Examining the (In)adequacy of Public Participation in the Environmental Impact Assessment Process in Zimbabwe

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Abstract

Zimbabwe's rich mineral endowment has been an issue of contention to various stakeholders for various reasons. To communities, on one hand, their major concern has been for their inclusion in the decision-making processes leading to the mining developments. The legal framework on the promotion of environmental rights, the Constitution of Zimbabwe, the Environmental Management Act and other subsidiary legislation seeks to ensure that local communities are involved in decision-making processes through consultation and participation mechanisms. This is especially the case through the Environmental Impact Assessments (EIAs) that are mandated for several mining developmental projects. Pertinent to the EIA process is public participation which is meant to articulate the views and opinions of interested and affected members of the community where the proposed development is to take place. However, there are instances where local communities assert that they were not consulted before mining operations commence. This becomes a defect in the EIA process and this paper seeks to investigate the possibility of an *ex post facto* EIA being used to remedy this defect. As such, this research paper spurs for the inclusion of marginalized communities from the mineral resource-rich areas in Zimbabwe in the decision-making process that affects them.

Keywords: public participation; Environmental Impact Assessment

1 Introduction

Zimbabwe like many other nations around the globe has incorporated Rio Declaration Number 17 regarding Environmental Impact Assessments (EIAs) through section 97 of the Environmental Management Act. An EIA as defined by Sands is a process which produces a written statement that is to be used to guide decision-making and several related functions such as preserving environmental damage. In essence, an EIA needs to be produced before the proposed listed activity commences least the intention of the legislature is defeated. However, one of the key ingredients of an EIA is public participation by interested stakeholders to give their opinions on the project before detrimental effects on the environment emanate. Currently, the EIA process is once again in the spotlight in Zimbabwe with some sectors identifying it as an impediment to developments more so at a time that 'Zimbabwe is open for business'. On the other hand, discussions around 'regularizing' unauthorized listed activities that commenced without an EIA are increasingly gaining traction. On this note, one has to pose and reflect the implications of all these actions on the voices and concerns of interested parties given that public participation, a key ingredient in a democratic nation such as Zimbabwe, may be overlooked in both processes. This paper seeks to investigate the possibility of an *ex post facto* EIA being used to remedy this defect.[1] As such, this research project spurs for the inclusion of marginalized communities in mineral resource-rich areas in Zimbabwe.

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[1] The focus of this paper is not whether or not to provide for *ex post facto* EIA regime in Zimbabwe but rather how to make provisions for *ex post facto* EIAs cure existing public consultation defects without undermining the ordinary EIA regime.

An EIA is a systematic process that scrutinizes the effects of developmental actions, before such action is undertaken, on the environment.[2] On the other hand, the United Nations Environment Program defines an EIA as a "tool used to identify the environmental, social and economic impacts of a project prior to decision-making".[3] An EIA process contains a negotiation of procedural, distributional rights and duties between regulators, project developers, interested and affected parties.[4] Above all else, an EIA emphasizes the prevention of harm on the environment. This is not to say that before this process planners have no way to assess and minimize the adverse impacts of developmental actions on the environment. Planners have traditionally assessed impact, but not in a systematic, holistic and multidisciplinary manner which the EIA process provides.[5]

How public participation takes place is structured in a way that is representative of the views and opinions of the people in the community under consideration. Whatever form public participation takes, whether it is workshops, public meetings or advisory committees, it must be conducted in a way that meaningfully engages the local community.[6] Public participation in EIAs also improves the quality of the information brought to the decision-makers and assists in recognizing priorities and rallying the requisite support. The participants in domestic EIAs usually include, in addition to the affected local population, governmental agencies, technical personnel, and representatives of non-governmental organizations (NGOs).[7] Where the EIA does not include these stakeholders, the level of participation would not be viewed as effective.[8]

2 Background to the Environmental Impact Assessment Process and the Role of Public Participation

Public participation is a term that is used to refer to an active process of interaction and engagement among various stakeholders.[9] It is an 'active' process because all parties concerned must fully engage for the process to be effective. Little postulates that this sort of interaction should be able to influence the management and development of natural resource use, which must then improve the well-being of citizens in terms of personal growth, income and other values.[10] Furthermore, effective participation must ensure that participants are allowed to express their views freely, regardless of whether those are solicited or not.[11] In a nutshell, public participation is a mixture of communication, interaction and exchange of data and views on an issue of common interest.

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[2] G. Wood, *Environmental Impact Assessment: A Comparative Review*, 2nd ed. (Prentice Hall, New York, 2003) pp. 1-15.

[3] Convention on Biological Diversity, 'What is Impact Assessment?' <https://www.cbd.int/impact/whatis.shtml> visited on 20 July 2019.

[4] A. Morrison-Saunders and G. Early, 'What Is Necessary to Ensure Natural Justice in Environmental Impact Assessment Decision- Making', 26:1 *Impact Assessment and Project Appraisal* (2008) pp. 29-42.

[5] J. Glasson, R. Therivel and A. Chadwick, *Introduction to Environmental Impact Assessment*, 3rd ed. (Routledge, London, 2005).

[6] C. Chess and K. Purcell, 'Public Participation and the Environment: Do We Know What Works?'' 33:16 *Environmental Science and Technology* (1999) p. 2685.

[7] J. O. Castaneda, 'The World Bank Adopts Environmental Impact Assessments', 4 *Pace Yearbook of International Law* (1992) p. 241.

[8] *Ibid.*, p. 250.

[9] T. P. Sambo, *Conceptual Analysis of Environmental Justice Approaches Procedural Environmental Justice in the EIA Process in South Africa and Zambia*, Unpublished PhD Thesis, University of Manchester, 2012, p. 90.

[10] P. D. Little, 'The Link between Local Participation and Improved Conservation: A Review of Issues and Experiences', in D. Western, M. Wright and S. Strum (eds.), *Natural Connections: Perspectives in Community-Based Conservation* (Island Press, Washington, D.C., 1994) pp. 347-372.

[11] B. Agarwal, 'Participatory Exclusions, Community Forestry and Gender: An Analysis for South Asia and a Conceptual Framework', *World Development* (2001) p. 29.

The Aarhus Convention provides an apt summary of the reasons for public participation, particularly for environmental decision-making.[12] Though not binding upon Zimbabwe, the Aarhus Convention in its preamble makes provision for the promotion of environmental education, to further the understanding of the environment as well a sustainable development.[13] Additionally, it calls for "widespread public awareness of, and participation in, decisions affecting the environment and sustainable development".[14] Thus, it can be argued that the principal reason for including public participation in environmental concerns is that every citizen must contribute to the achievement of sustainable development.[15]

Further, the Convention observes that public participation contributes to "public awareness of environmental issues" and allows the public to "express its concerns and enable public authorities to take due account of such concerns".[16] "Accountability of and transparency in decision-making" is also observed as a justification for public participation.[17] According to Coenen other reasons for public participation, especially in environmental matters include the need to:

- Increase the legitimacy of environmental decisions and reducing the levels of conflict,
- Improve the quality of environmental decision- making, and
- Enable people to understand societal environmental problems.[18]

This is because a higher level of accountability and transparency tends to be a prerequisite for the legitimization of environmental decisions.[19] Since public participation is the cornerstone of environmental decision-making, it must facilitate functional dialogue between environmental experts, state agencies and affected local communities.

2.1 *Forms of Public Participation*

The forms of public participation have evolved from the creation of mere awareness on contentious issues to the involvement and incorporation of local knowledge and opinions into planning and decision-making processes.[20] Most recently, there has been a clear call for public participation in environmental decision-making, and this call has emphasized particularly "procedures and institutional structures that enhance deliberation and enable participation".[21] Thus, it becomes pivotal to consider this form of participation that supports following the

[12] The Aarhus Convention is a multilateral regional agreement, negotiated under the United Nations Economic Commission for Europe (UNECE). This is of the five regional commissions of the United Nations that has 56 countries located in the European Union, Western and Eastern Europe, South-East Europe and Commonwealth of Independent States (CIS) and North America 199, <http://www.unece.org/about/about.htm>. *See* 1991 Espoo Convention available at <https://www.unece.org/fileadmin/DAM/env/eia/documents/legaltexts/Espoo_Convention_authentic_ENG.pdf>, visited 27 July 2020.
[13] *Ibid.*
[14] *Ibid*.
[15] Sambo, *supra* note 9, p. 98.
[16] Aarhus Convention, *supra* note 12, Preamble.
[17] *Ibid*.
[18] F. Coenen, *Public Participation and Better Environmental Decisions: The Promise and Limits of Participatory Processes for the Quality of Environmentally Related Decision- Making* (Springer, Netherlands, 2009) pp. 2-5.
[19] Sambo, *supra* note 9.
[20] M. Reed, 'Stakeholder Participation for Environmental Management: A Literature Review', *Biological Conservation* (2008) pp. 2417-2431.
[21] J. Black, 'Proceduralising Regulation: Part I', 4:20 *Oxford Journal of Legal Studies* (2000) pp. 597-614.

correct procedure in decision-making processes. Regardless of whatever starting point is adopted for public participation, it should aid in encouraging citizens from diverse backgrounds to contribute to the protection and conservation of the environment-related matters in their communities.

For public participation to be efficient; there must be a system in place that formally records the view of all participants and translates them to specific outcomes.[22] Furthermore, effective participation must focus on citizens' ability to reach conclusions through reflection, discussion, communication and reasoned argument.[23] Therefore, an EIA becomes one such process that utilizes public participation as a means of fostering environmental protection and conservation.

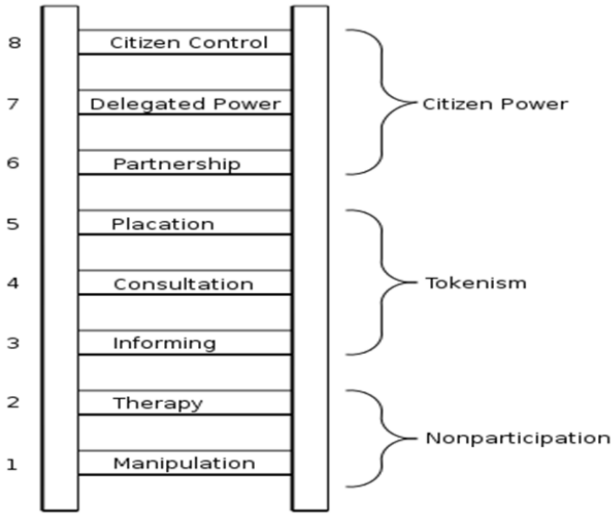

Figure 1: Arnstein's original ladder of citizen participation (Source: Arnstein, 1969)[24]

The earliest argument on public participation describes it in terms of a ladder with eight rungs rising from non-participation to participation in an attempt to include citizens in decision-making processes as reflected in Figure 1 above.[25] This ladder perceives the extent and intent of citizen involvement through rungs at three levels: non-participation (therapy, manipulation); tokenism (informing, consultation, placation); and citizen power (partnership, delegated power, citizen control).[26] On this ladder, effective participation would ideally be where citizens are in partnership with or delegate the power or a decision-making organ whereas manipulation or therapy essentially constitutes a non-existent level of participation.

In Zimbabwe, public participation is one of the key cornerstones encoring the Constitution of Zimbabwe.[27] The national objectives of the Constitution refer to the importance of promoting public participation especially in cases of national developmental issues.[28] National developmental initiatives in most cases require the undertaking on an EIA as they fall within

[22] M. Mason, *Environmental Democracy: A Contextual Approach* (Earth Scan, London 2000) p. 1.
[23] J. Steele, 'Participation and Deliberation in Environmental Law: Exploring a Problem-Solving Approach', 3:21 *Oxford Journal of Legal Studies* (2001) pp. 415-442.
[24] S. R. Arnstein, 'A Ladder of Citizen Participation', 35 *Journal of the American Planning Association* (1969) pp. 216-224.
[25] *Ibid.*
[26] Sambo, *supra* note 9, pp. 92-93.
[27] Constitution of Zimbabwe Amendment (No.20) Act, 2013 (hereafter 'Constitution of Zimbabwe').
[28] *Ibid.*, Section 13 (2). Measures referred to in this section must involve the people in the formulation and implementation of development plans and programmes that affect them.

listed actives in the First Schedule of the Environmental Management Act which is discussed below. [29] This is further reiterated in section 9 of the Constitution which calls for the adaptation of laws and policies at all levels of governance that promote good governance to which public participation is one key ingredient to its attainment.

3 Zimbabwe's Legal Position with Regard to *Ex Post Facto* Authorizations

On the background of Rio Earth Summit, Zimbabwe like many other nations in the world developed environmental legislation specifically geared on curbing the harmful activities on the environment through the promulgation of the Environmental Management Act in 2002.[30] Principle 17 of the Rio Declaration as reflected in the Environmental Management Act requires states to put in place an EIA regime "as a national instrument [that] shall be undertaken for proposed activities … [which] are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority". Reflected in this principle as will be noted below is the need for states to establish mechanisms for EIAs, a process that should apply to activities likely to cause a significant negative impact on the environment and that the EIA be undertaken before the activity commences.

Importantly, the foundation of the EIA regime is hinged on the precautionary approach to environmental management.[31] At the heart of the precautionary principle is the need for decision-makers to prevent harm to the environment and reduce activities that might cause such harm before any action commences.[32] The precautionary principle is also an established environmental norm guiding the interpretation and application of all environmental practices in Zimbabwe by all persons and government agencies as reflected in Section 4 (2) (f) of the Environmental Management Act.[33] It is on this background that the EIA regime in Zimbabwe is grounded and is to be understood if the Constitutional right of promoting sustainable development is to be attained in an ecologically sensitive manner.[34]

Legislation in Zimbabwe has identified certain activities that have the potential of significantly causing adverse harm to the environment in Section 97 read in conjunction with the First Schedule of the Act. Section 97 (1) is clear that listed activities such as dam construction, housing developments, industry, infrastructure, mining and power generation, amongst others are projects which must not be implemented without the project proponent not having a valid EIA certificate. The process of one getting a valid EIA is further amplified in the Environmental Impact Assessment & Ecosystems Protection Regulations.[35] These Regulations detail the importance of undertaking wide stakeholder consultations before a report is submitted to the Environmental Management Agency Director-General for consideration as he is mandated to verify if such consultations were undertaken.[36]

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[29] M. Dhilwayo, 'An Assessment of Local Governance Legislation's Ability to Promote Accountable Service Delivery in Zimbabwe', Unpublished Research Paper, 2018.

[30] [Chapter 20:27]. *See* Principle 11 of the Rio Declaration says that: "States shall enact effective environmental legislation. Environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply. Standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries"

[31] *Mohamed Ali Baadi and Others* v. *The Hon. Attorney General*, Petition No 22 of 2012, para. 121.

[32] P. Sands, *Principles of International Environmental Law*, 2nd ed. (Cambridge University Press, 2003) p. 246.

[33] Environmental Management Act, *supra* note 30. *See also* D.V. Cowen, 'Toward Distinctive Principles of South African Environmental Law: Some Jurisprudential Perspectives and a Role for Legislation', 52 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* (1989) p. 8.

[34] Section 73(1)(b) (iii) of the Constitution.

[35] Environmental Impact Assessment & Ecosystems Protection Regulations Statutory Instrument No. 7/2007.

[36] *Ibid*., Section 10(4) and (5).

It is clear from a brief reading of the Constitution, the Environmental Management Act and the Environmental Impact Assessment & Ecosystems Protection Regulations that an EIA process plays an integral role in environmental conservation to which public participation is a key pillar. The challenge, however, emanates in circumstances that the EIA process is noted to have been defective after a licence has been issued; what legal recourse do stakeholders have in such instance? Should the project be halted, demolished or the EIA be approved *ex post facto* are some unanswered questions in Zimbabwe.

4 Analysis of *Ex Post Facto* Environmental Impact Assessment Authorizations

The term '*ex post facto'* is Latin meaning 'after the deed' or 'a thing done afterwards' and usually applied to conduct that is criminalised retrospectively by statute.[37] In the context of an EIA, it refers to a process that is undertaken when the project has already commenced.[38] The rationale for a project proponent's need to undertake an EIA is before commencing the activity is because an *ex post facto* application and authorization are an anomaly. By its very nature, an EIA is a proactive, prospective and planning tool only applicable to projects before they commence.[39] In some jurisdictions, this type of EIA is referred to as retrospective EIAs.[40] An example is the Chinese EIA regime which classifies EIAs into three categories namely retrospective EIA for existing projects, the present EIA for projects under construction and the prospective EIA for projects which are still in their planning stages.[41] Although these EIAs differ in terms of when they are conducted, they all have the same rationale, which is to minimise environmental harm resulting from certain projects.

An EIA can also be regarded as having been done *ex post facto* when undertaken in instances that a decision to commence with the project has already been made. This is clarified in EIAs as they relate to the United Kingdom where it is stated that in the worst-case scenario, an EIA can be conducted as a retrospective process even when the decision for the commencement of the development has been made but the actual groundwork not yet commenced.[42] This observation essentially places such action within the ambit of an *ex post facto* EIA. An EIA which has been authorised with details on how the activity should be conducted even though there would not yet be actual commencement of the project falls within the same category under discussion.[43]

Although, an *ex post facto* EIA may be perceived to be contrary to the very nature of an EIA and therefore useless; there is unstated value in providing for or undertaking these authorisations. The significance of an *ex post facto* EIA is that it brings projects undertaken without the proper authorisation, meaning authorisation given without all processes being followed to the letter, within the control of relevant authorities. While it may be at odds with the spirit and the purport of the usefulness and effectiveness of an effective EIA regime, it seems to be a necessary evil in countries which have defective EIA processes.[44] As already alluded to,

[37] *Beazell* v. *Ohio*, 269 U.S. 167 (1925).
[38] R. Paschke and J. Glazewski, 'Ex Post Facto Authorisation in South African Environmental Assessment Legislation: A Critical Review', *Potchefstroom Electronic Law Journal* (2006) p. 1.
[39] S. I. F. Ndlovu, 'Critical Analysis of Ex Post Facto Environmental Impact Assessment Authorisations In South African Law', Unpublished LLM thesis, University of Cape Town, 2014.
[40] Ibid., p. 7.
[41] *Ibid.*
[42] *Ibid.*
[43] *Ibid*., p. 8.
[44] *Ibid.*, p. 10.

where an EIA has already been granted but it is discovered that its authorisation was defective as it did not follow due process, then an *ex post facto* EIA becomes necessary. Therefore, in such instances, the question is not whether or not to provide for *ex post facto* EIA but rather how to make provisions for *ex post facto* EIAs to cure these defectives without undermining the ordinary EIA regime.

At a practical level, there are five possible ways in which *ex post facto* EIAs can be addressed through legislation. The first is that current EIA legislation expressly prohibits it, and if this is the case, the legislation would have to be unequivocal that an *ex post facto* EIA may not be granted under any circumstances. The second is that legislation is silent on the issue, and this is the most common way to address the issue. In such a case, there is uncertainty which creates confusion on whether or not an application *ex post facto* would be granted if applied for. Due to this uncertainty, courts are relied upon to interpret the law and do so within the existing EIA legislative framework. The third is for the existing EIA regime to expressly provide for a narrow scope for *ex post facto* EIA authorisations. This option is not without limitation as the extent and scope are usually arbitrary.[45] The fourth is to provide for an unlimited scope for undertaking *ex post facto* EIA and this leads to a situation where there exist two EIA regimes operating side by side. The fifth is to make provision for an *ex post facto* EIA and authorisations on an *ad hoc* basis.[46] The relevant authority would issue notices granting an opportunity for defaulters to lodge applications for or to undertake *ex post facto* EIAs within a specified time.[47]

5 The Effect of *Ex Post Facto* EIA Authorization in the Current Regime

It is clear that the provisions of the Constitution, the Environmental Management Act and its regulations were not formulated to be applied to activities which have already commenced. Permitting *ex post facto* authorisations is, on the other hand, discouraged as it effectively encourages some people to undertake identified actions without the permissions on the background of them undertaking the process after the fact where in most instances irreversible harm to the environment would have occurred.

The Constitution of Zimbabwe gives every person the right to a clean environment that is not harmful to health or wellbeing and to have the environment protected for the benefit of present and future generations, through reasonable legislative and other measures that:

> (i) prevent pollution and ecological degradation;
> (ii) promote conservation; and
> (iii) secure ecologically sustainable development and use of natural resources while promoting economic and social development.
> (2) The State must take reasonable legislative and other measures, within the limits of the resources available to it, to achieve the progressive realisation of the rights set out in this section.[48]

It is clear utilising the canon of constitutional interpretation that further requires every court, tribunal, forum or body to promote and be guided by the spirit and objectives of this Chapter that actions that are aimed at preventing environmental damage should be respected.[49] This should be read in conjunction with section 326 (2) that requires an approach consistent with

[45] The fact that one applies for an *ex post facto* does not guarantee the authorization of the EIA that one undertakes as the authority uses discretion regardless of whether the activity has commenced.
[46] Ndlovu, *supra* note 39 p. 10.
[47] *Ibid.*, p. 11.
[48] Section 73 of the Constitution.
[49] Section 46(2) of the Environmental Management Act.

customary international law. As mentioned earlier in this paper, the Rio Declaration seeks to promote the participation of concerned citizens at all levels and one such mechanism it seeks to promote is the EIA process.

The EIA regime is a form of 'other measures' that the state has been mandated by the Constitution to put in place to ensure the realisation of the environmental right. These measures and mechanisms should be interpreted taking into account section 4 (2) principles of environmental management that seek to prevent actions that may significantly affect the environment. Central to the EIA regime in Zimbabwe is the notion of projects which must not be implemented and nowhere in legislation is reference made to activities that have already begun.[50] The EIA process also does not provide exceptions in circumstances where an activity could have undertaken without having been given the authority to commence with the activity. In effect section 92 (2) criminalises the commencement of any activity undertaken without the aforementioned authorisation.

Therefore, it could be argued that to undertake an EIA on an activity that has already commenced significantly undermines the role of the EIA process in environmental decision-making processes. However, it could still be argued that where an EIA process is alleged to be defective to the point that it excluded key stakeholders like interested and affected communities then an *ex post facto* EIA, which essentially halts the project or activity and begins the EIA process *de novo* would constitute sufficient relief to affected communities.

On the other hand, the highest court in Zimbabwe in *Greatermans Stores* v. *Minister of Public Service, Labour and Social Welfare*[51] provided clarity on retrospective legislative application. In this case, the Chief Justice Malaba stated that retrospectivity is one way to which parliament if it desires can use civil legislation in a bid to promote the constitutional objectives of peace, order and good governance.[52] The Judge distinguished the application of retrospectivity in criminal law and civil law by stating that:

> While the Constitution offers meaningful constitutional restraint against retrospectivity about criminal legislation in terms of practical limitation upon the exercise of legislative power, this safeguard does not extend to civil legislation. In other words, there is no constitutional requirement of civil legislation retrospectivity.[53]

The Judge also reiterated that:

> there is no constitutional provision that prohibits the legislature from using retrospectivity as a method of giving effect to civil legislation. Retrospective law-making has been part of instruments of governance of human affair for many centuries.[54]

It is clear from reading this case that retrospective application of civil law can bring to close the issue of *ex post facto* EIAs in Zimbabwe's legislation so long as it does not violate the Declaration of Rights[55] and therefore putting the current political rhetoric within the confines of the law.[56] As it stands, Zimbabwe's law does not unequivocally provide for *ex post facto*

[50] *Ibid.,* Section 97(1).
[51] *Greatermans Stores* v. *Minister of Public Service, Labour and Social Welfare* CCZ 2/18.
[52] *Ibid*., p. 10.
[53] *Ibid*., p. 11.
[54] *Ibid.*
[55] Chapter 4 of the Constitution of Zimbabwe.
[56] D. Mhlanga, 'Epworth to Regularise Illegal settlements', *Newsday*, 31 July 2019.

EIA authorization as clearly is the case in South Africa[57] and Lesotho in limited circumstances.[58] The Zimbabwe judiciary has left that responsibility to the legislature in line with the principle of separation of powers. If the legislature so desires to cure the defects within a submitted EIA that excluded the participation of interests stakeholders, the mandate is upon them, least numerous court actions will be brought by communities as is evident from the case of *Marange Development Trust* v. *Zimbabwe Consolidated Diamond Company (Private) Limited and Environmental Management Agency*.[59]

Although Zimbabwean jurisprudence has never considered the issue of *ex post facto* EIA applications directly, South African jurisprudence has case law that contended with this issue. In the *Silvermine Valley Coalition v. Sybrand van der Spuy Boerderye and Others*[60] case, the issue of whether an *ex post facto* EIA could be granted came under the spotlight. The applicant was a voluntary organization which comprised of ten NGOs and the first and second respondents were the lessee and lessor, respectively, of the site in Simonstown, Cape Town. The first respondent had begun earthworks in preparation for the planting of a vineyard on a site that since 1945 had been quarried for gravel. One of the NGOs requested the first respondent to undertake an EIA and threatened legal action should such request be ignored. This request produced a letter from the first respondent's attorneys informing the NGO that the first respondent was continuing with the establishment of the proposed vineyard and stated that the first respondent had appointed its attorneys to accept service of any application.[61] The applicant approached the court for an order forcing the first respondent to undertake an EIA in terms of the provisions of the National Environmental Management Act, the requisite legislation for EIAs.[62]

The Court considered the relevant statutory provisions and concluded that:

> When this legislative framework is analysed in its complex totality, it becomes clear that an EIA fits in the scheme which has been set up to ensure that an official approval is granted *before certain land can be put specific uses as defined* … It would appear that, in general, a person who performs an identified activity unlawfully without authorization cannot be forced to comply with a procedure applicable to one who has sought authorization. The unlawfulness of the conduct determines the remedy.[63]

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[57] Section 24G of the National Environmental Management Act 107 of 1998 (NEMA).
[58] Section 34(2)(i) Environmental Management Act.
[59] *Marange Development Trust* v. *Zimbabwe Consolidated Diamond Company (Private) Limited and Environmental Management Agency* HC 902/17. Marange Development Trust (MDT) approached ZELA over concerns it had over the conduct of ZCDC which is mining a few metres from some households exposing them to various hazards. The other concern of the community group was the lack of recollection in the community involved in the development of the company's EIA report. ZELA provided legal advice to the community group by assisting them to write a letter to ZCDC. The letter requested the company to provide the community group with its EIA documents. The failure by the company to neither respond nor provide the requested EIA document resulted in the community group requesting assistance from ZELA to file a legal application against the company for operating illegally without an EIA. MDT applied to the High Court under case number HC 902/17 against ZCDC and the Environmental Management Agency (EMA) seeking an order from the Court to interdict the company from carrying out mining operations until the law has been complied with. The High Court of Zimbabwe granted the order interdicting Zimbabwe Diamond Consolidated Mining Company (ZCDC) to halt its diamond mining operations in Marange immediately pending approval of an Environmental Impact Assessment (EIA) certificate by the Environmental Management Agency (EMA).
[60] *Silvermine Valley Coalition* v. *Sybrand van der Spuy Boerderye and Others*, 2002 (1) SA 478 (C).
[61] *Ibid.*
[62] *Ibid*.
[63] *Ibid*., p. 488, emphasis added.

Further, the Court reasoned that the current EIA regime provides for civil and criminal remedies, should one commence proposed activities without the requisite authority. In respect to civil remedies, a mandatory or prohibitive interdict can be issued by the court, and in respect of criminal sanctions, there may be litigation and an order to repair the damage caused to the environment can be issued.[64]

In the *Eagles Landing Body Corporate* v. *Molewa NO and Others*[65] case, the applicant was the body corporate of the Tradewinds Sectional Title Scheme and the first and second respondents were the MEC for and the head of the North West provincial department of environmental affairs (the "department") and the third respondent was a golf estate developer.[66] The third respondent begun construction of a peninsula (as part of the golf estate), and the department issued a directive directing the third respondent to stop the earthworks and undertake an EIA. The third respondent complied and was granted an authorization to continue with the construction. The applicant, unsuccessfully, appealed against the decision authorizing the continuation of the construction and construction was continued to completion. The applicant then approached the High Court to review and set aside the decision.[67] The Court held that granting the order sought by the applicant would be of no practical effect since the construction had been completed.[68] On this basis, the Court refused to grant the order sought by the applicant.[69]

However in the recent Italian case of *Aldo Alessandrini and Others* v. *Provincia di Macerata and Others*,[70] the Court was asked whether it is legally possible to make an EIA for a project which has already commenced. The requisite EIA Directive (Directive 2011/92) requires, for projects which come under its field of application, that an EIA be made before the permit for the construction and/or operation is granted. The European Court of Justice held that such an *ex-post* EIA was compatible with EU law.[71] The case involved the construction of biogas plants in two Italian municipalities. The competent authorities granted a permit for these plants because regional legislation provided that an EIA was not necessary. The plants were built. However, later, the regional legislation was declared void by the Italian Constitutional Court because it was in contradiction with EU Directive 85/337 (2011/92) EIAs. The competent Italian authorities then requested an EIA to be made for the plants. Furthermore, it added that the impacts that needed to be considered were not only future impacts but also those since the completion of the project.

Although the recent case of *Aldo Alessandrini and Others* makes provision for the use of an *ex-post* EIA, stating unequivocally that this process does not undermine the initial EIA, the issue of post-EIAs must be considered carefully. As already alluded to in the context of Zimbabwe, the best option where a local community has been sidelined in the decision-making process through a defective public participation process could be the *Greatermans Stores* case. In this instance, the aggrieved party would seek an interdict to halt the project due to a defective EIA and pray that the process is applied retrospectively. The judgment in the *Greatermans Stores*

[64] *Ibid.*
[65] *Eagles Landing Body Corporate* v. *Molewa NO and Others*, 2003 (1) 412.
[66] *Ibid*., p. 416.
[67] *Ibid.*
[68] *Ibid.*, p. 432.
[69] *Ibid.*
[70] *Aldo Alessandrini and Others* v. *Provincia di Macerata and Others*, Judgment of 26 July 2017, ECLI:EU:C:2017:589.
[71] *Ibid*., para. 28.

case makes it a possibility for local communities to find recourse without going as far as considering ex-post EIAs.

6 Conclusion

An Environmental Impact Assessment is an important tool that not only ensures the protection of the environment but also ensures the participation of communities in the decision-making process of action that impact their livelihoods. Whilst project proponents may see this as an unnecessary delay in commencing a developmental project, it is through such that communities may also buy in the project and give a social license to operate once the EIA has been approved. Indeed, local communities may not have the necessary formal education levels as the project proponents, but as custodians of community, heritage can also add value to some areas that would have been overlooked in the project conceptualization process.

The moral or ethical rationale on its own does not do much to change the action of business personnel, but in Zimbabwe, like many other jurisdictions in the worlds, no activity can commence without an EIA having been given before the action. Other countries such as South Africa and Lesotho have attempted to formally provide for retrospective environmental authorizations, a process that is not outlawed in Zimbabwe but one which the legislature if it so desires such a process has to take into account the implications that such an action may have on environmental management. On the other hand, *ex post facto* authorizations may be one manner in which existent defects nor originally identified can be cured. So that project proponents do not abuse this as a way out, proper confides should be put in place should legislation seek to take this.