

The LEGAL MONITOR

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A newsletter published by Zimbabwe Lawyers for Human Rights for members & human rights defenders



23 August 2010

Edition 59

COST-FREE

Ministers in court over abduction

HARARE-Judge President Justice George Chiweshe will preside over the trial of four ministers and several top state security agents who are being sued for damages exceeding \$150 000 by Mapfumo Garutsa, a Norton resident who was a victim of abduction and subsequent enforced disappearance.

The trial will commence during the week beginning 30 August at the High Court.

Garutsa is claiming a total of \$190 000 in damages which he suffered after he was allegedly abducted by state security agents and charged with committing acts of terrorism and banditry.

The abductee, who was accused of receiving training in Botswana and bombing police stations, was kept *incommunicado* for 22 days from 30 November 2008 until 22 December 2008 when he was brought to a police station. His captors accused him of bombing a bridge along Manyame River and Manyame railway bridge.

Garutsa says he was subjected to torture and was starved of food while detained at a prison in Goromonzi. He says he was only served "a small plate of sadza with dried vegetables". He says his captors assaulted him and immersed him in a sink full of water.



Former State Security Minister Didymus Mutasa

The abductee's lawyer Alec Muchadehama says the experience was "traumatic and is still haunting his client to date".

The four ministers are former State Security Minister Didymus Mutasa, Justice and Legal Affairs Minister Patrick Chinamasa, co-Home Affairs Minister Kembo Mohadi and former co-Home Affairs Minister Giles Mutsekwa.

Happyton Bonyongwe, the director-general of the Central Intelligence Organisation (CIO), Police Commissioner-General Augustine Chihuri

and Paradzai Zimondi, the Commissioner of Prisons are being sued together with seven top police officers who include Chief Superintendent Peter Magwenzi, Chief Superintendent Chrispen Makedenge, Senior Assistant Commissioner Nyathi, Asher Walter Tapfumaneyi, Superintendent Joel Shasha Tenderere, Superintendent Regis Takaitei and Detective Chief Inspector Mpofu.

The abductee is claiming \$50 000 damages for unlawful assault and torture, \$50 000 as damages

for the abduction, enforced disappearance and unlawful detention *incommunicado*. \$50 000 for malicious prosecution and \$40 000 for unlawful detention.

Garutsa, a victim of enforced disappearances which were outlawed by the United Nations General Assembly Resolution 47/133 of 18 December 1992, says he was seriously tortured during the period he was held *incommunicado*.

He said the torture was unlawful, inhumane, degrading and violated section 15 of the Constitution and other regional and international human rights instruments such as Article 5 of the Universal Declaration of Human Rights, Article 1 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 5 of the African Charter on Human and People's Rights and Article 7 of the International Covenant on Civil and Political Rights which outlaw torture.

Besides Garutsa, other victims of abduction who include Movement for Democratic Change (MDC) and human rights activists and a freelance journalist are demanding damages from cabinet ministers and state security agents for their alleged abduction, unlawful detention *incommunicado*, and deprivation of liberty in 2008.

ZLHR intervention saves nurse

HARARE-A Magistrate has freed a nurse on charges of using a live bullet to threaten Harare Central Hospital chief executive officer Jealous Nderere who had fired her from work.

Mugove Blessing Chihota was dismissed from her job at the hospital in November 2008 for allegedly absconding from work for a month.

More trouble followed in March this year when she was charged with threats to commit crime as defined in Section 186 (1) (b) of the Criminal Law (Codification and Reform) Act Chapter 9:23.

The charges arose from allegations that Chihota allegedly sent a wrapped live bullet to Nderere as an act of intimidation.

Magistrate Archie Wochiunga acquitted Chihota recently after ruling that State witnesses failed to link Chihota to the commission of the offence.

"From the State evidence, the physical element of the offence was not established. There is no direct evidence linking the accused person to the offence," said Magistrate Wochiunga in his ruling.

The State had sought to link Chihota to the case by alleging that the bullet delivered to Nderere



Jealous Nderere, Harare Central Hospital CEO

was wrapped in the same termination letter handed to the nurse by the hospital authorities.

This was despite that several copies of the same letter existed.

In his testimony, Nderere told the court that on 10 March this year, he received a package from his office orderly, Onias Shamhu, which had been dropped off by an unidentified man. Nderere linked Chihota to the offence after telling the court that the letter wrapping the bullet was the dismissal letter he addressed to the nurse. This, he said, had led him to conclude that Chihota was trying to get back at him. Nderere said after receiving the letter he feared his life was in danger and that someone wanted to kill him.

In her application for discharge at the close of the State case earlier this month, Chihota, represented by David Hofisi of Zimbabwe Lawyers for Human Rights, argued that State witnesses had provided no evidence upon which a "reasonable court acting carefully might convict" Chihota.

"The witnesses did not lead any evidence incriminating Accused. In fact, their evidence exonerated Accused from the alleged offence," read the discharge application.

Apart from Nderere, the State called in two other witnesses, Shamhu and Edith Mutizira, a human resources assistant at the hospital who handed

Chihota her dismissal letter. Shamhu stated that the person who had delivered the letter was a man, and not Chihota. Mutizira acknowledged that copies of the letter she handed to Chihota and alleged to have been used to wrap the bullet could have been copied by other people other than the accused.

Magistrate Wochiunga concurred with the defence. "It is clear that the letter could have originated and edited from at least seven sources," he said.

Chihota has since successfully applied to the Health Services Board against her dismissal from work, which she described as unprocedural and caused by "bad blood". The hospital dismissed her without carrying any investigations or conducting an internal disciplinary hearing to determine the case in which she was being accused of absconding from work from 15 October 2008 to 14 November the same year. She however contended that she was reporting for work during that time, and hospital staff check-in registers as well as colleagues would testify to this. Though the Health Services Board has overturned Chihota's dismissal, the hospital is still pursuing her. Nderere has written to Chihota asking her to attend a disciplinary hearing on 9 September on the same case.



17 August 2010
Press Statement

Attorney General's office launches fresh attack on Muchadehama under the nose of the Inclusive Government

Zimbabwe Lawyers for Human Rights (ZLHR) expresses its shock and outrage at the malicious actions of the Attorney General (AG), through his subordinates, in appealing against the acquittal of prominent human rights lawyer **Alec Muchadehama**, more than eight months after he was freed by the Magistrates' Court on 10 December 2009.

On Friday 13 August 2010, **Roderick Tokwe**, a senior law officer in the AG's Office, filed a Chamber Application seeking leave to appeal against the acquittal of Muchadehama, a partner at Mbidzo, Muchadehama and Makoni Legal Practitioners and a dedicated senior member of ZLHR.

In his Notice and Grounds of Appeal Tokwe argues that Magistrate **Fadzai Mthombeni** erred and misdirected herself in acquitting Muchadehama and **Constance Gambara**, the clerk of High Court Judge, Justice **Chinembiro Bhunu**, with whom he was jointly charged, at the close of the State's case last December.

He claims that Muchadehama and Gambara "brought the administration of justice into contempt (*sic*)" by allegedly disobeying Justice Bhunu's order granting the AG leave to appeal against bail awarded to three victims of State sponsored abduction namely **Gandhi Mudzingwa**, **Kisimusi Dhlamini** and **Andrison Manyere**, who were represented by the human rights lawyer. Tokwe now wants the human rights lawyer and Justice Bhunu's clerk to be placed before the trial court for a continuation of the trial.

In an attempt to recommence the trial of Muchadehama and Gambara, **Austin Muziwi**, the Principal Law Officer in the AG's Office states in an affidavit that the late filing of the Chamber Application for Review, though regretted, was as a result of "problems" encountered by the Chief Transcriber in preparing the transcript. Muziwi claims that there is no time limit laid down within which, as the trial prosecutor, he can file the application for leave to appeal and thus he is seeking the condonation of the High Court.

Muchadehama, a crusading human rights lawyer, had been on trial for contempt of court for allegedly facilitating the illegal release from Chikurubi Maximum Prison of two Movement for Democratic Change (MDC) officials, Mudzingwa and Dhlamini, and Manyere - a freelance photo-journalist, who had been granted bail by High Court Judge, Justice **Charles Hungwe**.

He was acquitted on Thursday 10 December 2009 together with Gambara at the close of the State's case when the court found that the prosecutors had failed to prove the essential elements of the alleged crime and ruled that there was no *prima facie* case warranting the two being put to their defence.

It is not surprising that this frivolous appeal conveniently comes at the same time that the High Court has finally set trial dates for civil claims for damages filed by various political and civil society activists who were victims of state-sponsored abduction against the Co-Ministers of Home Affairs, the Commissioner-General of Police, and named state security agents and senior police officers. The abductees are represented by Muchadehama and other lawyers at his firm.

At the very least, a reasonable perception has been created by these actions that this is an act of blatant malice by an office whose leaders' appointment is still considered an outstanding issue, which is yet to be fully dealt with by the three principals to the Interparty Political Agreement.

It is solely calculated to distract Muchadehama from his core business in representing human rights defenders and hamper his ability to deal with other cases as he will be forced to spend time and energy defending himself against continuing frivolous charges.

Persecuting lawyers for simply carrying out their lawful duties and ensuring the fundamental right to legal representation for countless repressed human rights defenders in Zimbabwe is an act calculated to harass and intimidate an independent legal profession and break the existing legal safety net for human rights defenders.

Such actions cannot be tolerated or condoned in a democratic society. They only validate charges that there is pursuit to fulfill a political agenda of certain parties and individuals against perceived opponents through convictions at all costs.

What is saddening and shocking is that this ongoing persecution and harassment of an upstanding member of the human rights legal profession is going on right under the nose of an Inclusive Government that claims to be making much progress in resolving the country's

political crisis, and at a time when SADC Heads of States and Government are meeting at a Summit in Namibia to review developments in Zimbabwe.

ZLHR is of the strong belief that progressive elements from the Movement for Democratic Change (MDC) within the Inclusive Government are not doing enough to resolve the outstanding issue of a partisan Attorney General and a clique of law officers who are intent on fighting political battles rather than ensuring the swift and effective prosecution of perpetrators of murder and violence to fight the pervasive culture of impunity within our society. As the greatest current threat to the restoration of the Rule of Law in Zimbabwe, action is needed to resolve this outstanding issue, and it is needed now.

Instead of playing to the gallery and focusing on ineffective diplomacy, these representatives should be pursuing the outstanding matters without fear or favour to prove to Zimbabweans that there are no sacred cows being shielded from prosecution; to conserve scarce state resources which are being misdirected towards attacking the independence of the legal profession; and to ensure that sanity and professionalism are restored in the Office of the Attorney General. There are countless law officers therein who are committed to professionalism and the restoration of pride in this abused state institution, and the failure by the Inclusive Government to act is a betrayal of their hopes and aspirations-as well as those of the broader legal profession and the public at large-for the early transformation of this critical institution.

Introduction

Devolution of power to the provinces [provincialisation] has been debated at some length in the press recently, and the constitutional outreach programme has revealed how strongly people feel about the issue. In Matabeleland, for example, there will probably be little support for a new constitution, whatever its merits, if it does not confer a considerable measure of autonomy upon the western provinces. And this feeling is not confined to Matabeleland: the further one gets from Harare, it seems, the stronger is the desire for autonomy.

The desire is easy to understand in the light of the country's history. Zimbabwe has always been a centralised state and its governments, both before and after Independence, have tended to be authoritarian. The present Constitution gives barely a nod to the provinces: section 111A allows governors to be appointed for "any areas" (though only provincial governors have been appointed) but these governors are appointees of the central government and their main function is to enforce the ruling party's control over the provinces. Local authorities are mentioned hardly at all in the Constitution.

The demand for devolution is probably a reaction to the over-centralisation of the past and the excesses resulting from it. The new constitution must go some way towards meeting this demand if it is to be acceptable to the majority of Zimbabweans. But how far should it go? What are the advantages and drawbacks of devolution and, particularly, of provincialisation? What are the problems that are likely to be encountered if power is devolved to the provinces?

Before trying to answer these questions, let us see how provincialisation has been tackled in two draft constitutions that have been put forward in recent years.

Devolution in current constitutional proposals The Kariba Draft

Under clause 245 of the so-called "Kariba draft" constitution each of the country's 10 provinces would have a provincial council, but the council would not be an elective body. It would be chaired by the provincial governor who would be a presidential appointee and an *ex officio* senator, and its members would include the members of Parliament whose constituencies fall within the province, as well as councillors for local authorities in the province and "other persons" specified in an Act of Parliament. The functions of provincial councils would be limited to planning and co-ordinating governmental activities in the province.

In clause 248 Local authorities would be established by an Act of Parliament and their functions - administrative, legislative and fiscal - would also be conferred on them

CONSTITUTION WATCH CONTENT SERIES 2/2010

(19th August 2010) Devolution Part I

by Act of Parliament. They would, however, be elective bodies.

The "Kariba Draft", therefore, does not go far along the road to devolution of power: provincial councils would be dominated by members of the central legislature and their powers would be minimal; local authorities would be created by the central government and their powers would also be controlled from the centre. On the other hand, the draft constitution does state in clause 242:

"Provincial councils and local authorities must be given as much autonomy as is compatible with good governance; decentralisation must be a principle applying to all levels of local government so that there is participation by the people and democratic control in decision-making."

The Kariba Draft also specifies that the state must provide adequate finance to enable provincial and local authorities to carry out their functions.

The NCA Draft

The draft constitution produced by the National Constitutional Assembly would go much further towards provincialisation. Each of five provinces would have a provincial assembly consisting of members elected on a system of proportional representation; these assemblies would have power to legislate on matters of provincial concern such as planning, tourism, transport, education and health. They would also have taxing powers. Provincial governments would be run by provincial governors elected by the assemblies, assisted by executive councils consisting of members of the assemblies. The central Parliament would have power to nullify provincial legislation, though it would need a two-thirds majority of both Houses to do so.

Under the NCA draft there would be local authorities for urban and rural areas, with powers conferred by an Act of Parliament. The draft states that:

"Local government institutions must be given as much autonomy as is conducive for the attainment of the objects of local governance." And these objects are:

- "to provide democratic and accountable government for local communities;*
- "to promote social and economic development;*
- "to provide participation by the people in decision-making."*

The NCA draft also specifies that an Act of Parliament

must make provision for an equitable distribution of finance between central and provincial governments.

The NCA draft would go further than the Kariba draft in setting up provincial governments with real autonomy. In regard to local authorities, the provisions of both drafts are substantially the same.

Neither draft, it may be noted, gives provincial governments power to supervise or control local authorities. Their supervision would apparently be vested in the central government.

Advantages of Devolution or Provincialisation

The advantages of devolving power may be summarised as follows:

1. Strong local governments should lead to improved governance and economic development, at least in theory. This is because:
 - a. Local politicians are closer to the people they serve, and are likely to be more responsive to their wishes.
 - b. This greater responsiveness gives people a greater say in the aspects of government that closely affect them, such as the provision of water, electricity, education and health care.
 - c. Improved delivery of essential services leads to greater productivity.
2. Devolution should lead to a more equitable distribution of national resources between the provinces.
3. The decentralisation of power creates separate power-bases within the State and dilutes the control that can be exercised from the centre. Paradoxically, this may make the State more resilient and reduce the likelihood of coups d'état, because seizing power from the central government does not necessarily bring control over the provinces. In the last days of the USSR, for example, a coup failed when the coup plotters, having gained control of the central government, found they could not control the semi-autonomous republics that made up the State. On the other hand, it must be remembered that Nigeria, which is a federal State, has had more than its fair share of coups.
4. More definitely decentralisation of power makes it less likely that an single political party can take control of all the power centres of the state and substitute itself for legitimate government.
5. Provincial and local governments are training-grounds for politicians, giving them valuable managerial

skills which can be employed at national level for the benefit of the country as a whole.

Too much should not be made of these advantages. Devolution does not necessarily lead to good governance, for example. Experience in this country has shown that local politicians and officials can be just as corrupt and incompetent as national ones, and just as difficult to get rid of. In order to improve the quality of government, therefore, devolution must be accompanied by measures to increase transparency and accountability - to strengthen democracy, in fact.

Disadvantages of Devolution

Provincialisation has its drawbacks:

1. For a country with a relatively small population and a small tax base having an additional tier of government could be unsustainable.
2. It could create another cadre of office bearers getting hefty salaries and perks without giving value for money.
3. It can encourage regionalism or tribalism. Advancing one's own province or even tribe may be acceptable in a provincial politician, but it is a very serious defect at the national level.
4. It may slow down the processes of government if provincial authorities have to be consulted before decisions are taken at the centre.
5. Similarly, decisions of the central government may be rendered ineffective if their implementation is left to provincial authorities.
6. If too much power is devolved to the regions or provinces, the central government may not be left with enough power to hold the country together.

Conclusion

One final point needs to be emphasised: If there is to be any devolution of power to provinces and local authorities, it must be genuine and effective. Real powers should be devolved, and the provincial and local governments must be capable of exercising them. There is no point in giving a provincial government responsibility for water, for example, if the water supplies are controlled by a national parastatal body; no point in giving it power to draw up plans if it cannot implement them. Devolution cannot be achieved simply by mentioning provincial and local authorities in the Constitution and passing the necessary legislation. There must be a proper transfer of financial and managerial resources from the central government to the provincial and local authorities to enable them to exercise their devolved functions and to continue exercising them.

Veritas makes every effort to ensure reliable information, but cannot take legal responsibility for information supplied.

Abductors: Mtetwa demands identities

HARARE-Crusading human rights campaigner Jestina Mukoko has asked lawyers representing four ministers and senior police chiefs to reveal the identity of people who abducted her two years ago.

Mukoko's lawyer Beatrice Mtetwa asked the lawyers from Mutamangira and Associates who are representing the four ministers and the top police officers to reveal the names of the law enforcement agents who abducted her after the lawyers challenged her abduction report and justified it as an arrest.

The ministers include former State Security Minister Didymus Mutasa, Defence Minister Emmerson Mnangagwa, Co-Home Affairs Minister Kembo Mohadi and former co-Home Affairs Minister Giles Mutsekwa.

The police chiefs are Police Commissioner-General Augustine Chihuri, Chief Superintendent Peter Magwenzi and Brigadier-General Asher Walter Tapfumaneyi. Attorney General Johannes Tomana is also being sued by the pro-democracy campaigner.

In their response to summons served on them by Mukoko in which she is demanding more than \$200 000 in damages which she suffered as a result of her abduction, wrongful arrest and torture the lawyers deny the torture allegations and claim that her abduction was an act of arrest. "The defendants aver that the plaintiff was arrested by law enforcement agents who had reasonable suspicion that she was involved in a conspiracy to recruit and engage in acts of terrorism, banditry and sabotage,...The defendants deny that the plaintiff was tortured and put the plaintiff to strict proof of claim," read part of the lawyers' response to the summons served on the ministers.

But in responding to the denial by the ministers and the police chiefs Mtetwa is now demanding



Jestina Mukoko on a hospital bed after her abduction

the identities of the law enforcements agents whom they claim arrested Mukoko. Mtetwa wants the ministers and the police bosses to furnish her with the "full particulars of each law enforcement agent involved in the alleged arrest of the plaintiff (Mukoko), including the name, rank, address and organisation to which he/she is attached."

The human rights lawyer also want the ministers and the police chiefs to mention the "lawful holding facility" where Mukoko was "taken to after her alleged arrest."

Mtetwa also wants the ministers and the senior police officers to disclose "under whose custody" was the human rights campaigner during the period 3 December, 2008 to 22 December 2008.

Mukoko, the director of the Zimbabwe Peace Project (ZPP) was abducted by state security agents in December 2008 from her Norton residence and held incommunicado in secret detention centres until the end of December when she was produced at a police station and subsequently in court.

She was accused of recruiting persons to commit terrorism and banditry, including the recruitment of insurgents to train in Botswana for an alleged armed uprising against President Robert Mugabe's previous government.

Mukoko sued the ministers and the police bosses after the Supreme Court granted her a permanent stay of prosecution after ruling that her constitutional rights were violated as a result of the abduction, torture and *incommunicado* detention."

On show...



Patience Chimedza

Patience Chimedza of ZLHR showcases some of the organisation's publications at the just ended NGO expo held in Harare. ZLHR was one of several NGOs that took part in the expo, which highlights the work of civil society to the public

Quote of the week



Beatrice Mtetwa

"Alec is being targeted for no other reason than that he is a human rights defender. That is why you see applications of this nature only against people like him. It also shows total abuse of power by the Attorney General (AG) where he thinks that if a human rights lawyer is charged he or she must be convicted. It is a clear sign that he is no longer exercising impartiality. The Alec case was a case where prosecutor Andrew Kumire was found guilty of contempt of a magistrate who initially heard the case but up to today the AG hasn't done anything at all to deal with that contempt. Instead, he is chasing after Muchadehama. The fact that Tomana has a string of cases against people seen as enemies of the State pending at various courts means he wants to side track Alec so that the lawyer concentrates on defending himself as opposed to defending the rights of his clients": Human rights lawyer Beatrice Mtetwa on colleague Alec Muchadehama's latest troubles with the Attorney General, Johannes Tomana's Office.

Cases of violence plague constitutional reforms

...as outreach meetings abandoned

CHIPINGE-Reports of violence and intimidation continue to plague the Constitution Select Committee (COPAC) led constitution making process. Cases of violence have forced some outreach meetings to be abandoned, a development that has heightened concerns on whether the new charter will reflect people's will.

Last week, a COPAC outreach meeting scheduled for Checheche Primary School in Chipinge, Manicaland Province had to be abandoned because of violence. A similar incident happened in the same district about two weeks ago.

This time, the meeting had to be abandoned after some ZANU PF youths assaulted two villagers prior to the commencement of an outreach meeting. The villagers Charles Chovi and Charles Chunje were assaulted by some ZANU PF youths at Checheche Primary School, who were led by Tonderai Ngwendu and Gilbert Kombo, who used benches, boots and clenched fists.

The two villagers were accused of sitting on some benches which had been set up before the arrival of the COPAC team members for a meeting to solicit people's input into a proposed draft constitution.

ZESN, ZPP, ZLHR Independent Constitution Monitoring Project (ZZZICOMP) whose monitors are shadowing the constitution making process reported that Chovi and Chunje sustained some injuries on their bodies and on the ear and sought medical attention at St Peters Hospital.

The COPAC meeting was called off after some villagers protested that the meeting could not proceed as some of them had been assaulted and intimidated before the arrival of the COPAC team members.

Ngwendu and Kombo were fined by the police at Chisumbanje Police Station, who also asked Chovi and Chunje to pay an admission of guilty fine for engaging in public fighting.

Mutasa North legislator David Chimhini who led a COPAC team that was supposed to convene the meeting in Checheche confirmed the assault and the abandonment of the meeting.

Hon. Chimhini said it was evident that some villagers had been intimidated before the arrival of the COPAC team and his team had to postpone the meeting to a date to be advised as tension was high at the meeting.

Douglas Mwonzora, from Prime Minister Morgan Tsvangirai's Movement for Democratic Change (MDC) who co-chairs COPAC told *The Legal Monitor* last week that he was worried about cases of violence and intimidation.

"We are hoping that the police will get on top of the situation so that people can air their views on what they want in the new constitution," he said.

Mwonzora co-chairs COPAC with Munyaradzi-Paul Mangwana from President Robert Mugabe's ZANU PF party and Edward Mkhosi, an appointee of Deputy Prime Minister Arthur Mutambara.

The outreach programme-an exercise to gather citizens' views on the new governance

charter-has been marred by a plethora of problems.

Besides violence and intimidation, administrative hiccups have affected constitutional reforms. About two weeks ago, the exercise briefly came to a halt in Manicaland, Masvingo, Mashonaland East and Midlands provinces after the government-owned Central Mechanical and Equipment Department (CMED) stopped supplying fuel to COPAC demanding payment first.

New cases of violence left many doubting the credibility of the process COPAC process.

Zimbabweans' contributions are supposed to form the basis of the proposed new constitution according to a political agreement signed by President Mugabe and Prime Minister Tsvangirai in 2008 that gave birth to their transitional government last year in February. This is part of their wishes ostensibly to pave the way for governance reforms.



China power... Xinhua, China's official news agency is putting final touches to a giant screen in Harare's First Street. Zimbabweans have been reduced to watching foreign television stations because they cannot stand the crude propaganda churned out by state-controlled television and radio. The Zimbabwe government enjoys a broadcasting monopoly.



Slow learners... It has taken ages for the Harare City Council to realise that solar can power the city's traffic lights. Most traffic lights in Harare are dysfunctional, partly because of unending electricity shortages, resulting in avoidable accidents.