

The LEGAL MONITOR

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COST-FREE

Tomana outstanding issue-SADC

MAPUTO-The Southern African Development Community (SADC) has tasked Zimbabwe's political leaders with resolving outstanding issues to the Inter-Party Agreement Political (IPA), including the contentious appointment of Attorney General (AG) Johannes Tomana, within a month.

Tomana, whose appointment Prime Minister Morgan Tsvangirai insists is irregular and should be reversed, has been receiving political support from President Robert Mugabe and ZANU PF. In defending Tomana, Mugabe had argued that the AG's job was not part of the IPA also known as Global Political Agreement (GPA), and therefore non-negotiable.

But a Communiqué released after the SADC Troika meeting in Mozambique last week re-affirmed the regional bloc's decision in January that the transitional government should review Tomana's appointment, together with that of the Reserve Bank Governor, Gideon Gono.

SADC, which pushed for the power sharing arrangement after rejecting results of the violent June 2008 presidential election run-off, are the guarantors of the IPA.

"Summit decided as follows: (i) the political parties signatory to the GPA should engage in



AG Johannes Tomana

dialogue with immediate effect within fifteen (15) days and not beyond thirty (30) days; (ii) the dialogue should include all the outstanding issues emanating from the implementation of the GPA and SADC Communiqué of 27 January 2009," read a section of the 5 November 2009 SADC Communiqué.

The 27 January Communiqué referred to by the Maputo summit stated in part that: "The appointments of the Reserve Bank Governor and the Attorney General will be dealt with by the inclusive government after its formation."

Tomana and Gono's appointments are part of issues such as the continued abuse of security and

judicial institutions to persecute rights defenders, political violence, stalled democratic reforms and the inequitable sharing of government posts that should be resolved.

Since the formation of the transitional government in February, the AG's Office has come under intense criticism for its partial handling of political cases and increased targeting of lawyers handling such cases.

Rights groups use the example of the continued prosecution of human rights and political activists on terrorism, banditry and sabotage charges as one example of Tomana's abuse of his disputed status as AG to pursue pro-democracy rights and political activists. Tomana has refused to be swayed by a Supreme Court ruling freeing a peace activist whose circumstances are similar to those of the other activists.

The Supreme Court in September freed Mukoko on the grounds that her rights had been infringed when she was abducted, tortured and held *incommunicado* by State security agents last year. The arrest and prosecution of top lawyer, Mordecai Mahlangu last week added to more than a dozen politically motivated prosecutions that the AG's Office has continued to push in defiance to calls for reform.

Parly to amend POSA?

HARARE-Parliament will tomorrow continue to debate a motion for leave to introduce a Private Members Bill that will amend a draconian security law used by the previous government to restrict political activity by pro-democracy groups and individuals.

The historic motion, which was introduced by Movement for Democratic Change (MDC) House of Assembly Chief Whip Hon Innocent Gonese, MP and seconded by Hon Tabitha Khumalo, the MP for Bulawayo East on Thursday, faces stiff resistance from ZANU PF MPs who for the last decade have been religiously spared the use of the draconian Public Order and Security Act (POSA) by the Zimbabwe Republic Police, at the expense of other democratic forces.

POSA, a revised and strengthened version of the colonial Law and Order Maintenance Act (LOMA), regulates political gatherings, forces individuals and groups to notify police before any gathering, and penalises one's failure to carry identity documents among other things.

"We want to de-criminalise the requirement of moving around with identity documents," said Hon Gonese.

Many members of the House spoke passionately about the negative and unjustifiable effects POSA has had on their own and on the public's freedom of expression, assembly, association and movement.

"It's a motion for leave of the house to bring in a Bill to amend POSA. We want the House to amend specific clauses such as Clause 2 which

deals with the definition of public gatherings and Clause 14 which deals with breach of peace to include the word 'serious' so that it deals with serious breaches only," said Hon Gonese.

"Failure to give notice to the police before a gathering should not constitute a criminal offence," added Hon Gonese.

He added that the courts and not the police should be responsible for prohibiting gatherings or imposing bans, and only on just cause.

In the past police have erroneously interpreted the notification requirement to mean an application for permission to hold a meeting.

Debate on the motion was adjourned to tomorrow. Hon Gonese said a simple majority is required for the motion to sail through.

Democratic space in Zimbabwe remains severely restricted due to a plethora of laws that inhibit freedom of assembly, movement and speech.

A transitional government formed by Prime Minister Morgan Tsvangirai and President Robert Mugabe has been slow in implementing reforms which include repealing draconian legislation nine months into the new administration.

STATISTICS ON THE USE OF POSA AGAINST HUMAN RIGHTS DEFENDERS

- | 2003 |
|--|
| ○ There were 55 cases involving the arrest and detention of Human Rights Defenders (HRDs), involving a total of 822 HRDs |

- | 2004 |
|---|
| ○ Of the 822 HRDs arrested, 274 individuals were charged under POSA |

- | 2005 |
|--|
| ○ None of them were successfully prosecuted by the State |

- | 2006 |
|---|
| ○ A total of 155 HRDs were charged under POSA |

- | 2007 |
|--|
| ○ None of them were successfully prosecuted by the State |

- | 2008 |
|--|
| ○ A total of 547 HRDs were arrested during this year |

- | 2009 |
|--|
| ○ 52 of the HRDs were charged under POSA |

- | 2010 |
|--|
| ○ None of them were successfully prosecuted by the State |

- | 2011 |
|---|
| ○ A total of 577 HRDs were arrested during the year |

- | 2012 |
|---|
| ○ Of these, 65 HRDs were charged under POSA |

- | 2013 |
|--|
| ○ None of them were successfully prosecuted by the State |

- | 2014 |
|--|
| ○ There were 96 cases of arrest and detention of HRDs, involving a total of 1,127 individuals. |

- | 2015 |
|--|
| ○ POSA was used in just 5 instances, owing to the advent of the Criminal Law (Codification and Reform) Act, which duplicated POSA in entire sections |

- | 2016 |
|--|
| ○ As such, the Code was used in 24 instances of arrest and detention |

- | 2017 |
|---|
| ○ None of the HRDs were successfully prosecuted by the state – either under POSA or the Criminal Code |

- | 2018 |
|--|
| ○ There were 1,446 instances of arrest and detention of HRDs |

- | 2019 |
|--|
| ○ Of these, 271 were charged with participating in unlawful gatherings and were charged under either POSA or the Criminal Code |

- | 2020 |
|--|
| ○ None of the cases finalised have been successfully prosecuted by the State |

- | 2021 |
|---|
| ○ At least 125 people have so far been arrested and accused of participating in gatherings and charged under either POSA or various provisions of the Criminal Code |

- | 2022 |
|---|
| ○ None of the cases thus far have been successfully prosecuted by the State, save for one instance in which the HRDs paid admission of guilt fines. |

- | 2023 |
|---|
| ○ This was to secure their release and avoid being detained in inhumane and degrading conditions in police cells. The admission of guilt fines are now being challenged by the affected HRDs in the Magistrates' Court. |

Source-ZLHR Human Rights Defenders Emergency Project

Abductee's life at risk



Prison guards escort Pasco Gwezere (circled) into holding cells at Rotten Row Magistrates Court

HARARE-Zimbabwe Prison Service (ZPS) officials on Saturday defied a court order granting medical practitioners access to incarcerated Movement for Democratic Change (MDC) transport manager, Pasco Gwezere, who was severely tortured by State security agents during the period of his abduction.

Harare Magistrate Archie Wochiunga last Friday ordered prison authorities to allow private medical practitioners to examine and treat Gwezere after State prosecutor, Michael Mugabe, consented to an application filed by Gwezere's lawyer, Alec Muchadehama.

But doctors who went to Chikurubi Maximum Prison where Gwezere has been

transferred to from Harare Remand Prison failed to attend to their client after senior prison officials denied them access.

The prison officials imposed new conditions requiring Gwezere's doctors to consult him in the presence of prison doctors, in an apparent defiance of Magistrate Wochiunga's court order.

"They (prison officials) are reluctant to have him examined and I think they fear that his injuries will be exposed to the whole world," said Muchadehama.

In court last Friday, Muchadehama protested that his client was still not receiving proper and adequate attention from the prison doctors, despite a ruling by Magistrate Wochiunga who last Monday ordered prison doctors to treat Gwezere



Prison guards shielding photo-journalists from taking tortured Gwezere's pictures

for the serious injuries he had sustained during torture sessions conducted by his abductors. The doctor for Harare Remand Prison, Dr Dhubhi, has been refusing to treat Gwezere since Sunday 1 November 2009, potentially putting his health and well-being at risk.

It is noteworthy that Dr Dhubhi continues to play a critical role in covering up State torture. In 2007 he was responsible for ordering the removal from the Avenues Clinic of tortured persons who were on life support to Harare Remand Prison. State doctors worryingly continue to be complicit in torture, cruel and other inhumane and degrading treatment or punishment of accused persons.

Muchadehama told Magistrate Wochiunga that Gwezere's left leg was becoming septic and needed urgent medical treatment.

The human rights lawyer protested at the appearance in court of his client in leg irons and handcuffs - a practice which he said was not necessary, and unprocedural for an accused person. Despite Muchadehama's protest, the leg irons and handcuffs were not removed.

Gwezere will appear in court again today when Muchadehama is expected to place complaints of torture before Magistrate Wochiunga and challenge his placement on remand in the circumstances.

Media lawyer granted bail

HARARE-Magistrate Munamato Mutevedzi last week granted bail to prominent human rights and media lawyer Mordecai Mahlangu, who was arrested for writing a letter to Attorney General (AG) Johannes Tomana protesting the subpoenaing of Peter Hitschmann in the trial of Deputy Agriculture Minister Designate Roy Bennett.

Mahlangu, a senior partner with Gill, Godlonton & Gerrans Legal Practitioners and a member of Zimbabwe Lawyers for Human Rights (ZLHR) is being charged with contravening Section 184 (1) (c) of the Criminal Law (Codification and Reform) Act Chapter 9 : 23 that is "defeating or obstructing the course of justice".

In his Form 242 or Request for Remand Form Detective Inspector Henry Sostein Dowa, who is the investigating officer in the case, accuses Mahlangu of signing a letter in which he stated that Hitschmann will not be able to give evidence during the trial of Bennett, which commences in the High Court today.

Dowa accuses Mahlangu of preparing an affidavit on behalf of Hitschmann and causing him to sign it, disassociating himself from giving evidence expected from him during the trial of Bennett whom President Robert Mugabe has refused to swear in as Deputy Agriculture Minister.

Magistrate Mutevedzi granted Mahlangu bail last Tuesday after the State departed from its tradition of denying human rights defenders bail and consented to having the prominent lawyer admitted to bail.

State prosecutor Michael Mugabe proposed that Mahlangu deposits US\$100 with the Clerk of the Magistrates Court as bail money and that he continues to reside at his Borrowdale home.

Mugabe consented to have Mahlangu remanded to 16 November 2009.

Mahlangu's lawyers Kay Ncube, Raymond Moyo and Simon Sadomba all of Gill, Godlonton & Gerrans, who are members of ZLHR, advised Mutevedzi that they will make an application challenging the placement on remand of the human rights and media lawyer.

Mahlangu becomes the fifth human rights lawyer to be arrested this year whilst carrying out lawful, professional duties as officers of the court. Other lawyers arrested during the course of their duties this year include Tawanda Zhuwarara, Roselyn Hanzi, Alec Muchadehama and Tapera Sengweni.



Mordecai Mahlangu

Biti challenged to focus on poor

HARARE-Civil society groups have called on Finance Minister Tendai Biti to focus on poverty eradication in line with Zimbabwe's commitments to the UN's Millennium Development Goals (MDGs) when crafting the 2010 national budget.

Biti will present his national budget statement to Parliament at the end of November, and has already conceded that he is under pressure because the transitional government has few resources against huge amounts needed to revive the economy.

In a statement on Friday, the National Association of Non-Governmental Organisations (NANGO) said Biti should prioritise spending on infrastructure development and revival of crumbling social amenities such as public schools and hospitals.

“According to United Nations Development Programme assessments, Zimbabwe has slipped back on MDGs after a steady start”

“Civil society organisations in the country call upon the government to develop a national budget that is in line with putting the country back on course for the attainment of the Millennium Development Goals.

This calls for a budget which is pro-poor, gender sensitive and child friendly. Such a budget should be underpinned on the principles of accountability, transparency, and people centredness,” read the statement.



Finance Minister Tendai Biti

World leaders agreed at a UN Summit in 2000 to work for a world with reduced poverty, less hunger, equal opportunities for women and better access to education and health services by focussing on eight key areas constituting the MDGs.

The eight MDGs that countries should achieve by 2015 are; eradicating extreme poverty, achieving universal primary education, promoting gender equality and empowering women, reducing child mortality, improving maternal health, combating HIV, tuberculosis and other diseases, ensuring environmental sustainability and creating a global partnership for development.

According to United Nations Development Programme assessments, Zimbabwe has slipped back on MDGs after a steady start.

Diamonds - Moza weak link

NAMIBIA-The Kimberley Process Certification Scheme (KP) has said it will closely monitor the export of Zimbabwe diamonds to curb illegal smuggling, but a porous border with Mozambique will make it difficult to police the movement of illicit stones.

A KP plenary held in Namibia last week spared Zimbabwe a suspension that had been recommended by the group's own review mission that visited the country in July.

Instead, the KP will offer technical assistance for Zimbabwe to meet minimum standards in mining and selling diamonds from Marange, where hundreds of soldiers are allegedly still using brute force to dig for diamonds in syndication with civilian labour.

KP members meeting in Namibia last week failed to agree on Zimbabwe's suspension, and adopted an export plan that will include closer scrutiny and monitoring of gems coming out of Marange. Groups that campaigned for Zimbabwe's ban from the KP said rights abuses and smuggling of Marange diamonds would continue because of a ready market in Mozambique—a country that does not produce any diamonds but offers an unregulated, thriving black market.

The KP is a voluntary regulatory body that polices diamond trade to block the sale of diamonds mined in conflict situations, used to finance war or both. KP countries account for 98 percent of world production and trade of rough diamonds, making KP certification an important stamp of approval for diamond traders and buyers.

Watchdog groups noted that it would be difficult for Zimbabwe and the KP to combat this illicit smuggling because Mozambique is not a member of the KP and has weak security systems. Mozambique offers a safe transit point for illicit Marange diamonds destined for countries such as South Africa and Lebanon, according to several reports by diamond trade observers and the KP itself.

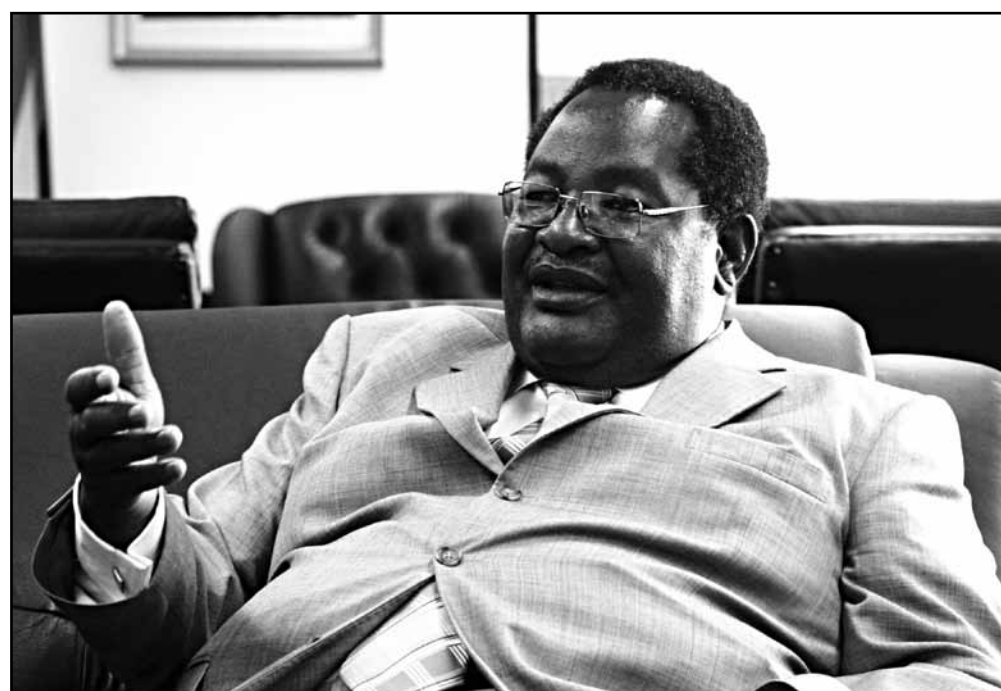
Global Witness' Annie Dunnebacke said civil society was “very disappointed” with the decision to keep Zimbabwe within the KP scheme.

Human Rights Watch (HRW), which in June revealed serious military extra-judicial abuses, including killings, said the KP could not trust Zimbabwe to end abuses and illegal mining in Marange as shown by the country's failure to act over the past two years.

“Scores of buyers and middlemen openly trade in Marange diamonds in the small Mozambique town of Vila de Manica, 20 miles from Mutare. The smugglers include people from Lebanon, Belgium, South Africa, and India, who circulate Marange's diamonds onto the international market,” HRW said.

A report by the KP's review mission on Zimbabwe circulated among members at the Namibia plenary noted that the government was aware of Mozambique's status as a transit point for smuggled diamonds since 2007.

“The Review Team was not presented with any information by the Government of Zimbabwe concerning specific efforts to prevent the continuous exit of diamonds from Zimbabwe. to Mozambique,” read part of the report, whose recommendations of a six-month suspension in exchange for technical assistance was ignored by the KP plenary. Mines and Mining Development Minister, Obert Mpofu (pictured right), has defended Zimbabwe, saying the country has done all it could in complying with KP requirements.



Obert Mpofu, KP says his ministry involved in smuggling

Feltoe, Shana shortlisted for ZEC

HARARE-University of Zimbabwe (UZ) law lecturer Professor, Geoff Feltoe, and Christian leader, Reverend Goodwill Shana, have been shortlisted amongst 12 candidates for appointment to the Zimbabwe Electoral Commission (ZEC).

Speaker of Parliament, Lovemore Moyo, recently submitted the names of shortlisted candidates for appointment to ZEC to President Robert Mugabe and Prime Minister Morgan Tsvangirai, who should agree on the appointments as stipulated in the Inter Party Agreement (IPA) signed last year.

Theophilus Gambe and Joyce Kazembe, who once served in the old electoral commission, are part of the shortlist. Petty Makoni, Pahlani Mubonderi, Sibongile Ndlovu, Bessie Nhandara, Dr Kalaya Njini, Daniel Chigaru, Lakayana Dube, and Mkhululi Nyathi, a Bulawayo based lawyer.

Mugabe and Tsvangirai are expected to appoint eight members from the list submitted by Parliament's Standing Rules and Orders Committee (SROC) of which four people apart from the chairperson should be women.

The two leaders are mandated to appoint a chairperson who must be a Judge or a former Judge of the Supreme Court or the High Court after consultation with the Judicial Service Commission and the SROC. Persons qualified for appointment as a Judge are also eligible to chair the commission.

Members of ZEC will serve for a term of six years and their appointment may be renewed for one further term only.

The commission's functions include preparing for, conducting and supervising elections for the office of President, Parliament, and local council. They also oversee referendums.

The electoral body will ensure that elections and referendums are conducted efficiently, freely,

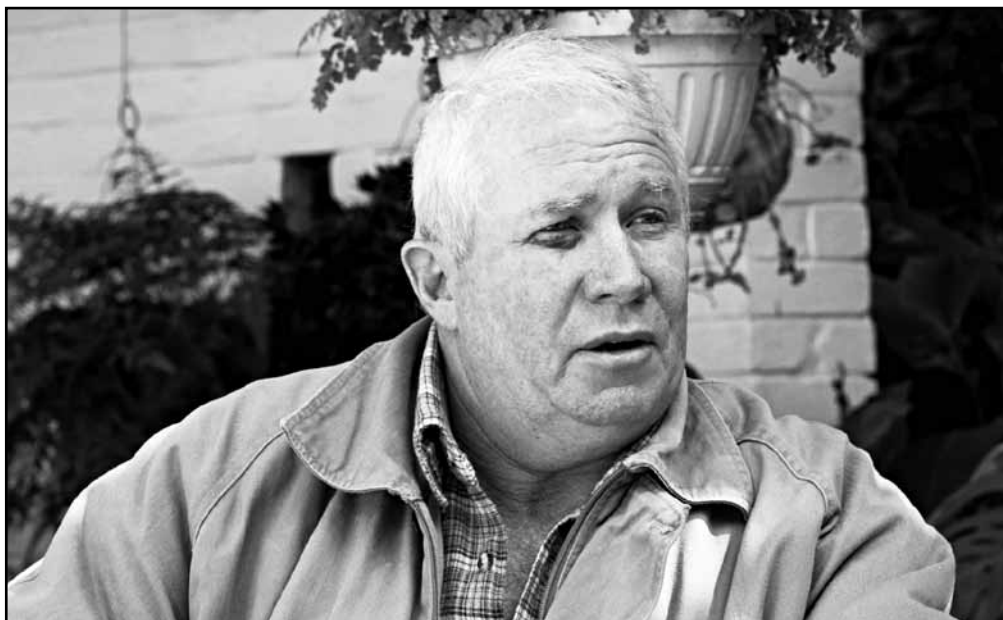
fairly, transparently and in accordance with the law.

The electoral body will also supervise the registration of voters and compile the voters' roll and registers.

Besides ZEC, the President and the Prime Minister are expected to appoint commissioners to the Zimbabwe Media Commission (ZMC). Names of shortlisted candidates have already been submitted for possible appointment. The Zimbabwe Human Rights Commission and the Anti Corruption Commission are still outstanding

The establishment of the four commissions that are being set up in terms of a constitutional amendment enacted earlier this year is part of democratic reforms that the transitional government agreed to by signing the IPA.

Bennett trial kicks off



Roy Bennett faces life in jail

HARARE-The trial of senior Movement for Democratic Change (MDC) official, Roy Bennett who is facing charges of intention to commit sabotage, banditry and insurgency commences at the High Court today.

Harrison Nkomo, one of the defence lawyers for the MDC treasurer-general told *The Legal Monitor* that the trial would be presided over by Justice Chinembiri Bhunu.

Nkomo added: "We are ready to start and clear the name of our client. We hope the State is ready too. I am not sure how long the trial will take given that the State has a number of witnesses."

The trial should have started last month at the Manicaland Regional Magistrates Court in Mutare but prosecutor Michael Mugabe successfully indicted Bennett to the High Court.

Johannes Tomana, the controversial Attorney General, personally travelled to Mutare to

prosecute Bennett when the High Court was in circuit in the eastern city.

But the defence team asked for the case to be postponed to November 9 to allow them time to look at the State outline.

Bennett denies the charges of intending to commit sabotage, banditry and insurgency, which potentially carries the death sentence.

He has another charge of inciting to commit sabotage, banditry and insurgency, which he denies as well. The second charge carries a maximum sentence of life imprisonment.

Bennett's arrest on what the MDC calls trumped-up charges and President Mugabe's refusal, since his release on bail in March, to swear him in as Deputy Minister of Agriculture have added to tensions in the transitional government formed by Prime Minister Morgan Tsvangirai of the MDC and President Mugabe's ZANU-PF in February.

Church concerned

HARARE - The Zimbabwe Council of Churches (ZCC) has expressed concern at the lack of compliance with the terms of the Inter Party Political Agreement (IPA) as a number of significant issues are still unresolved.

In a Pastoral Letter to the nation written after a meeting of the ZCC national executive last week, the Pastors acknowledged the promising positive national developments including the initiation of economic reform, national healing and reconciliation and constitutional reform. The Pastors were however concerned with the slow implementation of the IPA, also known as the Global Political Agreement (GPA).

The Pastors noted 'with great concern that these processes have been grossly' affected by the following:

- The delay in the appointment of provincial governors and one deputy minister of agriculture.
- The disengagement by the MDC-T over issues of non-compliance.
- The apparent lack of political will in resolving the political impasse in Zimbabwe which has created a lot of anxiety among the people.
- The delays, uncertainty and lack of transparency in constitutional reform and national healing processes.
- The continued biased reporting by sections of the media has further rendered the GPA very fragile.
- The general uncertainty that has grabbed the whole nation has eroded investor confidence in our beautiful country.
- Poor remuneration of both public and private sector employees.
- The difficulties people face in raising school fees and exam fees. The continued subsidising of teachers' salaries by parents who are already overburdened by economic hardships.
- The continued deterioration of the health services.
- Continued exploitation of the unemployed and rural poor who have to barter their possessions in the desperate search for the limited foreign currency.
- Continued land invasions and acts of violence and intimidation in parts of the country some of which have resulted in internal displacements.

The Pastors expressed concern at actions by political elements determined to derail the nation building process and the continued manipulation and closure of democratic space and selective application of the law using such draconian legislation as POSA and AIPPA.

"The people of Zimbabwe have suffered for too long due to problems that can be resolved amicably. They are looking to the leaders to be more magnanimous and conscientious of their plight each time they meet to deliberate on the future of our nation.

"We therefore call upon the principals to the GPA to fully commit themselves to addressing expeditiously outstanding issues of the GPA, the principals and their political parties to respect the lives of Zimbabweans and put their selfish interests aside and build the once beautiful land of Zimbabwe," the ZCC said.

They called upon ZANU PF to respect the terms of the GPA and fully commit themselves to addressing outstanding issues and urged "those perpetuating division and polarization to stop all beatings, false accusations, torture, intimidation and any threats and redirect such energy towards nation building".

"We call upon the government to repeal repressive laws and create more democratic space for people as a necessary condition for genuine constitutional reform, and true national healing and reconciliation," the ZCC Pastors said.

They urged:

- SADC, as guarantor of the GPA, to ensure that the principals from the three political parties comply with the terms of the agreement.
- all Christians and all people of good will in Zimbabwe, SADC, Africa and the whole world to continue to teach and preach the message of hope and peace, and pray with and for us that God may give us guidance, wisdom and courage as we labour to resolve the political, economic, leadership and moral crisis bedevilling Zimbabwe.
- the regional and international community to accompany us in the process of nation building

A SADC Troika Summit last week gave Zimbabwe's political leaders 15 days to implement fully the power-sharing agreement.

79-year old farmer jailed

HARARE-A Magistrates court on Friday sentenced a 79-year-old widowed farmer, Hester Theron to three months imprisonment, wholly suspended for five years for disobeying a court order two weeks ago to vacate her farm.

Hester - the mother of Commercial Farmers Union president Deon Theron - has been ordered to leave the 2 000 hectare Friedenthal farm, south of Harare where she has lived since 1957 by 8 December.

Her son Deon said: "She has been sentenced to three months in prison wholly suspended for five years and must vacate the farm by 8 December."

Hester's case is the climax of a chaotic land reform programme that has been used by ZANU PF to torment perceived Movement for Democratic Change (MDC) supporters and a section of white people accused of funding the MDC.

The haphazard land reform is blamed for turning almost half the 11 million population into paupers surviving mostly on donor benevolence.

Meanwhile, Judge President Rita Makarau will next week preside over the case in which a Headlands commercial farmer has asked the High Court to convict a top army brigadier for contempt of court for refusing him to collect his equipment and property.

Justice Makarau postponed the application by farmer Charles Lock to November 16 to allow Brigadier Justine Mujaji time to file opposing papers.

This followed an application by Lock's lawyer Happias Zhou who had filed papers at the High Court last week saying his client had not been allowed to enter Karori farm to collect his crops and equipment.

Lock alleges that Mujaji deployed armed soldiers at the farm to bar him and court messengers from entering the property to retrieve crops and his other belongings such as tractors.

Last week Zhou said: "The judge (Justice Makarau) will hear oral evidence during the week beginning the 16th of November. We filed further affidavits to update the court as to what is happening since our last appearances. The other side did not have time to respond to our further affidavits.

"The judge was of the view that it was not going to be easy to determine the matter on the affidavits. So she will need to hear oral evidence. My client did not get access to all the equipment and crops. So the further affidavits are to show that contempt is continuing."

Last month Prime Minister Morgan Tsvangirai wrote to Defence Minister Emmerson Mnangagwa to stop Mujaji - Zimbabwe Defence Forces Director General of Planning and Programmes - from illegally invading Lock's farm.

However, Mujaji has ignored Prime Minister Tsvangirai's instruction to obey the law, and has instead increased hostility towards Lock and officers of the court seeking to enforce the order.

Once a breadbasket, Zimbabwe has largely failed to provide inputs and other support to black villagers to maintain production on white farms they were allocated under the controversial land redistribution programme.



Evicted, Hester Theron