

# **Public interest litigation as an empowerment tool: The case of the Chiadzwa Community Development Trust and diamond mining in Zimbabwe**

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## Summary

Mining in general, and diamond mining in particular, is one of the main drivers of foreign direct investment (FDI) in Zimbabwe, and it is poised to remain so in the short to medium term. While mining is bringing 'development' to the country, it is also causing suffering to local communities where it is taking place, for example where communities are losing agricultural and grazing land, grappling with deforestation, water and air pollution, being forcibly evicted and relocated without fair and adequate compensation, and are not able to share the benefits created by mining ventures. This situation contrasts with the fact that advocates of mining investments perceive rural communities living in and around mining areas as potential beneficiaries alongside the state and the private sector.

To address these problems, the Zimbabwe Environmental Law Association (ZELA) has used public interest litigation as part of a wider strategy to empower communities affected by mining. Although the public interest case was dismissed, it has resulted in a number of positive outcomes, including communities asserting their rights and being given a voice to participate in policy and decision-making processes. Communities are using this voice to demand information, meaningful local consultation, fair and adequate compensation, and participation in project benefits (for example, in the form of social infrastructure). Through public interest litigation, communities in the Marange diamond fields have become participants and influencers of development rather than passive observers.

ZELA has learned that in a context like Zimbabwe where both the political and legal frameworks pose formidable challenges, public interest litigation should be used as part of a wider set of legal empowerment strategies, including legal literacy, advocacy and community mobilisation.

### About the author

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## 1. Introduction

Zimbabwe is emerging from 12 years of economic, social and political problems that were triggered by the Fast Track Land Reform Programme in 2000. The mining sector in general, and diamond mining in particular, has been identified as critical to Zimbabwe's economic recovery, stabilisation and eventual growth.<sup>1</sup> Zimbabwe has a diverse resource base consisting of 66 minerals with significant reserves in diamonds, platinum, chrome, coal, iron ore and black granite, lithium, copper, asbestos and emeralds among others (Ministry of Mines and Mining Development, 1990).

Since 2009, the mining sector has grown at an annual rate of more than 30%. The average contribution of the mining sector to Gross Domestic Product (GDP) has risen from 10.2% in the 1990s to 16.9% in 2009-2011, overtaking agriculture. Mineral exports rose by about 230% over the 2009-2011 period, making it the leading export sector (Ministry of Finance, 2013). These statistics suggest that mining has become the most dynamic sector in Zimbabwe's economy since the establishment of the Inclusive Government in 2009. The role of the mining sector in Zimbabwe's economic development is set to continue in the short to medium term.

While mining has the potential to contribute to sustainable development, it also has the potential to undermine it. Indeed, mining operations may affect the enjoyment of environmental, economic, social and cultural rights (EESCR) of communities in mining areas. These rights are recognised under international, regional and national human rights instruments. At an international level, EESCR are protected by the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Rio Declaration on Environment and Development. At a regional level, they are protected by the African Charter on Human and People's Rights (ACHPR). And at a national level, certain environmental rights are recognised by the Constitution of Zimbabwe, the Environmental Management Act (Chapter 20:27), the Mines and Minerals Act (Chapter 21:05) and the National Environmental Policy and Strategies. For example, the Environmental Management Act provides that every person has the right to 'a clean and healthy environment that is not harmful to health', to access environmental information, and 'to participate in the implementation of the promulgation or reasonable legislative, policy and other measures' to protect the environment. The Mines and Minerals Act states that there must be 'no prospecting on any portion of communal land without the consent of the occupier of the land concerned', and provides for compensation of communities whose land is acquired for mining activities. To different extents and in different ways, these multiple legal instruments

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1. The 2013 National Budget indicates that mining will continue to play a critical and pivotal role in the country's economic development until 2018 with mineral revenues reaching about US\$14 billion (Ministry of Finance, 2013).

establish legally enforceable rights that can provide the basis for public interest litigation.

However, these promising legal provisions have significant shortcomings. While Zimbabwe is a signatory of international and regional human rights instruments relating to EESCR, these have not been incorporated in national law. The Constitution of Zimbabwe recognises fundamental human rights including freedom of expression, assembly and association, which can facilitate community empowerment in relation to mining developments. However, EESCR are not recognised as human rights in the constitution. This is one of the reasons communities are marginalised in policy and decision-making relating to mining activities.

In addition, Zimbabwe's land tenure regime is a big stumbling block to community rights. Communities lack secure tenure over land and mineral resources. Communal land where rural communities are found and where most mining takes place is state land vested in the President who holds it in trust. Communities who live and earn a living from communal land and its associated resources, do not own it. Rural communities have access, use and management rights. The occupation, access, use and management of communal land is regulated by the Communal Lands Act (Chapter 20:04) and the Rural District Councils Act (Chapter 29:13). Under the latter, Rural District Councils (RDCs) manage rural and communal land and the resources found on it with administrative and development planning authority on behalf of the state. RDCs may issue permits for the occupation, access, use and management of communal land within their jurisdiction.

Because communities do not have ownership rights to land and natural resources, they have very limited leverage, if any, to negotiate, which the state and mining companies can take advantage of. While to some extent, consent requirement in the Mines and Minerals Act helps communities negotiate, actual ownership of land would greatly enhance their negotiating position. White commercial farmers who previously owned land under title deeds before the Fast Track Land Reform Programme were able to negotiate better deals with the state and the private sector when mineral resources were discovered on their land.<sup>2</sup>

These limitations in the nature and scope of local land rights undermine the effectiveness of empowerment strategies based on the exercise of legal rights. That said, legal instruments do provide communities with important rights but these are poorly implemented. Public interest litigation can push the boundaries of the interpretation and application of legal provisions that are not used to their full potential. The process involved in developing public interest litigation can also produce positive effects outside the legal sphere – for example, in terms of community organisation and mobilisation.

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2. This situation has changed as a result of the Fast Track Land Reform Programme, which was initiated by the Zimbabwe Government to redress the historic land imbalances in 2000. Constitutional Amendment No. 17 of 2005 resulted in the nationalisation of all land in Zimbabwe through the insertion of section 16B. As of today, all land in Zimbabwe is state land.

This note distils lessons from ZELA's experience with public interest litigation in relation to the Marange diamond fields in Zimbabwe.<sup>3</sup> ZELA carried out public interest litigation as part of wider support to the Chiadzwa community who have been affected by the diamond fields. The community has organised itself as a legal entity through the Chiadzwa Community Development Trust (CCDT).

Section 2 discusses key features of the approach used by ZELA, and Section 3 outlines outcomes, enabling and constraining factors, and lessons learned.

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3. The Marange Diamond fields are in the Marange District Council in Mutare West Constituency, Manicaland Province. Mutare, the capital city for Manicaland Province, lies about 300 km from Harare, the capital city of Zimbabwe. Marange diamonds are mostly alluvial, consisting of sandy materials and loose gravel although there are also some kimberlites. Unconfirmed reports suggest that Marange diamond reserves have the potential to supply 20-30% of the world's diamond demand if and when fully exploited. Diamond prospecting in Marange currently covers about 120,000 hectares of land, although it is estimated that the diamond fields could cover up to 1.8 million hectares.

## **2. Public interest litigation as an empowerment tool**

Public interest litigation is a tool to promote better implementation of the law, and to push the boundaries of its interpretation. It is mainly used for the benefit of the poor and marginalised members of society. It is most effective when used in conjunction with other tools for empowerment and capacity building, such as legal literacy and legal clinics, research, advocacy campaigns, registration of groups as legal entities, and social and grassroots movements to leverage legal rights.

In Chiadzwa Community, the need for public interest litigation emerged as a result of rapid developments in diamond mining. In 2008, the Government of Zimbabwe in partnership with private mining companies began mining in the Marange diamond fields. Mining here led to the eviction and relocation of communities from the Chiadzwa area to Arda Transau, a semi-urban area on the outskirts of Mutare, about 80 km from Chiadzwa.

The evictions and relocations were set to take place before the affected families had been compensated with no agreement on the compensation payable to them. Responsibility for handling the resettlement lay with the mining companies, which had made no provisions for accommodation or social infrastructure at Arda Transau. The affected communities were not adequately informed or consulted about their impending eviction and relocation. In addition, the mining companies began work without the necessary environmental impact assessment (EIA).

As a result of mining in Chiadzwa, community members have lost valuable agricultural and grazing land, which has undermined their food security. Diamond mining has also raised environmental concerns, including deforestation, water and air pollution and siltation of rivers. Some of the mining takes place in sacred and cultural sites so has also impacted on the community's cultural rights. The involuntary nature of the resettlement, the lack of consultation and the lack of information provided increased the feeling of disempowerment among community members.

It is against this background that, in December 2009, community members with support from ZELA used public interest litigation through an urgent chamber application to interdict the eviction and relocation until compensation and other issues affecting the community had been resolved. Specifically, the legal action sought a provisional order interdicting the respondents, that is the mining companies and the Government of Zimbabwe, from evicting and relocating, or causing the eviction or relocation of any persons from the Chiadzwa area and adjacent communal lands for purposes of facilitating mining operations, until the respondents and the affected persons had entered into a written agreement relating to the compensation payable to the affected persons. The request for a provisional order further sought to prevent the respondents from conducting their mining operations, and constructing an airport, until they had been granted EIA licenses in accordance

with the Environmental Management Act. The urgent chamber application was lodged by ZELA on behalf of the members of CCDT against three mining companies, the Minister of Mines and Mining Development and the Minister of Local Government, Urban and Rural Development.

Although ZELA's work with the Chiadzwa community involved other strategies including legal literacy and advocacy, training and capacity building and registration of CCDT as a legal entity, public interest litigation was necessary due to the pending eviction and relocation. Legal literacy training and capacity building helped community members understand how mining activities were violating their rights under national, regional and international instruments. Through advocacy, members of the CCDT have managed to bring their plight to the attention of stakeholders in the mining sector including legislators in the parliamentary portfolio committees on Mines and Energy, Environment and Natural Resources, the Ministries on Mines and Mining Development, the Minister of Local Government, Urban and Rural Development, their legislator and mining companies. They have also profiled their plight at national, regional and international platforms.

Communities were mobilised through a series of workshops organised by ZELA on the use of the litigation strategy. During the workshops, participants discussed the opportunities and challenges provided by litigation as one of the ways of asserting, defending and claiming their rights. Some community members had misgivings about the courts providing a remedy to their predicament. These misgivings arose from the fact that the Member of Parliament for Mutare West Constituency, where the Marange diamond fields are found, is a member for the Movement for Democratic Change (MDC), and opposing the evictions and relocations was seen as part and parcel of opposition politics.<sup>4</sup> Another misgiving was related to the involvement of the state in diamond mining activities through joint ventures between a government-controlled company and mining companies. The state had a direct interest in the mining activities and it regarded mining as key to economic recovery, stabilisation and eventual growth. Some community members were reluctant to openly challenge state-related mining activities. Finally, another concern related to the judiciary. Following the Fast Track Land Reform Programme, there have been allegations that the judiciary was purged of those who were thought to be opposed to the Zimbabwe African National Union Patriotic Front (ZANU-PF)'s policies and replaced by those who are allegedly supportive. These allegations have reduced public trust in the impartiality of courts.

Through the workshops and meetings, however, communities also began to appreciate that within the context they found themselves, litigation could be a useful strategy for pursuing the objectives of CCDT. These objectives included contesting

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4. Zimbabwe is currently led by a coalition government. The coalition is a product of the Global Political Agreement, which was signed between the Zimbabwe African National Union – Patriotic Front and the two MDC formations on 15 September 2008. However, although there is a coalition government, the MDC formations are in practice still regarded as opposition parties. Civil society organisations that work on issues that resonate with the MDC agenda are also regarded as part of the opposition.

the proposed compulsory relocation, protecting the environment, and fighting against any conduct that undermines the rights, standard of living and way of living of the beneficiaries. The lawsuit was lodged by two representatives of the CCDT with support from ZELA.

Another impact litigation case that ZELA took on involved providing legal assistance to Mr Mudiwa (the serving Vice Chairperson of CCDT and one of the two community representatives who filed the lawsuit). He was charged with causing criminal nuisance under Section 46 of the Criminal Law (Codification and Reform) Act (Chapter 9:23). The charge arose from Mr Mudiwa's actions in mobilising communities to resist their eviction and relocation from Chiadzwa to Arda Transau before compensation issues had been discussed and agreed. He had also urged communities to resist relocation until diamond mining companies had made provisions for decent accommodation and put in social and health amenities for the affected families at Arda Transau.



### 3. Outcomes and lessons learned

The urgent chamber application supported by ZELA on behalf of Chiadzwa community was heard on 21 December 2009, and judgment passed on 24 December (Malvern Mudiwa and Others vs. Mbada Mining Private Limited and Others 2009). The application was dismissed on the basis that it was not urgent. The judge pointed out that mining operations began in 2007 and that the applicants should have raised the failure to carry out an EIA then, rather than two years later under an urgent application procedure. In addition, the judge argued that since mining activities had begun two years earlier, communities should have known they were going to be relocated. While it is indeed true that mining activities commenced in 2007, it was not until the week beginning 7 December 2009 that communities were officially notified of their eviction and relocation. Before then, the only information they had received was based on media reports and from policemen and soldiers providing security in the area. This does not constitute adequate information and notice.

With regards to compensation, the judge noted that the applicants were not contesting relocation per se but the circumstances under which they were being relocated, as they did not know the amount of compensation they were going to be paid or the nature of social amenities at the place of relocation. In his ruling, the judge argued that both the applicants and respondents had held discussions regarding compensation. The judge noted:

*“The respondents had not refused to pay compensation, although no agreement had been reached on the amount of compensation. In the event of a deadlock in negotiations, the applicants were entitled to approach the Administrative Court for adjudication in terms of section 80 of the Mines and Minerals Act”.* (Malvern Mudiwa and Others vs. Mbada Mining Private Limited and Others 2009)

While it is true that the Mines and Minerals Act does not require compensation prior to relocation, once communities have moved, their limited negotiated power disappears completely.

The judge ruled there was no evidence that applicants had visited the proposed relocation site to assess the state of the amenities or what improvements were necessary prior to relocation. The application was also dismissed on the basis that the applicants lacked *locus standi*, i.e. the legal standing to sue the respondents. The judge argued that Newman Chiadzwa and Malvern Mudiwa, the Chairperson and Vice Chairperson of CCDT, made the application in their individual capacities, when it should have been submitted in the name of the Trust.

The above account shows the limitations of court-based strategies. In formal legal terms, little has been achieved as yet through the litigation. And yet, the litigation did result in some positive outcomes. Although the urgent chamber application was



Photo : © ZELA

A 'Model 3' house on the left and a communal kitchen on the right in Arda Transau, the relocation site for communities from Chiadzwa.

dismissed, the information provided under oath (by the diamond mining companies, the Minister of Local Government, Urban and Rural Development and the Minister of Mines and Mining Development) as part of the court proceedings has proven critical in advocacy work carried out by both CCDT and ZELA. During the court action, ministers and mining companies disclosed plans regarding the relocation process, which were not previously in the public domain.

When relocations first began in 2009, houses and social amenities had not been built at Arda Transau for the affected communities. Relocated families were moved into old tobacco farm barns, with no schools or clinics thereby violating their right to education and health. After the court application, communities used the information disclosed in court to hold the mining companies and government to account.

The government and mining companies had promised in their affidavits that the communities would not be relocated until proper houses and social amenities were in place. Armed with these promises, community members were able to resist relocation until suitable houses and social amenities had been built.

In addition, community mobilisation resulted in the mining companies building standardised ('Model 3') three bedroom houses, an outside kitchen and toilet and social amenities including a school, clinics and boreholes. While the quality of some of the housing is now questionable (some houses have started cracking and the roofs of some have blown off in the wind), the accommodation provided was far better than that found in the tobacco barns. While this outcome cannot be solely attributed to the litigation strategy, there is no doubt the court action greatly contributed to it.

To date, more than 1,000 families have been relocated without any compensation apart from 'disturbance allowances' of US\$1000 and groceries for one month. One of the reasons families have not been paid significant compensation upon relocation is because of Zimbabwe's land tenure laws. Communal land where mining activities take

place is state land. Communities residing on this land have access, management and use rights rather than ownership. The lack of secure tenure affects communities' ability to bargain effectively with the state and the private sector when it comes to eviction and relocation. However, some businesses were able to negotiate a better deal. With some financial muscle, these groups threatened to sue if they were not adequately compensated. One businessman was reportedly compensated US\$500,000 for the loss of his thriving retail business and mansion. The threat of litigation acted as bargaining chip in the businessman's negotiations with the mining companies.

Following the legal assistance given to Mr Mudiwa the prosecution withdrew its case against him before the trial due to lack of evidence. Although the state withdrew their charges, it is important to note that they could still bring him to trial should new evidence arise regarding the alleged crime. This case clearly demonstrates the challenges community activists face in their work, in exercising their EESCR, and in their involvement in public interest litigation.

Commenting on the role of litigation as a community empowerment tool, Mr Mudiwa said:

*'As a community, we used to be afraid about speaking about rights as we thought this would be judged to be political. However, the training we have received from ZELA about our EESCR through the various projects, gave us the knowledge and confidence to defend our rights against those violating them and also to the greater population of our community as we are no longer afraid to demand the realization of our rights! (ZELA, 2012)*

Although the public interest litigation was ultimately not successful, ZELA learned a number of lessons from this case. The public interest litigation was strengthened by other strategies, which included awareness raising, community mobilisation and registration of the community as a legal entity in the form of CCDT. Awareness raising helped communities understand how mining activities were violating their EESCR and how they could claim and defend them. The organisation of the Chiadzwa community into a legal entity was very important for the public interest litigation case. One of the reasons often given by the state and private sector to justify the marginalisation of communities in natural resource governance is that communities do not constitute a legal entity. The private sector, for example, has pointed out that the lack of legal persona makes it difficult for businesses to negotiate and conclude formal agreements with communities. The importance of a community's legal status is aptly captured by Griffin, who notes:

*'Until communities are organized and formally recognized through the setting up of their own community based organisations, they cannot effectively engage government and the private sector'. (Griffin, 1999)*

CCDT registered as a legal entity on 30 June 2009 through a Deed of Trust and Donation (MA 405/2009). While legal registration is not a precondition for communities to negotiate and litigate, as a legal entity they are in a stronger position

when challenging mining laws and other policies and decisions that do not promote their interests.

ZELA also learned that it is important to prepare for the ramifications that will fall on local communities as a result of challenging state and private interests. For example, when Mr Mudiwa was charged with criminal nuisance, ZELA provided assistance in the form of legal representation. This showed the community that ZELA was prepared to stand with it through thick and thin and helped build trust and confidence between ZELA and the community.

One of the biggest challenges of public interest litigation is funding. Getting funding for this type of work is very difficult, especially in countries like Zimbabwe where there is a democratic deficit. Supporting work related to civil and political rights is seen as the quickest and surest way of ensuring that Zimbabwe returns to democracy and good governance. The role of EESCR in promoting democracy, good governance and sustainable development is seen as peripheral. ZELA has litigated in two other public interest cases relating to water pollution, where the court judgments were then not enforced. The project built on earlier work under previous projects.

In conclusion, public interest litigation as an empowerment tool presents both strengths and weaknesses. Weaknesses relate to limitations in the legal rights afforded to local communities, to the likelihood of success in court proceedings, and to mechanisms for enforcing favourable judgments. Community leaders who engage in litigation may face reprisals from government authorities, including through criminal prosecution. The strengths of this approach relate not only to the benefits of favourable judgments in successful cases but also a greater awareness of rights among community members, stronger community organisations, and the disclosure of information that can be used in subsequent advocacy strategies and as a bargaining chip in negotiations.

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