

The LEGAL MONITOR

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



05 July 2010

Edition 52

COST-FREE

Workers defeat POSA

Judge says repressive law does not apply to labour...

BULAWAYO-A High Court Judge has granted an order that nullifies the police's use of the Public Order and Security Act (POSA) to stop workers' union activities.

Justice Nicholas Mathonsi on Friday awarded an application by the Zimbabwe Congress of Trade Unions (ZCTU) to proceed with an event to commemorate the death of 472 workers in one of the country's worst mine disasters in history.

Police had relied on POSA-a harsh law systematically used by State security agents to arrest rights groups and activists-to block the ZCTU from conducting the commemorations on two occasions.

The ZCTU was forced to engage Zimbabwe Lawyers for Human Rights (ZLHR) to approach the courts after police again used the draconian legislation to block the commemorations for the third time in a month.

But Justice Mathonsi agreed with ZCTU lawyers Lizwe Jamela and Nosimilo Chanayiwa both of ZLHR that police were abusing POSA to stop legitimate worker-related activities.

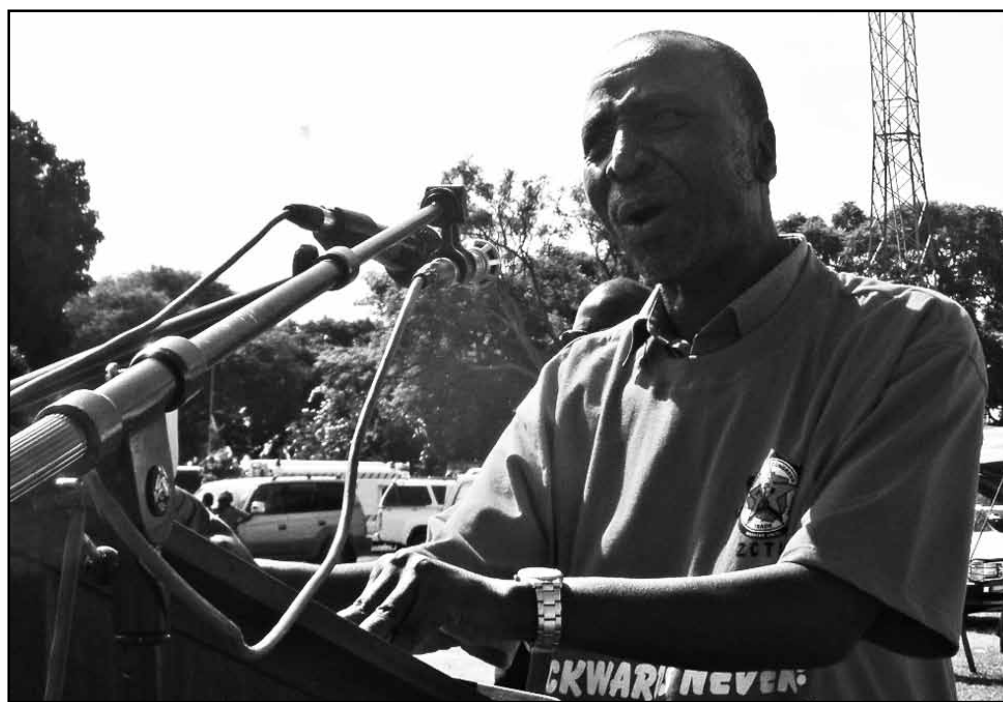
Justice Mathonsi ordered the police to allow last weekend's event to proceed in Kwekwe. Lawyers

have described the court's decision as a landmark ruling in the fight for workers' rights.

Justice Mathonsi agreed with ZCTU lawyers' argument that: "The law is clear as enunciated in section 26A of the Public Order and Security Act that the provision relied by the 1st Respondent (Officer commanding police Kwekwe district, Superintendent Madiro) do not apply to my organisation and as such no authority is needed from the police and the commemoration needs to go ahead with or without police's presence."

"Section 26A of the Public Order and Security Act gives exemptions of certain gathering from section 25 which was stated by the 1st Respondent as applying to the planned gathering, the Schedule to the Act state as follows:" Classes of gathering to which section 23, 25, and 26 do not apply: Gatherings- (j) held by a registered trade union for the bona fide trade union purposes for the conduct in accordance with the labor act," read the ZCTU application granted by Justice Mathonsi.

Speaking after the victory, Jamela said: "The labour union had planned to have activities in both Harare and Kwekwe on 12th June to mark the tragedy. They wrote to the police courteously



ZCTU president Lovemore Matombo

informing them of the planned activity and also requesting police escort, which was supposed to take place on the 5th of June. The police responded by a letter indicating that they were not approving the planned commemoration leading to its postponement to the 26th of June.

"Again the police interfered and indicated that they were not approving the commemoration purportedly by powers vested in POSA. The application is to declare police's actions as unlawful and interdicting the police from interfering as POSA expressly exempts ZCTU from the POSA provisions."

Tomana sanctions ZimRights boss prosecution

MASVINGO-Attorney General Johannes Tomana has given Masvingo prosecutors authority to prosecute Joel Hita, the Zimbabwe Human Rights Association (ZimRights) regional chairperson for Masvingo, who is accused of organising a photo exhibition without police authority.

Hita was arrested in April for a photo exhibition titled "Reflections" in Masvingo and charged with "holding a public meeting without notifying the authorities."

Hita's lawyer Blessing Nyamaropa of Zimbabwe Lawyers for Human Rights (ZLHR) said Masvingo area public



Attorney General Johannes Tomana

prosecutor only identified as Shumba advised him that Tomana had given him the authority to proceed with the trial once the court set the trial date.



Blessing Nyamaropa

Shumba advised Nyamaropa that he would use the seized photos as exhibits during the trial. The prosecution of Hita comes hardly a fortnight after Tomana authorised the prosecution of Gukurahundi visual artist Owen Maseko.

Maseko will stand trial in August for allegedly undermining the authority of or insulting President Robert Mugabe.

Maseko was arrested in March under the country's security harsh laws for staging an exhibition in Bulawayo about the 1980s Matabeleland massacres carried out by troops loyal to President Robert Mugabe's previous government.

Besides Maseko, several legislators among them Hon. Douglas Mwonozora, Hon. Pishai Muchauraya, Hon. Eliah Jembere and Senator Morgan Komichi have been dragged to court to answer charges of undermining or insulting President Mugabe.

Zimcodd employee charged over meeting

MUTARE-Police have charged an employee of the Zimbabwe Coalition on Debt and Development (Zimcodd) for organising a meeting without their approval.

Shylene Nyamutsa, the Zimcodd programmes assistant for the northern

region was arrested at Dangamvura Hall on Thursday, where her organisation, a socio-economic justice coalition had convened a workshop focusing on the effects of debt on health and economic, socio and cultural rights.

Nyamutsa was accused of failing to notify the regulating authority about the meeting in

contravention of Section 24 of the Public Order and Security Act (POSA).

Facilitators Simbaisi Maunganidze, Kelvin Ndimiyana and Margaret Muranda, who were detained together with Nyamutsa were released without any charge.

The Zimcodd employee who was detained at Dangamvura Police Station in Mutare was released after she was charged by the police late Thursday.

Nyamutsa will appear in court today.

Amendment of Indigenisation Regulations

Amendments to the Indigenisation Regulations were made by SI 116/2010, gazetted in a Government Gazette Extraordinary on Friday 25th June, effective immediately.

No changes are made to:

- The US\$500 000 figure for the prescribed asset threshold
- The 30th June deadline for submission of Form IDG 01 and indigenisation implementation plans
- The 51 percent control target stated in the regulations.

Changes Made by the Amendments

“Cede” replaced by “dispose of”: Section 3 of the regulations originally called for every business above the prescribed asset threshold (US\$500 000) to “cede” at least a 51 percent interest to indigenous Zimbabweans by March 2015.

The amendment replaces “cede” with “dispose of” and defines this term as meaning “sell, donate or otherwise dispose of”. (The Parliamentary Legal Committee (PLC) objected to the word “cede”, with its implication of compulsory acquisition without proper compensation. The term also attracted criticism from legal commentators and stakeholders.)

“Asset value” replaced by “net asset value”: giving more precision on which businesses are affected by the Regulations. The original regulations targeted businesses with an “asset value” of or above US\$500 000. The undefined term “asset value” was criticised as vague, and has now been replaced by the more satisfactory “net asset value”, defined as the difference between total value of assets and total value of liabilities.

Only businesses above the \$500 000 threshold to submit Indigenisation Plans:

The original regulations were unclear on whether indigenisation implementation plans had to be submitted by all businesses or only by businesses above the US\$500 000 asset value threshold. An amendment clears this up – the new section 4(2) specifically states that only businesses

above the threshold have to submit what are now called provisional indigenisation implementation plans.

Changes to form IDG 01 and other forms: Form IDG 01 [the form that must be submitted by 30th June 2010 by all existing businesses] is changed by the addition of new paragraphs requiring contact details for the business submitting the form and a statement of the “net asset value” of the business. Similar changes are made to Forms IDG 02, 03, 04 and 05.

Provision of Sectoral and Subsectoral Committees to advise the Minister: A new section 5A provides for the appointment by the Minister of sectoral and subsectoral committees, to be chosen from lists of nominees submitted to him by the Ministers responsible for various sectors and subsectors of the economy [these are defined as the sectors and subsectors listed in item 3 of Form IDG 01]. The committees will be chaired by members of the National Indigenisation and Economic Empowerment Board. The committees will advise the Minister on:

- Appropriate net asset value thresholds and compliance periods for their sectors and subsectors
- Credits towards meeting their indigenisation quotas that may be allowed to businesses for socially and economically desirable activities

Provision of rules for share ownership schemes or trusts: The rules cover ownership schemes or trusts for employees, management and communities. New sections 14, 14A and 14B allow businesses that have established such schemes or trusts in compliance with these rules to have this fact taken into consideration towards meeting their indigenisation quotas.

- Trust deeds will have to be registered with the Deeds Office.
- Community share ownership schemes are intended mainly to allow the residents of rural district council areas [which include communal lands] to benefit from businesses that exploit the community’s natural resources. Other distinct communities may also be the beneficiaries where a business exploits natural resources adjacent to a community’s place of residence.

Provision for purchase of shares by Indigenisation and Economic Empowerment Fund:

- The Fund will be the “purchaser of last resort” where a business wishing to dispose of shares in compliance with the regulations is unable to find a suitable indigenous purchaser, even with the assistance of the database of potential purchasers kept by the Ministry for the purpose.
- Where a business wishes to dispose of more than 28 percent of its shares to an employee share ownership scheme or trust, the Fund will have the right of first refusal to purchase the shares in excess of that percentage.

No Indigenisation Levy Until Passed by Parliament

In May, the chairman of the National Indigenisation and Economic Empowerment Board said an indigenisation levy would be coming “soon”. The levy can only be imposed by statutory instrument gazetted by the Minister of Youth Development, Indigenisation and Empowerment, but no such statutory instrument can be gazetted until the draft has been approved by the Minister of Finance and by resolution of both Houses of Parliament. (Indigenisation and Economic Empowerment Act, sections 17 and 18.)

Presidential Powers Act Invoked to Protect RBZ

SI 115/2010, gazetted on 18th June under the Presidential Powers (Temporary Measures) Act, makes the State Liabilities Act applicable to legal proceedings against the Reserve Bank (RBZ), including proceedings already commenced. [This is only the third resort to the controversial Presidential Powers (Temporary Measures) Act since the formation of the Inclusive Government. Like all SIs made under this Act, SI 115 will expire 180 days after its gazetting – i.e., on 18th December 2010.

RBZ assets now immune from forced sale: Under the State Liabilities Act State property cannot be seized under court orders and sold to raise money to pay off creditors. So the main effect of this SI will be to stop court-ordered auction sales of RBZ property to satisfy debts owed to its many creditors. (Both the Minister of Finance and the Attorney-General’s Office previously said that the sales that have already taken place were illegal because RBZ assets are State assets.

This SI will give the government and the new RBZ board breathing space in which to organize the management of the RBZ debts problem.)]

New procedures for legal cases against RBZ: Another effect will be to require RBZ creditors to follow special notification procedures before launching legal actions against RBZ.

Judicial Service Act Now In Force

As foreshadowed in Bill Watch 23 of 12th June, SI 114/2010 fixed the 18th June as the date of commencement of the Judicial Service Act. As a result the Judicial Service Commission [JSC], not the Public Service Commission, now has responsibility for appointing, promoting and disciplining magistrates and fixing their conditions of service.

Civil society comments on this development have cautiously welcomed its potential for building a truly independent judiciary. There has also been a call for changes to the JSC’s composition and method of appointing its members, given that the present constitutional provision leaves the appointments in the President’s discretion. (This is a point that needs to be taken up in the constitution-making exercise now at last under way.)

JSC membership is laid down by section 90 of the Constitution:

- Three ex officio members: The Chief Justice (or in his absence the Deputy Chief Justice) as chairperson, the chairperson of the Public Service Commission, and the Attorney-General (all of whom are appointed to the full-time posts by the President.)
- Two or three members appointed by the President: (one of the appointed members must be a judge or former judge, a lawyer of at least five years’ standing or otherwise legally qualified) Currently Sternford Moyo and Canaan Dube, senior lawyers in private practice, fill two of these places. It has been customary for the Judge President to be the third appointed member, and Justice Rita Makarau was on the JSC until her elevation to the Supreme Court. It is not yet known whether Judge President George Chiweshe will be appointed a JSC member.

Source: Veritas.

Police feast in Maguwu's house

HARARE-Farai Maguwu has made his first stand in court since incarceration three weeks ago and gave a testimony that further exposed brute methods used by police when pursuing genuine rights and political activists.

The diamond activist last week recounted to a packed Harare Magistrates Court how police, led by Detective Inspector Henry Sostein Dowa used hostage arrests, assault and property grab in their quest to nail him for allegedly whistle blowing on gross human rights abuses and illegal mining by soldiers manning Marange diamond fields.

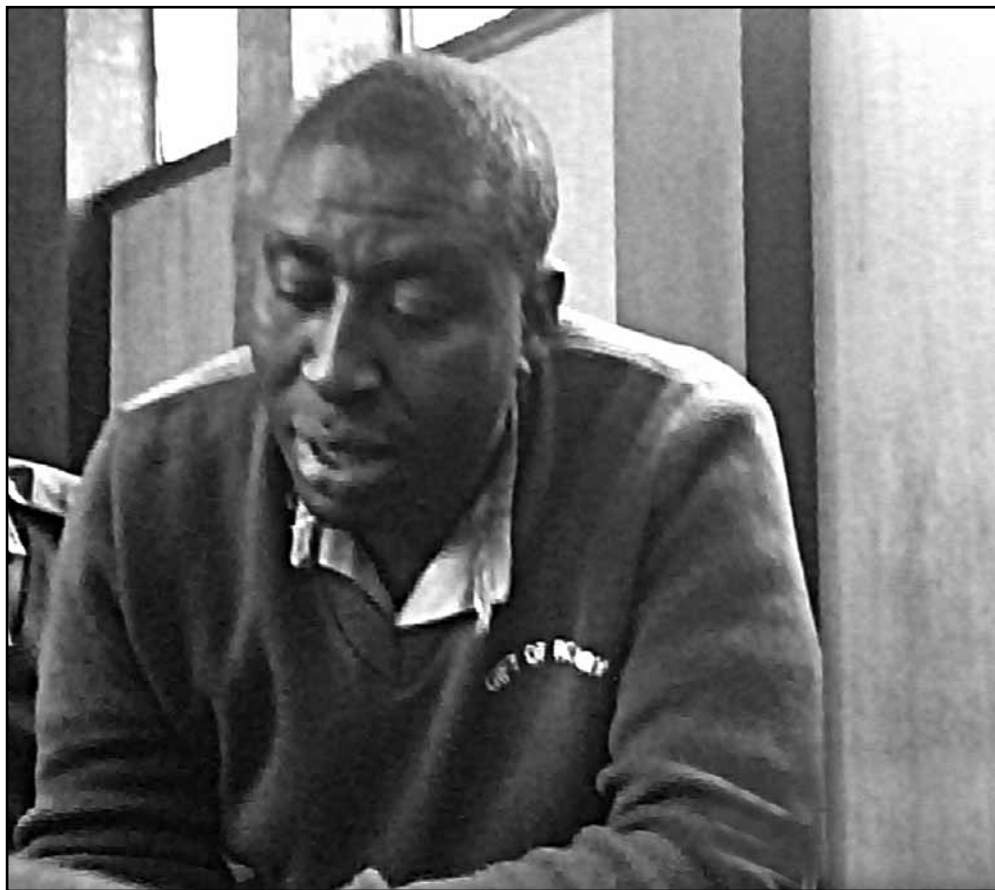
"I have been informed that Dowa and his colleagues were staying in my house for six days before I surrendered myself to the police. I am told they (police) arrived on a Thursday. They were even sleeping on my bed and eating my food," said Maguwu.

While Maguwu's testimony, made during International Day Against Torture week did not shock many, it starkly reminded Zimbabweans, particularly human rights defenders, how their work and lives remained unsafe.

Clad in a grey prison jersey and spotting a pensive look and avoiding direct contact with a packed courtroom that included several of his relatives, Maguwu said the police were out to fix him.

"They took the car, some bags and for the rest I think the family knows better than me. It defies logic why they took my car," he added.

"Because of the cold conditions, I have been subjected to, I developed swollen tonsils and the doctor had to operate me some ten days ago. There has not been any sense of urgency in the investigations. They (police) have taken



Farai Maguwu

interest in my suffering and incarceration in remand prison."

Maguwu's case has been characterised by the use of torture, terror and fear since police started looking for him late in May.

Maguwu told the court that police arrested his young brother, Lisbern after failing to locate him at his Chikanga home in Mutare. The diamond rights researcher said Lisbern was tortured while

in police detention, at the same time being quizzed about his whereabouts and activities.

The police threatened Lisbern's lawyer Blessing Nyamaropa of Zimbabwe Lawyers for Human Rights (ZLHR).

Harare Magistrate Don Ndirowei on Friday denied Maguwu bail, the third time the diamond rights activist has failed to secure freedom before the courts since his arrest on 3 June. This was

despite strong arguments by Maguwu's lawyer Beatrice Mtetwa that the police were deliberately delaying investigations to prolong Maguwu's stay in prison.

In a twist, Dowa, who claimed that he was recalled from a UN peacekeeping mission in Kosovo in 2003 on health grounds, claimed that defence lawyers were delaying the case by denying him access to a laptop that was recovered at the diamond activist's house.

"He (Maguwu) said he would want the authority of the board of directors and all five board members (of Maguwu's Centre for Research and Development) who are out of the country. One is in Japan, another in the United Kingdom, another in Canada while the fourth was in South Africa. It is very difficult to get in touch with them to get the authority to access the laptop. It is a very difficult task to look for somebody in Japan or South Africa without a specific address," said Dowa.

Mtetwa however said Dowa was inventing excuses. She argued that the laptop was unnecessary in the case because the State's case rested on a document that was already before the courts.

For the first time, Dowa was forced to defend his expulsion from the UN mission in Kosovo, where rights groups were calling for his arrest or deportation because of his alleged record in torture cases.

Dowa said he could produce medical statements to prove that he was not expelled, but fell sick while on duty.

Zimbabwe is one of the countries where the use of torture by police seeking confessions from suspects or to punish political is still rife.

GALZ employee pleads innocent

HARARE-Ignatius Mhambi, an employee of the country's only gay and lesbian group, the Gays and Lesbians of Zimbabwe (GALZ), has pleaded not guilty to charges of possessing pornographic material when his trial commenced before Harare Magistrate Sandra Mupindu last Thursday.

Ignatius Mhambi, a consultant accountant for GALZ is on trial on charges of possessing pornographic material in breach of the country's censorship laws. The police allege that they recovered pornographic material from Mhambi's office drawers when they raided the GALZ offices in central Harare in May.

The GALZ employee entered a not guilty plea after the charge of possessing pornographic material had been put to him by State prosecutor Memory Mukapa.

Prosecutor Mukapa tendered two exhibits to the court, a Digital Video Disc (DVD) entitled Truth or Fantasy and a booklet

containing pornographic material, which was allegedly recovered from Mhambi's office.

The prosecutor led evidence from the State witness Detective Sergeant Charity Mankosi Sibanda who was part of the police team that raided the GALZ offices and allegedly recovered the pornographic material. Mhambi's trial will continue today while that of his workmate Ellen Chademana, an administrative assistant at GALZ will commence this Wednesday.

Prosecutors say the two GALZ employees will once again stand trial on a second charge of undermining the authority of President Robert Mugabe.

Mhambi and Chademana were served with summons to stand trial last Thursday for allegedly undermining the authority of or insulting President Mugabe, but the trial was postponed as the State preferred to finalise their trial for possession of pornographic material.

The police allege that Chademana and Mhambi contravened Section 33 (2) (a) (iii) of the Criminal



Detective Inspector Gomo, one of the police detectives who arrested the GALZ employees

Law (Codification and Reform) Act in that they publicly, intentionally and unlawfully made a statement about or concerning President Mugabe with the knowledge or realizing that there is a real risk or possibility that the statement is false and that it may cause hatred, contempt or ridicule of the octogenarian leader.

The police allege that the two GALZ employees displayed a plaque of former San Francisco Mayor Willie Lewis Brown, Jr in their office in which the African-American denounces President Mugabe's homophobia against gays and lesbians.

Intimidation affecting constitution making: COPAC

HARARE – The Constitutional Parliamentary Committee (COPAC) has admitted that there are cases of intimidation, a development likely to affect the exercise to gather the views and ideas of Zimbabweans to be included in the new constitution.

“As opposed to violence, we have had cases of intimidation. We urge people to report such cases. Once we establish that there is intimidation or violence we will put measures to redress that,” said COPAC co-chairperson Douglas Mwonzora in an interview with The Legal Monitor.

“We still have many places to attend to (to get people’s views), so we want to get there without any cases of violence. We had cases where people are being subjected to undue influence.”

Zimbabwe’s troubled constitutional outreach programme enters its third week amid reports of incidents of intimidation, disruptions and no-shows in major towns and cities.

When The Legal Monitor attended a COPAC outreach in Marondera, the people said they were longing for a new constitution.

At Igava farm-about 50km south of Marondera-people spoke as if they were singing from the same hymn book.

“We want a president who has a well-known history of liberation war. We do not want a prime minister,” said speaker after speaker. Even when other issues had been raised, the issue of a “president who has a credible war history” kept on propping up.

“There is no way we can ask people not to say what they want-whether it is a party position



Under fire... COPAC coordinator Peter Kunjeko (circled) is mobbed by outreach members demanding their allowances. Such chaotic scenes have characterised several COPAC activities

or not. All we are against is intimidation or violence,” said Mwonzora.

Mwonzora, who is from Prime Minister Morgan Tsvangirai’s MDC, co-chairs COPAC with Munyaradzi Paul Mangwana from President Robert Mugabe’s ZANU PF party and Edward Mkhosi from Deputy Prime Minister Arthur Mutambara’s party.

The constitution-making process finally took off last month after being delayed for eleven months due to a myriad of problems, including bickering between ZANU PF and the MDC over how the reforms should take place.

The proposed new charter is expected to usher in new elections. President Mugabe has insisted new polls should be held next year whether or not

there is a new constitution, while Prime Minister Tsvangirai has said elections must be preceded by a new and democratic constitution.

Zimbabweans hope a new constitution will guarantee human rights, strengthen the role of Parliament and curtail the President’s powers, as well as guaranteeing civil, political and media freedoms.

Violence clouds electoral reforms

HARARE-The government last week continued with talk of electoral reform agreements, but failure to end violence and abuse of the law continues to fuel doubts on the ability of the coalition partners to deliver a credible election on the basis of paper reforms alone.

Justice Minister Hon. Patrick Chinamasa announced that he would finally be tabling before Parliament proposed amendments to the Electoral Act agreed last year. The changes will among other things compel the Zimbabwe Electoral Commission to release presidential election results within five days of voting, provide for an audit mechanism for the results and barring police officers deployed to polling stations from taking part in voting processes such as assisting the blind or incapacitated voters.

Such voters will be assisted only by people of their choice above 18 years of age.

According to the proposed changes, political parties and candidates contesting the election would have free access to an electronic version of the voters’ roll.

The reforms present a raft of measures to curb violence such as the setting up of a special body to receive complaints or allegations of electoral violence, monitor and investigate such reports and the setting up of special electoral courts empowered to ban candidates involved in violence from further participation in the polls. The proposed amendments also provide for polling station based voter registration instead of ward based registration.

While the proposed changes cover a wide range of concerns, organisations such as Zimbabwe Election Support Network (ZESN) say the rights of Zimbabweans in the Diaspora to vote should be included, as well as opening up space for civil society to conduct voter education unhindered. ZESN, a coalition of non-governmental organisations, is the country’s biggest electoral watchdog group.

An area of concern however, is the eradication of conditions that have made it impossible for Zimbabweans to freely choose a government through a clean ballot process since 2000.

These conditions include the continued violence in rural areas, where rights groups and political parties such as Prime Minister Morgan Tsvangirai’s Movement for Democratic Change continue to report widespread assaults and intimidation by President Robert Mugabe’s supporters and security agents.

ZESN has said paper reforms will mean nothing if issues such as security sector and judicial reforms continue to be ignored.

More worrying for civil society is the intimidation and violence that has characterised the constitution making process outreach programme, a process that is supposed to lay the foundation for future credible elections among other democratic reforms. The Zimbabwe Peace Project, Zimbabwe

Lawyers for Human Rights and ZESN have complained about the arrest and harassment of some of their monitors during the first two weeks of the outreach programme. They say this pattern of violence and selective application of the law could spill to elections if the government continues to ignore the scourge.

“The police did not respond to cases of political violence and for the negotiators to entrust the same police with protection of citizens where they failed in the past without real transformation in the security makes citizens vulnerable to electoral violence. ZESN advocates for the transformation of the security sector to enable them to protect citizens and not perpetrate violence. There is need to restore citizens’ trust in these institutions before they can be given important roles to ensure peace and security in pre-election, election and post election times,” said ZESN in a recent critique of the reforms.