TOWARDS LEGAL EMPOWERMENT OF COMMUNITY SHARE OWNERSHIP TRUSTS IN ZIMBABWE

Introduction

In 2010, the Government of Zimbabwe adopted a watershed economic empowerment policy reform, introducing a variety of schemes that shared economic benefits between private sector companies and communities. Through the Statutory Instrument 116 of 2010 the Indigenisation and Economic Empowerment (General) (Amendment) Regulations, 2010 (No. 2), three types of share ownership schemes were introduced. These are; the Employee Share Ownership Scheme, the Management Share Ownership Scheme and the Community Share Ownership Scheme. The schemes were part of an assortment of vehicles for achieving the government’s indigenisation policy, which required that all businesses should have fifty-one percent (51%) of their shareholding under indigenous people.
The Community Share Ownership Scheme established Community Share Ownership Trusts (CSOTs) as vehicles of community development. The thrust of the CSOTs at inception was to ensure that communities benefit from the exploitation of natural resources within their areas. This would then be used as a measuring tool to assess the extent of compliance with the 51%-49% principle enunciated in the law. Ensuring that communities are direct beneficiaries of natural resources is not only ethical but most importantly brings about sustainable development and social cohesion. However, this principle encountered resistance from the private sector and some international players who viewed themselves as losers in the economic empowerment model.

Since their inception, CSOTs in Zimbabwe have operated with varying degrees of success where mining communities have been the major beneficiaries. However, recent legal and policy reforms in Zimbabwe have proved to be a major threat to the life and welfare of Community Share Ownership Trusts (CSOTs). Specific challenges came in the form of the Finance Act (2018) which repealed some of the 2010 provisions that the Government had introduced through the Indigenisation and Economic Empowerment Act [Chapter 14:33]. This brief explores the development gains of CSOTs in Zimbabwe and recommends ways of legally protecting and empowering them as important vehicles for community economic empowerment.

Methodology
Silveira House convened a two-day workshop with members of the Association of Community Share Ownership Trusts of Zimbabwe (ACSOTZs) where the current state and future of CSOTs was discussed. The outputs of the workshop were distilled and packaged in this policy brief document. In addition, workshop outputs were corroborated by literature and international laws.

Problems Prior to Community Share Ownership Trusts Establishment
Before the establishment of CSOTs there was no model or legal structure by which Communities could own shares in the commercial exploitation of natural resources in their areas. Some communities used to benefit through Corporate Social Responsibility (CSR) initiated and implemented by the companies voluntarily. This approach did not take cognisance of the communities’ needs since communities did not participate in decision making thereby lacking any impact on the livelihoods of the benefiting communities. Furthermore, the voluntary nature of CSR resulted in many companies opting not to adopt them. The Indigenisation and Economic Empowerment Act of 2007 [Chapter 14:33] as amended by the Finance Act, 2018. (No. 13 of 2018) has the effect of disempowering communities by taking them back to the time of CSR. This is contrary to international treaties and the constitution of Zimbabwe, particularly Article 2 of the International Convention on Economic, Social and Cultural Rights which provides that

“All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.”

Article 25 of the International Convention on Economic, Social and Cultural Rights provides that

“Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources”. 
Article 21 of the African Charter on Human and Peoples’ Rights recognizes that:
“All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in
the exclusive interest of the people. In no case shall a people be deprived of it.”;

Article 21(5) of the African Charter on Human and Peoples’ Rights mandates that:
“State Parties to the present Charter shall undertake to eliminate all forms of foreign exploitation
particularly that practised by international monopolies so as to enable their peoples to fully benefit
from the advantages derived from their national resources”;

The United Nations General Assembly Resolution 61/295 provides in Article 26 that:
“1. Indigenous peoples have the right to the lands, territories and resources which they have
traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and
resources that they possess by reason of traditional ownership or other traditional occupation or use, as
well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such
recognition shall be conducted with due respect to the customs, traditions and land tenure systems of
the indigenous peoples concerned.’

Section 13 (National development) (4) of the Constitution of Zimbabwe obliges that:
“The State must ensure that local communities benefit from the resources in their areas”;

Section 14 “Empowerment and employment creation” of the Constitution provides that:
“(1) The State and all institutions and agencies of government at every level must endeavour to
facilitate and take measures to empower, through appropriate, transparent, fair and just affirmative
action, all marginalised persons, groups and communities in Zimbabwe”;

Section 282 of the Constitution of Zimbabwe “Functions of traditional leaders” provides that:
“(1) Traditional leaders have the following functions within their areas of jurisdiction——
(a) …
(b) to take measures to preserve the culture, traditions, history and heritage of their communities,
including sacred shrines;
(c) to facilitate development”;

Section 2 of the Mines and Minerals Act which provides that:
“The dominium in and the right of searching and mining for and disposing of all minerals, mineral oils
and natural gases, notwithstanding the dominium or right which any person may possess in and to the
soil on or under which such minerals, mineral oils and natural gases are found or situated, is vested in
the President, subject to this Act”.

It is observable that the establishment of CSOTs through the Indigenisation and Economic
Empowerment Act [Chapter 14:33] was in line with the aforesaid provisions of the
international treaties and the Constitution of Zimbabwe. The challenge with the amendment
to the Indigenisation and Economic Empowerment Act [Chapter 14:33] brought by the
Finance Act, 2018 is that it has financially crippled the CSOTs and left them for dead.

**The Current Position of Community Share Ownership Trusts in Zimbabwe**

CSOTs came into effect in 2011 and a total of 61 CSOTs were registered through deeds of
trusts which provided for structural and operational procedures of the said trusts. The trusts
cover all the administrative districts in Zimbabwe, with 60 of the trusts being in the rural
areas. The funding of the CSOTs was to come through shareholding in various qualifying
businesses operating in the local communities. The law required that every business would
dispose of 10% of its shares to the community in order for it to be considered as having
complied with the indigenization and economic empowerment policy. However, there was
only partial compliance by some businesses and no compliance at all by the majority.
Then, qualifying businesses pledged a total of USD$128 million nation-wide. However, USD$45 million, which amounts to 35% of the pledges, was actually paid. Only twenty-six (26) out of the 61 CSOTs (42%) received some form of funding from qualifying businesses. Only two qualifying businesses namely Blanket Mine (Gwanda) and PPC Private Limited (Colleen Bawn) complied through the issuance of share certificates to the respective CSOTs. This translates to 3.3% of all CSOTs. As of 2018 to date fifty-five (55/61) Trusts are non-operational due to lack of funding from qualifying businesses. This effectively means that 90% of the registered Trusts are not operational.

The six (6) CSOTs that are currently in operation have managed to do so due to the fact that out of the disbursements they received they have managed to invest the surplus of their resources after carrying out some community projects. This happened because the 6 CSOTs received substantial amounts from the qualifying businesses, albeit not equivalent to the 10% shareholding required by the law.

The Obtaining Legal Framework and its loopholes

The current law dealing with CSOTs is enshrined in Statutory Instrument 116 of 2010 as indicated above and section 14B particularly provides as follows:

"Community share ownership schemes or trusts"

14B (1) In this section—
“community” means—
(a) the residents of the Rural District Council established in terms of the Rural District Councils Act [Chapter 29:13] whose natural resources are being exploited by a qualifying business; or
(b) the residents of one or more wards of a Rural District Council specified in a community share ownership scheme whose natural resources are being exploited by a qualifying business; or
(c) any other distinct community of persons as defined in a community share ownership scheme, who are affected by the exploitation of the natural resources in or adjacent to their place of residence;
“natural resources” include—
(a) the air, soil, waters and minerals of Zimbabwe;
(b) the mammal, bird, fish and other animal life of Zimbabwe;
(c) the trees, grasses and other vegetation of Zimbabwe;
(d) the springs, vleis, sponges, reed-beds, marshes, swamps and public streams of Zimbabwe;
(e) any landscape, scenery or site having aesthetic appeal or scenic value or of historic or archaeological interest;
“qualifying business” means a company engaged in exploiting the natural resources of any community;
“ward” means an area defined as a ward under the Rural District Councils Act [Chapter 29:13].

(2) A community share ownership scheme or trust that complies with this section may be taken into consideration when assessing the extent to which a business has achieved or exceeded the minimum indigenisation and empowerment quota:
(3) A community share ownership scheme or trust shall be constituted by a Deed of Trust registered with the Deeds Office and shall, subject to subsection (4), have the following features—

(a) in the case where the beneficiary community are the residents of a Rural District Council, the Rural District Council shall have the right to appoint the trustee or trustees who will hold the shares or interest in the qualifying business on behalf of the community (the actual percentage of which shares or interest shall be added towards the fulfilment of the minimum indigenisation and empowerment quota); or

(b) in the case where the beneficiary community are the residents of one or more wards of a Rural District Council, the manner of appointment of the trustee or trustees who will hold the shares or interest in the qualifying business on behalf of the community (the actual percentage of which shares or interest shall be added towards the fulfilment of the minimum indigenisation and empowerment quota) shall be as agreed between the Rural District Council concerned and the qualifying business; or

(c) in the case where the beneficiary community are the members of a distinct community of persons as defined in a community share ownership scheme, the manner of appointment of the trustee or trustees who will hold the shares or interest in the qualifying business on behalf of the community (the actual percentage of which shares or interest shall be added towards the fulfilment of the minimum indigenisation and empowerment quota) shall be as set out in the Deed of Trust of the community share ownership scheme or trust concerned.

(4) An owner of a business wishing to use the qualifying scheme or trust for the purpose of this section shall submit to the Minister, Form IDG 04 together with a copy of the Deed of Trust of the qualifying scheme or trust:

Provided that, in considering whether a community share ownership scheme or trust set up for the benefit of a community referred to in subsection (3)(a) or (b) should be accepted as a qualifying scheme or trust, the Minister shall have regard to whether the scheme or trust provides that the monies accruing to the scheme or trust will be applied to any or all of the following purposes—

(a) the provision, operation and maintenance of—

(i) schools and other educational institutions and facilities and amenities connected therewith, and educational scholarships; and

(ii) hospitals, clinics and dispensaries;

and

(c) the provision and maintenance of dipping tanks; and

(d) the provision, development and maintenance of roads; and

(e) the provision, development and maintenance of water works and water sanitation works; and

(f) gully reclamation and other works related to soil conservation and the prevention of soil erosion, and the conservation of the environment generally.

(5) All dividends or other monies accruing to the beneficiaries by virtue of a community share ownership scheme or trust in terms of this section shall—

(a) in the case of a community referred to in subsection (3)(a) or (b), be recorded in a separate account of the Rural District Council concerned, as will ensure that the amount of such dividends or other monies may be ascertained separately from any other revenue accruing to the Rural District Council
Deficiencies of the Finance Act of 2018

The content and import of the Finance Act of 2018 have been at variance with the thrust towards supporting CSOTs. The main deficiencies of this Act are as follows:

a) The Act negatively affects the continued capitalisation of CSOTs as it makes it optional for investors to support CSOTs, their capitalisation and fulfilling previous financial pledges towards the CSOTs.

b) The Act disempowers the CSOTs by relegating them to the status of perpetual dependents. It gives unfettered powers to the Qualifying Businesses and makes the CSOTs reliant on these businesses’ goodwill.

c) Mining companies dealing with minerals other than diamonds and platinum, have been completely excluded from the possibility of supporting the community-benefiting scheme (CSOTs) since only those mining diamonds and platinum may support CSOTs if they wish. Thus, investors in platinum and diamonds are also not obligated to consider supporting the CSOTs.

d) The new law has reversed the community gains from the community-benefit scheme system. This scheme had given hope to the communities around mining areas that they would benefit from the minerals around them.

e) Section 24(1)(b) of the 2018 Finance Act contravenes Sections 13(4), and s14(1) of the national Constitution and is therefore unconstitutional.

f) The Act and its provision militate against continental resolution, espoused in the African Mining Vision agenda. The AMV agenda stresses for the continent’s natural resources harnessed for the socio-economic development of all citizens.

In other words, the Finance Act of 2018 removed the legal framework that was supportive of CSOTs.

Why should CSOTs be Legally supported?

CSOTs have thus far played a key role in community development despite not receiving substantial support from qualifying enterprises or corporates. By June 2018, a total disbursement of USD$ 44.5 million had been made to 26 CSOTs. Fig 1. Illustrates some of the few successful projects by CSOTs in Zvishavane, Gwanda and Mhondoro.
The performance of some CSOTs suggests that they are a potent developmental lever for Zimbabwe and they deserve to be legally supported.
Policy Recommendations

This brief concludes with four recommendations for building an effective legal framework and process for community share ownership trusts.

1. **CSOT considerate legal framework**
   A clear and robust legal framework for CSOTs is proposed. In the process of amending the Indigenisation and Economic Empowerment Act or replacement of that Act by any other Act or enactment of any empowerment Act, Government must come up with a law which requires that communities within which extractive companies operate inherently enjoy a minimum of 20% shareholding in those companies in fulfilment of the international conventions and the Constitution of Zimbabwe principles. Parliament and other development organisations are encouraged to advocate and support this proposal.

   Such law must recognise CSOTs as a vehicle for community development and investment. The trusts that are registered should have provisions that necessitate them to be self-sustaining in future in the event of the extractive activity ceasing to be fruitfully operational.

2. **Clarification of CSOTs principles**
   In the above proposed legal amendments, a clear understanding of certain principles embedded in the community share ownership scheme concept such as extraction; man-made crisis, community areas, humanitarian purpose, inherent enjoyment and expropriation, among others is required. These terms should be clearly defined in a law to be adopted by the government, which law must entrench ownership rights to communities within areas where any extractive activity is undertaken.

3. **Strict Enforcement of Supportive Laws**
   In light of low levels of compliance by corporates in fulfilling their responsibility to CSOTs, it is proposed that compliance to the proposed law must be mandatory and those who do not comply must be denied registration status as extracting companies and if already registered and operating, must be sanctioned. Where there is need for consideration or compensation on existing businesses, the State should consider providing such businesses a tax holiday calculated based on a certain percentage of production level.

4. **Effective Supporting Policies and Mechanisms**
   Creation of effective mechanisms to guarantee that the rights communities as represented by CSOTs are a principal consideration in devising measures on economic empowerment. This includes a holistic supporting institutional framework that ensures that the demands by CSOTs are addressed. Civil society and other organisations can play a role in advocating and capacitation of such cognate institutions.

*Special acknowledgements:* Dr Alois Madhekeni, Father Anold Moyo, Zandile Mvududu and ACSOTs.

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