

The LEGAL MONITOR

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State's star dims

HARARE-The Attorney General, Johannes Tomana last week failed to produce the State's star witness, Michael Hitschmann to testify against Deputy Agriculture Minister-Designate Roy Bennett forcing the defence lawyers to raise accusations of deliberate attempts to fumble the matter.

On Friday Tomana, informed High Court Judge, Justice Chinembiri Bhunu that the State's sixth witness was arms dealer Hitschmann – who is said to have implicated Bennett in plotting to commit terror activities. But he was then told by his junior law officer Chris Mutangadura that Hitschmann was not in court and could not make it on time.

"He (Hitschmann) did not come because we thought he would not (be required to) take the witness stand. This is a situation we did not anticipate," said Tomana, who is leading the prosecution team. He added: "The way forward is to adjourn to the next available date."

That attracted criticism from the defence team led by Beatrice Mtetwa, who then applied for the release of Bennett's passport and the relaxation of bail conditions. She said the State was making a deliberate attempt to drag the matter on.

"The star witness is no longer shining as we were made to believe," added Mtetwa. "The accused (Bennett) is under severe restrictions; if the passport can be returned so that his life can resume and he enjoys his right of movement as enshrined in the constitution," said Mtetwa. "Given that the State has been responsible for all the adjournments, giving him (Bennett) back his passport would be a balance based on the presumption of innocence and moreso in light of the festive season."

But Tomana said Bennett was facing a serious charge. "The State is not amenable to the relaxation of the bail conditions. Those (existing bail conditions) are the minimum amenable conditions until the case is finalized."

Justice Bhunu refused to release Bennett's passport.

He said the trial would resume on January 12 next year.

Charges against Bennett arose in 2006 when Hitschmann was allegedly found with an arms cache, which the prosecution says he acquired after he was given \$5 000 by Bennett to topple President Robert Mugabe.

Bennett's co-accused, Hitschmann was acquitted of the same charges of terrorism.

Bennett denies the charges, which his Movement for Democratic Change (MDC) party – led by Prime Minister Morgan Tsvangirai – says are politically motivated to keep him out of the unity government formed with President Mugabe's ZANU-PF party. The charges carry a death penalty upon conviction.

The MDC says ZANU PF is frustrating efforts to swear in Bennett as Deputy Agriculture Minister.

Tomana's prosecution seems to be heading for collapse with the State witnesses having so far failed to directly link Bennett to the charges. One of the witnesses admitted that the police had not recorded an inventory of arms alleged to have been recovered from Hitschmann's house in 2006. Another witness failed to explain why weapons alleged to have been recovered had increased from nine to 49.

On Friday, a policeman said he had not recorded the serial number of a laptop recovered from

Hitschmann's house. The laptop is said to have contained emails that implicated Bennett in terrorism activities.

The State alleges Hitschmann was paid by Bennett to buy weapons to assassinate government officials. Police say Hitschmann implicated Bennett in the procurement of the arms, but Bennett's lawyers argue that the arms dealer had been tortured into making false confessions. Hitschmann has since written an affidavit saying he does not want to testify against Bennett on the grounds that he was tortured.

AG fears upheaval over SADC Tribunal

HARARE-The Attorney General (AG) is blocking latest moves to register and enforce a SADC Tribunal ruling that declares Zimbabwe's land reform illegal and racially discriminatory.

Fatima Maxwell, the director of Civil Division in the AG's Office, said registration and enforcement of the SADC ruling as sought by a former commercial farmer would result in political upheaval in Zimbabwe.

Maxwell said this while opposing an application by former Commercial Farmers Union (CFU) President, Colin Cloete and his enterprise Gramara Private Limited, seeking the registration and enforcement of the SADC Tribunal ruling delivered in November 2008.

The Windhoek-based regional court last year declared as null and void the seizure of a farm belonging to Cloete, a former Chegutu farmer and the properties of 78 other commercial farmers which were seized by the government at the height of the land reform programme. The Tribunal barred the government from



Minister Chinamasa

evicting the farmers and further repossessing white-owned farms, saying the applicants had been discriminated against on the grounds of race.

The regional court directed the government to take all necessary measures through its agents to protect the possession, occupation and ownership of land by the farmers.

But in a fresh attempt to scuttle the implementation of the SADC Tribunal's ruling, Maxwell said enforcing the Tribunal's ruling would cause instability in the country.

"To register the Tribunal judgment would result in a public outcry and social and political instability. The judgment nullifies the implementation of land reforms in the country. The effect of the judgment is to reverse the land reform," said Maxwell.

Maxwell's comments are in sync with recent statements by Justice and Legal Affairs Minister, Patrick Chinamasa, who has refused to abide by the SADC Tribunal ruling.

The government has rubbished the Tribunal and has warned the regional court against interfering with Zimbabwe's land reforms.

Chinamasa, who unilaterally withdrew Zimbabwe from the SADC Tribunal, argues that the regional court's ruling has no legal force in Zimbabwe.

Human rights lawyers say Chinamasa's attempt to pull out of the SADC Tribunal is futile and unjustifiable.

Meanwhile, High Court Judge Bharat Patel last week barred South African Advocate Jeremy



AG's Fatima Maxwell

Gauntlett from representing Cloete in the Tribunal ruling registration case.

Patel made the ruling after presiding over an urgent chamber application filed by Gauntlett seeking to condone the non designation of South Africa as a reciprocating country.

Maxwell, who represented the State challenged Advocate Gauntlett's ability to represent his clients in a Zimbabwean court because he had been denied an exemption certificate by Chinamasa which is required to allow South African lawyers to appear in Zimbabwean courts.

Gauntlett has already been granted such an exemption certificate by Chinamasa on two prior occasions, including a certificate granted on 25 June 2009, when he represented crusading human rights campaigner Jestina Mukoko, that was acknowledged by all parties as "open-ended," meaning it made no reference to a specific case and could be interpreted as allowing him to appear in multiple matters in Zimbabwean courts.

But in now denying the advocate an exemption certificate, Chinamasa argued that Gauntlett practises in South Africa, which is not a reciprocating country with Zimbabwe.

However, Chinamasa's double standards were exposed when it emerged that on 13 November 2009, two days after Gauntlett had been denied an exemption certificate, the minister granted an exemption certificate of exactly the type requested by Advocate Gauntlett to Advocate GC Pretorius, from South Africa.

SA recognises SADC Tribunal

GAUTENG-A South African court last week confirmed the country's commitment to honour the terms of a landmark property rights ruling by the Southern African Development Community (SADC) Tribunal.

A ruling in the North Gauteng High Court which confirmed a settlement reached between South Africa's Department of Trade and Industry and South African born farmer Louis Fick, binds the South African government to honouring the terms of the ruling by the Windhoek based Tribunal.

The case arose when Fick sought to stop the signing of the Bilateral Investment Protection Agreement (BIPA) between South Africa and Zimbabwe on Friday last week on the basis that there was no protection of existing rights of farmers in Zimbabwe outlined in the Tribunal ruling.

A controversial clause in the bilateral agreement, whose text has been kept tightly under wraps, excluded historical claims

arising from Zimbabwe's controversial land reforms. This has been confirmed by, Trade and Industry Minister Rob Davies.

The ruling came after South African lobby group AfriForum brought an urgent application on Fick's behalf to interdict today's signing ceremony, arguing that the exclusion clause would in effect legalise past land grabs and supercede the SADC Tribunal ruling.

The ruling means that the bilateral treaty signed Friday between Zimbabwe and South Africa cannot prevent South African farmers in Zimbabwe from seeking relief from international courts for past illegal land acquisitions, as was initially feared.

In the ruling, SA's government gave South African citizens the assurance that the bilateral treaty "does not affect existing rights or remedies in terms of other sources of international law".

"The (South African) government respects and undertakes to honour (the tribunal's decision) in terms of its own obligations in terms of the SADC Treaty," read part of the ruling.

Hospitals reject farm workers

CHEGUTU-State hospitals are denying medical treatment to farm workers affected by violence linked to the constitution making process, the General Agricultural and Plantation Workers Union (GAPWUZ) has said.

GAPWUZ officials told *The Legal Monitor* that violence related to the constitution making process was the latest upheaval affecting farm workers, who have been victims of forced evictions and election violence.

“What is worsening the situation is that hospitals are refusing to admit wounded farm workers who

do not have identification documents. Yet the majority of farm workers lost their identification particulars during election violence and the tide of evictions,” the GAPWUZ official said.

He said a GAPWUZ team that conducted field visits to Chegutu last week met with several injured farm workers, some with stab wounds, who narrated how the latest violence had worsened their plight.

The refusal by public hospitals to treat farm workers who fail to produce identity documents is an infringement on the Right to Health as stipulated in several UN treaties. By virtue of

being party to legally binding treaties such as the UN International Covenant on Economic Social and Cultural Rights, the Zimbabwe government should protect farm workers’ rights to health and access to safe and potable water, adequate sanitation, and sufficient supply of safe food, nutrition and housing.

Without food, shelter and medical care, some of the affected farm workers have fled to Harare to seek assistance from farming unions such as GAPWUZ and the Commercial Farmers Union, said the GAPWUZ official. “Humanitarian aid for farm workers has been declining against

rising needs and this has put immense pressure on both the unions and the affected workers. The State has been unwilling to help. The police appear complicit while hospitals are just shutting their doors.”

Several reports by local and international groups note that farm workers have been the silent victims of the often-violent land reform programme. Thousands violently forced off farm compounds by newly resettled owners have turned into nomads, while others are living in the open in mountains and as squatters across the country.

Jurists monitor Bennett trial

HARARE: A Judge of South Africa’s Supreme Court of Appeal, Azhar Cachalia has been in the country to observe the high profile trial of Roy Bennett, the Deputy Agriculture Minister-Designate, who is charged with plotting acts of terrorism.

“Justice Cachalia’s experience will be invaluable in assisting the International Commission of Jurists (ICJ) to come to a conclusion on the fairness or otherwise of the Bennett trial process,” said Martin Masiga, the senior legal adviser at the ICJ Africa Programme, on behalf of which the jurist is monitoring the trial.

The ICJ comprises 60 of the world’s most eminent jurists dedicated to the primacy, coherence and implementation of international law and principles that advance human rights.

Bennett is charged with the possession of weapons with the intention to commit sabotage, terrorism, banditry and insurgency.

“The trial of Roy Bennett is significant as Zimbabwe goes through its transitional phase because serious allegations of executive use or misuse of the justice system to persecute legitimate opposition to it have been made,” said Masiga. The ICJ said the question as to whether the trial of Bennett was in good faith at all or is politically motivated continues to overshadow his trial.

“The handling of what to charge Bennett with and the failure to explain the multiple changes in charges against him raised suspicion. The issuing of summons and/or arrest of some of the lawyers defending Roy Bennett and his potential witnesses deepened the suspicions,” the ICJ said.

The State has for some time exhibited rare zeal in matters of criminal prosecution and the Attorney General (AG) Johannes Tomana is personally appearing in court to prosecute Bennett.

Since his appointment as a High Court judge in 2001, Justice Cachalia’s ascent on the Bench has been nothing short of dazzling. An appeal court judge since 2006 and most recently a candidate for the Constitutional Court, Cachalia is among a select group of judges representing the face of a new, emerging generation of the SA judiciary.

He came to the Bench with an impeccable political pedigree-one of the most prominent anti-apartheid families in the country-and some of the judgments he has delivered over the past eight years have had a significant impact on the development of a post-apartheid, human rights-centred jurisprudence.

Justice Cachalia previously visited Malaysia in 2002 as part of a delegation from the Joseph R.Crawley Program in International Human Rights at Fordham Law School, which undertook a study of that country’s Internal Security Act.

More recently he visited Cairo to examine, among other things, the impact of the ongoing state of emergency in Egypt on democratic opposition in that country. Justice Cachalia who is now back in South Africa following the adjournment of Bennett’s trial will be back again when trial resumes in January next year.

Trial observations are a widely used and internationally accepted type of human rights monitoring. They are one potential method



Senator Roy Bennett

of ensuring that human rights standards on fair trial and the rights of an accused person are respected.

The presence of a representative of an international organisation, like the ICJ, shows to the government in question that it is under scrutiny by the international community.

It is widely acknowledged that political opponents and “traditional” human rights activists are subject to harassment and persecution by governments around the world; but it is also judges and lawyers who are targeted by governments, threatened or otherwise prevented from fully and freely discharging their functions. This is inimical to the proper administration of justice.

The ICJ undertakes observations of trials or legal proceedings where a judge or lawyer is under prosecution or administrative sanction on charges arising from the legitimate exercise of professional duties as part of its activities on the protection of the independence of judges and lawyers.

The ICJ may also observe trials where there is reason to believe that the judiciary is itself not independent or impartial. Following the trial observation, the trial observer prepares a report on the trial. The report contains a description of the proceedings and evaluation of its consistency with fair trial guarantees. The report, or its summary, is usually published by the ICJ together with recommendations to government authorities.

African govts fail AIDS test

HARARE-South Africa’s most prominent AIDS advocacy group Treatment Action Campaign (TAC) has criticized African governments for lacking the political commitment to fight the HIV and AIDS pandemic.

TAC chairperson, Nonkosi Khumalo, who visited Zimbabwe last week on a fact finding mission, said politicians and governments on the continent were doing little in the fight against HIV and AIDS.

“What is lacking is the right political commitment from our politicians and governments. Governments are not committing enough resources on their health care systems. I don’t think the political commitment matches the needs. You cannot rely on donor funding because it is not guaranteed for ever...our African leaders should demonstrate whose agenda are they serving, whose interests are they serving, as it is definitely not the aspiration and interests of the Zimbabweans,” said Khumalo.

TAC advocates for increased access to treatment, care and support services for people living with HIV and campaigns to reduce new HIV infections.

TAC, which was formed in 1998 in Cape Town has become the leading civil society force behind advocating for comprehensive health care services for people living with HIV and AIDS in South Africa.

Khumalo who was accompanied by Ntombuzuko Kraai, the deputy chairperson of TAC at provincial level said her mission engaged and communicated with members of the public and civil society organizations and concluded that it will take a lot to rebuild Zimbabwe and promote a culture of recognition, respect and realization of all the rights of the citizens of this country.

The TAC chairperson said although President Robert Mugabe, Prime Minister Morgan Tsvangirai and Deputy Prime Minister Arthur Mutambara had committed themselves to speedily drafting a new constitution this has not happened and citizens feel let down as they have not been consulted while their views have not been taken into consideration.

Khumalo said access to health care is non-existent in Zimbabwe.

“With an HIV prevalence of 13.7 percent and HIV prevalence going down and incidence going up, government’s commitment should be matching the scourge, but as it looks presently, very little is being done,” Khumalo said.

The TAC chairperson said 600 000 people are in urgent need of ARV therapy compared with 180 000 people who are currently receiving treatment.

“There aren’t enough essential drugs and ARVs in the public health centres. People are forced

to share their drugs. Implications of this are dire for members of the public here. In a country where over 80 percent of the population is not economically active, where should they be getting this amount of financial resources?,” asked Khumalo.

The chairperson said her organization will continue to support civic society in Zimbabwe in its quest to create a democratic and just society where human rights are upheld.

Since 1998, TAC has held government accountable for health care service delivery; campaigned against official AIDS denialism; challenged the world’s leading pharmaceutical companies to make treatment more affordable and cultivated community leadership on HIV and AIDS.

TAC’s efforts have resulted in many life-saving interventions, including the implementation of country-wide mother-to-child transmission prevention and antiretroviral treatment programmes.

For its efforts TAC has received world-wide acclaim and numerous international accolades, including a nomination for a Nobel Peace Prize in 2004 while in 2006 the New York Times named TAC, “the world’s most effective AIDS group”.

Members of Padare Men’s Forum march to mark 16 Days of Activism Against Gender Violence campaign



The 16 Days of Activism Against Gender Violence campaign has been observed in Zimbabwe since 1991 and the campaign for this year is running under the theme Commit Act Demand: We CAN End Violence Against Women!

The 16 Days of Activism Against Gender Violence is an internationally recognised campaign held every year between 25 November and 10 December.

The campaign commences with the International Day for the Elimination of Violence against Women (25 November) and ends with International Human Rights Day (10 December).

The founding participants chose these dates in order to symbolically link gender-based violence (GBV) and human rights and to highlight gender based violence as a violation of human rights.

COMMIT ACT DEMAND:



We Can End Violence
Against Women!

FEATURING

TUKU

LIVE IN CONCERT

Zimbabwe Poets For Human Rights

Marimba Group
Drama Groups

DATE : FRIDAY 04 DEC 2009
TIME : 0800HRS TO 1400HRS
VENUE : QUEENS HALL MUTARE
ADM : FREE (ALL WELCOME)

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Brutalised at home, kissed abroad-WOZA story

BULAWAYO-At home, menacing uniformed men respond to their overtures for love and peace with guns and baton sticks. But abroad, Women of Zimbabwe Arise (WOZA) have been warmly embraced.

An award and a kiss from US President Barack Obama marked international recognition for this women's movement that has grown despite constant State harassment.

On 23 November, Obama honoured WOZA leader, Magodonga Mahlangu and her organisation with the 2009 Robert F. Kennedy Human Rights Award for their steadfast campaign against rights abuses.

Presenting the award to Mahlangu, Obama praised WOZA and its leaders for the inspirational work and willingness to withstand intimidation and physical abuse by a government whose power lay in using violence to suppress dissent.

"By her example, Magodonga has shown the women of WOZA and the people of Zimbabwe that they can undermine their oppressors' power with their own power, that they can sap a dictator's strength with their own. Her courage has inspired others to summon theirs," said Obama.

The Robert F. Kennedy Human Rights Award was established in 1984 to honour human rights defenders around the world. It carries a cash prize of \$30,000, as well as ongoing legal advocacy and technical support from the Washington-based Robert F. Kennedy Center for Justice and Human Rights.

Since its formation in 2002, WOZA has become the face of peaceful resistance to dictatorship in Zimbabwe. Through police brutality to numerous criminal prosecutions, the group has refused to be cowed by State brutality. Weekly, they continue rallying women and men into the streets to campaign for more freedoms.

WOZA demonstrations have taken different forms—from placard waving street protests to "love" marches where placards are replaced with roses to demand more care for women. Whether marching against political abuses or to campaign

for better access to health for women, brutal riot police and jail have remained a consistent feature.

This heavy handedness does not appear to have worked despite more than 3 000 WOZA members having been in prison or police custody at different intervals. Starting with a handful of activists, Mahlangu and co-founder, Jenni Williams' movement now boast of over 75 000 followers.

"They have been gassed, abducted, threatened with guns and badly beaten - forced to count out

loud as each blow was administered. History is not on the side of those who arrest women and babies for singing in the streets or dictators who starve and silence their own people and cling to power by threat of force," Obama said.

Obama saluted WOZA for their resilience. "Over the past seven years, they have conducted more than a hundred protests - maids and hairdressers, vegetable sellers and seamstresses, taking to the streets, singing and dancing, banging on pots empty of food and brandishing brooms to express their wish to sweep the government clean."



Magodonga Mahlangu



Jenni Williams leading one of WOZA's many peaceful demonstrations

Human rights violations intensify

HARARE-Continued human rights violations could affect the constitution making process and food aid programmes in the country, the Zimbabwe Peace Project (ZPP) has noted.

In its latest bi-monthly focus report released on Friday, the ZPP said it had noted 1 986 "politically motivated human rights violations" in the past two months. Of these, 1 513 were against Movement for Democratic Change (MDC) supporters and officials.

"The period under review witnessed resurgences in acts of politically motivated human rights violations, 931 of which were recorded in September while 1055 were cases recorded in October, both months showing huge increases in the harassment and assault categories," said the Jestina Mukoko-led ZPP. It added: "Harassments and assaults accounted for 1587 cases of the total violated, scenarios that cast a bad omen for the country's human rights profile."

ZPP - a coalition of churches and NGOs interested in human rights and peace building - said violence increased as the tension between ZANU PF and MDC worsened over the two months under review.

"Most of the violations committed in communities derive their inspiration from the conduct of political business at macro level," it said. "Members of the public were victimized for commenting on most macro level issues such as the MDC disengagement, arrest of Roy Bennett,

changes brought by the inclusive government. When macro politics tensed up, members of the public in both urban and rural communities became highly protective of their political turf and even quick to resort to violence at the slightest provocation."

ZPP said the issue of the Kariba Draft Constitution continued to distract attention from the 'real constitutional issues as pro-ZANU PF organizers were at most meetings quick to take it as an opportunity to instruct villagers to either accept the Kariba Draft or face unspecified actions.'

"The operational framework of NGOs in the human rights sector remained severely constrained with an almost systematic and uniform approach adopted towards them across the 10 provinces," said ZPP.

"Reports made references to several cases in which constitution awareness workshops... were frequent targets of disruptions by party youths, police and traditional leaders. Traditional leaders were reportedly under extreme pressure from war veterans and the local political leadership with several cases in which village heads were threatened with demotion whenever they were reported to have given permission to human rights activists to conduct workshops in their areas."

ZPP said it was concerned by the violations as that would mean people will not say out their true views on the issues for a new constitution.



Jestina Mukoko, the ZPP executive director

"We once more reiterate that a repeat of what nation experienced in the constitution the 1999 making process must be avoided at all costs," said ZPP. "Reports of continued harassment of those in the teaching profession by some party supporters

do not augur well for the future nation... Food and humanitarian assistance continue to be politically interfered with. This is hardly sustainable given the critical food situation in the country. NGOs must be accorded more space to execute their mandates."