GOVERNMENT OF ZIMBABWE TO COMPENSATE FORMER WHITE FARMERS – THE DEVIL IS IN THE DETAIL

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INTRODUCTION

In a historic event that caught the attention of the world, last month the Zimbabwean government entered into a Compensation agreement with former white farmers whose land was expropriated under the land reform program. The agreement is limited to compensating for improvements only and not for loss of the land itself, a position that derives from the 2013 constitution. The agreement has drawn mixed reactions from various interested quarters and this article seeks to bring to the fore aspects of legal and commercial interest.

BACKGROUND

At the turn pf the century, the Government of Zimbabwe presided over what has come to be known as the land reform program which saw evictions of 4,500 white farmers and redistributed the land to about 300 000 'indigenous' families, arguing it was redressing colonial land imbalances. For twenty years, the Government stood by the decision and boldly proclaimed that the program would never be reversed, and that there would be no compensation for lost land.

WHERE IS THE AGREEMENT

Before delving into its terms, it must be stated that the actual agreement has not been made public which is odd for an agreement having widespread public character and possibly consequences. There is no reason at all why the public would not be given sight of this document to not only critique it but also to prepare for its implementation. The constitution of Zimbabwe guarantees the right to access public information such as this agreement, and while an interested person may use channels of the law to be given access to it, there must really be an explanation why the State is not voluntarily releasing this vital information. There is a general problem with public agreements being withheld from the public in Zimbabwe, and one glaring example of this was the widely publicised Afreximbank guarantee of the bond notes in terms of which the public was openly encouraged to accept bond notes since there was a guarantee that in the event of failure, an international financial institution would make good on such loss. When the bond note failed to hold the promised value of 1:1, the guarantee was never enforced and this arises from the fact that the government refused to release it to the public from the very onset. What therefore is the reason for the secrecy behind the compensation agreement? This should be addressed promptly to ensure that there is transparent allocation of resources and to curtail suspicion.

WHY IS THIS AGREEMENT IMPORTANT?

For proponents of either side of the philosophic arguments for or against land reform and compensation, the agreement is undeniably important. The land reform program remains at the centre of Zimbabwe's international isolation and ejection from the mainstream financial and trading systems resulting from sanctions against the country. Twenty years on, some form of an agreement was always required to bring an end to this impasse or at least to have conversations started around normalising relations with the international community.

Whether one supports compensation or not, the agreement brings the possibility of closure of the land issue once and for all, which result may still be far off but the agreement is certainly a start towards that goal. It is therefore critical that opinions be expressed from a cross section of the population regards the character of the agreement.

A DETAILED LOOK AT THE COMPENSATION AGREEMENT

The Global Compensation Agreement was birthed by section 72(3)(a) and section 295 (1) and (2) of the Zimbabwean Constitution. While the text has not been availed, information in the public domain is that it was agreed between the Zimbabwean Government and representatives of the former white farmers that the total sum to be paid out as compensation is $3.5billion United States dollars. The terms of payment are that half of this sum is to be distributed within one year of entering the agreement, and the outstanding payments will be paid over the following five years. Each of the 3,500 farmers who applied for compensatio that is if the money is to be evenly distributed.

What is in that agreement?

WHO STANDS TO BENEFIT FROM COMPENSATION?

There are 3 categories of farmers that are entitled to compensation in terms of the constitution and these are briefly highlighted below:

- "**Non-indigenous**" farmers, i.e. white farmers, even though many were third and fourth generation farmers who were totally committed to their country, had been given title to their land and had invested extensively. According to the constitution, they are only entitled to compensation for "improvements" on their farms and not for the land.

- “**Indigenous**” Zimbabweans or black Zimbabweans, although the constitution avoids clarifying this racial distinction. According to the constitution, they are entitled to compensation for both improvements and for the land.

“**Foreign**” farmers whose land ownership rights were covered under bilateral agreements signed by Zimbabwe with other countries. According to the constitution, they are entitled to compensation for both improvements and for the land.

The agreement’s main objective is to provide compensation for the non- indigenous and foreign white farmers for improvements that had done on the farms and not for the land they lost or the trauma they experienced through the dispossession activities.

WHO SHALL COMPENSATE?

The question is vital for various reasons. While the Constitution places the obligation of payment of compensation on the British, there is everything wrong with hoping to enforce an agreement against a country which is not party to it. This involves the foreign policy of the British and would require that they commit to settlement of the claims. Until such commitment is made, it must be presumed that alternative sources of funding shall be found. In the absence of confirmation that the British Government accepts liability, the Government of Zimbabwe was primarily responsible for the reform programs and one may argue that it must compensate for losses arising from it. If this is so, then the State must be read to mean the taxpayer. This argument would have the negative impact that the entire nation would take collective responsibility to pay compensation of property that was enjoyed by few people, as not all persons in Zimbabwe benefitted from the program.

A second possibility presents itself in this regard that may result in equity. The improvements for which compensation is to be paid are known and the beneficiaries of the land where these improvements were made are known. There is no rational reason why there was no valuation of the actual improvements on each farm and have each beneficiary pay his part of the improvements bill. If a new farmer inherited a farmhouse with a swimming pool there can be no justification for placing the burden of paying for these assets on the entire nation, more-so where the assets are still in the hands of the beneficiary.

The present model of compensation creates more questions than it presents answers. How was the figure of US$3.5 billion arrived at for improvements only if no valuation was done on the farms which gives a breakdown of each new farmer’s proportion of the compensation bill. The argument being advanced herein is that if any portion of compensation is to be paid from the public purse, the Global Compensation agreement would in reality be another debt assumption exercise where the taxpayer is to inherit bills for property which is in the hands of a few persons who could and should use the said assets to create profit and pay for the improvements that they inherited. A valuation at the level of each farm unit is critical. Some former white farmers were even reported to have destroyed or vandalised infrastructure before leaving the farms and where this happened, there must be a lower value payable in compensation, if any at all depending on the state of the improvements at the time of handover, than where improvements were handed over in working order. Similarly, there appears no formula for differentiating losses between the former farmers and a one size fits all approach is just inequitable. There must be a scientific basis on which a certain amount is payable to a particular person and a thumb-sucked figure can hardly suffice as it will inevitably lead to unjust enrichment in some cases, and under compensation in others.

In fact, the present formulation of the agreement as publicised misses a perfect opportunity to bring the farms to maximum productivity by attaching compensation targets to each farmer to the extent of his benefit, and attaching consequences of failure to produce to the required level, which must include the likelihood of losing the farm. The logic of protecting unproductivity on farms is self-defeating as there is a general sense that occupants of the farms may not be paying their proportionate share to the fiscus? This may present the perfect chance to reintroduce independent title on the farms with a view of unlocking the 'dead capital' which the farms presently sit on thus allowing easier access to financing of operations and provide financial institutions with better securitisation options.

Having discussed the likelihood of compensation coming from the national purse and also from the individual farmers, we consider the actual terms which present a third source of financing the compensation bill. According to Section 72(2) of the constitution, the previous colonial power (Britain in our case) has an obligation to pay for the compensation. In the event that this payment does come from Britain, the next issue to consider is whether the money will be coming gratuitously, or is it going to have loan agreements in terms of which the State will either take up the primary or collateral obligation to ensure settlement. The structure of the payment is a matter of national interest to ensure that there is transparency in the compensation arrangement and at the moment it remains opaque.

WHETHER ZIMBABWE HAS THE CAPACITY TO PAY?

Zimbabwe is in debt distress, and its total public and external debt is unsustainable. With longstanding external arrears, foreign financing has been scarce, and large fiscal deficits are lately being financed through domestic borrowing. Over the last five years, government debt has risen substantially from just over 48 percent of GDP in 2013 to an estimated 82% in 2017.

According to the International Monetary Fund, Zimbabwe is experiencing an economic and humanitarian crisis. Macroeconomic stability remains a challenge: the economy contracted sharply in 2019, amplified by climate shocks that have crippled agriculture and electricity generation. The newly introduced Zimbabwean dollar has lost most of its value; inflation is very high; and international reserves are very low.

Although the white farmers agreed to a significantly reduced compensation figure of US3.5 billion for improvements for the group of largely white dispossessed commercial farmers, it is important to note that the Zimbabwean government does not have this money and it still has to be raised from the sceptical international community. International lending organisations are monitoring with concern the human rights situation, issues around rule of law and property rights, as well as the fight against corruption. Given the timelines in the agreement, the first payment is due in a very short space of time and unless there is a secret financing source, the present silence on where this exacting amount shall come from is not a good omen at all. Transparency is key in this regard in order to give the entire nation the right to debate the implications of any proposed plan and contribute positively on such an important matter concerning the nation.

RECOMENDATIONS

If any portion of the compensation is to come from taxpayer's money, the primary obligation must rest on the actual beneficiary of a farm before the taxpayer is to be involved._The basis of compensation must be actual loss quantified by a competent valuation and not a thumb-sucked figure. Government must be transparent about the entire Global Compensation Deed, details must be made available to the ordinary citizens of who is funding the compensation, who the listed beneficiaries are and all the pertinent details of the agreement._Government must consider solidifying land tenure to ensure that land is bankable again so as to spur production on the farms.

CONCLUSION

Given the divisive nature of land, it is probably for the best that an agreement is put in place to bring the matter to an end. The devil is however always in the detail and the secrecy with which the agreement is being dealt with leaves suspicion to run wild regarding the terms. If compensation is only for improvements then some former commercial farmers may not be eligible for compensation having destroyed improvements on their farms, but the present discourse suggests that all the registered former farmers are in line to collect compensation. Transparency is key in a matter such as the present so that future generations do not reopen this chapter on account of the fact that there is no public buy in or input into the subject.

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The Victoria Falls Stock Exchange—A Capital Markets Game Changer?

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The Capital Markets landscape in Zimbabwe looks set to be altered significantly by the introduction of what has been named the Victoria Falls Stock Exchange through Statutory Instrument 196 of 2020. This piece of legislation introduced a capital market meant to be a global offshore capital market focused on attracting hard currency into Zimbabwe. Will this new exchange attract the much needed counters and investors and just how much protection is afforded to both listed companies and investors on the exchange? These are some of the hard questions that both policy makers and market watchers alike must promptly address as the nuts and bolts are being sorted for the launch of the latest kid on the capital markets block.

Globally, there has been an emergence of offshore capital markets which are primarily focused on attracting foreign direct investment. Examples of such internationally recognized global bourses include but are not limited to the Hong Kong Exchange, Dubai Stock exchange and the Mauritius Stock Exchange. The Victoria Falls Stock Exchange is founded on similar principles to the above mentioned international capital markets. Zimbabwe hitherto had two capital markets trading in Zimbabwean dollars, both being regulated by the Securities' Exchange Commission of Zimbabwe. The Victoria Falls stock Exchange therefore becomes the third stock exchange in the country after Zimbabwe Stock Exchange and Financial Securities Exchange. The Victoria Falls Stock Exchange will be the first Capital market in the country trading solely in foreign currency meaning the base currency for this bourse will be the USD dollar currency as opposed to the Zimbabwean RTGs Dollar.

Background to the formation of the vfex

Pursuant to the temporary closure of the Zimbabwe Stock Exchange on the 26th of June 2020, investors were exiting the market due to inflation rates fluctuations by transferring their dually listed shares to offshore exchanges in order to withdraw their hard currency from the bourse. The government of Zimbabwe reacted to the situation by firstly abolishing the partial fungibility of the dually listed shares through the Exchange Control (Suspension of Fungibility of Certain Shares) Order, 2020 [Government Notice 583 of 2020] ("the Fungibility Suspension Order") and ultimately by ordering a total halt of any trading activities on the Zimbabwe Stock Exchange capital market. Fungibility of shares allowed investors to repatriate their profits from the stock market through another exchange as this was not possible on the Zimbabwe Stock Exchange. The loss of investor confidence arising from these drastic measures has been well documented in various media and the new exchange comes on the backdrop of these decisions which amount to the Government of Zimbabwe interfering with the proprietary rights of investors by regulatory changes that negatively reordered the market and led to its closure. The first hurdle therefore that the new exchange must overcome is confidence, and that hurdle is loaded with various facets aside from overcoming the fate of investments on pre-existing exchanges in the country.

The Confidence Question

As already alluded to, the new exchange will have to shrug off questions of security of investment given the manner in which government regulation all but negated investments held on the existing bourse. What guarantees are there that will ensure that the Regulator or the Government will not backtrack on investment security should they later opine that the exchange does not serve the national interest? These are real questions of government integrity which should not normally arise but sadly in the context of recent developments will invariably take centre stage.

This however is not the only question that hinges on investor confidence. The second question that must be adequately addressed is the issue of repatriation of funds for foreign investors, a problem that has long existed for those that have ploughed foreign money into local markets and later wish to return these funds to the their origins. The third issue that must be considered when putting up the architecture of the new bourse is the currency conversion issue. While the regulations provide that the new exchange shall be denominated in United States Dollars, Zimbabwe has recently seen similar laws providing for multi-currencies being replaced overnight by mandatory inequitable conversions to local currency. A fourth question is a general lingering issue of just how much respect the Government of Zimbabwe has for property rights given the various acts of expropriation, even of investments covered under Bilateral and Multilateral investment treaties and arrangements. In our view, the above issues require attention in order that the new bourse can be given a chance at taking off, failing which, the much publicized exchange may suffer from investor apathy. In fact there must be a reaffirmation by the Government of its commitment to observance of property rights not only by avoiding direct expropriation, but also ensuring that creeping expropriation or regulatory taking does not occur either in the new exchange or generally in Zimbabwe.

Having dealt with the challenges that must be overcome, we shall take a brief look at the mechanics of the exchange hereunder.

Which companies can List on the Victoria Falls Exchange. Can local companies intending to go global also list on the Victoria Falls exchange.

While the formation of the new exchange is an attempt to lure foreign companies to list, it also allows in the regulations the listing of local firms as well. Local companies are allowed to list on the Victoria Falls Stock Exchange provided the source of their funds originate from offshore or free funds. See s3 of SI196/2020

There is potential for local companies to tap into global capital by listing the stipulated portion of their shares on the new bourse. This could also be a lucrative offshore investment opportunity for domestic insurance and pensions firms to hedge with more secure foreign currency instruments provided the necessary prescription is promulgated to allow them to do so. It may also be a boon for capital intensive operations such as mining and infrastructure firms that require large foreign exchange capital injections to list on the exchange so as to fund domestic capex requirements.

Listing Requirements

The regulator remains Securities and Exchange Commission of Zimbabwe as the chief regulator of capital market players in Zimbabwe. The requirements were largely drawn from the Zimbabwe Stock Exchange Listing Rules except for minor changes. Where a company is a resident Zimbabwean company that is already listed on Zimbabwe stock Exchange, section 3(b) of SI 196 of 2020 requires that such company shall not list more than 20 percent of its authorized share capital. The other requirement is that the source of funds must be either offshore or free funds. Companies that are not currently listed on the Zimbabwean Stock Exchange may list 100 percent of their share capital provided that 20 percent of that shall be reinvested in Zimbabwe for the next five years from the date of such listing.

Taxation and Transaction Costs

The resort town of Victoria Falls has been earmarked as a Special Economic Zone in Zimbabwe. Due to this special Economic zone status, the government will more likely offer attractive tax free incentives in this regard. According to the Minister of Finance and Economic Development in his Mid Term Budget speech, Government is in the process of establishing a number of incentives to the Exchange in order to create confidence in the operation of the Offshore Financing Centre, and attract capital across the globe. Therefore, there will likely be favorable tax rates in regard to dividends, capital gains tax and withholding tax. Since the exchange is molded on the same principles with other international Capital markets, we anticipate that it will eventually become a tax haven for investors. A very fine line must be drawn in this regard to ensure that the exchange does not quickly become grey listed as such establishments have been known to be abused by money launderers and other illicit financial transactions. Details of incentives as well as measures to protect the integrity of the market are eagerly awaited.

The Ease of Doing Business

The project calls for serious efforts towards streamlining the processes of commercial transactions in Zimbabwe. There is competition from various global markets for the same capital that the new bourse will be chasing and the basic question that must be asked by authorities is why would an investor take his money off the NYSE to invest in VFEX? What measures will be in place to attract such movement of global capital? One of the issues that will be seriously looked at is how quickly and seamlessly transactions will be done, from company formation times, tax registrations, authorizations for movement of funds and various other such processes. As it stands, the government has ticked off such processes as the company registry as having been improved in terms of turnaround time but the reality on the ground is the exact opposite. Seriousness must be exhibited in this regard. Another example of incongruent celebrations of progress which does not exist on the ground is the enactment of the new company legislation which since taking effect in February 2020 is barely being implemented, with the electronic registry that is provided for not being in existence some 9 months after the law came into force. There are however promising shoots with such developments as the Zimbabwe Investment Development Agency Act which has brought in comprehensive investor protection provisions under section 17. The takeaway here is that real progress must be seen regards ease of doing business and the Government must not be drawn into claiming false victories which do not exist in the market as the realities are easily exposed in practice.

Clearing & settlement

Business entities are allowed to open either local or international offshore accounts depending on the preference of the company wherein payments from the exchange will be made. Initially the Reserve Bank of Zimbabwe will be responsible for all the clearing and settlement until such a time where financial institutions and banks with sound financial statements can actually do the clearing. In terms of the law, the exchange itself should be able to execute settlement of transactions in consultation with the Reserve Bank of Zimbabwe.

In order to boost confidence within the capital market sector, the Reserve Bank must ensure that there is transparency and efficiency of the settlement system. There must not be compulsory acquisition of the profits without consent and adequate compensation. Trades must be settled promptly and proceeds repatriated without bureaucratic red tape.

Conclusion

The idea of establishing a hard currency stock exchange is innovative but must in the circumstances that Zimbabwe has created for itself be supported by robust confidence creating mechanisms. The task is daunting but if the VFEX is to thrive, real effort must go into abandoning past practices that have led to capital flight and giving tangible guarantees to both listed companies and investors who shall buy into these.

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