

Regulating Against Business "Fronting" to Advance Black Economic Empowerment in Zimbabwe: Lessons from South Africa

TV Warikandwa* and PC Osode**

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Author

Tapiwa V Warikandwa and Patrick
C Osode

Affiliation

University of Fort Hare
South Africa

Email

TWarikandwa@ufh.ac.za
POsode@ufh.ac.za

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Abstract

This article examines Zimbabwe's indigenisation legislation, points out some of its inadequacies and draws lessons from South Africa's experiences in implementing its own indigenisation legislation. Both countries have encountered challenges relating to an upsurge in unethical business conduct aimed at defeating the objectives of their black economic empowerment programmes, policies and legislation. This practice is called business fronting. However, while South Africa has succeeded in enacting a credible piece of legislation aimed at addressing this issue, Zimbabwe has yet to do so. The article points out that the failure to specifically regulate against business fronting poses the most significant threat to the attainment of the laudable aims and objectives of the indigenisation programme and related legislation. In order to avoid becoming a regulatory regime that is notorious not only for being functionally ineffective but also for tacitly permitting racketeering in reality, the article argues for the adoption of anti-fronting legislation in Zimbabwe using the South African legislation as a model.

Keywords

Black economic empowerment; indigenisation; business fronting; Zimbabwe; South Africa; distributive justice.

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1 Introduction

Black economic empowerment programmes in Zimbabwe and South Africa have often seen the indigenous people who were previously and who remain largely excluded from the economic mainstream going into a state of euphoria¹ based on the genuine belief that such programmes are an effective panacea² for their existential socio-economic challenges.³ This belief appears to be affirmed by the values set out in the *African Charter on Human and People's Rights*,⁴ which recognise and advance the right to the free disposition of wealth and natural resources in the best interests of indigenous peoples.⁵ It is thus not surprising to see that indigenisation in Zimbabwe is founded on a socio-political creed that land and mineral resources exist in the country's territory to a greater extent⁶ for the benefit of indigenous people⁷ and to a lesser extent for multinational corporations.⁸ The term multinational corporation, for the purposes of the implementation of indigenous economic empowerment laws, is often controversially

* Tapiwa V Warikandwa. LLB; LLM; LLD (Fort Hare). Post-doctoral Fellow, Department of Mercantile Law, Nelson R Mandela School of Law, University of Fort Hare, South Africa. Email: TWarikandwa@ufh.ac.za.

** Patrick C Osode. LLB (Jos); BL (Nig); LLM (Lagos); SJD (Toronto). Professor, Department of Mercantile Law, Nelson R Mandela School of Law, University of Fort Hare, South Africa. Email: POsode@ufh.ac.za.

¹ Gallagher 2015 *JMAS* 27. Also see Moyo "Political Economy of Transformation" 23-24.

² Chowa and Muvare 2013 *RJE* 14.

³ Ngwerume and Massimo 2014 *JPAG* 4. Also see Government of Zimbabwe *First Report of the Thematic Committee* 6; Andreasson "Indigenisation and Transformation"; Matunhu 2012 *SAPRJ* 5; ZELA 2013 <http://www.zela.org/docs/publications/2013/uae.pdf>; Mabhena and Moyo 2014 *IOSR-JHSS* 72; and Zikhali, Ncube and Tshuma 2014 *IJHSS* 27.

⁴ See art 21(1) as read with art 22(1) of the *African Charter on Human and People's Rights* (1986).

⁵ Andreasson 2010 *PG* 424. Also see the case of *AMCO v Republic of Indonesia* (Merits) 1992 89 ILR 368 paras 405, 466; and *De Sanchez v Banco Central de Nicaragua* 770 F 2d 1385 US Court of Appeals 5th Circuit (19 September 1985) para 17, for a comparative analysis of similar practices in other jurisdictions in the world.

⁶ Section 3(1)(a) of the Zimbabwean *Indigenisation and Economic Empowerment Act* [Chapter 14:33] of 2007 (herein after IEEA) stipulates that: "at least fifty-one per centum of the shares of every public company and any other business shall be owned by indigenous Zimbabweans..." Also see ss 3(1)(b)(iii), 3(1)(c)(i) and 3(5) of the IEEA.

⁷ Section 2(1)(b) of the IEEA. Section 2(1)(b) must be read together with s 14 and s 20(1)(c) of the *Zimbabwean Constitution Act* 20 of 2013. Also see s 1 of the South African *Broad-Based Black Economic Empowerment Act* 53 of 2003 (B-BBEE Act), which provides that: "'black people' is a generic term which means African, Coloureds and Indians". In the same section of the B-BBEE Act, it further provided that "'broad-based economic empowerment' means the economic empowerment of all black people including women, workers, youth, people with disabilities and people living in rural areas through diverse but integrated socio-economic strategies ..."

⁸ Leal-Arcas *International Trade and Investment Law* 178. Also see Munyedza 2011 *BEJ* 9.

understood to refer to western-owned companies and not Asian-owned companies.⁹ The need to remedy colonial injustices and significantly improve the extent of the participation of indigenous Zimbabweans in the country's economic activities is often advanced as the primary justification for indigenisation programmes which seek to economically empower previously disadvantaged Zimbabweans.¹⁰ Premised on the need to redistribute the country's economic resources in a manner that favours indigenous Zimbabweans,¹¹ Magure points out that the indigenisation programme has promised much to the anxious and highly expectant majority but delivered little.¹² Instead, many of the benefits from the indigenisation programme have gone to a few well-connected elites¹³ due largely to unethical business practices such as business fronting.¹⁴ Accordingly, in order to ensure that each and every indigenous Zimbabwean benefits from the indigenisation of land as well as other economic resources and is enabled to enter the economic mainstream, the IEEA urgently requires strengthening through the inclusion of specific anti-fronting clauses

⁹ Makwiramiti 2011 <http://www.polity.org.za/article/in-the-name-of-economic-empowerment-a-case-for-south-africa-and-zimbabwe-2011-02-24>. The Zimbabwean President Robert Mugabe once argued that, "Why should we continue to have companies and organisations that are supported by America and Britain without hitting them back? The time has come for us to revenge and one way of (doing this) is for us to use the IEEA. That Act gives us authority to take over the companies. We can begin with 51%, but in some cases we must read the riot act and say this is only 50% but if you do not lift the sanctions we will take 100%." Also see Matyszak 2010 <http://researchandadvocacyunit.org/system/files/Everything%20you%20ever%20wanted%20to%20know.pdf>; and Matyszak 2013 http://archive.kubatana.net/docs/demgg/rau_zimplats_saga_120423.pdf.

¹⁰ Section 2(1)(b) of the IEEA. Also see s 2 of the South African B-BBEE Act; Department of Trade and Industry 2007 <http://www.thedti.gov.za>; Global Business Holdings 2011 <http://gbholdings.org>; Watson 2010 <http://www.minorityperspective.co.uk>; and Sokwanele 2010 <http://www.sokwanele.com>.

¹¹ See the definition of "indigenisation" in the s 2(1)(b) of the IEEA and the objectives of the black economic empowerment programme in s 2 of the South African B-BBEE Act.

¹² Magure 2012 *JCAS* 67; Matyszak 2010 <http://researchandadvocacyunit.org/system/files/Everything%20you%20ever%20wanted%20to%20know.pdf>; Raftopoulos and Moyo 1995 *EASSRR* 17; Carter and Wilton 2006 *JEC* 65; Matyszak 2016 <http://researchandadvocacyunit.org/system/files/Chaos%20Clarified.pdf>; An dreasson 2003 *JCAS* 384; Magaisa 2015 <http://alexmagaisa.com/the-trouble-with-zimbabwes-indigenisation-policy/>; and Sibanda 2014 *IJPLP* 24.

¹³ Magure 2012 *JCAS* 68-69. Also see Tekere *Lifetime of Struggle* 11; and Raftopoulos "State, NGOs and Democratisation" 21-45. The authors point out that the Government led by the Zimbabwe African National Union Patriotic Front (ZANU PF) has created a fertile environment for the emergence of a "national bourgeoisie". The national bourgeoisie consists of members of the ruling party ZANU PF who deliberately pursue their objectives as an integral part of the ruling party's politics of patronage.

¹⁴ Anon 2012 <https://www.modernghana.com/news/399099/zimbabwe-equity-laws-should-benefit-poor-bank-chief.html>. Also see Gaomab 2009 <http://www.fesnam.org>; Helmsing *Perspectives of Local Economic Development*.

or alternatively the enactment of an independent anti-fronting legislation.¹⁵ It is therefore not surprising that at the time of writing this article, the *Public Sector Corporate Governance Bill* had been tabled before parliament with a view to introducing a law which addresses corruption and other related maladministration challenges in the public and private sectors.¹⁶ Specifically, the law will seek to address any murky business activities in both the private and public sectors and ensure that such practices are punishable at law.¹⁷ This in itself is sufficient evidence of the Zimbabwean Government's acknowledgement of the inadequacies of the existing laws in fighting corruption and other irregular business activities, including business fronting.

This article argues that presently, because of the omission to provide for the problem of fronting, Zimbabwe has inadequate black economic empowerment legislation which has created a reality in which the benefits of the legislation's implementation appear to accrue largely to the well-connected, politically favoured elites and their associates.¹⁸ The article is divided into six parts. The first part introduces the concept of indigenisation in Zimbabwe, while the second presents a brief description of the country's indigenisation regulatory framework. The third part undertakes an analysis of incidents of business fronting in Zimbabwe and shows why it is easy to front. The fourth part examines the regulation of business fronting in South Africa, while the fifth part draws lessons for Zimbabwe from South Africa's amendment of its black economic empowerment legislation in order to effectively address the challenge of fronting. The last part of the article offers recommendations on how best to strengthen Zimbabwe's indigenisation laws in preventing fronting.

¹⁵ Incorporating anti-fronting clauses in the IEEA or enacting anti-fronting legislation would be a sign that the Zimbabwean government is sincere in its efforts to arrest the scourge of fronting, which is a significant aspect of corruption in Zimbabwe. It will also show that the Government is serious about implementing its commitments regarding the *Southern Africa Development Community (SADC) Protocol against Corruption* adopted on the 14th of August 2001 in Blantyre, Malawi.

¹⁶ The Bill's main objective is to address the inadequacies of the existing laws on corporate governance in addressing issues of unethical business practices in Zimbabwe. The presentation of the Bill before parliament has been linked to the need to ensure that individuals, government officials, and company representatives do not defeat the objectives of the Zim Asset Policy. The Zim Asset Policy itself "... was crafted to achieve sustainable development and social equity anchored on indigenisation, economic empowerment and employment creation which will be largely propelled by the judicious exploitation of the country's abundant human and natural resources". See the full Zim Asset Policy at Government of Zimbabwe Date Unknown <http://www.dpcorp.co.zw/assets/zim-asset.pdf>.

¹⁷ Mugabe 2016 <http://allafrica.com/stories/201605090140.html>.

¹⁸ See Magure 2012 *JCAS* 69.

2 Zimbabwean indigenisation law

Indigenisation policies and processes in Zimbabwe are regulated by the *Indigenisation and Economic Empowerment Act (IEEA)*.¹⁹ The IEEA provides the policy definition of empowerment as:

The creation of an environment which enhances the performance of ... economic activities of indigenous Zimbabweans into which they would have been introduced or involved through indigenisation.²⁰

Emphasis in the definition is clearly on the compelling need to ensure that the benefits of the indigenisation policy cascade down to indigenous Zimbabweans in their multitudes and not just to a few politically connected elites and their foreign business partners, which may be the current state of affairs.²¹ It is submitted that the need to maximise the reach or dispersal of those benefits is the reason why section 2(1)²² of the IEEA further defines indigenisation as:

... a deliberate involvement of indigenous Zimbabweans in the economic activities of the country, to which hitherto they had no access, so as to ensure the equitable ownership of the nation's resources.²³

The indigenisation policy of Zimbabwe, the IEEA, as well as the Indigenisation and Economic Empowerment Regulations seek to achieve the following objectives:

- a) transforming indigenous Zimbabweans from being mere suppliers of labour and consumers to participants in the country's economy as owners of businesses;²⁴

¹⁹ Indigenisation and Economic Empowerment Act [Chapter 14:33] of 2007 (herein after referred to as the IEEA).

²⁰ Section 2(1) of the IEEA.

²¹ Moyo "Land Reform and Redistribution" 29. Also see Fargher *The Herald* 10; Moyo "Scramble for Land in Africa" 29; Philip 2012 *JPS* 681; Moyo "Primitive Accumulation" 61; Carmody "Ecolonization" 169; and Mazingi and Kamidza "Inequality in Zimbabwe" 371.

²² Section 2(1) also defines empowerment as "...the creation of an environment which enhances the performance of the economic activities of indigenous Zimbabweans into which they would have been introduced or involved through indigenization".

²³ Section 2(1) of the IEEA.

²⁴ Section 2(1) of the IEEA.

- b) transferring equity shareholding in all businesses with a net asset value of United States Dollars (USD) 500 000 and above to indigenous Zimbabweans;²⁵
- c) promoting the procurement of at least 51% of goods and services needed by all government departments, statutory bodies and local authorities from businesses controlled by indigenous Zimbabweans;²⁶
- d) establishing a National Indigenisation and Economic Empowerment Board (NIEEB) to advise the Minister and manage the Indigenisation and Economic Empowerment Fund;²⁷
- e) establishing an Indigenisation and Economic Empowerment Fund to provide assistance to indigenous Zimbabweans for the purposes of financing share acquisitions, warehousing shares under employee share ownership schemes or trust, and management buy-ins and buy-outs;²⁸
- f) setting up Employee, Management and Community Share Ownership Schemes or Trusts as part of the 51% indigenous shareholding to ensure the broad-based participation of indigenous Zimbabweans in the economy;²⁹
- g) reserving business sectors such as the production of food and cash crops, employment agencies, estate agencies, milk processing, marketing and distribution, advertising agencies, and the provision of local arts and craft to indigenous Zimbabweans;³⁰ and
- h) providing a dispute resolution platform in the form of the Administrative Court to be available to any business aggrieved by a

²⁵ Sections 3(1) and 3(5) of the IEEA. Also see *Indigenisation and Economic Empowerment* General Notice 459 of 2011 and *Indigenisation and Economic Empowerment* General Notice 280 of 2012.

²⁶ Section 3(1)(f) of the IEEA.

²⁷ Section 7 of the IEEA.

²⁸ Section 12 of the IEEA.

²⁹ Section 12(2)(a)(ii) of the IEEA.

³⁰ Sections 3, 4 and 5 of *Indigenisation and Economic Empowerment (General) (Amendment) Regulation* Statutory Instrument 66 of 2013 [CAP 14:33]. These reserved economic sectors include the following: the agricultural production of food and cash crops; transport (buses, taxis and car hire services); the retail and wholesale trades; barbershops; hairdressing and beauty salons; employment agencies; estate agencies; valet services; grain milling; bakeries; tobacco grading and packaging; tobacco processing; advertising agencies; milk processing; the provision of local arts; and marketing and distribution. Also see s 3(1)(e) of the IEEA.

Minister's decision to apportion 51% of such an entity to indigenous Zimbabweans.³¹

The methodology for implementing the controversial IEEA³² is prescribed in the equally controversial *Indigenisation and Economic Empowerment (General) Regulations*.³³ The controversy lies mainly in the 51% indigenisation equity threshold imposed on all foreign-owned businesses, as illustrated in the Table below:

Sector	Minimum net asset value	Lesser share of non-indigenous businesses	Years to comply
<i>Indigenisation and Economic Empowerment General Notice 459 of 2011</i>			
Manufacturing	Of or above one hundred thousand dollars (USD 100 000)	26%	1st year
		36%	2nd year
		46%	3rd year
		51%	4th year
<i>Indigenisation and Economic Empowerment General Notice 280 of 2012 – Other Sectors</i>			
Financial Services	See Part I of Notice 280	51%	1 year
Tourism	See Part II of Notice 280	51%	1 year
Education and Sport	See Part III of Notice 280	51%	1 year

³¹ Sections 20(1)(c) and 20(2) of the IEEA.

³² Sections 3(1)(a), 3(b)(iii), 3(c)(i), and 3(5) of the IEEA. Also see Magaisa 2012 <http://www.zimeye.org/the-illegality-of-Zimbabwe%E2%80%99s-new-indigenisation-regulations-in-the-banking-and-education>; and Matyszak 2016 <http://researchandadvocacyunit.org/system/files/Chaos%20Clarified.pdf> 1-20.

³³ See the *Indigenisation and Economic Empowerment (General) Regulations* Statutory Instrument 21 of 2010 [CAP 14:33], which was gazetted on the 29th of January 2010 and subsequently came into effect on the 1st of March 2010.

Arts, Entertainment and Culture	See Part IV of Notice 280	51%	1 year
Engineering and Construction	See Part V of Notice 280	51%	1 year
Energy	See Part VI of Notice 280	51%	1 year
Services	See Part VII of Notice 280	51%	1 year
Telecommunications	See Part VIII of Notice 280	30-51%	1 year
Transport and Motor Industry	See Part IX of Notice 280	51%	1 year

Source: *Government of Zimbabwe IEE* General Notices 459 of 2011 and 280 of 2012

The specified share transactions issues regarding the 51% equity threshold appear to constitute a threat to business investments in that they are not negotiable.³⁴ Section 3(5) of the IEEA provides that an exemption from complying with the said regulatory requirements is permissible only in instances where the foreign-owned company is able to furnish evidence that the transfer of a lower percentage of its shares or a longer period of achieving the indigenisation objectives is appropriate in its special or unique circumstances.³⁵ However, section 3(5) has been a source of contention as policy makers had appeared to suggest that it implies that the 51% equity threshold is negotiable.³⁶ In fact section 3(5) suggests otherwise, as it provides that:

The Minister may prescribe that a lesser share than fifty-one per centum or a lesser interest than a controlling interest may be acquired by indigenous Zimbabweans in any business in terms of subsections (1)(b)(iii), (1)(c)(i), (1)(d) and (e) in order to achieve compliance with those provisions, *but in doing so he or she shall prescribe the general maximum timeframe within which the fifty-one per centum share or controlling interest shall be attained.*³⁷

³⁴ For a detailed analysis of these issues see Matyszak 2016 <http://researchandadvocacyunit.org/system/files/Chaos%20Clarified.pdf> 15-18.

³⁵ Section 3(5) of the IEEA. Also see ss 4, 7 and 8 of the *Indigenisation and Economic Empowerment (General) Regulations* Statutory Instrument 21 of 2010 [CAP 14:33]; and ss 4, 7 and 8 of the 2010 regulations.

³⁶ Matyszak 2016 <http://researchandadvocacyunit.org/system/files/Chaos%20Clarified.pdf> 15-18.

³⁷ Section 3(5) of the IEEA. Emphasis added.

In justifying the indigenisation programme as reflected in the IEEA, the government has been consistent in advancing and relying upon a populist argument that the country's land and mineral resources should benefit Zimbabweans and not only multinational companies.³⁸ This is probably premised on the genuine need to ensure that indigenous Zimbabweans and not multinational companies receive the greater share of the proceeds flowing from the exploitation of the country's land and mineral resources.

Section 2(1) of the IEEA pursues a distributive justice agenda.³⁹ This is because the ultimate policy goal of transferring the ownership of the land and mineral resources to indigenous Zimbabweans is the closing of the ever-widening inequalities⁴⁰ between the wealthy and the indigent.⁴¹ Accordingly, a theoretical construction such as the distributive justice theory, which advocates a just and fair distribution of the benefits and proceeds originating from the land and mineral resources in any society, becomes strongly affirming of the Zimbabwean indigenisation process.⁴² Accordingly, the government should in this regard be applauded for trying to ensure that multinational corporations do not continue to take the larger share of the said proceeds⁴³ and benefits while indigenous people remain exposed to various forms of exploitation.⁴⁴ To address such socio-economic injustices, it is clearly plausible to adopt legal policies whose objectives are

³⁸ Section 3(1)(e) of the IEEA prohibits foreign investment in sectors reserved for Zimbabweans. Also see Matyszak 2010 <http://researchandadvocacyunit.org/system/files/Everything%20you%20ever%20wanted%20to%20know.pdf>.

³⁹ Rawls *Theory of Justice* 94. The distributive justice theory was originally postulated by John Rawls. The underlying rationale of this theory is that people should be compensated for their past misfortunes. In the Zimbabwean context such misfortunes would relate to the colonial injustices which precluded indigenous Zimbabweans from participating in mainstream economic activities.

⁴⁰ Government of Zimbabwe Date Unknown <http://www.dpcorp.co.zw/assets/zim-asset.pdf>.

⁴¹ Matyszak 2010 <http://researchandadvocacyunit.org/system/files/Everything%20you%20ever%20wanted%20to%20know.pdf>; and Sithole and Chikerema 2014 *ZJPE* 84.

⁴² Stark 2010 *BC Third World LJ* 3. Also see O'Connell *Vindicating Socio-economic Rights* 7.3; Stark "Jam Tomorrow" 263.

⁴³ The courts in *De Sanchez v Banco Central de Nicaragua* 770 F 2d 1385 US Court of Appeals 5th Circuit (19 September 1985) paras 405, 466 and *AMCO v Republic of Indonesia* (Merits) 1992 89 ILR 368 para 17 emphasised that states do enjoy a customary international law right to regain the ownership of industries as part of their territorial and economic sovereignty. A substantial foreign ownership of national resources and/or business sectors threatens national and economic sovereignty. Also see Leal-Arcas *International Trade and Investment Law* 178; Chekera and Nmeielle 2013 *AJLS* 69; and Murombo 2013 *LEDJ* 31.

⁴⁴ Such forms of exploitation include labour market abuse, the deprivation of basic social services, and marginalisation from participating in the Zimbabwean economy. See Mazingi and Kamidza 2011 http://www.osisa.org/sites/default/files/sup_files/chapter_5_-_zimbabwe.pdf.

directed at reform of the society's economic order in order to achieve an equitable, fair and just distribution of responsibilities and benefits.⁴⁵

However, it must be ascertained whether the contemporary capitalist and/or neo-liberal economic order⁴⁶ can effectively accommodate social policies designed to bridge the gap between the rich and the poor and, for that purpose, embrace the implementation of socio-economic programmes implicit in the distributive justice theory, such as indigenisation programmes.⁴⁷

Alvarez has pointed out that today neoliberal ideology shapes institutions whose policies account for contemporary international economic law.⁴⁸ Governments are not an exception. This concern is readily manifest in the fact that whereas section 3 of the IEEA and the broad tenor of Indigenisation and Economic Empowerment General Notice 114 of 2011 is that every Zimbabwean should benefit from the country's resources, section 2(1) of the IEEA excludes the State/Government as a specific beneficiary of indigenisation. This suggests that only individuals and juristic persons were earmarked to benefit from the indigenisation programme. Reference in section 2(1) of the IEEA is made to the following categories of beneficiaries as being the targets of indigenisation: "1) a natural person, 2) a company 3) an association, syndicate or partnership amongst others ...".⁴⁹

There may be some justification for the exclusion of the government as a direct beneficiary of indigenisation. After all, the listed categories of beneficiaries are subjects of the State, whose business operations have the potential to directly or indirectly contribute to the fiscus and/or revenue base of the country. However, the net effect of excluding the State as a direct beneficiary of the indigenisation laws in Zimbabwe is that unscrupulous individuals⁵⁰ and companies owned by such individuals or persons related

⁴⁵ Ratnapala *Jurisprudence* 335.

⁴⁶ The neoliberalism economic policy model and ideology places emphasis on free trade. It allows for minimal state intervention in socio-economic affairs and aggressively advocates the freedom of capital and trade. See Monibot *How Did We Get into This Mess?* 12; Harvey 2006 *GA* 145; Gamble *Crisis without End?* 10; and Genev 2005 *EEPS* 343.

⁴⁷ Warikandwa and Osode 2014 *SJ* 44.

⁴⁸ Alvarez and Barney 2008 *SEJ* 171.

⁴⁹ See s 2(1) of the IEEA.

⁵⁰ Transparency International 2014 <https://www.transparency.org/cpi2014/results>. The 2014 Transparency International Global Corruptions Index reveals that Zimbabwe is one of the most corrupt states in Southern Africa and the world in general with a ranking of number 156 out of 175. In trying to explain the source of such corruption, Transparency International chairperson Jose Ugaz pointed out that: "A significantly lowly ranking is perhaps an indication of predominant bribery, absence of adequate

to or connected to them have become largely responsible for an upsurge in corruption.⁵¹ As a result the gains from the mineral resources which should be available for the pursuit of the best interests of the State and its subjects at large are being externalised through the collusion of these companies and individuals.⁵² If excluding the State as a beneficiary of indigenisation⁵³ promotes corrupt business practices such as fronting, then the underlying legal or policy position adopted is problematic, at least in the Zimbabwean context.⁵⁴ As a result of the exclusion, instead of increasing the participation of the black majority, the current regulatory practice may increase the pace of widening inequality between the wealthy and the indigent;⁵⁵ and it could also undermine the implementation of the indigenisation programmes and laws as the resources necessary for that purpose would not be available.⁵⁶

sentencing as well as punishment for corruption and public institutions that do not act in response to citizens' needs".

⁵¹ Coltart 2008 <https://www.cato.org/publications/development-policy-analysis/decade-suffering-zimbabwe-economic-collapse-political-repression-under-robert-mugabe>.

⁵² Chitereka and Hamauswa 2014 *ZJPE* 69. Also see Matunhu 2011 *AJHC* 65; and Murombo 2013 *LEDJ* 33.

⁵³ Makoni 2014 *COC* 160. Indigenisation is defined as "a Government-initiated process whereby it limits certain industrial sectors to its native citizens only, and hence forces foreigners (aliens) to sell those targeted assets. The Government does not have ownership of the assets, but rather ensures a stronger hold over its domestic economy and through indigenisation can encourage and ensure the growth of local firms and individuals". Also see Rood 1976 *JMAS* 427; and Rood 1977 *JMAS* 489.

⁵⁴ As a possible alternative to indigenisation, the Zimbabwean Government could have considered a nationalisation policy which aims to benefit the nation as a whole as opposed to individuals and private companies owned by indigenous Zimbabweans. Nationalisation refers to the process when a government initiates "...asset seizure as part of social and economic reform to improve livelihoods of a country's nationals". See Makoni 2014 *COC* 160. According to Atud, nationalisation could offer the following benefits to a country. It a) allows profits to be equitably distributed amongst more people, and the country as a whole; b) leads to regional economic growth and not just national economic growth; c) focuses more on citizens' social welfare as opposed to profiteering; d) leads to a country's greater economic performance and efficiency; and e) promotes employment creation and job security. Also see Atud 2011 <http://www.miningweekly.com/print-version/chamber-of-mines-2011-06-22> and Solomon 2012 <http://www.saimm.co.za/Conferences/ResourceNationalism/ResourceNationalism-20120601.pdf>; Leon 2009 *JENRL* 33; and Libby and Woakes 1980 *ASR* 33. See further Makoni 2014 *COC* 161-163 where she describes the mixed nationalisation experiences of Zambia, Chile, Venezuela and Norway. However, for nationalisation to be a success, the timing of the implementation of the programme should be right. There should also be qualified personnel to run the nationalised entities as well as capital available to fund the business operations of such entities.

⁵⁵ Robertson 2012 <http://www.mikecampbellfoundation.com/images/Downloads/Indigenisation%20blocks%20recovery%20John%20R%2026%20July%2012.pdf>.

⁵⁶ Efforts to realise the benefits of indigenisation have not achieved the intended objectives. Even supplementary policies aimed at strengthening Zimbabwe's economy so as to further enhance the viability of the indigenisation policies have not met with success. For example, the Zimbabwe Agenda for Sustainable Socio-Economic Transformation policy has failed due in part to the poor indigenisation policies. See Government of Zimbabwe Date Unknown <http://www.dpcorp.co.zw/assets/zim->

Against this background, unregulated, unethical and fraudulent practices such as business fronting, which subvert the pre-eminent objective of increasing the participation of the indigenous Zimbabweans⁵⁷ in the economic mainstream, must be systematically confronted.

3 Business fronting in Zimbabwe

Zimbabwean courts have not had the opportunity to pass judgement on the troubling issue of business fronting and the duty of State organs in responding to allegations of fronting. This could be due in part to the politicised nature of the country's judicial system.⁵⁸ The indigenisation programme was introduced and implemented at the behest of the ruling party, the Zimbabwe African National Union - Patriotic Front (ZANU-PF).⁵⁹ Not surprisingly, most of the current beneficiaries of the indigenisation programme are people sympathetic to ZANU-PF and its policies.⁶⁰ These beneficiaries include members of the judiciary such as judges, who received farms forcefully taken from white owners at the height of the chaotic land reform programme.⁶¹ The persons who perpetrate violations of indigenisation laws also appear to be members of ZANU-PF, who know that as long as they are in the good books of the country's and party's leadership they will not be prosecuted.⁶² The practical result is that there is no rapidly developing jurisprudence on business fronting in Zimbabwe. However, this has not stopped concerns being raised in the media regarding incidents of business fronting. Surprisingly, President Robert Mugabe himself has added his voice to the increasing chorus of concerns about incidents of

asset.pdf. Also see Zimbabwe Democracy Institute 2014 <http://www.zdi.org.zw/en/images/zimasset.pdf>; and Sibanda 2013 http://www.ruzivo.co.zw/publications/working-papers.html?download=49:Broad%20Based%20Economic%20Empowerment%20in%20Zimbabwe-Matebeleland%20and%20Midlands_PIP%20Working%20Paper.pdf.

⁵⁷ Section 14(1) of the 2013 *Zimbabwean Constitution*. Also see s 2(1) of the IEEA.

⁵⁸ Chidzuza 2014 *PELJ* 369. See also Madhuku 2002 *JAL* 232.

⁵⁹ Moyo "Land Reform and Redistribution" 29. Also see Mhiripiri 2009 *JLS* 83.

⁶⁰ Makombe 2013 <http://www.plaas.org.za/sites/default/files/publications-pdf/LDPI20Makombe.pdf>; Magure 2014 *JAE* 19; and Coltart 2008 <https://www.cato.org/publications/development-policy-analysis/decade-suffering-zimbabwe-economic-collapse-political-repression-under-robert-mugabe>.

⁶¹ Selby 2007 <http://www3.qeh.ox.ac.uk/pdf/qehwp/qehwps143.pdf>. Also see Selby *Commercial Farmers*.

⁶² The need to observe the rule of law has been raised as a fundamental issue by the ousted former Zanu-PF member and also former Vice-President of Zimbabwe, Dr Joice Mujuru, who in launching the political manifesto for her new political party placed emphasis on ensuring that political bigwigs are subject to the law. See Article 8(iii) of the Blueprint to Unlock Investment and Leverage for Development (BUILD) (Mujuru 2015 <http://www.nehandaradio.com/2015/09/08/full-text-of-mujuru-manifesto/>).

business fronting,⁶³ which should, under the current economic crisis of Zimbabwe, be regarded as a serious crime.⁶⁴

Business fronting in Zimbabwe can be attributed to a number of factors. Among those involved are:

- a) disgruntled foreign investors who use corrupt and greedy well-connected business elites to retain the investments they lost and/or stand to lose in the face of the aggressive indigenisation policy in Zimbabwe;⁶⁵
- b) unscrupulous and well-connected elites who seek to maximise their returns from the spoils of the haphazard indigenisation programme;⁶⁶ and
- c) ordinary people who benefited from indigenisation programme on merit, accidentally or through political patronage, and have realised that the indigenisation programme lacks the necessary implementation-related financial support and is simply being used to score political points.⁶⁷

This realisation has made the ordinary citizens who are beneficiaries of the indigenisation programme comfortable with fronting for foreign business persons in return for huge sums of money which the government cannot offer them. These citizens have come to view the indigenisation programmes as counter-productive and a significant threat to investment security.⁶⁸ It is thus not surprising that indigenisation policies are closely associated with the economic decline which has characterised Zimbabwe's economy in the last decade.⁶⁹

Business fronting has been covertly taking place in Zimbabwe⁷⁰ probably because there is no specific legislation which provides authoritative guidance as to what fronting is or prescribes deterrent measures against

⁶³ Langa 2014 <https://www.newsday.co.zw/2014/10/29/indigenous-businesspeople-fronting-foreigners-mugabe/>.

⁶⁴ Murombo 2010 *SAPL* 568. For an analysis of the effects of incoherent policies, also see Fredriksson and Svensson 2003 *JPE* 1383.

⁶⁵ Ndlela *Financial Gazette* 2.

⁶⁶ Ndlela *Financial Gazette* 2.

⁶⁷ Wynn 2013 <http://ewn.co.za/2013/11/20/Blacks-fronting-for-whites-on-Zim-farms>.

⁶⁸ Mpfu 2012 <https://www.newsday.co.zw/2012/12/06/indigenisation-versus-juice-which-is-the-way-forward>. Also see Goko *Daily News Zimbabwe* 12.

⁶⁹ Zimudzi 2012 *JCS* 508.

⁷⁰ Republikein 2014 <http://www.republikein.com.na/sakenuus/mugabe-warns-against-fronting-foreign-firms.232808>. Also see Gumede *Corruption Fighting Efforts*.

those who engage in the practice. In the absence of a specific piece of legislation which defines business fronting,⁷¹ how it is monitored and a prescription of the consequences, the fundamentally plausible programme will continue to flounder. As the law currently stands in Zimbabwe, practices which constitute fronting in the commercial arena are not clearly outlined for interpreters of the IEEA. But the success of any law lies largely in its clarity.⁷² It is therefore submitted that the omission of specific business fronting provisions in the IEEA detailing the definition of the conduct, how it is to be policed and the consequences thereof undermines the attainment of the IEEA's transformative objectives.⁷³ Under the law as it currently stands, any fraudulent and/or dishonest business conduct is dealt with in terms of the *Criminal Law Codification and Reform Act* (CLCRA).⁷⁴ Under the CLCRA, the penalty for refusing to comply with the business-related provisions of the Act is a maximum fine at level 12,⁷⁵ which is currently USD 2000, five years imprisonment or both.⁷⁶ Such a penalty is clearly incapable of having a significant deterrent effect when compared to the real and potential benefits of the illicit practice.

A closer analysis of the IEEA points to the existence of a number of clauses which appear to have been specifically included to preserve the interests of the wealthy in Zimbabwe.⁷⁷ For example, the IEEA mandates the

⁷¹ Anon 2013 <http://businessdaily.co.zw/index-id-national-zk-32850.html>.

⁷² Tebbit *Philosophy of Law* 47.

⁷³ A comparison with the situation in South Africa will show that business fronting has been clearly defined, with its monitoring mechanisms clearly spelt out, as are its consequences. Namibia, which also seeks to come up with an indigenisation law, has included the definition of what fronting is in its *New Equitable Economic Empowerment Framework Bill* of 2016, which is still under consideration by the Namibian Parliament. See s 1(j) of the proposed NEEEF Bill.

⁷⁴ *Criminal Law Codification and Reform Act* 23 [Chapter 9:23] of 2004 (CLCRA). Also see the new schedule of offences which became effective with the introduction of the *Finance Act* 3 [Chapter 23:04] of 2009.

⁷⁵ See First Schedule of the CLCRA.

⁷⁶ The statutory punishment provided for in the CLCRA is also similar to the one referred to in s 10(3) of the *Indigenisation and Economic Empowerment (General) Regulations* Statutory Instrument 21 of 2010 [CAP 14:33]. The sections make it an offense to fail to submit a form (IDG01) which shows that indigenisation requirements or a proposed business transaction such as a merger, foreign investment or unbundling of a business are accompanied by an acceptable indigenisation plan, in which case the penalty is a level 12 fine (USD 2000), five years imprisonment or both.

⁷⁷ For example, s 18(1) of the IEEA provides that any person who, "...under an obligation to do so, without lawful excuse, fails or refuses to pay, collect or remit any levy or any interest or surcharge connected therewith shall be guilty of an offence and liable to a fine not exceeding level six or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment". In terms of the schedule of offences provided in the *Finance Act* 3 [Chapter 23:04] of 2009 a level six offence carries a fine of USD 300. Also see the First Schedule of the CLCRA.

responsible Minister to keep a record of individuals who stand as prospective beneficiaries of shareholder interests in non-indigenous companies.⁷⁸ Further, the regulations provide the Minister with an essentially unlimited discretion to determine whether or not to accept or reject an indigenisation proposal or to attach conditions to the approval of such a proposal, a discretion which is conducive to the politics of patronage.⁷⁹ Recent evidence produced before a parliamentary portfolio committee on Mines and Mineral resources revealed Community Trust pledges that were covert⁸⁰ and unaccounted for,⁸¹ apparently made at the directive of the former Minister of Youth Empowerment and Indigenisation, Mr Saviour Kasukuwere,⁸² in respect of allegedly inaccurate and non-existent indigenisation plans.⁸³

The chaotic state of affairs surrounding the Community Share Ownership Trusts (CSOTs) therefore makes it critically important to highlight the fact that the IEEA stipulates that "no appeal lies against a Ministerial decision to reject an indigenisation plan".⁸⁴ Further, it provides that:

⁷⁸ Section 15(1) of IEEA.

⁷⁹ Section 5 of the *Indigenisation and Economic Empowerment (General) Regulations* Statutory Instrument 21 of 2010 [CAP 14:33].

⁸⁰ See the Portfolio Committee on Youth, Indigenization and Economic Empowerment 2016 <http://www.veritaszim.net/node/1891>. In this report it is indicated that evidentiary proof in the form of a written letter from the Provincial Affairs Minister of Manicaland Province directing a diamond mining company to deposit contributions related to the CSOTs pledges into a named account (which is not a government account) was furnished before the Parliamentary Portfolio Committee on Youth Indigenisation and Economic Development. The Provincial Affairs Minister had in giving oral evidence denied any knowledge of such a letter. However, when the letter bearing the Minister's signature was provided as evidence, the same Minister then argued that he could not remember that he had once written such a letter.

⁸¹ See the Portfolio Committee on Youth, Indigenization and Economic Empowerment 2016 <http://www.veritaszim.net/node/1891>. In one of the leading Community Share Ownership Trusts (CSOTs) called the Marange-Zimunya CSOT, diamond miners have not paid up their pledges and have even declared ignorance of the existence of such trusts. Other miners indicated that they only knew of USD 1.5 million. It was anticipated that mining companies, namely Mbada Diamonds, Diamond Mining Company (DMC), Anjin Investments, Jinan and Marange Resources would give USD50 million to the Marange and Zimunya communities under the CSOTs pledges arrangement, with each company contributing USD 10 million. However, the CSOTs, loosely referred to as a "gentleman's agreement", have thus far received only USD 400 000, with DMC mining services and Marange Resources paying USD 200 000 each.

⁸² Mugabe and Gumbo 2014 <http://www.herald.co.zw/pay-up-diamond-mining-firms-told/>.

⁸³ See Portfolio Committee on Mines and Energy 2013 <http://petergodwin.com/wp-content/uploads/2013/06/Chininga-Parliament-Report-on-Marange-Diamond-Mining-June-2013.pdf>.

⁸⁴ Section 20 of IEEA.

... the noting of an appeal ... shall not, pending the determination of the appeal, suspend the decision, order or other action appealed against unless the Administrative Court directs otherwise.⁸⁵

As already highlighted above, Zimbabwean courts currently have a tendency not to act independently of the executive, as attempts to do so can lead to a purging of judicial officials.⁸⁶ Accordingly, the implementation of legislation such as the IEEA can be manipulated to enrich politically connected indigenes and thereby promote, rather than discourage, the practice of business fronting in Zimbabwe.⁸⁷

4 Regulation of fronting in South Africa

The fronting challenge in South Africa was exacerbated by the fact that, until 2011, the courts had not definitively pronounced on government's duties in responding to fronting practices; but the opportunity arose in the landmark case of *Viking Pony Africa Pumps (Pty) Ltd v Hidro-Tech Systems (Pty) Ltd*.⁸⁸ This case allowed the Constitutional Court to pronounce itself *inter alia* on the policy rationales of Black Economic Empowerment (BEE), which it regarded as a constitutionally mandated governmental response to "one of the most vicious and degrading effects of racial discrimination in South Africa", being "...the economic exclusion and exploitation of black people".⁸⁹ The Constitutional Court's ruling in the *Viking Pony* case effectively imposes an obligation on an organ of state that has received a complaint about alleged fronting to properly investigate the complaint and to act accordingly.⁹⁰

The ruling in the *Viking Pony* case was followed in 2013 by the passing into law of the *Broad-Based Black Economic Empowerment Amendment Act*

⁸⁵ Section 20(2) of IEEA.

⁸⁶ Chiduzo 2014 *PELJ* 369.

⁸⁷ Magure 2012 *JCAS* 69.

⁸⁸ *Viking Pony Africa Pumps (Pty) Ltd v Hidro-Tech Systems (Pty) Ltd* 2011 2 *BCLR* 207 (CC) (herein after *Viking Pony*).

⁸⁹ *Viking Pony* para 1.

⁹⁰ *Viking Pony* para 17. The Constitutional Court held that one of the main issues for determination was the meaning of "detect" and "act against" in reg 15 of the *Preferential Procurement Regulations* issued under GN 501 in GG 34350 of 8 June 2011. Also see s 217 of the *Constitution of the Republic of South Africa*, 1996, which provides that: "when an organ of state ... contracts for goods or services, it must do so in accordance with a system which if fair, equitable, transparent, competitive and cost-effective". See further *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province* 2008 2 SA 481 (SCA) para 17-18; *Chairperson, Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd* 2008 2 SA 638 (SCA) para 14; and *Tetra Mobile Radio (Pty) Ltd v MEC, Department of Works* 2008 1 SA 438 (SCA) para 9.

(Amendment Act).⁹¹ Fronting in the Amendment Act is regulated in a combination of three ways focusing on: (a) definition, (b) monitoring, and (c) consequences. Fronting has often been used as a token of the superficial inclusion of historically disadvantaged persons into mainstream economic activities with no actual transfer of wealth or control.⁹² The provisions of the Amendment Act are intended to provide authoritative guidance as to what fronting is, and to prescribe deterrent measures against those who violate its provisions. The South African B-BBEE Amendment Act adopted a plausible dualist approach to addressing the challenge of defining business fronting; the one approach focusing on providing a comprehensive yet elastic definition of fronting and the other aimed at establishing a strong and properly resourced institutional framework for implementation.⁹³ The first facet of the said definition is a broad, catch-all definition of what constitutes business fronting. In this regard section 1(e) of the B-BBEE Amendment Act defines "fronting practice" as: "a transaction, arrangement or other act or conduct that directly or indirectly undermines or frustrates the achievement of the objectives of this Act or the implementation of any of the provisions of this Act ...". Clearly, the wording of this broad definition includes the three most common forms of business fronting, namely window dressing,⁹⁴ benefit diversion⁹⁵ and the use of opportunistic intermediaries.⁹⁶

⁹¹ *Broad-Based Black Economic Empowerment Amendment Act* 46 of 2013 (B-BBEEA Act).

⁹² Mebratie and Bedi 2011 <http://nbn-resolving.de/urn:nbn:de:101:1-201111029344>. Also see Mbeki *Architects of Poverty* 66-68.

⁹³ Levenstein 2013 <http://kasieconomics.com/2013/08/20/bee-fronting-legislation-has-serious-implications/>.

⁹⁴ Section 1(e)(a) of the B-BBEEA Act defines window dressing as an act of introducing black people to an enterprise on the "basis of tokenism and maybe in the form of: 1) discouraging or inhibiting them from substantively participating in the core activities of an enterprise and discouraging or inhibiting them from substantively participating in the stated areas and/or levels of the participation". Also see DTI 2013 http://www.thedti.gov.za/economic_empowerment/fronting.

⁹⁵ Section 1(e)(b)-(c) of the B-BBEEA Act defines benefit diversion as "initiatives implemented where economic benefits received as a result of the B-BBEE status of an enterprise do not flow to black people in the ratio as specified in relevant legal documents". Also see Honeycomb Transformation 2013 <http://www.honeycombtransformation.co.za/fronting-companys-ownership/>.

⁹⁶ Section 1(e)(d) of the B-BBEEA Act defines opportunistic intermediaries to include "... enterprises that have concluded agreements with other enterprises with a view to leveraging the opportunistic intermediary's favourable B-BBEE status in circumstances where the agreement involves: 1) significant limitations or restrictions upon the identity of the opportunistic intermediary's suppliers, service providers, clients or customers; 2) the maintenance of their business operations in a context reasonably considered improbable having regard to resources; 3) terms and conditions that are not negotiated at arms-length on a fair and reasonable basis".

The legislature through section 1(e) of the B-BBEE Amendment Act adopted a plausible, catch-all, open-ended definition of business fronting,⁹⁷ which is an approach that is usually characterised by an element of vagueness intended, in this particular case, to ensure coverage of conduct or activities which may amount to business fronting but which may have been unwittingly excluded by the legislature.⁹⁸ The second facet of the definition consists of a closed list of practices, conduct or situations falling within the regulatory scheme of business fronting.⁹⁹

In addition to the dual-faceted definition of fronting, the B-BBEE Amendment Act establishes a Broad-Based Black Economic Empowerment Commission (B-BBEE Commission) which is required to effectively assume

⁹⁷ Section 1(e) of the B-BBEE Act defines fronting as any "transaction, arrangement or other act or conduct that directly or indirectly undermines or frustrates the achievement of the objectives of the B-BBEE Act, including but not limited to practices in connection with the B-BBEE initiative...".

⁹⁸ *National Credit Regulator v Opperman* 2013 2 SA 1 (CC) para 48. It was pointed out in this case that the need for clarity in legislative instruments does not require absolute certainty. Also see *Affordable Medicines Trust v Minister of Health* 2006 3 SA 247 (CC) (*Affordable Medicines*) para 108; Raban 2010 *PILJ* 175. Also see Schauer *Playing by the Rules* 140; Scalia 1989 *U Chi L Rev* 1175; and Sustain 1995 *CLR* 1021; Raz 1972 *Yale LJ* 823, 841. See further Kaplow "General Characteristics of Rules" 512-513; and Posner 1997 *Harv JL & Pub Pol'y* 101, 103.

⁹⁹ The challenges identified above as being likely to result from the element of vagueness inherent in a broad definition of "fronting" are certain to be mitigated by the second facet of the definition of "fronting" in the B-BBEE Act, which explicitly identifies certain specific conducts as constituting fronting. This part of the definition s 1(e) declares "fronting practice" as: "... including but not limited to practices" connected to a B-BBEE initiative – (a) in terms of which black persons who are appointed to an enterprise are discouraged or inhibited from substantially participating in the core activities of that enterprise; or (b) in terms of which the economic benefits received as a result of the broad-based black economic empowerment status of an enterprise do not flow to black people in the ratio specified in the relevant legal documentation". In addition, s 1(e)(c) provides that fronting includes practices in connection with a B-BBEE initiative "involving the conclusion of a legal relationship with a black person for the purpose of the enterprise achieving a certain level of B-BBEE compliance without granting the black person economic benefits". Lastly, s 1(e)(d) provides that fronting includes practices in connection with a B-BBEE initiative: "involving the conclusion of an agreement with another enterprise in order to achieve or enhance B-BBEE status in circumstances in which i) there are significant limitations on the identity of suppliers ... ii) the maintenance of business operations ... is reasonably considered improbable and iii) the terms and conditions were not negotiated ... on a fair and reasonable basis". Also see *NDP Namboodripad v Union of India* 2007 4 SCC 502; *Hamdard (Wakf) Laboratories v Deputy Labour Commissioner* 2007 5 SCC 281; *Bharat Cooperative Bank (Mumbai) Ltd v Employees Union* 2007 4 SCC 685; *Himalayan Tiles and Marble (P) Ltd v Francis Victor Coutinho* 1980 3 SCC 223; *Dilworth v Commissioner of Stamps (Lord Watson)* 1899 AC 99; and *Mahalakshmi Oil Mills v State of AP* 1989 AIR 335.

the role of the regulatory watchdog over issues pertaining to the B-BBEE Act.¹⁰⁰ The B-BEE Commission which will be established as:

... a juristic person with the duty of providing oversight to the B-BBEE process has the responsibility to: 1) investigate cases of fronting; 2) investigate complaints; and 3) receive and monitor reports on B-BBEE from organs of state and listed entities.¹⁰¹

The role of the B-BBEE Commission¹⁰² could be likened to a limited extent to the role of the Anti-Corruption Commission in Zimbabwe.¹⁰³ However, the difference between the two is that the B-BEE Commission deals with matters specifically related to the BEE programme, which makes it a specialised juristic person unlike the Anti-Corruption Commission, which has no defined area of speciality and appears to have been intended to deal with all matters of corruption.¹⁰⁴ The effectiveness of such a commission is likely to be minimal, as it lacks expertise on the multiplicity of complex issues which are required to come before it. Further the Anti-Corruption Commissioners are appointed by the State President and function on the lines of political patronage, just like the judiciary in Zimbabwe, which fact places the prospects of the Commission's effectiveness in serious doubt.¹⁰⁵

Furthermore, the penalties prescribed for business fronting under the B-BBEE Amendment Act are fairly severe and therefore more likely to generate an effective deterrence effect than those in their Zimbabwean counterparts. This submission flows from the fact that the B-BBEE Amendment Act creates a number of offences and associated penalties.¹⁰⁶ For example, it creates an offence for the intentional misrepresentation of

¹⁰⁰ Section 8 of the B-BBEEA Act. Under this provision, s 13B is inserted into the B-BBEE Act to provide for the establishment and status of the B-BBEE Commission.

¹⁰¹ Section 13B of the B-BBEEA Act. Also see s 13F of the B-BBEEA Act, which is titled "Functions of Commission", and s 13J of the B-BBEEA Act, which is titled "Investigations by the Commission".

¹⁰² See s 13B and 13F of the B-BBEEA Act.

¹⁰³ See ss 12 and 13 of the *Zimbabwe Anti-Corruption Commission Act 13* [Chapter 9:22] of 2004 (hereinafter the ZACA).

¹⁰⁴ Section 13F of the B-BBEEA Act. Also see s 13J of the B-BBEEA Act. Compare this with the preamble of the ZACA, which provides that the purpose of the Anti-corruption Commission is to address corruption "...as a matter of extreme urgency, and ... fight corruption and ... put in place measures and mechanisms that would eliminate the scourge of corruption...". It is submitted that one such mechanism which the Zimbabwean Anti-Corruption Commission is yet to advocate is an anti-fronting piece of legislation. Fronting requires a specialised legal instrument if it is to be effectively dealt with.

¹⁰⁵ See ss 4, 5 and 7 of the ZACA.

¹⁰⁶ See ss 13N, 13O and 13P of the B-BBEEA Act, titled "Offences in connection with Commission", "Other offences and penalties" and "Prohibition on business with organs of state following conviction under this Act".

information for the purposes of securing a favourable B-BBEE status; providing false information to a government entity; and failure by a public officer to report any offence in terms of the B-BBEE Act.¹⁰⁷ A person convicted in terms of the B-BBEE Amendment Act could be liable to a fine¹⁰⁸ or imprisonment of up to ten years for a section 13O(1)(a)-(d)¹⁰⁹ violation and a period not exceeding 12 months for a section 13O(2)¹¹⁰ violation. There is no guidance as to what the extent of imprisonment could be, as fronting is not yet specifically legislated against in the IEEA. However, based on the experience of the implementation of indigenisation and related regulations in Zimbabwe thus far, it is highly probable that a stiff penalty may be imposed on a person who is not politically connected and who is found to have engaged in conduct resembling business fronting. Another option available to the authorities in Zimbabwe is to rely on the level 12 penalty provided in the CLCRA. That penalty currently stands at a miserly USD 2000 which, it is submitted, would hardly deter anyone from committing a potentially high profit-yielding economic crime such as business fronting.¹¹¹

In respect of juristic persons, the B-BBEE Amendment Act allows the imposition of a fine of up to a maximum of ten per cent of the juristic person's annual turnover.¹¹² And in addition to the penalties, any person convicted of any offence under the B-BBEE Amendment Act may be banned from further contracting with any Government entity.¹¹³ It is submitted in this respect that

¹⁰⁷ Section 13N of the B-BBEEA Act.

¹⁰⁸ Section 13O(3)(a) of the B-BBEEA Act provides that "... if the convicted person is not a natural person ... a fine not exceeding ten per cent of its annual turnover will be preferred" where s 13O(1) is violated. S 13O(1)(a)-(d) prohibits misrepresentation or attempts to misrepresent the B-BBEE status of an enterprise, amongst other things. For a comprehensive list of such other types of prohibited conduct see ss 13O(1)(a)-(d) of the B-BBEEA Act. Where the person is convicted of violating s 13O(2), which makes it an offence for a B-BBEE verification professional or any procurement officer to fail to report the making of an attempt to commit an offence listed in s 13O(1), the punishment shall be a fine as provided for in s 13O(3)(a) or both the fine and imprisonment for a period not exceeding 12 months.

¹⁰⁹ Section 13O(1)(a)-(d) of the B-BBEEA Act prohibits misrepresentation or attempts to misrepresent the B-BBEE status of an enterprise, amongst other things.

¹¹⁰ Section 13O(2) of the B-BBEEA Act criminalises the failure by a B-BBEE verification professional or any procurement officer to report the making of an attempt to commit an offence listed in s 13O (1)(a)-(d).

¹¹¹ See the First Schedule on the Standard Scale of Fines of the CLCRA.

¹¹² Section 13P of the B-BBEEA Act.

¹¹³ Section 13P of the B-BBEEA Act. Due to the fact that there is a lot of room for corruption when government tenders for goods or services, the *Prevention and Combating of Corrupt Activities Act* 12 of 2004 requires the Minister of Finance to create a Register of Tender Defaulters which aims at addressing such incidents of corruption. The register is kept by the National Treasury. Should a person or business be convicted by a court of law of crimes involving contracts or tenders, its name and

the penalties imposed by the South African B-BBEEA Act are on the face of it sufficiently stiff to produce the much desired deterrence effect from the perspective of would-be offenders.¹¹⁴ In this regard the Zimbabwean legislative framework presents further significant weaknesses. The penalty of USD 2000 clearly does not match up to the ten years imprisonment or fine of 10% of the annual turnover of a company provided for in the South African legislative regime. This particular difference in the regulation of fronting between the two countries might explain why the practice exists in Zimbabwe. Accordingly, to the extent that fronting threatens to derail the country's controversial indigenisation programme, the penalty-related provisions of the Zimbabwean legislative framework stand to gain much strength from a reform process which embraces the South African approach as epitomising "best practice" in the prevention and regulation of business fronting.

5 Lessons from South Africa

The reason for South Africa's adopting the anti-fronting legislation was that within a few years of introducing the Black Economic Empowerment (hereinafter BEE) programme¹¹⁵ it became evident that in practice the benefits were not reaching large numbers of those intended to be the beneficiaries of the programme.¹¹⁶ Rather, the pattern emerged of a few well-connected business elites colluding with politically connected black elites to capture the opportunities spawned by the programme.¹¹⁷ A robust and systematic approach had to be adopted to address this untenable situation.¹¹⁸ The result was the passing of the *Broad-Based Black Economic*

details are recorded in this Register together with the details of the crime committed. This creates an additional penalty for the offenders.

¹¹⁴ However, it should be noted that the efficacy of the penalty provisions in the B-BBEEA Act is yet to be proven in practice, as there are still no judicial precedents relating to the penalties prescribed under the B-BBEEA Act. This is obviously because the provisions have been in force for only a little over one year.

¹¹⁵ See DTI 2003 http://www.thedti.gov.za/economic_empowerment/bee-strategy.pdf. Also see the Preamble of the B-BBEE Act. The B-BBEE Act seeks to establish a legislative framework for the promotion of black economic empowerment.

¹¹⁶ Ncube *Sunday Times*. Also see the Foundation for the Development of Africa 2004 http://www.foundation-development-africa.org/africa_black_business/fronting.htm.

¹¹⁷ Andrews 2008 <https://research.hks.harvard.edu/publications/getFile.aspx?Id=426> 96. Also see Zuma "B-BBEE Not Just About Benefiting a Few Individuals"; Andreasson 2011 *B&S* 647; Bogopane 2013 *JSS* 277. See further Yokogawa 2010 <http://www.yokogawa.com/za/cp/overview/za-bee.htm>.

¹¹⁸ BEE Commission *National Integrated Black Economic Empowerment Strategy 2*. Also see Osode "Advancing the Cause of Black Economic Empowerment" 261. Also see Kalula and M'Paradzi 2008 *SJ* 108. Also see Osode 2004 *SJ* 108; Southall 2007 *RAPE* 83; and Cheadle, Thompson and Hayson Inc *et al Black Economic Empowerment 1*.

Empowerment Amendment Act (Herein after B-BBEE Amendment Act).¹¹⁹ This Act amended the *Broad-Based Black Economic Empowerment Act*¹²⁰ with the primary objective of addressing all known and perceived weaknesses in the current regulatory framework.¹²¹

It is submitted that Zimbabwe can draw lessons from South Africa's challenges with business fronting and related practices in the following ways:

- a) by acknowledging that in practice, the benefits of the indigenisation programme are not reaching large numbers of the previously disadvantaged indigenous Zimbabweans intended to be the beneficiaries, due to the prevalence of corrupt and unethical business practices such as business fronting, and hence, by accepting the need for effective regulatory mechanisms to address such a challenge;
- b) by adopting a clear definition of what amounts to business fronting, as has been done by South Africa in the B-BBEE Amendment Act of 2013;
- c) by outlining the monitoring mechanisms for business fronting; and
- d) by clearly elaborating the consequences of fronting practices by way of the statutory prescription of severe penalties that will act as effective deterrents.

¹¹⁹ *Broad-Based Black Economic Empowerment Amendment Act* 46 of 2013 (the B-BBEEA Act).

¹²⁰ *Broad-Based Black Economic Empowerment Act* 53 of 2003.

¹²¹ *Viking Pony Africa Pumps (Pty) Ltd v Hidro-Tech Systems (Pty) Ltd* 2011 2 BCLR 207 (CC). Also see *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province* 2008 2 SA 481 (SCA) para 17-18; *Chairperson, Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd* 2008 2 SA 638 (SCA) para 14; and *Tetra Mobile Radio (Pty) Ltd v MEC, Department of Works* 2008 1 SA 438 (SCA) para 9; *Esorfranki Pipelines v Mopani District Municipality* 2014 2 All SA 493 (SCA); *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 4 SA 113 (C) paras 83 and 84; *Chairperson, Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd* 2008 2 SA 638 (SCA) para 27; *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province* 2008 2 SA 481 (SCA) para 23; *Eskom Holdings Ltd v New Reclamation Group (Pty) Ltd* 2009 4 SA 628 (SCA) para 9; and *Moseme Road Construction CC v King Civil Engineering Contractors (Pty) Ltd* 2010 4 SA 359 (SCA) para 20; Quinot and Arrowsmith "Introduction" 1; and Arrowsmith "National and International Perspectives" 3.

6 Conclusion

In their current state, Zimbabwe's IEEA and related *Indigenisation and Economic Empowerment Regulations* do not benefit most indigenous Zimbabweans. Instead, as correctly pointed out by Magure, they appear to be advancing the interests of politically connected elites.¹²² This is the result of deficiencies at the levels both of legal instrument design and of institutional enforcement. In parts one and five of this article it has been pointed out that the major deficiency of the IEEA is the omission to systematically address the problem of business fronting. Accordingly, it is proposed that the IEEA be amended and reinforced with anti-fronting provisions accompanied by effective enforcement mechanisms. Two possible approaches could be adopted, as follows:

- a) amending the IEEA by inserting provisions which specifically define what constitutes business fronting, how it is to be policed, and the consequences of engaging in fronting practices. This approach would make the IEEA a comprehensive one-stop-shop for obtaining adequate guidance on illegal and unethical business practices relating to indigenisation; or
- b) enacting a separate piece of legislation that regulates business fronting practices in the mould of South Africa's B-BBEE Amendment Act.

Of the two proposed approaches, the first option would be preferred, as there is an already existing legal framework regulating indigenisation issues in the form of the IEEA. To that end, incorporating the anti-fronting provisions in that legislation would be more cost-effective and less time-consuming.

And in undertaking such a law reform process, Zimbabwe can draw valuable lessons from South Africa,¹²³ which has recently amended its BEE legislation to combat business fronting. In promulgating the amendment statute, South African policy makers accepted that business fronting is a significant contributory factor preventing the success of the country's

¹²² Magure 2012 JCAS 68-69. Also see Matyszak 2010 <http://researchandadvocacyunit.org/system/files/Everything%20you%20ever%20wanted%20to%20know.pdf>.

¹²³ Section 1(e) of the B-BBEEA Act. South Africa has adopted a dual approach of defining what constitutes business fronting. In addition to providing such a definition, the B-BBEEA Act prescribes the monitoring mechanisms and the consequences of engaging in business fronting.

indigenisation programme, especially by facilitating benefits diversion, creating opportunistic beneficiaries and thereby limiting the trickle-down effects as well as the overall impact of the related instruments and initiatives.¹²⁴ It is against this background that the B-BBEE Amendment Act is commended to Zimbabwean law and policy makers as a model, seeing that it contains substantive definitional and implementation-related provisions which seem adequate to the task of addressing the formidable threat to the success of the indigenisation programme posed by business fronting.

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¹²⁴ Levenstein 2013 <http://kasieconomics.com/2013/08/20/bee-fronting-legislation-has-serious-implications/>.

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LIST OF ABBREVIATIONS

AJHC	African Journal of History and Culture
AJLS	African Journal of Legal Studies
ASR	African Studies Review
B&S	Business and Society
B-BBEE	Broad-Based Black Economic Empowerment
B-BBEE Commission	Broad-Based Black Economic Empowerment Commission
B-BBEE Act	Broad-Based Black Economic Empowerment Act
B-BBEEA Act	Broad-Based Black Economic Empowerment Amendment Act
BC Third World LJ	Boston College Third World Law Journal
BEE	Black Economic Empowerment
BEJ	Business and Economic Journal
BUILD	Blueprint to Unlock Investment and Leverage for Development
CLCRA	Criminal Law Codification and Reform Act
CLR	California Law Review
COC	Corporate Ownership and Control
CSOTs	Community Share Ownership Trusts
DMC	Diamond Mining Company
DTI	Department of Trade and Industry

EASSRR	Eastern Africa Social Science Research Review
EEPS	East European Politics and Society
GA	Geografiska Annaler
Harv JL & Pub Pol'y	Harvard Journal of Law and Public Policy
IEEA	Indigenisation and Economic Empowerment Act
IJHSS	International Journal of Humanities and Social Sciences
IJPLP	International Journal of Public Law and Policy
IOSR-JHSS	International Organisation of Scientific Research Journal of Humanities and Social Sciences
JAE	Journal of African Elections
JAL	Journal of African Law
JCAS	Journal of Contemporary African Studies
JCS	Journal of Contemporary Studies
JEC	Journal of Enterprising Culture
JENRL	Journal of Energy and Natural Resources Law
JLS	Journal of Literary Studies
JMAS	Journal of Modern African Studies
JPAG	Journal of Public Administration and Governance
JPE	Journal of Public Economics
JPS	Journal of Peasant Studies
JSS	Journal of Social Science
LEDJ	Law, Environment and Development Journal
NIEEB	National Indigenisation and Economic Empowerment Board
PELJ	Potchefstroom Electronic Law Journal
PG	Political Geography
PILJ	Public Interest Law Journal
RAPE	Review of African Political Economy
RJE	Researchjournali's Journal of Economics
SADC	Southern Africa Development Community
SAPL	Southern African Public Law
SAPRJ	Southern African Peace Review Journal

SEJ	Strategic Entrepreneurship Journal
SJ	Speculum Juris
U Chi L Rev	University of Chicago Law Review
Yale LJ	Yale Law Journal
ZACA	Zimbabwe Anti-Corruption Commission Act
ZANU-PF	Zimbabwe African National Union - Patriotic Front
ZELA	Zimbabwe Environmental Law Association
Zim-Asset	Zimbabwe Agenda for Sustainable Socio-Economic Transformation
ZJPE	Zimbabwe Journal of Political Economy