not to be left untouched. During the one party era, nationalization of private property affected the sector. This was achieved through the mechanism of the law. Furthermore, upon reverting to participatory democracy and principles of economic liberalization, the mining sector was handed back to private hands.

The dissertation addresses the teething problems the Mines and Minerals Development Act No.7 of 2008 has come to be associated with. Chief among them are the questions of; accrued rights, intent behind the Savings and Transitional Provisions to mention but a few.

This exposition demystifies the Act by reviewing the sections giving rise to debate. The work of scholars such as Ndulo is reviewed and deviated from by citing relevant legal provisions expressing a contrary view.

Lastly, this dissertation reviews incentives a Zambian citizen is entitled to if any. This work reviews mining legislation vis a vis the innovations provided to Zambians engaged in mining. Further, the Zambia Development Agency Act has enjoyed wide consultation.

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DEDICATION

To my late auntie Eunice who died on 1st December 2004. This work was inspired by your support and confidence in me. It is only proper that this work stands as a tribute to your life. May your soul rest in peace.

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CHAPTER 1

Historical Background of Zambia's Mining Sector

Introduction

Mining has always been an important aspect of Zambia's livelihood. This undertaking has inspired a multitude of changes that have influenced the sector both positively and negatively. From time in memorial, various pieces of legislation have been passed and abolished in order to respond to both social and economic factors prevailing in the country. This is because mining is the main stay of the economy and is seen as the panacea to Zambia's economic doldrums.

The problems, implications and motivations of enacting the Mines and Minerals Development Act No.7 of 2008 cannot be discussed in isolation; therefore, an examination of the origins of mining in Zambia (with a focus on the copper mining industry) deserves attention. Secondly, mining legislation post independence will be briefly highlighted. This will be done to draw attention to the transformation of the sector paving way for a firm appreciation of the 2008 Act.

STATEMENT OF THE PROBLEM

Despite legislation regulating the sector, changes to the laws has been quick to come. It appears Zambia's latest legislation on mining attracts criticism especially regarding mining rights. This paper explores the innovations of the new Mines and Minerals Development Act No.7 of 2008 and the challenges it poses. Furthermore, despite the oppressive nature of this legislation, there has been no litigation in the Zambian courts of law, nor the dispute settlement bodies of countries elected in the dispute settlement clause of the development agreements concerning the same, yet, most mining companies express concern at the new legislation.

This research also aims at reviewing the inconsistency within the Act as regards the Savings and Transitional Provisions. It is difficult to decipher what the view of the Act should be. Should rights held by prospective mining right holders under the old Act be carried on into the new mining regime, or does the 2008 Act extinguish these rights?

Later, the paper aims at investigating if any provisions within the Act are devoted to increasing new investment opportunities to Zambian citizens. This will be effected by comparison with the old Mines and Minerals Development Act.

OBJECTIVES OF THE RESEARCH

The ultimate objective of this research is to evaluate the impact the new Mines and Minerals Development Act of 2008 has on the mining sector in Zambia. What are the innovations, potential problems and proposed Solutions?

Particular attention will be paid to problematic provisions such as section 14(3), which places a restriction on the area of land upon which an investor may obtain a prospecting license. Emphasis will be placed on investors who previously held prospecting mining licenses under the old regime by determining whether the question of accrued rights holds any credibility. In order to determine this, the following benchmarks are cardinal:

- i. A comprehensive historical background on Zambia's' mining sector from the colonial era to present day.
- ii. Review of legality of development agreements entered into by the Zambian government and the Investors

- iii. Review of the problematic s.14 (3) and the Savings and Transitional Provisions of the Act in a bid to discover whether it is legal for the Zambian government to abrogate the terms of the development agreements through the new regime.
- iv. Analysis of the consequences and opportunities the Act may bring to small-scale miners in Zambia.

RATIONAL AND JUSTIFICATION OF RESEARCH

The advent of the new mining regime has sparked irritation from the mining community. Concerns have been raised at controversial provisions of the new act, that it has been the pre-occupation of lawyers to advise their clients concerning the same. Unfortunately, the courts have not adjudicated on s.14 (3) nor the Savings and Transitional Provisions. It appears the mining companies are reluctant to air their grievances before the courts of law.

SPECIFIC RESERCH QUESTIONS

- i. Do prospective mining license holders under the old regime poses accrued rights under the new Act or are the rights extinguished?
- ii. Is the Zambian government bound by the development agreements signed with the various mining companies?
- iii. Is s.14 (3) of the new Act constitutional?
- iv. What changes has the new Act made as regards the small-scale mining licenses?
- v. Does the Zambian citizen have special rights as regards mining?
- vi. What incentive does the Act provide for local investors?

Research Methodology

This study will be based on both primary and secondary information. Where necessary, interviews with mining executives may be conducted.¹ Premium will be placed on primary and secondary sources of data.

Mining in the Colonial Period: the Origins of Mining in Northern Rhodesia

Pre- 1914 Search for Minerals in Central Africa

The world's demand for copper to be used as a medium in the generation and transmission of electricity was a factor justifying mineral exploration in Central Africa before 1914. The factor precipitating this was the availability of finance from overseas.

In such remarkable circumstances, of mineral and especially copper exploration, a further reason attention was directed towards Central Africa was the earlier travelers (i.e. the Portuguese and later David Livingstone) who reported the presence of minerals including copper and gold.²

Discovery of diamonds at Kimberly in the Orange Free State in 1867, and gold in Witwatersrand in Transvaal in 1886 gave credence in the belief that gold would be found in Mashonaland and further north in the divide between the Zambezi and Congo rivers.³

Private enterprise rather than any imperial grants was the factor chiefly responsible for the push into Central Africa. After the British government had annexed Bechuanaland in 1885 to prevent

¹ Most development agreements contain a dispute resolution clause subjecting the parties i.e. the mining companies and the government to foreign law jurisdictions. It would be interesting to know whether this clause would be relied on in an event of a dispute, bearing in mind the cancellation of development agreements via the new Act. Since the parties agreed on subjection to foreign jurisdiction, it would be interesting to know which courts would attend to this matter especially where government argues that they are no longer bound by the agreements.

² Simon Cunningham, *The Copper Industry in Zambia: Foreign Mining Companies in a Developing Country*. New York: Praeger Publishers, 1981, p.26

³ *Ibid*, p.27

the German colony of South West Africa and Boer colonies from uniting and so encircling Cape Colony, it would not have probably intervened if Germans, Boers and Portuguese had shown no interest in territories further north. The Cape colonialists were determined no other power should possess the wealth of the area.⁴

Further, the famous scheme by Cecil Rhodes of a from 'Cape to Cairo' railway was an essential part of the effort. This made it possible to establish permanent European presence in central Africa.

Advances in metallurgy and geology coupled with the belief that Africans might have failed to discover all mineral deposits or to appreciate the importance of those found, meant European skill and capital would be needed to locate and extract the minerals.

The railway proved a profitable enterprise as it reduced the cost of transportation and in turn made commercial agriculture and mining economically possible. The above coupled with the protection from the British government and subsequent formation of a charter in 1889 forming the British South African Company, which later sent agents to sign concessions with African chiefs, sparked the genesis of modern mining industry in Zambia.⁵

The Chattered Companies Mining Regime

The discovery of most of Zambia's mineral wealth was under colonial rule. In 1924, Northern Rhodesia became the direct responsibility of the crown and so, to assist development, it had good reason to accept responsibility (risk) and undertake prospecting.

⁴ This was under the premiership of Cecil Rhodes who was prepared to use his wealth acquired from diamond and gold finances of his exploration efforts in South Africa.

⁵ Upon the occupation of Mashonaland, two agents were sent North of the Zambezi to sign concessions with King Lewanika in June 1890 and in Katanga. Moreover, after failure by Rhodes to acquire Katanga, he concentrated his efforts south of the Zambezi, which did not live up to his expectations of the Rand. He never crossed the Zambezi and the development of Northern Rhodesia was mentioned very little in his correspondence

Further, copper was a strategic mineral used in ships, aircrafts, transport and artillery, therefore, it was clearly in national interests for the government to establish an important source of supply within the empire under British control.

However, even though new deposits were discovered, it did nothing to promote fresh exploration in the country, although once the deposits had been discovered and proved to be of immense size, it acted to ensure that the operating companies did not come under American control.⁶

Despite the mineral deposits, Northern Rhodesia was still not attractive to investors. More could have been done in the style of construction of new roads, power stations and hospitals. Cunningham argues that had the colonial government created a work force ready for industrial and perhaps mining life by building schools and educating some of the Africans, it would have made the country more attractive.⁷

Nevertheless, this neglect to invest in the county's mineral wealth was not without good reason. The size of the country begs the combined size of Spain and Germany put together, situated in the middle of Africa with a population of three thousand (3000) Europeans and less than one million Africans in 1920 and crossed only by a railway made it unattractive.⁸

However, even though it had done all it could even though British government reports show that it did not⁹, not much could be anticipated from the government of Northern Rhodesia, which was

⁶ Simon Cunningham, *The Copper Industry in Zambia: Foreign Mining Companies in a Developing Country*. New York: Praeger Publishers, 1981), p.43

⁷ ibid

⁸ The location of Northern Rhodesia in itself was very unattractive. It was remote and few Europeans saw it fit to explore further into the interior of Africa, let alone to the heart of Africa.

⁹ ibid

nothing but a few scattered colonial officers without the resources to foster industrial or mining expense to maintain the kind of social services that existed in Britain.¹⁰

Without more personnel, the colonial government could do little more than adopt a liberal policy of laying down regulations for treatment of Africans, but in no way encouraging, or preventing, the countries mineral wealth by private companies from exploitation.¹¹

Cunningham observes that the British South African Company tried to provide exploration in the country by creating a sustainable mining code that took into account the differences between Northern and Southern Rhodesia and especially that gold and copper were likely to be found in the former. Further, the BSA Company closed the country to individual prospectors and granted prospecting rights over certain areas only to those with who were adequately backed and were ready to spend a specified sum on exploration. As a result, the BSA issued thirty-six prospecting licenses, which found their way into the hands of seven mining houses.¹²

Exploration by Selected Companies

The Work of Copper Ventures Limited 1921- 1925

This small syndicate was a pioneer in the discovery of copper in Zambia. This company had several properties¹³ that could not cover all the deposits. It desired to acquire a large mining concession in Northern Rhodesia.

¹⁰ This is partly attributed to the fact that the BSA Company was cash strapped and needed capital injection in order to run the territory effectively.

¹¹ *ibid*

¹² Simon Cunningham, *The Copper Industry in Zambia: Foreign Mining Companies in a Developing Country*. New York: Praeger Publishers, 1981), p.26

¹³ This means pockets of land upon which they had rights to prospect.

Moreover, it was only after numerous conversations and the assistance of Sir Edward Davis that negotiations ended in 1922 with a reservation until 31st December 1927 of an area approximately 1800 miles against the Nkana claims and pegging.¹⁴

The appointment of Horner as consulting engineer of Bwana Mkubwa Copper Company saw him point out the possibilities of discovering more copper deposits containing enormous tonnages of approximately 3.5% ore.¹⁵

In addition, it is with this recommendation that in July the Syndicate obtained a larger concession containing exclusive rights to explore fifty thousand square miles of what was called the Rhodesia Congo Boarder Concession.¹⁶

Teams of explorers were sent with African carriers into the bush and another being a younger man with schooling in engineering. The Africans were given hammers to break hard rock and paying them five pounds for any interesting sample they produced. This was in order to discover rocks distinguished in colour by mineralization.¹⁷

By using these primitive means, the ore bodies of Mufulira, Konkola and Nchanga had been discovered. Subsequent discoveries in Zambia have not revealed such rich deposits. The reason for such success was that during the period Brooks was the manager of Congo Boarder

¹⁴ P.K Horner, *History of Prospecting For Copper- Northern Rhodesia 1921 -1925*. Written in 1926 (RST archives, op.cit documents 131-34. (Sir Edward Davis who as well as being a director of the BSA Company was chairman of Bwana Mukubwa Company)

¹⁵ R. Brooks "How the Northern Rhodesian Coppers Were Found," *Northern Rhodesian Journal* 1 (1950), pt.II:30-31

¹⁶ This concession was granted on condition that the company be formed with a capital of a hundred and fifty thousand pounds in shares of one pound each with forty five thousand pounds as working capital. (The Congo Boarder concession extended along the border from the eastern extremity of Katanga to Angola was about the size of England but had no roads, only one railway crossing it and had not been surveyed.

¹⁷ R. Brooks "How the N.Rhodesian Coppers Were Found," *Northern Rhodesian Journal* 1 (1950), pt.II:30-31 (It should be noted that in those early days, the search was for deposits like those found in the Katanga, whose rich oxide carbonate ore were near the surface, and not for sulphide deposits below the surface.

Concession Limited, “all the money needed for operations in Rhodesia was provided... without question or hesitation.”¹⁸

The other reason for this success according to Brooks was that he was given control and power over operations in Africa over the selection of personnel and selection of concessions on which to work and the planning of programmes.¹⁹

However, while Copper Ventures prospectors discovered important mineral deposits and did important preliminary development work, Cunningham mentions:

there is considerable dispute over whether the syndicate realized the importance of this discovery. This evidenced in the sale in 1924 of the Nkana Concession and mine for two hundred and fifty thousand pounds to Bwana Mkubwa Company. Considering the wealth of the deposits sold, it was not in the long run a profitable deal.²⁰

Additionally, the deposits were not adequately examined, Roan being ignored and work at Mufulira being confined to digging a few trenches and shafts. The two thousand pounds necessary to sink a drill hole at Mufulira was not spent, since it was thought that the property did not justify it. Moreover, the syndicate halted its drilling operations at Nkana and moved its drills to Nchanga in the Congo Boarder Concession.²¹

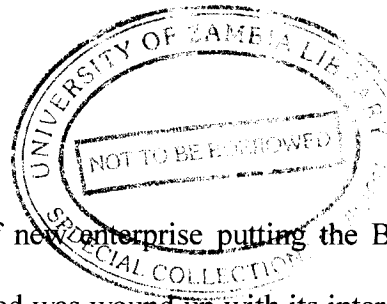
However, it is speculative to project what Copper Venture would have achieved with more capital. Subsequent companies were not just financiers because they arrived at different assessments of the deposits even before drilling.

¹⁸ *ibid*

¹⁹ *ibid*

²⁰ Simon Cunningham, *The Copper Industry in Zambia: Foreign Mining Companies in a Developing Country*. New York: Praeger Publishers, 1981), p. (Copper Ventures was not short of funds that it spent money on valueless properties in Southern Rhodesia and near Lusaka. It has been argued that had it concentrated on the Nkana Concession it would have had sufficient capital to develop it to a point where they became valuable assets).

²¹ *ibid*



Re-Examination of Deposits

Upon fulfillment of the function of floating off new enterprise putting the Bwana Mkubwa Company on firm footing, Copper Ventures Limited was wound up with its interests distributed on a *pro rata* basis to its members, one of them Chester Beatty, who had a strong desire to pursue his interests in Northern Rhodesia.

Therefore, in 1925, Beatty sent Russell Parker, a 28-year-old geologist to Northern Rhodesia to conduct a preliminary examination. Parker upon conducting the same discovered that earlier prospectors had not noticed a gradual increase in the grade of ore and in the width of mineralization.

Upon going down the shaft, he ascertained that sinking had been discontinued just below the line where green malachite (copper-oxide-ore) ceased. Due to this, he recommended a deeper shaft drilling.²² Due to this new drilling method which had never been tested, it was discovered that less than half way into the Roan Basin, thirty million tons of ore had been proved, an amount adequate to start planning for large scale operations.²³

The next examination was on the Nkana Concession. Based on advice given by Parker and Selkirk, Beatty obtained from Bwana Mkubwa Mining Company an option in the Nkana concession. The method of searching for minerals was very different from that employed by Brooks in the Congo Boarder Concession.

A great deal of knowledge gathered over the years by Copper Ventures Limited was used in the prospecting. In addition, due to surveys on Nkana Concession, the first geological map was ready in December 1927. This gave Parker and Gray impetus for a more thorough examination.

²² Parker recommended that it would cost E10 000, but Beatty sourced E27 000 and accepted the proposals.

²³ P.K Horner, *History of Prospecting for Copper- Northern Rhodesia, 1921 -1925*. Written in 1926 (RST archives, op.cit. Documents 131 – 34).

This culminated into the discovery of the Chambeshi deposits though small. By 1930, fourteen drill holes had been sunk and ore deposits of 21 million short tons were discovered. This brought the total resources of the three Nkana Concession deposits to 162 million short tons at 4.4% copper although the figure could continue rising with further drilling.²⁴

Dr Bancroft's Work at Nkana and Nchanga Mines

Anglo –American Corporation had been consulting engineers until 1927 when it took control of operations by putting a leading geologist Dr. Bancroft in charge of the work in Northern Rhodesia. During his stay, Nkana mine was of interest in that the outcrops were extremely small. Only two outcrops at Wusakili stream and further North West revealed the existence of an ore body estimated by 1931 to contain more than 120 million short tons. The outcrops at Nchanga were similarly magnificent.²⁵

While Brooks had sank drill holes at Nkana of more than 225 feet, Bancroft first drill hole sank in September 1927 disclosed 250 – 280 feet a true width of 21.5 feet width or at 5.82%. Bancroft also discovered the massive Nchanga West ore body.²⁶

With all this work established and copper deposits discovered in such massive quantities, the road was paved for giant mining companies to commence large scale mining operations in Northern Rhodesia.

Among them being Anglo American Corporation, Bwana Mkubwa Mining Company and Rhodesian (Later Roan) Selection Trust to mention but a few, were until the time of nationalization in 1969 the largest players in Zambia's copper industry. Finally, Northern

²⁴ Simon Cunningham, *The Copper Industry in Zambia: Foreign Mining Companies in a Developing Country*. New York: Praeger Publishers, 1981), p.55

²⁵ Bancroft, op. cit; and F.L Coleman, *The Northern Rhodesian Copperbelt, 1889- 1962* (Manchester: Manchester University Press: 1971).

²⁶ *ibid*

Rhodesia became an attractive mining destination as technical and financial resources began pouring in.

Mining Legislation after independence.

Prior to the existence of any mining code in Zambia, the British South African Company granted mineral rights to individuals by means of exchange letters. Ndulo mentions, “the terms of the grant specified the number of claims to be pegged within a stipulated area and in some cases graded to farms of stipulated size.”²⁷

In 1911, the British South African Company applied to the British High Commissioners office of Southern Africa for a mining code for Northern Rhodesia. This culminated into the Mining Proclamation, No.1 of 1912 that took effect on 1st July 1912. In 1934, it was renamed the Mining Ordinance of 1934 and it survived with little substantive amendments in the 1958 Mining Ordinance.

Noteworthy is the statement in the Mining Ordinance that the right to prospect can only be obtained from the British South African Company. There was no claim as to who could mine and who could not, but it was clear that anyone with or without mining experience could do so.

Other legislation passed after 1958 include the Mines and Minerals Act Cap 329 of the Laws of Zambia, Mines and Minerals Act No. 32 of 1976 and the current controversial Mines and Minerals Act, No 7 of 2008. Other legislation tied to mining are the Copper (Export) Tax Act, Cap 669 and the Mineral Tax Act of 1970.

²⁷ Ndulo, Muna. ***Mining Rights in Zambia.*** (Nairobi: East African Publishers, 1988),p.142

Conclusion

This chapter apart from laying the foundation of this research has given a background of the origins of mining in the colonial period. Names such as Parker, Bancroft and Beatty shall forever remain tied to Zambia's mining history. It should also be mentioned, that North Americans fostered the investment and development in Zambia's mines. They were willing to manage risk coupled with a sense of adventure and unwavering belief, that Northern Rhodesia had a lot to offer the world in terms of mineral wealth.

CHAPTER 2

Mining Rights vs. Property Rights

Introduction

Whether mining rights constitute property rights is a question that remains unresolved. This chapter seeks to determine this question. Despite the drama that has, and continues to occur within the Zambian mining sector, one remains dissolute at the lack of explicit legislative and judicial instruction concerning the same that it is left to scholars who are sometimes responsible for misinterpretation. The current constitution and position of the Mun’gomba Draft Constitution will be the centre of attention in order to determine this difficulty. Statutory provisions will also be consulted. Lastly, this chapter makes a comparative study with the nature of mining rights in South Africa.

Constitutional Position: Property Rights vs. Mining Rights

Article 16 of the current constitution, offers protection against the deprivation of property. In an event that the government passes a law in violation of a mining right, can a mining right holder claim that his rights as prescribed under the said Article have been violated?

Connected to the above is Section 14 (3) of The Mines and Minerals Development Act No.7 of 2008 (“**the Act**”), which inspires the above questions. It reads thus:

a person, and in the case of a company or its subsidiaries shall not hold a number of mining licenses whose accumulated total area is more than hundred and forty-nine thousand, seven hundred cadastre units.²⁸

²⁸ The Mines and Minerals Development Act, No. 7 of 2008.

The cited provision appears innocent in its construction; however, if viewed from the perspective of the previous Mines Act (“the old Act”) in which land upon which a prospecting license was held was not subject to restriction, a conflict of interests is easily recognizable.

As a result of the above, holders of mining rights under the old Act, exceeding the new requirements cannot continue to hold them under the terms previously held.

Therefore, if this is the case, what recourse does the affected party have in law? Is Article 16(1) of the Republican Constitution the solution? It reads as follows:

Except as provided in this Article, property of any description shall not be compulsorily taken possession of, and interest in or right over property of any description shall not be compulsorily acquired, unless by or under the authority of an Act of Parliament which provides for payment of adequate compensation for the property or interest or right to be taken possession of or acquired.²⁹

The following provisions are also of interest to mining:

Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of clause (1) to the extent that it is shown that such law provides for the taking possession or acquisition of any property or interest therein or right thereover-

(o) for the purpose of or in connection with the prospecting for, or exploitation of, minerals belonging to the Republic on terms, which provide for the respective interests of the persons affected;

(x) where the property is any mineral, mineral oil or natural gases or any rights accruing by virtue of any title or license for the purpose of searching for or mining any mineral, mineral oil or natural gases-

(i) upon failure to comply with any provision of such law relating to the title or license or to the exercise of the rights accruing or to the development or exploitation of any mineral, mineral oil or natural gases; or

(3) An Act of Parliament such as is referred to in clause (1) shall provide that in default of agreement, the amount of compensation shall be determined by a court of competent jurisdiction.³⁰

²⁹ Cap 1 of the Laws of Zambia

³⁰ *ibid*

What then is a mining right? The Act provides no express guidance in this quest. However, the interpretation section directs attention to section 6(1) in which a mining right is said to include (i) a prospecting licence (ii), a large scale mining licence(iii), a large scale gemstone license, (iv)a small scale mining license,(v)a small scale gemstone license and (vi) an artisans mining right.³¹

The above does not define a mining right, but exposes the crucial features. Therefore, a mining right can be said to include any or all of the various licenses.

Ndulo mentions that

a mining right gives to a holder an exclusive right to prospect, exploit, process and utilize the minerals within the boundaries of his license for a term of years, on condition that the holder has observed and fulfilled all obligations demanded by the state through mining laws.³²

Ndulo further makes his case that “the possessory interests in a mining license **do not fall within the standard classification of property rights....**”³³

Thus, between the mining right holder and all persons other than the state, the mining right holder is treated as possessing all attributes of a free title, so long as the requirements of the laws with respect to continued development are satisfied and subject to the statutory limitations.

With a mining license, the holder of it is given the right, as well as the privilege, to go upon mineralized lands and sever minerals specified in the license and the power by severance to acquire title to the minerals and depose of them.³⁴

³¹ Act No.7 of 2008

³² Ndulo, Muna. *Mining Rights in Zambia*. (Nairobi: East African Publishers,1988),p.142

³³ *ibid*, p. 146

³⁴ *ibid*,p.147

Ndulo further argues that title is split. There is the (i) legal title to both minerals and land, which is retained in the state as owner while the (ii) use of land and title after severance of minerals passes to the holder of the mining license.³⁵

While Professor Ndulo makes the correct assessment as to the implication of holding a mining right, he makes a flawed conclusion when he mentions that mining rights are not property.

The term property is not defined in the Republican Constitution, nor is it addressed in the Act. However, Article 16 of the Constitution (which is the Article protecting against deprivation of property) refers to mining rights. One may conclude that this indicates an intention to classify these rights as property.

Fortunately, the Interpretation and General Provisions Act offers direction as to the meaning of this problematic expression. This Act is applicable to the current situation by virtue of section 2(1), which mentions that:

The provisions of this Act shall apply to every written law passed or made before or after the commencement, unless a contrary intention appears in this Act or in the written law concerned.³⁶

No contrary intention to exclude the application of the cited Act exists in itself or the Act, therefore, the meaning of property in Cap 2 is the legal meaning that will be attached to the word in contention.

The interpretation attached to the word property under section 3, which is coined as “personal property” or “personalty” or “goods” includes:

money, bonds, bills, notes, deeds, chattels real, **mining rights** in or under or in respect of any land and corporeal property of every description other than real property.³⁷

³⁵ Ibid

³⁶ Interpretation and General Provisions Act. Cap 2 of the Laws of Zambia

The implication of the cited section effectively classifies mining rights as “personal property” or “personalty” or “goods” therefore ranking them as property despite them consisting a series of licenses. Therefore, according to Cap 2, mining rights are property rights.

This means mining companies whose rights may be affected or extinguished by the Act may raise an argument alleging that their property rights have been violated.

A vivid intention of this violation occurs in the second schedule under section 162 (2) paragraph two of the Act that mentions thus:

For the avoidance of doubt, all mining rights and non-mining rights granted under the repealed Act shall cease to be valid one year after the commencement of this Act.³⁸

Therefore, if the mining rights cease to be valid after this grace period, the state has in effect compulsorily acquired them because they revert to the state. Further, although the state has powers of compulsory acquisition, the instances in which these powers can be exercised have been circumscribed³⁹ and except for undeveloped and unutilized land owned by non-residents, compensation must be paid.⁴⁰

Notwithstanding the above, the constitution offers exceptions to the rule in Article 16(1) and this occurs in Article 16(2) (o) which provides that even though legislation regarding mining rights provides an exemption to Article 16(1), the Act should provide for the interests of those who would be affected by the new law.

Careful interaction reveals that the Act cancels the mining and non-mining rights unilaterally without adequately providing for the interests of affected or would be affected persons.

³⁷ Section 3 of the Interpretation and General Provisions Act. Cap 2 of the Laws of Zambia

³⁸ Mines and Minerals Development Act No. 7 of 2008

³⁹ See Constitution of Zambia (1991), art 16 (1)

⁴⁰ *Ibid*, art 16(2)

The Zambian government may lawfully cancel such property rights if the holder of a mining right fails to adhere to the terms of the license granted. However, the Act makes no such distinction as it applies to every mining and no-mining right holder. Therefore, in the absence of default on the part of mining right holders, Article 16 (2) (i) of the Constitution is inapplicable.

It is therefore the submission of this research that Professor Ndulo concluded wrongly, when he avowed that mining rights do not fall under the ambit of property rights. Furthermore, this essay submits that mining rights are recognized as property rights under Zambian law.⁴¹ However, it would be interesting to see how the Zambian courts would interpret such a question.

The Position of the Draft Constitution

The Draft Constitution essentially reflects the thinking of society on how they intend the constitutional structure of Zambia to take shape.

Since it has been shown that mining rights are property rights, it is imperative to seek the guidance of the Constitutional Review Commission (CRC) in order to provide insight as to the views that may shape the future.

Property according to the Constitutional Review Commission is defined as:

anything, short of another person, which within the bounds of natural law, a person can use.... There are two main categories of properties, that is, real property (land) and personal property (moveable). Some personal property can be physically possessed whilst others, such as copyright or labour cannot.⁴²

According to the above description, mining rights may be classified as personal property that can or cannot be physically possessed (this may include acquiring property to extracted minerals).

⁴¹ It has been shown that a mining right can be considered personal property by the holder of the license for as long as adherence to the terms of the license granted under the hand of the Zambian government are religiously obeyed.

⁴² Report of the Constitution Review Commission, 29 December 2005, p.181.

However, despite the importance of the right to property, the Commission mentions that there were no submissions on the subject of the right of the individual to property per se. The Commission however recommended that the right of the individual to property be included in the Constitution as a justifiable right.⁴³

This spirit is reflected by Article 65 (2) of the Draft Constitution in which the “state shall not deprive a person of property of any description or of any interest in or over property, except under an Act of Parliament.”⁴⁴

This stems from the belief that no government can claim legitimacy if it is not able to give recognition to and protect the right to property, which must be the cornerstone of a country’s constitution.

Unfortunately, the Draft Constitution offers no definition of property under Article 352 of the definitions section. This implies that the words in question shall have the meaning as given under a relevant Act, which in this case amounts to the definition provided under Cap 2 of the Laws of Zambia.

The definition provided by the CRC cannot be relied on, as it does not represent the current position of the law.

It is therefore accurate to state, that the classification of mining rights as property as per Cap 2 would still be valid if the Draft Constitution came into force. Furthermore, the protection of this right is strengthened via Article 349 (1) (b) which pronounces; “the constitution shall be interpreted in a manner that advances the Bill of Rights and the Rule of law.”⁴⁵

⁴³ Ibid

⁴⁴ Constitution of Zambia Act, 2005 (Draft Constitution for the Republic of Zambia).

⁴⁵ Article 349 (1) (b) of the Constitution of Zambia Act, 2005 (Draft Constitution for the Republic of Zambia).

This means that a provision in the Act extinguishing a mining right (**which I classify as property on the strength of Cap 2**) will not be allowed to stand without prior compensation.

Article 65(4) mentions that:

..., prompt payment of full and fair compensation shall be made prior to acquiring, assuming occupation or possession of any property, as provided under an Act of Parliament.⁴⁶

Since the Act provides no prior compensation to mining right holders under the old regime, it is safe to conclude that the Act cannot stand justified under the Draft constitution, which reflects the current thinking of the Zambian society.

Comparative Study with South Africa: nature of South African Mining Rights.

Mining rights in Zambia are significantly different from those obtaining in South Africa. The nature of mining rights constitutes a relationship that exists between a state and a mining right holder. This position has not been discussed judicially in Zambia. However, South African judicial decisions provide direction.

This relationship is discussed in *Neebe v. Registrar of Mining Rights*⁴⁷, in which Neebe applied for an order compelling the Registrar of mining rights to pass and register a transfer of certain prospecting claims as property rights. The court rejected such an interpretation, concluding that the nature of a mining license holder is *sui generis*, specially created by statute, thus the incidents of such tenure must be gathered from the terms of the statutes which establish it.

Further, in the case of *South African Loan & Mortgage Agency v Cape of Good Hope Bank*⁴⁸, it was stated that claims that licenses in such diamond mines were in no sense of the word property

⁴⁶ Ibid, Article 65(4)

⁴⁷ [1902], T.S 65

⁴⁸ 9 S.C 182

rights. It further stated that the mining license holder takes no title by the minerals unsevered but only the power to acquire title by severing minerals from the title when they have become personal property and that he never owns the minerals as long as they remain underground.

While this position illustrates the law in South Africa, it cannot apply to Zambia because the Interpretation and General Provisions Act Cap 2 of the Laws of Zambia, is the only law of general application in which mining rights are classified as property. This represents the legal basis for classifying them as property rights. In fact, under Cap 2, they can be considered personal property.

South African decisions are however consistent in disagreeing with the above assertion. In *Osborne v Morgan & Ors*⁴⁹, mining rights had been issued pursuant to the Gold Field Act, 1874. The judicial committee held that “mining rights” are documents under the authority of the government to any person applying for them. The document of itself, created no interests in any part of the gold, either legal or equitable.

Further, in the case of *Robinson v Blundel*, the court made the following statement:

a license to hunt in a man’s park and carry away a deer killed to his own or, to cut down a tree in a man’s ground and to carry it away the next day for his own use, are licenses as to hunting and cutting down and a dispensation or license passeth no interest, nor transfers property in anything but only makes an action lawful which without it is unlawful.⁵⁰

The above statement makes it clear that in South Africa, a person holding a mining right cannot claim to have property rights by virtue of holding a license.

With respect to the Zambian position, Professor Ndulo seems not to appreciate the implication of his statement in which he expressly refuses to classify mining rights as property. He further

⁴⁹ [1888] 13 App Cas 227

⁵⁰ [1867] Mac T.Z 683

mentions that “as long as there is no denial of justice, the state can therefore enact legislation which creates new obligations subject of course to section 18⁵¹ of the constitution which forbids confiscating legislation which does not include provisions for compensation.”

If Ndulo believes that any mining legislation affecting mining rights should be subject to the constitution under section 18 of the previous constitution, (a provision for protection against the deprivation of property) he should pronounce them as property.

Ndulo further mentions that, “Changes which affect existing mining right holders adversely are unlikely, however, as this might result in intimidation of mining investors.”⁵² It is clear that Ndulo did not anticipate the current predicament in which the Act affects the rights of already existing mining right holders. He was right in concluding however, that such legislation would intimidate mining investors.

It appears Ndulo made his prediction based on the 1969 regime. He states thus:

where rules need change, it would appear that the state will follow a pattern established in 1969 and treat existing license holders as a separate class and arrange an amicable settlement with them “in that year (meaning 1969), when all pre-existing prospecting and mining rights were extinguished by introduction of the new system of mining rights, provision was made for immediate granting of licenses protecting producing mines.”⁵³

Unfortunately, the care taken by government in 1969 has not been adhered to under the Act. No provision for the interests of those affected has been addressed, nor has immediate granting of licenses to protect producing mines been issued.

⁵¹ Section 18 is the equivalent of section 16 of the current Republican Constitution

⁵² Ndulo, Muna. *Mining Rights in Zambia*. (Nairobi: East African Publishers, 1988), p.142

⁵³ *Ibid*, p.150.

Conclusion

This chapter has provided direction by showing how mining rights amount to property under Zambian law. Cap 2 of the Laws of Zambia has unlocked this mystery. Further, the theory by Ndulo that mining rights are not property is proved inapplicable because he ignored the instruction of Cap 2.⁵⁴ Furthermore, the Republican Constitution and the Mung'omba Draft Constitution have enjoyed consultation. It is therefore the conclusion of this paper that mining rights under the mentioned documents amount to property. Lastly, a comparative study of the nature of mining rights in South Africa, has established that mining rights do not amount to property in that country.

⁵⁴ This assertion is made because Professor Ndulo's work on Mining Rights was published 24 years after the enactment of Cap 2 of the laws of Zambia. This law has not been repealed and therefore remains the current law of the Republic of Zambia.

CHAPTER 3

The question of Accrued Rights

Introduction

Savings and Transitional Provisions are meant to preserve existing rights of persons as a shift into a new legal regime occurs. This chapter aims at demystifying the savings provisions of the Act in light of statutory and case law. Further, the ascertainment of rights preserved under the provisions will also occupy a place of prominence in this paper. Lastly, section 14 (3) of the Act will help demonstrate the problems these provisions present.

The Purpose and use of Savings and Transitional Provisions

Savings and Transitional Provisions of any Act ought to preserve some rights. The word savings means to preserve and therefore the next question is, are any rights protected in the Savings and Transitional Provisions of the Act?

The above question is addressed by paragraph 2(1) of section 162 (2) appearing in the second schedule of the Act which states thus:

A holder of a mining or non mining right shall, within a period of one year from the commencement of this Act, apply for a mining right or non mining right, as the case may be, in accordance to the provisions of this Act: Provided that the Minister or director, as the case may be, shall only grant a license for the unexpired period for which it was granted under the repealed Act.⁵⁵

Two interpretations may be placed upon this quotation. Firstly, one may argue that the granting of a mining right for the unexpired period it was granted under the Mines and Minerals Act,1995 (“**the old Act**”) indicates an intention by the legislature to safeguard the interests of mining

⁵⁵ Mines and Minerals Development Act No.7 of 2008

right holders otherwise the use of the word “shall” would not have found its place within the statute.

However, scrutiny shows that what is preserved is the time upon which this mining right was granted. Otherwise, it appears the application for a mining or non-mining right should conform to the Act, which as is evident, has brought about innovations that may severely affect their rights.

Section 14 (3) (c) of Cap 2 mentions: “Where a written law repeals in whole or in part any other written law, the repeal shall not affect any right, privilege, obligation or liability acquired, accrued or incurred under any written law so repealed.”⁵⁶

The implication of the cited provision demonstrates that under this general rule, mining right holders under the old regime will have their rights under the old Act preserved.

In the case of *Miyanda v The Attorney General*⁵⁷, the court was of the view that his right to a hearing before dismissal was preserved in the new legislation even though it did not appear in the amendment of the new Act.

However, In *Re Joseph*⁵⁸, where an accrued right by a practitioner to petition for admission was found to have existed but was held to have been lost because the language of the relevant repealing Act made it clear that no such right survived.

In the *Thixton's case*⁵⁹, a matter of civil status was involved and the right in question was fundamental to the liberty of the subject. By reason of the fact that the amended legislation encroached on the ordinary rights of the subject, the court held that the statute had to be

⁵⁶ Cap 2 of the Laws of Zambia

⁵⁷ (No.1) (1985) Z.R.185 (S.C.)

⁵⁸ (1973) Z.R. 256 (H.C.)

⁵⁹ Attorney General v Thixton (1966) Z.R. 10 (C.A.)

construed strictly and that an existing right should not be considered as destroyed "unless there be express words or the plainest implication."⁶⁰ It was further stated that:

Some rights, in order to become "accrued" or "acquired" for the purposes of section 14 (3) (c) of the Interpretation and General Provisions Ordinance, require some incident or event to occur; others, especially those fundamental to the liberty of the subject, accrue automatically by the expiry of some period of qualification.⁶¹

The courts expression further provides a condition precedent upon which a right can accrue. However, even in such a scenario, it is clear that no intention to preserve rights by satisfaction of a precedent is present except that of time.

On the strength of the above, it would be prudent to examine whether the statute contains a contrary intention extinguishing the rights held under the old Act. The Act states thus:

for the avoidance of doubt, all mining rights and non-mining rights granted under the repealed Act shall cease to be valid one year after the commencement of this Act.⁶²

This provision expressly extinguishes all rights held under the old Act and it is therefore the submission of this essay that the rights as held under the old Act were extinguished forthwith upon the coming into force of the Act.

Lastly, a mere preservation of time is attainable for already existing mining right holders under the old Act. This is because provision is made for granting a mining right for the unexpired period under the repealed Act. No right is preserved, but time.

⁶⁰ Attorney General v Thixton (1966) Z.R. 10 (C.A.)

⁶¹ *ibid*

⁶² Mines and Minerals Development Act No.7 of 2008

Section 14(3) of the Mines and Minerals Development Act No. 7 of 2008

The above section is extremely interesting especially as far as it brings to light some innovations the legislature intended. It provides thus:

a person, and in the case of a company or its subsidiaries, shall not hold a number of licenses whose accumulated total area is more than one hundred and forty-nine thousand, seven hundred cadastre units.⁶³

Therefore, mining right holders owning prospecting rights beyond the required threshold, have their rights extinguished if they do not conform to the standards outlined in the cited section. In this light, any person with rights over an area larger than required and upon which prospecting ought to occur is severely constricted.

However, since this is merely a prospecting license which gives X no title to the land upon which he prospects, it would be difficult to quantify what kind of loss a mining right holder would suffer in an event that the area upon which prospecting ought to occur is constricted.

A mining right holder may claim compensation if he made an investment upon land he intends to prospect on. Such investments may include buildings, equipment incidental to prospecting or charges over the area.

However, one may argue that on a given area, land used for prospecting may be measured to include only those areas upon which actual prospecting ought to take place.

A holder of a prospecting license need not acquire rights over a block of land totaling not more than the restricted amount. He may simply hold land in different areas upon which prospecting is proposed, and it is those pieces of land that ought to be measured.

⁶³ *ibid*

The above proposition is advantageous in that mining right holders will only prospect over land that is not only suspected of holding minerals, but minerals providing economic basis for extraction. In a nutshell, maximum utilization of land is encouraged in this respect.

The Mines and Mineral Act, 1995 (“**the Old Act**”) placed no restriction on the area of land upon which a prospecting license could be held. However, the new Act provides a fetter. It appears the rationale behind such an impediment was to avoid monopolies in the mining sector. Whether such a provision is practical, begs a different consideration.

Ndulo when reviewing the 1969 mining regime stated thus;

there is no limitation as to the size of the area which one can be granted, which is a significant policy decision without safeguards, it could lead to the sort of monopoly of large areas as resulted under previous legislation.⁶⁴

He further provides clarity when he admits the following:

however, the likelihood of this occurring is made somewhat remote in practice in that the areas a person holding an exploration license can hold are limited partly by the minimum expenditure obligations, and more effectively by the program of intended operations.⁶⁵

The mining industry in Zambia is fairly young in so far as the players are concerned. No monopoly exists. However, it appears government anticipated such a scenario. Thus, such a provision may be viewed as foresight by the legislature.

Consequently, even though this may be commendable in the light of competition law, it may stifle investment especially by mining houses desiring more land to prospect for minerals.

Nevertheless, and by Ndulo’s words as reference, the area upon which mining right holders may prospect will be severely restricted by the cost needed to conduct the business and more

⁶⁴Ndulo, Muna. *Mining Rights in Zambia*. (Nairobi: East African Publishers, 1988),p.142

⁶⁵ Ibid.

effectively by the program of intended operations. Unfortunately, parliamentary debates concerning the Act did not address this crucial point.

Conclusion

This essay has resolved the question of accrued rights, as this question is likely to arise owing to the repeal of the old Act. An interaction with case law and Cap 2 of the Laws of Zambia has helped provide a solution. Furthermore, the notorious section 14(3) and the implications it may bring have also been considered. It appears the rationale behind this provision as Ndulo avowed lies in a justifiable need by government to prevent monopolies in Zambia's Mining sector. Even though this may not be the case presently, this provision is well intended.

CHAPTER 4

Legality of Cancellation of Development Agreements

Introduction

Every sovereign state has the right to enter into agreements with both individuals and other states. Various instruments are present in order to achieve this exploit. In Zambia, legislation may provide for such an undertaking. The thrust of this chapter aims at considering the legality of canceling mining development agreements by the state via the Act. This will be achieved by outlining a brief history of development agreements, stating the legal basis of them and finally determining with the help of both *Zambian* and international law, the legality of this cancellation.

Historical background to Development Agreements

The early devices relating to the contractual protection of foreign investment were worked out in the context of investments made in extractive industries, principally the oil industry. The usual form of entry was through concession agreements. This usually involved the transfers of sovereignty over whole tracts of land for long periods. The states that granted concession agreements were either colonies or protectorates.

Upon independence, new techniques of foreign investment had to be devised to reflect the interests of the host state and involve the internal balance between the interests of the host state and the foreign investor.⁶⁶ Development agreements were therefore devised to ensure investment protection by providing some semblance of legality. This explains the reasons behind provisions for entry into development agreements under the old Act.

⁶⁶ M. Sornarajah, *The International Law on Foreign Investment*. (Cambridge: Cambridge University Press, 2008), p. 406

Legal basis for entry into Development Agreements

In order to determine the legal basis of the Zambian government's entry into development agreements, it is cardinal to have a common frame of reference by defining what these agreements are.

The interpretation section of the repealed Mines and Minerals Act of 1995 defines a development agreement as "an agreement entered into under section nine in relation to a large-scale mining license"⁶⁷

Section 9 (1) of the same Act mentioned:

9 (1) For the purpose of encouraging and protecting large-scale investments in the mining sector in Zambia, the Minister may, on behalf of the Republic, enter into an agreement relating to the grant of a large-scale mining license.

(2) An agreement referred to in subsection (1) shall be known as a development agreement, and may contain provisions, which notwithstanding the provisions of any law or regulation shall be binding on the Republic....

The above quotation clearly illustrates that Development agreements were agreements the Minister entered into on behalf of the Republic in relation to granting large-scale mining licences. This evidences the legal basis for entering into these agreements.

Additionally, the Act mentions the binding nature of these agreements to the effect that no law or regulation would stand justified in light of these agreements.

This subsequently gave security to both foreign and local investors. No legislation or regulation would affect any development agreement between the state and an investor. One may therefore argue that this gave these agreements a peculiar superiority.⁶⁸

⁶⁷ Mines and Minerals Act Cap 218 of the Laws of Zambia.

The highlighted provisions communicate desperation in favour of fostering investment to the mining sector because the copper prices prior to 1995 were not competitive, and being the largest foreign exchange earner, the government was at pains to entice foreign investment. Consequently, the 1995 Act was born.

Among the agreements entered into, were with Lumwana Copper Mines, Kansanshi, Chambeshi, Konkola Copper mines to mention, but a few. As will be shown later, the clauses of the agreements entered into on behalf of the Republic pose considerable difficulty in light of the new Act.

Legality of Cancellation under Zambian Laws

Despite the clauses providing ‘security of investments’ by the Act, fortunes in the mining industry soon changed. Due to the sky rocketing copper prices on the London metal exchange, significant revenue promised to come to Zambia. However, this could not materialize because of the incentives granted to investors under these contracts and therefore, a paradigm shift became necessary.

A key feature of the development agreements were stabilization clauses, which in the opinion of this essay provide the basis of this argument. They provide an interesting array of legal implications.

Stabilization clauses essentially constitute a promise on the part of the host government not to amend its laws in a way that adversely effects the economic rights contained within that

⁶⁸ Certain scholars argue that the provisions of a simple contract cannot bind the state because they have legislative sovereignty and therefore such provisions should not bind them.

particular concession agreement⁶⁹. In other words, even if the Government amended its national laws, those new laws would not, in theory, apply to the aforementioned concession agreements.

Therefore, effective stabilization clauses aim at protecting the contract from application of legislation or administrative measures subsequent to the conclusion of a contract.

Following from the increased copper prices, the government made changes in violation of development agreements entered into by the passing of the Act, which provides as follows:

A development agreement which is in existence before the commencement of this Act shall, notwithstanding any provision to the contrary contained in any law or in the development agreement, cease to be binding on the Republic from the commencement of this Act.⁷⁰

Most development agreements between the government of Zambia and foreign mining companies contain stabilization clauses. Some go further as to contain a “Taxation Stability” clause. For example Clause 14.1 of the agreement between Kansanshi Mines and the Government of Zambia states that for a period of 15 years the government of Zambia were precluded from increasing the corporate income tax, VAT or impose any new taxes “so as to have, in each case, a material adverse effect on the Company's Distributable Profits or the dividends received by its shareholders.

The agreement between the Government of Zambia and Konkola Copper mines seems to have gone further. In addition to a “Taxation Stability” clause, the contract also contained general stabilization clause. Clause 13 of Part D of the development agreement between the government of Zambia and Konkola Copper Mines read as follows:

GRZ further undertakes that, during the Stability Period, it shall not by general or special legislation or by administrative measures or decree or by any other action or omission whatsoever (**other than an act of nationalization** such as is referred

⁶⁹ F.V. Garcia-Amador 1993. “State Responsibility in the Case of ‘Stabilization’ Clauses” *2 JTLP 23* at p. 23

⁷⁰ Act No.7 of 2008

to in Clause 0) ("**GRZ Action**") vary, amend, cancel or terminate this Agreement or the rights and obligations of the Parties under this Agreement, or cause this Agreement or the said rights and obligations to be varied, amended, cancelled or terminated, or prevent or hinder performance of this Agreement by any party thereto, provided always that this Agreement and the rights and obligations of the Parties under this Agreement may be varied, amended, cancelled or terminated as expressly provided herein. GRZ undertakes that KCM and its officers, directors, employees and shareholders shall be held free and made exempt from any GRZ Action or any change in the law of Zambia which would, but for such freedom or exemption, adversely affect KCM's rights under, or KCM's ability to comply with its obligations under, this Agreement.⁷¹

Were cancellation of a development agreement infringes property rights, the Constitution may be triggered. As stated in chapter two, mining rights are property. Moreover, on the strength of *Patel v Attorney General*⁷², the term property should as stated by the court, be construed generously. Furthermore, Section 19 of the ZDA Act provides:

An investors property shall not be compulsorily acquire nor shall any interest in or right over such property be compulsorily acquired except for public purposes under an Act of Parliament relating to the compulsory acquisition of property which provides for payment of compensation for such acquisition.⁷³

The position at law therefore presents a clear position as to the obligations of the Republic of Zambia. GRZ cannot unilaterally abrogate these agreements without providing some form of compensation. It is therefore clear in light of both the constitution and our investment code (ZDA Act), that the cancellation of development agreements amounts it a draconian measure.

However, despite the above position, the Zambian courts have not been called upon to determine the above question and therefore, the position of our courts on the same is yet to be revealed. It is clear however, that if such a matter arose, the Zambian government, like other governments will use sovereignty as a justification for such an action.

⁷¹ Development Agreement between KCM and GRZ

⁷² (1968) Z.R. 99 (H.C.)

⁷³ No. 11 of 2006

The Sovereignty Argument

It is clear that ordinary contracts between the State and the individual are governed by the municipal law of some country and not by international law⁷⁴. As such when investors enter into agreements with governments, there is no real guarantee that the latter will uphold the contractual obligations contained therein. This is because governments may change the law as and when they please to override the rights contained in investment contracts.

Stabilization clauses attempt to rectify this predicament by ensuring “that future changes in the legislation of the host state did not vary the terms of the contract on the basis of which entry is made”⁷⁵. They essentially do this by “freezing” the law so that future changes in the law will not affect the rights contained in the contract.

The aim of this section is to examine whether these clauses are in fact valid and whether they infringe the State’s sovereign rights. The first part of this section will attempt to define sovereignty and the latter part will examine arbitral tribunals’ decisions on stabilization clauses.

What is Sovereignty?

Sovereignty is very difficult to define especially in a world that is more globalised than it was five hundred years ago. Dunoff, Ratner and Wippman⁷⁶ correctly observe, “[s]overeignty is a concept regularly invoked in international discourse, but its meaning is notoriously difficult to pin down”.

⁷⁴ See the case Concerning the Payment in Gold of the Brazilian Federal Loans Issued in France (France v Brazil) 1929 PCIJ (ser. A) No. 20/21 at 121

⁷⁵ M. Sornarajah, *The International Law on Foreign Investment*. (Cambridge: Cambridge University Press, 2008), 407. See also Esa Paasivirta 1989 “Internationalization and Stabilization of Contracts versus State Sovereignty” 50 BYIL 315

⁷⁶ Jeffrey Dunoff et al, *“International Law Norms, Actors and Process: A Problem-Oriented Approach”*. New York: Aspen Publishers, 2006).

Some attempts have been made to define what encapsulates this illusive concept. In the UN debates over Cyprus,⁷⁷ the representative of Morocco contended that:

[T]he concept of sovereignty must at the very least include the total freedom of a free and independent country to be the sole architect of its constitution and to ensure that its content reflects, in the best possible way, the rights and guarantees of communities and private citizens alike – this of course in the absence of any kind of constraint or interference from abroad.

Turkey's response to this was "We are all sovereign countries here in the United Nations, but all of us have international commitments and we do not consider that to be curtailment of sovereignty",⁷⁸.

Henkin⁷⁹ contends that sovereignty is perhaps outdated. He argues that: "For legal purposes at least, we might do well to relegate the term sovereignty to the shelf of history as a relic from an earlier era." In his view the term sovereignty dealt more with the relationship between a prince and his subjects and is therefore "not a necessary or appropriate external attribute for the abstraction we call a state. Nor is it the appropriate term or concept to define the relation between that abstraction and its counterpart abstractions, other state".

In the opinion of this essay, defining sovereignty in a globalized world is perhaps very difficult. However, it is by no means an outdated concept. Sovereignty is a corpus of basic principles. These principles would include *inter alia* the ability to enter into agreements, the ability to pass laws and the ability to declare peace. This list of course is not an exhaustive one. However, these principles may be limited by the State's international obligations.

⁷⁷ U.N. SCOR, 19th Sess., 1097th mtg., at 4, U.N. Doc. S/PV. 1097 (1964).

⁷⁸ *Ibid* at 19

⁷⁹ Louis Henkin, *International Law: Politics and Values* (1995) pg. 8-10

Legality of Cancellation of development agreements at International law

This paper seeks the instruction of international law because, as cited earlier, stabilization clauses present in these agreements pose international obligations in that a clause of such a nature seeks to uplift the contract beyond the reach of the state and subjects it to international principles.

Sornarajah is perhaps the most well know proponent of non-liability of state even in instances were stabilization clause are present. He outlines the constitutional theory and the other being that even if a government entered into a contract, it is not bound.

Under constitutional theory, Sonarajah mentions that state legislatures have the right to pass legislation despite a stabilization clause. A legislature is not bound by its previous legislation and can therefore not be bound by the terms of the simple contract. It is clear that a statute according to him is superior to a contract.⁸⁰

Arbitral Tribunal's Attitudes towards Stabilization Clauses

Countless arbitral awards support the contention that stabilization clauses are in fact binding and as such preclude governments from unilaterally amending their laws in a way that adversely affect the contractual rights contained in concession agreements.

In *Sapphire International Petroleum Ltd. v. National Iranian Oil Co. (NIOC)*⁸¹, the tribunal found that premature termination of the concession agreement did impose a duty on the State to compensate the Sapphire International. The arbitral tribunal relied upon the principle of *pacta*

⁸⁰ M. Sornarajah, *The International Law on Foreign Investment*. (Cambridge: Cambridge University Press, 2008), p. 406

⁸¹ 35 I.L.R. 136 (1967)

sunt servanda to arrive at their decision, which dictates, “Contractual undertakings must be respected”.

Arguably, the idea that a contractual agreement precludes a State from amending its laws as and when it pleases militates against its sovereignty cannot stand. In *Saudi Arabia v. Arabian American Oil Co. (Aramco)*⁸² the arbitral tribunal concluded that, “[b]y reason of its very sovereignty within its territorial domain, the State possess the legal powers to grant rights [by] which it forbids itself to withdraw before the end of the concession.” These sentiments are shared by Weil⁸³ who states:

What would be the purpose of having a state renounce the exercise of certain of its prerogatives of sovereignty if, at the first difficulty, that state could free itself from this promise by invoking precisely these same prerogatives?

He goes on to say that:

In subscribing to a protection clause, the host government has thus created to the benefit the other contracting party a legitimate expectation, which the government may not subsequently frustrate without infringing the principle of good faith. Certainly, authors refer to the principle of estoppel, which forbids the state to take a position contrary to that which it took in the contract and on the faith of which the investor has obligated himself.⁸⁴

Further, in *AGIP v. Popular Republic of Congo* the government of Congo nationalized the oil distribution sector in 1974. Only AGIP, who entered into an agreement for the sale of fifty percent of AGIP’s capital to the government, remained unaffected. This agreement contained several stabilization clauses. In 1975, AGIP was nationalized by Congo. The arbitral tribunal opined that:

These stabilization clauses, freely accepted by the Government, do not affect the principle of its sovereign legislative and regulatory powers, since it retains both in

⁸² 27 I.L.R. 117 (1963)

⁸³ Patrick Weil 1974 “Les clauses de stabilisation ou d’intangibilité insérées dans les accords de développement économique” in *Mélanges offerts à Charles Rousseau* at p. 326

⁸⁴ *ibid*

relation to those, whether nationals or foreigners, with whom it has not entered into such obligations, and that, in the present case, changes in the legislative and regulatory arrangements stipulated in the agreement simply cannot be invoked against the other contracting party⁸⁵.

The above statement is very enlightening and persuasive. It appears Sonarajah misconstrued the effect of stabilization clauses when he avowed that a state's right to legislate would be affected. However, the right will still be exercised except that it will not apply to the particular contract in contention.

The arbitral tribunals in the cases of *BP v Libya*⁸⁶ and *Texaco Overseas Oil Petroleum Co. v California Asiatic Oil Co. v Libya*⁸⁷ which dealt with nationalization of oil companies in Libya were equally as unsympathetic to the sovereignty argument. In both cases, Libya had entered into agreements that contained stabilization clauses.

In *Texaco Overseas Oil Petroleum Co. v California Asiatic Oil Co. v Libya* focused on the principle of *pacta sunt servanda* and ruled that it was in fact possible for a sovereign state to bind itself to a contract with an investor. In this particular case, the stabilization clause read as follows:

The Government of Libya will take all steps necessary to ensure that the company enjoys all the rights conferred by the concession. The contractual rights expressly created by this concession shall not be altered except by the mutual consent of the parties.

The Arbitrator held that the clause did not "in principle impair, the sovereignty of the Libyan State". This was essentially because all its sovereign powers remained intact and could still be exercised on persons other than those to whom it owed contractual obligations.

⁸⁵ 21 I.L.M. 726 (1982) at Sec. 86

⁸⁶ 53 I.L.R. 297

⁸⁷ 17 ILM (1978) 1

Coale⁸⁸ contends that the arbitrator interpreted the stabilization clause as a basis to internationalize the contract. She further states that:

In other words, the arbitrator held that when the contract is internationalized, the parties act as equals and the state host is bound by the guarantees it has offered to the investor.

Thus far, we have seen case law that leans more in favour of the rights of the investor to the detriment of State sovereignty.

However, the decision in *Texaco* can be contrasted with *LIAMCO v Libya*⁸⁹ where the arbitral tribunal held that stabilization clauses do not affect the State's sovereign right to expropriate a contract. To hold otherwise in their view would amount to an intolerable interference with a State's sovereignty. This case represents recognition that arbitral tribunals can take into account the sovereignty argument. However, the effect of this case was to uphold the sovereign rights of the State to the detriment of the investor.

In addition, the arbitral tribunal in *Amoco International Finance v Iran*⁹⁰ took the view that internationalizing a contract is elevating the status of a contract to that of a treaty. Internationalizing a contract essentially involves the insertion of a choice of law clause that expressly states that international law will be the applicable law. The arbitral tribunal contended that doing would elevate the status of a private corporation to that of a State. The arbitral tribunal asserted that a private corporation should not be elevated to the status of a State. They further opined that:

As a fundamental attribute of state sovereignty, this right, commonly used as an important tool of economic policy by many countries, both developed and developing, cannot easily be considered as surrendered.

⁸⁸ Margarita T.B. Coale 2002 "Stabilization Clauses in International Petroleum Transactions" 30 (2) *Denver Journal of International Law and Policy* pp. 217-238.

⁸⁹ 62 ILR 141

⁹⁰ 15 Iran-US Claims Tribunal Reports 189 (1987)

Sornarajah scoffs at this idea by mentioning that an investment contract were a stabilization clause exists is not equivalent to a treaty. He mentions that treaties do not contain stabilization clauses because parties to treaties acknowledge that circumstances may change.

CONCLUSION

This chapter has shown that the action by the Zambian government to cancel the development agreements, despite the commitments it made, cannot be justifiable both under our municipal law, and under international law. It should also be mentioned, that the international position is extremely important because all mining development agreements contained dispute resolution clauses providing for international arbitration. Therefore, if litigation were pursued against the Republic of Zambia, it would succeed because of reasons given above.

CHAPTER 5

Incentives for the Zambian Citizen in Mining

Introduction

Tales of Zambia's hospitable investment climate have been spread everywhere, that it has seen an influx of foreign investment. As a tenet of development, foreign direct investment should contribute significantly to the revenue of the nation. This chapter seeks to address what measures have been put in place to encourage the Zambian to participate in the mining sector. Further, this chapter seeks to inspect whether the Mines and Minerals Development Act No.7 of 2008 provides special incentives to small scale miners.

Incentives to encourage Zambian Investment in the Mining Sector

Despite the importance of mining, it is disappointing to note, that the Act provides no special incentives to Zambian citizens that wish to undertake large-scale mining.⁹¹

In contrast, the old Act provided for incentives to mining right holders under the following sections:

96. Any investment in mining, including prospecting, by the holder of a mining right shall attract the deductions from income tax set forth in the Fourth Schedule.

97. (1) The holder of a mining right shall be entitled to exemption from customs and excise duties, and from any other duty or impost levied under the Customs and Excise Act, in respect of all machinery and equipment (including specialized motor vehicles) required for any of the activities carried on or to be carried on in pursuance of the right or otherwise for the purposes of his investment in mining or prospecting.

(2) The exemption to which an investor is entitled under this section shall be granted on application made in such manner, and accompanied by such evidence,

⁹¹ Mining houses in the context it is used makes reference to Zambians both natural and juristic.

as may be prescribed by a statutory instrument made under the Customs and Excise Act by the Minister responsible for finance.⁹²

It is observed that incentives offered under the old Act relating to tax exemptions were applicable across the board. That is to say, no distinction was made between foreign and local investors.

Under the Act, no provision for incentives is mentioned. This is because the new investment code makes provision for the types of incentives expected by investing in Zambia. However, not every investor is entitled unless particular benchmarks set within the Act are met.

An investor investing not less than five hundred thousand United States Dollars or the equivalent in convertible currency, in a priority sector or product, is entitled to incentives as specified by or under the Income Tax Act or Customs and Excise Act.⁹³

A priority sector or product means a sector or product that has high growth potential, listed in the second schedule.⁹⁴ Among these sectors are floriculture, horticulture, processed foods, manufacturing the following engineering products (i.e. copper products, iron ore and steel, cobalt), education and skills training etc.⁹⁵

It should further be mentioned that an investor is not entitled to incentives unless he holds a license, permit or certificate of registration under the ZDA Act.⁹⁶ Further, the incentives are to last a period of five years or for such period as the minister responsible for finance may prescribe.⁹⁷

An investor as per section 2 means:

⁹² Mines and Minerals Act cap 213 of the laws of Zambia

⁹³ S.56 of the Mines and Minerals Development Act No. 7 of 2008

⁹⁴ S.2 of the Mines and Minerals Development Act No. 7 of 2008

⁹⁵ Second schedule of The Zambia Development agency Act No. 11 of 2006

⁹⁶ Section 59 of The Zambia Development agency Act No. 11 of 2006

⁹⁷ Section 55 of The Zambia Development agency Act No. 11 of 2006

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.⁹⁸

Therefore, it is clear that an investor may be both Zambian or foreign. Further, and upon the recitment of the above provisions, it is clear that no distinction is made between incentives given to foreign investors and local investors. This means that the qualifications for investment do not take into account the disparities between foreign and local investors.

A vivid example is to the effect that in order to qualify for the various incentives given, an initial investment of five hundred thousand dollars ought to be made. This is irrespective of whether the investor is Zambian or non- Zambian. This encourages more foreign investors in comparison to local investors⁹⁹ who are relatively disadvantaged due to the lack of access to financial institutions as compared to their foreign counterparts.

In view of the above, it is left to Acts of Parliament specific to a particular industry to provide incentives to citizens of Zambia. It s therefore the conclusion of this essay that the legislative framework in place is not sufficient to foster large investment in the mining sector by Zambians.

Small scale Mining

As regards small-scale mining, the legislature is to be commended for taking significant steps to encourage Zambian investors to take part in mining.

Section 7 of the Act mentions:

A prospecting permit, small-scale mining licence, small scale gemstone license and an artisans mining right shall not be granted to a person who is not a citizen of Zambia or a company which is not a citizen of Zambia.¹⁰⁰

⁹⁸ Section 2 of The Zambia Development agency Act No. 11 of 2006

⁹⁹ These are persons who make direct investment in the country and who in the case of a natural person is a citizen or permanent resident and in the case of a company is incorporated in Zambia.

¹⁰⁰ Mines and Minerals Development Act No. 7 of 2008

The above solely intends to make small scale mining exclusive to Zambian citizens, be they natural or juristic persons. Further, under section 7(4) of the Act, “a mining right for industrial minerals shall only be granted to a citizen of Zambia and a citizen owned company.”¹⁰¹

However, section 2 of the Act mentions that:

a “citizens-owned company” which means a company where at least fifty point one percent of its equity is owned by Zambian citizens and in which the Zambian citizens have significant control and management of the company.¹⁰²

Section 7(6) defines it a citizen:

For the purposes of this Act, “citizen of Zambia” means

- (a) In relation to an individual, an individual who is a citizen of Zambia; and
- (b) In relation to a partnership, a partnership which is composed exclusively of persons who are citizens of Zambia.”¹⁰³
- (c) The legislature goes further by mentioning that “Any document or transaction purporting to grant a mining right to any person not entitled to hold the right¹⁰⁴ shall be void and of no effect.

It is therefore clear that in the field of small-scale mining, the legislature makes it express that only Zambians have the right to mine. Furthermore, the definition of a Zambian includes a body corporate, individuals and partnerships composed exclusively of persons who are Zambian citizens. From the encouragement of Zambians in the mining sectors perspective, it is clear that small-scale mining is protected and reserved exclusively for Zambians to the effect that any non Zambian holding any document purporting to give a mining right is void.

However, it is also notable that it is not an offence for a foreigner to hold such a right even though it is of no effect. What may amount to an offence is where the non-Zambian gives false information in order to acquire the small scale mining right.

Section 157 (2) mentions thus;

¹⁰¹ *ibid*

¹⁰² *ibid*

¹⁰³ *ibid*

¹⁰⁴ In this case a non Zambian

Any person who, in pursuance of a requirement under this Act, produces or makes available a document or any books that the person knows to be false or misleading in a material particular commits an offence.¹⁰⁵

Despite the above incentive, no other advantage accrues to X for being a small-scale miner. No special tax breaks are given, nor is there a fund established under the Act specifically meant to lend to Zambians encouraging them to invest in the mining sector. Despite the existence of the Citizens Economic Empowerment Fund, it would be essential to have a body specifically created to invite citizens to participate in mining.

Conclusion

This essay has shown that incentives offered to Zambians in mining are minor if at all significant. It has also been discovered that the Zambia Development Agency Act, does not make a distinction between a Zambian and a non-Zambian in terms of investment incentives. The five hundred thousand dollars cap is too high for the majority of Zambians to acquire in order to qualify for incentives outlined. Furthermore, even if such an amount was made available by banks, the interest rates are too high. The Act treats both foreign and local investors in the large-scale mining sector the same. However, the Act makes special provision for small-scale miners as has been shown. No foreign national is eligible to acquire a small-scale mining license. It is therefore the submission of this essay that the Act makes no adequate provision for the encouragement of Zambian citizens to undertake mining activities.

¹⁰⁵ Mines and Minerals Development Act No.7 of 2008

CHAPTER 6

Recommendations

The mining sector is Zambia's largest foreign exchange earner; therefore, it is critical to ensure that it is given special care and attention. This chapter seeks to offer solutions to the matters discussed in previous chapters. It is hoped, that this tiny contribution to knowledge does not gather dust, but is consulted in order to have a well-rounded approach to the problems in the mining industry.

Mining rights to be expressly defined as property in the Act

It is recommended that a definition of mining rights be clearly stipulated in the Act and be classified as property. Despite its definition in chapter two of the laws of Zambia, it is imperative to have an undoubtable position. Bearing in mind the persuasiveness of the work of distinguished scholars as professor Ndulo who refuse to classify mining rights as property, a court may decide in line with his submission. However, this is not the true position as shown in chapter two of this research.

Furthermore, professor Ndulo's point of view threatens the rights of mine owners. They are only confident of owning property in the minerals they expropriate, and not in the licenses. However, it should be realized the extinguishing a license effectively cancels the rights to the minerals. No property can pass in minerals unless they are extracted from the ground. Essentially, a mining right carries with it all the hallmarks of property and should be treated as such.

Ndulo's conclusion effectively prevents legal action under Article 16 of the constitution and the Zambia Development Agency Act because mining rights do not qualify as property according to

him. As a result, injustice is bound to arise. At present, no decided Zambian case on this matter is forthcoming.

This paper suggests that the definition of property be not conclusive, but illustrative. It must be wide enough to ensure future rights fall under the domain of property. An example would be: “property is, but is not limited to” followed by an outline of what may be considered property. Further inclusion to this list must be by statutory order issued by the Minister.

Provision for the Interests of Mining Houses

An amendment to the Act in order to provide for the interests of mining right holders under the old regime is recommended. It is extraordinary to preserve only the time in which the old Act granted the concessions, while all material aspects of the development agreements are eroded.

Furthermore, it is clear that the government may not afford to compensate the mining right holders under the old Act, but it is thought that section 162 under the second schedule ought to be revised. That is to say, it ought to be silent, or expressly preserve the rights of old mining right holders until such rights expire as per old Act.¹⁰⁶

The above measure promises to save the republic from the pains of laws suits, which are likely to fall out of governments favour assuming an impartial judiciary hears the matter.

A call for negotiations

A further recommendation is to encourage dialogue between government and investors in order to reach an amicable conclusion. Government should insert renegotiation clauses in mining agreements in order to take into account unforeseen circumstances that may occur in future such

¹⁰⁶ Silence is proposed because the rights of existing mining right holders may be preserved as per section 14(3) of Cap 2 of the laws of Zambia, which provides for such a scenario. Further, the non-express desire to extinguish such rights will allow for the operation of the cited section.

as the sudden sky rocketing price of copper on the London Metal Exchange. This move pledges to diminish the tension and mistrust mining companies may have towards the state and will create an environment in which investors will be more willing to adhere to government pleas.

The cancellation of development agreements poses an interesting problem. Having shown that such an action is not justifiable under both Zambia and international law, it would not be farfetched to project it as a time bomb waiting to detonate.

If one mining company takes the government to task and emerges successful, other mining houses are likely to follow suit. Eventually, millions of dollars will have to be paid by the state because of inconsistency in the manner they handled the mining sector. This effectively threatens to add to the indebtedness of the country. It is therefore recommended that government enter into negotiations with mining houses providing for their interests or allowing them to continue under the terms and conditions of the old act until they expire as stipulated there under.

Another recommendation would be to move the court requesting a pronouncement on the question of legality of cancellation of development agreements and whether mining rights do in fact constitute property. It would be interesting have the judicial point of view.

Incentives to Mining Houses that partner with Zambians

Mining houses collaborating with Zambian citizens should be given further incentives beyond those that do not. Incentives such as more tax relief should be encouraged. These should include; a higher percentage of capital allowances, accelerated depreciation, incentives for every job created, reduced or zero rated tax on payment of dividends and a significant reduction in the percentage of corporate tax. Further, the partnership must be significant and real. Zambian

citizens should not be used merely to acquire incentives and be discarded or relegated to insignificant or ceremonial positions in the company.

It is therefore recommended that incentives to investors must cease in an event that such a partnership extinguishes. Therefore, the law must make it mandatory for a Zambian citizen to inform the Minister of such a development in order to ensure that the investor ceases to enjoy only those benefits that accrue by virtue of him collaborating with a Zambian citizen.

Incentives to Zambian citizens

It is further recommended that in order to further encourage small-scale mining, a separate fund to provide loans to Zambians wishing to engage in the activity be set up. Secondly, government is encouraged to designate certain mineral rich areas and reserve them exclusively for small-scale mining, which would effectively empower Zambian citizens.

It is further recommended that an offence be created regarding a foreigner holding a small-scale mining license. Simply declaring it void and of no effect does not attach appropriate significance to the matter. Imprisonment and/or a fine in the case of a natural person, and a fine in the case of a company are proposed.

CONCLUSION

The Mines and Mineral Development Act No. 7 of 2008 has been the subject of debate in this research, not because of its positive innovations, but because of its repressive provisions. It is unfortunate that such an act found its way through the legislature without special attention being directed to the impact and distraction it was likely to cause. The most shocking feature it comprises is the lack of compensation to mining houses that held mining rights under the old regime.

Despite Zambia being a 'democratic country', that ought to be governed by the rule of law, it is discouraging to be associated with such legislation. The government should have taken the approach taken in 1969 when all affected mining companies were paid compensation. This omission by the government may prove detrimental to the Zambian economy eventually. Investors must feel safe to entrust their investments without fear of losing them through a unilateral decision by the government to change the law in such a draconian fashion.

Furthermore, stabilization clauses present the strongest point of argument for mining houses. Where specific acts of the state are prohibited under the clauses, government is under a duty to ensure it adheres to the conditions it willingly submitted to.

Additionally, were dispute settlement clauses provided for international arbitration, mining companies are encouraged to explore such an avenue as bias is dispensed with. Parties are free to choose a neutral ground for determination of disputes. In this case, arbitral proceedings are unlikely to take place in Zambia, which further increases the chances of a fair outcome.

Government should not haphazardly commit to agreements and hope to withdraw without bearing any consequences, for it is in the interests of justice that agreements are adhered to. The Zambian government is encouraged to consider the options already outlined above. Emphasis is placed on engaging mining houses in honest and progressive talks resulting in the reinstatement of development agreements that include renegotiation clauses meant to take into account changes in circumstances that may sweep through the mining sector for better or worse.

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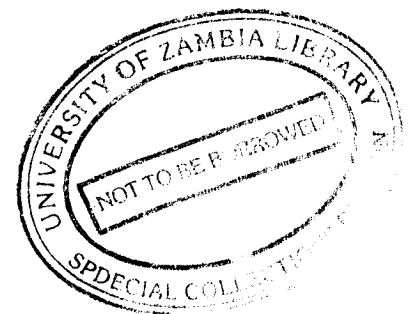
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