

THE LAW AND PRACTICE ON ENVIRONMENTAL IMPACT ASSESSMENTS (EIAS) IN ZAMBIA: STRENGTHS AND WEAKNESSES

Proceed Manatsa

LLM Candidate (Environmental Law) (UNILUS, Zambia), Registered Attorney of the High Court of Zimbabwe, Associate Lecturer, Department of Private Law, Midlands State University, Zimbabwe

ABSTRACT

This article reviews the Zambian EIA laws against a set of criteria to determine their strengths and weaknesses. The criteria employed include, the legal origins and the procedural aspects of the EIA process as well as the legal and institutional arrangements for EIA administration in the country. The paper also laments absence of a constitutional guarantee of the right to environmental protection as a factor that may negatively impinge upon EIA implementation. Furthermore, the paper agitates the entrenchment of a specific provision for environmental protection in the Zambian Constitution as a *condition sine qua non* for the promotion of sound environmental management in the country. The purpose of a constitutional protection of the right to environmental protection will be to give it higher latitude. What is more, the article sought to unravel the pluses and shortfalls inherent in the Zambian EIA legislation. The article concludes by proffering recommendations on how to improve on the existing legal framework for EIA administration in Zambia.

Keywords: Environmental Impact Assessments (EIA), Public Participation, Access to Information

Introduction

This paper analyzes the legislative regime for EIA administration in Zambia against a set of robust evaluation criteria to determine its strengths and weaknesses. The criteria used herein include: the origins and legal basis of EIA in Zambia; the institutional and administrative arrangements; procedure for public participation and access to information; decision making, monitoring as well as follow-through procedure. The article is divided into four parts. The

first part explores the origins of EIA in Zambia as well as the legal, policy and institutional framework for the administration of EIAs in the country. This is followed by a section on the strengths of the EIA regime. The third part sets out the weaknesses inherent in the EIA system for Zambia. The final part of the article is the conclusion and it also suggests recommendations on how to improve EIA administration in the country.

1. Origins and legal basis for EIA in Zambia

Before delving into the critical issues, it should be noted from the onset that the Constitution of Zambia which is the supreme law of the land does not have an explicit constitutional requirement for environmental protection.¹ This has been the case despite the fact that Zambia is a party to various international environmental law treaties.² Furthermore, the same Constitution does not contain a provision that recognizes the right to a clean and health environment. Absence of an explicit constitutional requirement for environmental protection and/or at least a guarantee of the right to a healthy and clean environment strongly suggests that Zambia is still lagging behind in terms of executing its obligations under international law. More so, absence of a constitutional guarantee on environmental protection can be interpreted as signifying dearth of a constitutional basis for EIAs in the country.

The above notwithstanding, the EIA regime for Zambia can be indirectly traced to the Preamble of the Zambian Constitution which provides as follows:

“We, the people of Zambia... Pledge to ourselves that we shall ensure that the State shall respect the rights and dignity of the human family, uphold the laws of the State and conduct the affairs of the State in such manner as to preserve, develop, and utilise its resources for this and future generations.”

Similarly, the Zambian EIA regime can be traced to the constitutionally guaranteed right to life³, the rationale being that one cannot fully enjoy the right to life in an environment that is

¹ See the Constitution of the Republic of Zambia (as amended by Act No. 18 of 1996).

² Examples of international environmental law treaties to which Zambia is a party are, the Convention on Biological Diversity and its Cartagena Protocol, the United Nations Framework Convention on Climate Change and its Kyoto Protocol and the Bamako Convention on trans boundary movement of biological waste, to mention but just a few.

³ See section 12 of the Constitution of the Republic of Zambia.

harmful to health. Moreover, the legal basis for EIA can be found in the Environmental Management Act⁴ under the following provisions:

- (a) Section 4 (1) of which provides as follows, “*Subject to the Constitution, every person living in Zambia has a right to a clean, safe and healthy environment.*” This provision provides justification for EIA.
- (b) Section 5 which provides for the duty to protect the environment.⁵

1.1 Policy and legal framework for EIA in Zambia

The 2007 National Policy on Environment is the principal policy that coordinates environmental management in Zambia. The Policy’s ultimate goal is to promote sustainable environmental protection. Among other objectives, it seeks to promote the sound management of Zambia’s environment, balancing the needs for socio-economic development and environmental integrity to the maximum extent possible while keeping adverse activities to the minimum.⁶

With regards to the legislative framework for EIA in Zambia, both the Environmental Management Act (EMA)⁷ and the (Environmental Impact Assessments) Regulations⁸ are noteworthy. The Environmental Management Act states the principles upon which it is founded and one of these principles is that adverse environmental effects “*shall be prevented and minimised through long-term integrated planning and the coordination, integration and cooperation of efforts that consider the entire environment as a whole entity*”⁹. This provision speaks volumes about the relative importance attached to EIAs in Zambia. More so, sections 23 and 29 of the Environmental Management Act provide for strategic environmental assessment and environmental impact assessments respectively.

⁴ Environmental Management Act No. 12 of 2011.

⁵ Section 5 of the EMA provides as follows, “Every person has a duty to safeguard and enhance the environment and to inform the Agency of any activity or phenomenon that affects or may affect the environment.”

⁶ See the 2007 National Environmental Policy for Zambia.

⁷ Act No. 12 of 2011.

⁸ The Zambian Environmental Impact Assessment Regulations were promulgated through Statutory Instrument 28 of 1997. The promulgation of SI28/1997 was prompted by a desire to ensure that environmental considerations are integrated into development activities within the country.

⁹ See section 9 of the Environmental Management Act of 2011.

1.2 Institutional and administrative structure for EIAs in Zambia

The Zambian Environmental Management Agency (ZEMA) is the principal environmental institution and the lead dog on matters pertaining to EIAs in the country.¹⁰ While ZEMA is the main lead agency, it should be noted that environmental issues cut across a variety of sectors and a number of other government institutions are involved in environmental management. Some of the sectoral agencies that may have a hand in EIA administration include but are not limited to the following¹¹:

- (a) Ministry of Lands;
- (b) Department of Forestry in the Ministry of Tourism, Environment and Natural Resources;
- (c) Ministry of Energy and Water Development;
- (d) Ministry of Mines and Mineral Development;
- (e) Zambia Wildlife Authority.

2. Strengths of the EIA legislative regime for Zambia

One of the key strengths of the EIA regime for Zambia is that it has elaborate provisions for public participation.¹² Regulation 10 (1) of the EIA Regulations provides as follows:

“The developer shall, prior to the submission of the environmental impact statement to the Council (now ZEMA), take all measures necessary to seek the views of the people in the communities, which will be affected by the project.”

That public participation in project formulation and implementation is a legislative requirement, is commendable since the public is given an opportunity to air their views with regards to the proposed development activities. Public participation is not only important in ensuring that projects are economically viable and environmentally sustainable but also that they are socially acceptable.

¹⁰It was formerly called the Environmental Council under the Environmental Protection and Pollution Control Act No. 12 of 1990 but was renamed the Zambian Environmental Management Agency (ZEMA) in terms of the new Environmental Management Act (EMA), No. 12 of 2011.

¹¹Chapman, K & Walmsley, B, 2003 Country Chapter: Zambia. In: SAIEA (Southern African Institute for Environmental Assessment), EIA in southern Africa. Windhoek: SAIEA, pp. 267–95.

¹² See section 91 of EMA as read together with Regulation 10 of the Zambian EIA Regulations.

The strength of the EIA regime for Zambia can also be measured by analyzing the legal requirements for the framing of the terms of reference. In this regard, Regulation 8 is paramount. In particular, Regulation 8(1) provides as follows;

“An environmental impact statement shall be prepared and paid for by the developer in accordance with terms of reference prepared by the developer in consultation with the ZEMA.”

That the terms of reference are prepared by the developer in consultation with ZEMA is progressive as it curbs incidences of bias. It is banal that where terms of reference are prepared by the developer alone, the terms of reference may produce biased outcomes. Thus, to curb such bias, the EIA regulations provide for ZEMA’s oversight in the preparation of the terms of reference. This will go a long way in ensuring rationality in as far as the outcomes of the environmental impact statements are concerned.

More or less linked to the above strength are detailed provisions for access to environmental information by the public¹³ as well as public review with regards to the terms of reference. In this regard, Regulation 8 (2) provides as follows:

“To ensure that public views are taken into account during the preparation of the terms of reference, the developer shall organise a public consultation process, involving Government agencies, local authorities, non-governmental and community-based organisations and interested and affected parties, to help determine the scope of the work to be done in the conduct of ... the environmental impact statement.”

That EIA regulations for Zambia provide for public review of the EIA process is both progressive and commendable. Public review of the terms of reference is critical in that it provides a key opportunity for ensuring not only that the EIA statements are properly framed but also address issues of community concern.

¹³ See Part VI of the EIA Regulations.

Apart from the above, the Zambian EIA regime can also be hailed for making provisions for post-assessment environmental audits¹⁴. Regulation 28 of the EIA Regulations stipulates that such post-assessment environmental audits shall focus on the implementation of the conditions attached to the authorising document and shall include the extent to which the measures specified therein would have been met¹⁵.

Last but important, the Zambian EIA system can be commended for its provisions on administrative or judicial review. In this regard, Regulation 24 (1) is critical. It postulates as follows; “If any party is aggrieved by the decision of the Council (now ZEMA), that party may, in writing, appeal to the Minister against the decision of the Council ...”. In addition to that, subsection (3) of the same regulation provides that, “If the aggrieved party is not content with a decision of the Minister, he may appeal to the High Court.”¹⁶ In my view, the appeal procedure is a merit in that it addresses the procedural flaws inherent in the EIA process.

3. Weaknesses of the EIA regime for Zambia

First, as has been noted, the Constitution of Zambia does not have an explicit provision on environmental protection.¹⁷ It should be stressed that absence of a constitutional provision for environmental protection in the current Zambian Constitution strongly suggests that the country is still lagging behind in terms of its obligations under international environmental law. Although the EIA regime can be indirectly traced to the right to life, it can be argued that the ideal situation should have been an environmental specific provision in the Zambian Constitution. This is so because the purpose of a constitutional guarantee is to give the right to environmental protection higher latitude.

Second, as has already been highlighted, environmental issues in Zambia cut across a variety of sectors and a number of government institutions outside of ZEMA are involved in environmental management. Examples include; Ministry of Lands; Department of Forestry in the Ministry of Tourism, Environment and Natural Resources; Ministry of Energy and Water Development; Ministry of Mines and Mineral Development; Zambia Wildlife Authority, to mention but just a few. While having sectoral agencies involved in EIA administration can be

¹⁴ See Part VII of the EIA Regulations.

¹⁵ See Regulation 28 (5) of the EIA Regulations.

¹⁶ For the purposes of appeal procedure (against refusal of permits), see also section 29 (5) of EMA.

¹⁷ See note 2 above.

lauded as a step towards decentralising the EIA process, sight need not be lost as to the fact that it can lead to duplication of responsibilities. Furthermore, that sectoral ministries coordinate specific environmental responsibilities is a weakness which can fuel institutional overlaps and conflicts. This will no doubt affect the monitoring and implementation of the EIA laws.¹⁸

Third, although the EIA Regulations may appear comprehensive with regards to their scope, it should be stressed that in reality, they are limited in their applicability. Whilst Zambia has laws which may appear progressive on paper, practical implementation and enforcement of the same laws is still lagging behind.¹⁹ A thorough examination of both the Act and the Regulations leads one to an inescapable conclusion that there is no definitive mechanism for ensuring that EIAs are considered in decision making. Compounding the situation has been a lack of clear lines of responsibilities amongst sectoral institutions referred to above.²⁰ With respect, this may fuel institutional overlaps and conflicts amongst the sectoral institutions.

Apart from the foregoing, there is also a fundamental weakness exhibited by the Act and this is the fact that it does not provide for the criteria for appointing officers of ZEMA.²¹ Yet the question of who appoints such officers has a huge bearing in the manner in which the Agency executes its duties. The composition of the Agency was provided for under the old Regulations, which regulations have since been repealed. With respect, it seems the functions of ZEMA were simply cut and pasted from those of the erstwhile Environmental Council of Zambia (ECZ) under the repealed Act. It is a trite principle of law the world over, that a good law is one which is certain. Now that the current Act lacks certainty with regards to the appointment procedure for the officers of ZEMA, it can be argued without gainsay that ZEMA has no legal basis at all and this is a fundamental weakness.

Last but not least, a thorough examination of the provisions of the Regulations would reveal that there are layering errors which strongly suggest that they were done in haste. Just to

¹⁸This is so because institutional overlaps will leave little room for overcoming the political bias that is inherent in development projects.

¹⁹Muyunda C, (2012), 'An appraisal of the Environmental Impact Assessments in Zambia', unpublished thesis.

²⁰While the law recognizes that sectoral agencies like Ministry of Lands, Ministry of Mines, the Zambian Wildlife Authority, (to mention but just a few) may have a hand in EIA administration, the laws are silent with regards to delimitation of the responsibilities of the sectoral institutions.

²¹With respect, it is not clear under the Act how ZEMA officers are appointed.

quote as examples, Regulation 8 (5) and the Regulation that immediately follows after Regulation 17 (which regulation should be read as Regulation 18 but is in actual fact labelled Regulation 24), bear enough testimony to the effect that the Regulations were done in haste and were neither revised nor proof-read. To solidify the above convictions, Regulation 8 (5) as currently constituted provides as follows, “A developer shall not begin work on preparing the environmental impact statement can begin until the Council has approved the terms of reference.” With respect, such grammatical construction does not make sense and two possibilities can be proffered for such an anomaly, namely, either that there was an error on the part of the draftsmen or that they were never revised. Whatever the case, it can be argued that the EIA Regulations were hastily drafted. It is therefore submitted that the Zambian legislature should consider amending the EIA Regulations so as to do away with the layering errors, omissions and/or mistakes, exhibited above.

4. Conclusions and recommendations

From the foregoing, a number of conclusions and recommendations can be made. First, the overarching issue is that in theory Zambia has shown its commitment to the cause of environmental protection by enacting the environmental Regulations and environmental protection laws, with detailed provisions for EIAs. However, the paper has established that in practice, EIAs are not as effective as they ought to be. The picture that has emerged in this article is that the country’s efforts to control environmental degradation through a comprehensive EIA regime faces and will continue to face serious challenges including: institutional overlaps and conflicts amongst sectoral agencies; poorly drafted Regulations compounded by their limited applicability in practice, to mention but just a few.

Against the backdrop of the afore-referred challenges bedevilling the Zambian EIA legislative regime, the following recommendations are made. First, Zambia should consider amending its Constitution so that it contains an explicit provision for environmental protection. The purpose of such constitutional protection will be to give the right a higher protection and will be in line with the country’s obligations under international environmental law. Second, there is need for Zambia to harmonize its environmental laws so as to ensure that there are clearly defined roles and responsibilities of sectoral agencies. Having clearly defined roles and responsibilities of the sectoral institutions that have a hand in EIA administration will go a long way in curbing institutional overlaps and conflicts. Lastly, the

Zambian legislature should consider revisiting and revising the EIA Regulations so as to rectify the compounding errors referred to in the above exposition.

REFERENCES

- Chapman, K & Walmsley, B, 2003 Country Chapter: Zambia. In: SAIEA (Southern African Institute for Environmental Assessment), EIA in southern Africa. Windhoek: SAIEA.
- Muyunda C, (2012), 'An appraisal of the Environmental Impact Assessments in Zambia', unpublished thesis submitted to the University of Zambia in partial fulfilment of the requirements of the Bachelor of Laws Degree.
- The 2007 National Environmental Policy for Zambia
- The Constitution of the Republic of Zambia (as amended by Act No. 18 of 1996)
- The Environmental Management Act (EMA), No. 12 of 2011.
- The Environmental Protection and Pollution Control (Environmental Impact Assessment) Regulations, 1997
- The Environmental Protection and Pollution Control Act No. 12 of 1990