

# Bondnotes law in court

HARARE-The High Court is expected to preside over an application filed by Zimbabwe Lawyers for Human Rights (ZLHR) seeking an order to set aside a law promulgated by President Robert Mugabe proclaiming the introduction of bond notes.

The application filed last week on Monday follows President Mugabe's side-stepping of Parliament on October 31 when he issued a decree clearing the way for the introduction of bond notes. He enacted the Presidential Powers (Temporary Measures) Amendment of the Reserve Bank of Zimbabwe Act and Issue of Bond Notes Regulations 2016, which were contained in Statutory Instrument 133 of 2016.

In issuing the decree, President Mugabe invoked his so-called presidential powers to unilaterally amend the Reserve Bank of Zimbabwe Act and attempted to legalise the imminent introduction of bond notes in Zimbabwe as the country's currency to be utilised alongside a basket of other foreign currencies that are already in use in the southern African country.

President Mugabe indicated that Finance and Economic Development Minister Hon. Patrick Chinamasa could issue a fresh currency called bond notes and bond coins, which will be legal tender in Zimbabwe and set the exchange rate of the bond notes against the US dollar and directing that each unit of a bond note is exchangeable for one US dollar.

ZLHR wants the High Court to set aside President Mugabe's decree as it is unconstitutional as the Presidential Powers (Temporary Measures Act) (Chapter 10:20) gives sweeping powers to the 92-year-old leader of making laws virtually on every subject.

In a founding affidavit filed as part of the application by ZLHR Acting Executive Director, Roselyn Hanzi, the human rights organisation wants the High Court to declare the proposed introduction of bond notes as unconstitutional and therefore null and void.

"As a human rights association, we are concerned with the protection of the Constitution and the need to ensure that our Constitution is respected. This too, we believe, is a function of the courts and the first respondent (President Mugabe) himself," said Hanzi in an affidavit. "This Act gives sweeping powers to the President of making laws virtually on every subject. It is our contention that Zimbabwe



Dzimbabwe Chimbga

is a constitutional democracy governed by the Constitution. In this regard, we regard section 2 of the Constitution of Zimbabwe as a key foundational provision."

The human rights organisation also wants the High Court to declare the Presidential (Temporary Measures) Act as ultra vires the Constitution and to be set aside.

ZLHR lawyers Tendai Biti and Dzimbabwe Chimbga, who cited President Mugabe, Hon. Chinamasa and Reserve Bank of Zimbabwe Governor Dr John Mangudya argued that President Mugabe acted illegally by not allowing Parliament to scrutinise such a deed and not allowing legislators to consult members of the public.

Biti and Chimbga argued that presidential powers could only be used in emergencies and the bond notes law that he was tinkering with was not an emergency since the government through Dr



Roselyn Hanzi

Mangudya first announced the introduction of the surrogate currency in May.

ZLHR lawyers are now awaiting a determination by judicial officials on when the application will be set down for hearing.

Many Zimbabweans and civic organisations have long criticised the use of a decree to establish laws.

Below is Veritas commenting on the use of Presidential Powers (Temporary Measures) Act

"Regular readers will not need reminding that the Veritas position is, and has been since 2013, that the Presidential Powers (Temporary Measures) Act is unconstitutional in its entirety. But the Government has continued to use it to gazette regulations covering a fairly wide range of controversial issues. So far, no-one has launched a serious legal challenge to the Government's position.

## A temporary measure only

As the title of the Presidential Powers (Temporary Measures) Act suggests, and as the text of the Act confirms, regulations made under the Act are temporary measures only. Unless confirmed by Act of Parliament they expire after 180 days. If, as must be the case, the Government intends bond notes to be a feature of life in Zimbabwe for longer than 180 days, it will have to go to Parliament with an appropriately worded Bill.

## A rushed job?

Although the introduction of bond notes has been seriously talked about by the Governor of the Reserve Bank and the Minister of Finance and Economic Development for several months, SI 133 bears signs of hasty preparation. For instance there are two section 2s. And in section 3(1) – which should be 4(1) – of the regulations the reference to "section 44A of the principal Act as inserted by these regulations" should have been to section 44B. Section 44A has been in the Act for some time. It is section 44B that is inserted by these regulations.

## Can the SI be challenged?

Yes, on at least three grounds:

1. As we suggested above, the Presidential Powers (Temporary Measures) Act, under which the SI was made, is unconstitutional. No SIs can validly be made under it.
2. Even if the Act were constitutional, it empowers the President to make regulations to deal with situations which are so urgent that it is "inexpedient" to wait for Parliament to pass an Act dealing with them. That was not the case here. There was ample time after bond notes were first mooted for a Bill amending the Reserve Bank of Zimbabwe Act to have been prepared and presented to Parliament. This would have made it unnecessary to resort to the Presidential Powers Act.
3. The SI itself contains a fatal inconsistency. The new section 44B which the SI purports to insert in the Reserve Bank of Zimbabwe Act empowers the Minister of Finance to issue notices authorising payments by bond notes which "are exchangeable at par value" with any specified currency.

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# Violence at Parly Hearings worry ERC

MUTARE: Public hearings of Parliamentary Portfolio Committee on Justice, Legal and Parliamentary Affairs meant to find ways to expedite electoral reforms have continued to experience violent disruptions with the latest incident in this eastern border city on Thursday last week.

According to the Election Resource Centre (ERC), suspected youths and women of the ruling ZANU PF party caused the disruption of the public hearing.

“In the melee that ensued, the violent ZANU PF supporters assaulted Honourable Jessie Majome, the Chairperson of the Committee. The assailants, mostly women charged at Hon. Majome and dragged her by the collar baying for her blood. Majome has since reported the incident at Dangamvura Police Station,” said the Tawanda Chimhini-led ERC in a statement after the incident. “The disruption in Mutare follows similar incidents at Nyamakwere Hotel in Mutoko on the 26<sup>th</sup> of October 2016.”

Police and Hon. Majome could not be immediately reached for comment about the Mutare incident which happened at Beit Hall in Dangamvura.

Parliamentary Portfolio Committee on Justice Legal and Parliamentary Affairs is conducting consultative meetings organized at the behest of ERC and other civic groups who petitioned Parliament to expedite electoral reforms in line with the May 2013 enacted Constitution.

“The ERC is gravely concerned by the growing trend which is a clear indication of deliberate efforts to disrupt the ongoing public hearings which are aimed at soliciting public input towards alignment of Electoral Laws with the Constitution of Zimbabwe.



Tawanda Chimhini

“It is the hope of the ERC that the success of this process would be a first step towards constitutionalism, credible elections and the creation of a level playing field in electoral processes. However, some political parties who have for a long time benefitted from the status quo are clearly against these efforts of improving electoral processes in the country. Zimbabwean citizens must be allowed to freely express themselves and contribute towards the holding of free, fair and credible elections,” the ERC executive director Chimhini said.

“Furthermore, the attacks on Parliamentarians must be condemned in the strongest possible terms. It is unacceptable and perpetrators must face the full wrath of the law.

Violence, whatever form, encroaches upon Section 52 (a) of the Constitution which guarantees the

right of every person to freedom from all forms of violence from public and private sources. All citizens, state and non-state actors, have the right to participate and input their views on the electoral reform process freely without fear.”

The Parliamentary Portfolio Committee on Justice Legal and Parliamentary Affairs is gathering citizens’ views on the ERC petition which calls for the extension of the right to vote to all eligible voters including the hospitalised, prisoners and those in the diaspora, independence of the Zimbabwe Electoral Commission (ZEC), increased swift access to electoral justice, opening up voter education to stakeholders as a continuous process and enabling an accessible and transparent voter registration process. Last week’s meeting in Mutare was the fourth meeting after Harare, Concession and Mutoko.

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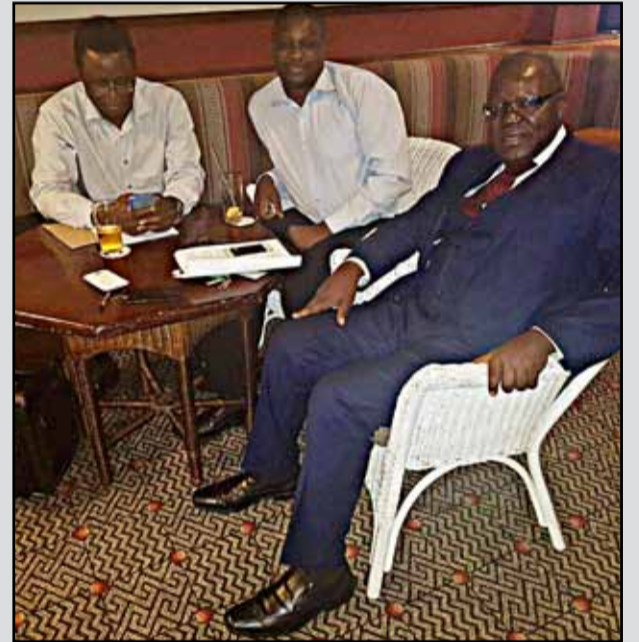
The SI then goes on to say that the Minister is deemed to have issued a notice authorising payment by bondnotes “as if each unit of a bond note is exchangeable for one United States dollar”.

The Minister’s notice, in other words, does not say that bond notes are in fact exchangeable for US dollars, which he is required to say by the new section 44B.

### Conclusion

It is deplorable that once again a Minister should have published a statutory instrument with such far-reaching and potentially explosive consequences on such shaky legal foundations. The instrument illustrates the dangers of Parliament giving extensive legislative powers to the Executive. If the instrument had been drafted as a Bill and introduced into the National Assembly to be passed as an Act of Parliament there would have been no problems as to its legal validity, and its potential consequences could have been thoroughly debated before it became law.

We must once more urge Parliament to devise ways of ensuring that statutory instruments with



#Bondnotesmustfall...Anti-bond notes lawyers Tendai Biti and Zimbabwe Chimba of ZLHR briefing Advocate Tererai Mafukidze regarding ZLHR’s High Court application challenging the introduction of bond notes in Zimbabwe

important economic and social effects are not published before there has been adequate public consultation. Perhaps a system can be put in place under which Ministers submit important statutory instruments to the Parliamentary Legal Committee [PLC] for assessment, and to relevant portfolio committees so that these committees can consult the public about them in the same way as they do with Bills.”



Jessie Majome

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# Four judges eye Chief Justice post

HARARE-The Judicial Service Commission (JSC) has started the process to replace Chief Justice Godfrey Chidyausiku who is set to retire at the end of February 2017 with four candidates being invited for public interviews.

Deputy Chief Justice Luke Malaba is one of the four candidates who have emerged from the nomination process. Others are two judges of the Supreme Court Justice Paddington Garwe and Justice Rita Makarau and High Court Judge President Justice George Chiweshe.

In October, the JSC invited members of the public and President Robert Mugabe to nominate candidates by close of business on Monday 31st October in accordance with section 180 of the Constitution.

After the interview in public on 12 December, the JSC is obliged to, as soon as possible, submit a list of three names to the President, who will select and appoint the next Chief Justice.

Recently, the JSC published Guidelines on the Appointment of Judges. They include submitting the list of candidates to the Law Society of Zimbabwe and other relevant organisations for comments on the professional conduct of the nominees, to be taken into account by the JSC in assessing the nominees, as well as inviting the candidates to complete a detailed questionnaire providing personal and professional information, including "any existing social, financial, political or other circumstance which may bring the judiciary into disrepute or have implications on the probity of the nominee for the office of Judge".

The Guidelines also provide for written comments on the nominees to be submitted by any member of the public. Members of the public can, therefore, play a part in this stage of the process, by submitting comments to the JSC on any or all of the candidates. But anonymous comments will not be entertained. Comments should, therefore, be in writing and identify the person making them.

The JSC will inform each nominee of adverse comments received regarding him or her, and may question nominees on such comments during the public interviews.

**Deadline for comments:** Although no formal deadline has been set for comments, they should obviously be submitted to the JSC as soon as possible, to allow officials enough time to inform nominees about adverse comments - say, by the last day of November. The JSC offices are in the Old Supreme Court Building, corner Kwame Nkrumah Ave and Third Street, Harare [next door to the public entrance to Parliament]. Telephone numbers are Harare 704118 or 706260.

**Who Will Conduct the Interviews and Decide on the Final List of Three Nominees?**

The interviews will be conducted and the list decided by the members of the JSC. On paper the membership of the JSC is thirteen. But there are two long-standing vacancies, and two of the current members - Deputy Chief Justice Malaba and Judge-President Chiweshe - will be ineligible to take part because they are themselves candidates. So the task ahead will fall to the other nine current members, who are: Chief Justice Chidyausiku; Justice Hapipias Zhou; Chief Magistrate Mishrod Guvamombe; Chairperson of the Civil Service Commission Dr Mariyawanda Nzuwah; Mr Lloyd Mhishi, Mrs Priscilla Madzonga and Mr Josphat Tshuma [legal practitioner members designated by the Law Society]; and Mrs Priscilla Mutembwa [accountant member designated by the Public Accountants and Auditors Board]. The nine of them are more than enough to constitute a quorum capable of valid acts and decisions, because the minimum for a quorum is seven members [Constitution, section 344].

**Note:** The two JSC vacancies are puzzling, and have existed all along. The missing members [Constitution, section 189 (1)] are -

- a professor or senior lecturer of law designated by an association representing the majority of the teachers of law at Zimbabwean universities or, in the absence of such an association, appointed by the President
- a person with at least seven years' experience in human resources management, appointed by the President.

What is the reason for failing to make the appointments? Although it is a fact that there is no national association of law teachers [why not, you law teachers?], that situation is catered for by the Constitution and clearly does not prevent an appointment of a suitable person by the President. And surely it is possible to find a suitable HR person? These are questions for the Minister of Justice, Legal and Parliamentary Affairs.

## What Will Happen After the Interviews?

After the interviews the JSC nine will have to decide on a list of three nominees and submit the list to the President. This will involve eliminating one of the four candidates. The Guidelines are silent on publishing the final list or identifying the eliminated candidate.

The President must then appoint one of these three nominees as Chief Justice, unless he considers that none of the three is suitable for the post. In that highly unlikely event, section 180(3) of the Constitution allows him to require the JSC to submit one further list of three qualified persons.

## Brief Biographies of the Candidates



Justice Luke Malaba (65)  
LL.B. (Hons) [University of Warwick, UK, 1974];  
LL.B. (University of Zimbabwe, 1982)  
Registered as a legal practitioner: 14th April 1986

Apart from an initial three years as a prosecutor in Bulawayo [1981-1984], Justice Malaba is a career judicial officer, whose magisterial career started at Masvingo in 1984. He rose steadily through the ranks of the magistracy and attained the rank of regional magistrate in 1990. He was appointed a judge of the High Court in 1994. He was promoted to the Supreme Court in July 2001 and became the country's first Deputy Chief Justice in July 2008.

Justice Malaba has also held an appointment as a judge of the COMESA Court of Justice.



Justice Paddington Garwe (62) pic - info@jsc.org.zw  
B.L. 1977, LL.B. 1978 (University of Rhodesia)  
Registered as a legal practitioner: 10th May 1979

Like Justice Malaba, he is a career judicial officer. He began as a magisterial assistant in 1978, and worked as a clerk of court and prosecutor before being appointed magistrate in February 1980. He rose rapidly to the level of regional magistrate in 1984 and became Chief Magistrate in 1989. After serving two years as Chief Magistrate, he became Permanent Secretary for Ministry of Justice, Legal and Parliamentary Affairs in 1991 and it was from

that post that he was appointed a High Court judge in October 1993. He became Judge-President of the High Court in 2001 and held that position until appointed to the Supreme Court in 2006.

Aside from his judicial duties Justice Garwe has taken a particular and wide-ranging interest in penal reform, and has been chairperson of the Zimbabwe National Committee on Community Service from 1993 to date and chairperson of the Pre-Trial Diversion Programme for Young Offenders from 2010 to date.



Justice Rita Makarau (56)  
B.L. 1982, LL.B. 1983 (University of Zimbabwe)  
Registered as a legal practitioner: May 1984

After gaining her legal degrees at the University of Zimbabwe, Justice Makarau started work as a public prosecutor in 1984 but very soon moved into private practice. From 1987-1990 she was legal adviser to the short-lived Parastatals Commission, before returning to private practice. She formed her own law firm in 1994, and remained in private practice until raised to the High Court bench in 2000, which makes her the only one of the four candidates with hands-on experience in private legal practice. She was also a part-time law lecturer at the University of Zimbabwe for five years from 1995. Appointed a High Court judge in 2000, in 2006 she was appointed Judge-President in succession to Justice Garwe, and served in that capacity until her appointment to the Supreme Court in May 2010. Although she remains a Supreme Court judge, her judicial work on that court has been largely on hold following her appointments as Acting Secretary to the Judicial Service Commission in 2010 and chairperson of the Zimbabwe Electoral Commission in March 2013, both of which positions she still holds - but would, of course, have to relinquish if appointed Chief Justice.

She held a non-constituency seat in Parliament from 1995 to 2000, courtesy of appointment by President Mugabe, and was a member of the Parliamentary Legal Committee. She was a member of the Constitutional Commission 1998-2000.

Before becoming a judge, Justice Makarau was active in women's organisations and charitable causes. She is a member of the Zimbabwe Women Judges Association and of the International Association of Women Judges.



Justice George Chiweshe (63) pic - info@jsc.org.zw  
B.L. 1985, LL.B. (Hons) 1987 (University of Zimbabwe)  
Registered as a legal practitioner: February 1988

Justice Chiweshe is a liberation war veteran whose legal studies at the then University of Rhodesia were interrupted in 1975 by his departure to become a ZANLA combatant, where he achieved the rank of Detachment Political Commissar. He became a prosecutor in 1980 and later completed his legal studies at the University of Zimbabwe. In 1983 he joined the Zimbabwe National Army, where he served in the Directorate of Legal Services, becoming its head and Judge Advocate General in 1996 and attaining the rank of Brigadier-General.

He was appointed to the High Court in 2001. His judicial work was interrupted for several years by his tenure as Chairperson of the Delimitation Commission of 2004 and Chairperson of the Zimbabwe Electoral Commission from 2005 to 2010. In August 2008, together with other retired officers, he was promoted to Major-General by President Mugabe. Shortly after returning to his judicial duties from the Electoral Commission, he became Judge-President of the High Court in May 2010 in succession to Justice Makarau. He has occasionally acted as a judge of the Supreme Court/Constitutional Court.

## Chief Justices of Zimbabwe to Date

Chief Justice Hector Norman Macdonald (1977 to 1980)

Chief Justice John C.R. Fieldsend (July 1980 to February 1983)

Chief Justice Telford Georges (March 1983 to February 1984)

Enoch Dumbutshena (29 February 1984 to 1990)

Chief Justice Anthony R. Gubbay (from 1991 to 2001)

Godfrey Guwa Chidyausiku from 2001 to present. But due to retire end of February 2017.

Guidelines on the Appointment of Judges

## Introduction

In terms of Section 180 of the Constitution, whenever it is necessary to appoint a judge, the Judicial Service Commission must advertise the position, invite the President and members of the public to make nominations, conduct interviews in public of prospective candidates, prepare a list of three qualified persons as nominees for each position and submit the list to the President, who must appoint one of the nominees and cause such appointment to be published in the Gazette.

The qualifications for office for each court are detailed in the Constitution. These include the requirement that to be appointed as a judge, a person must be a fit and proper person to hold that office.

In carrying out its mandate in terms of section 180 of the Constitution, the Judicial Service Commission is bound by the provisions of that section. It shall adopt the processes that follow hereunder in fulfilling its mandate.

## Purpose of the guidelines

These guidelines:

- set out the essential processes that the Judicial Service Commission will follow in implementing section 180;
- act as an aide-memoir and checklist for essential matters which the Judicial Service Commission must take into consideration in determining the qualifications and probity of the nominees for judicial office during the selection process;
- inform the entire decision-making process of the Judicial Service Commission.

The guidelines also take cognisance of the imperatives of section 191 of the Constitution for the conduct of the business of the Judicial Service Commission in a fair, just and transparent manner. The guidelines encapsulate these imperatives.

Additional sourcing: Veritas

# MP troubled for national colours

HARARE-Parliament security has again blocked Mutasa Central MP, Trevor Saruwaka from attending parliamentary proceedings for wearing an outfit with national flag colours.

This is the third time that Hon. Saruwaka has been barred from attending parliamentary proceedings because of this type of dressing.

He is already challenging the decision in the High Court with the help of Zimbabwe Lawyers for Human Rights.

“They said until they see a letter from the Speaker of the House of Assembly reversing the ban they are not going to let me in.

“I was left with no choice but to go back home,”

said Hon. Saruwaka after last week’s debacle.

“This clear violation of the Constitution and abuse of the standing rules and orders by the Speaker must be stopped.

“If MPs don’t enjoy rights enshrined in the national Constitution in Parliament what chance of enjoying their rights do the people of Muponda village in Mutasa Central stand? Nil. It’s a sad chapter in the lives of all free thinking Zimbabweans,” he said.



Hon Trevor Saruwaka

## Minister in trouble over VID officials

HARARE-A 24-year-old lady has taken Hon. Jorum Gumbo, the Minister Of Transport and Infrastructural Development to court seeking damages after she lost her mother last year when a vehicle she was in lost control and hit a tree while being chased by officers from the Vehicle Inspectorate Department (VID).



David Hofisi

Vaida Nyamusenguda died on 15 October 2015 and her daughter Charity has since instructed David Hofisi of Zimbabwe Lawyers for Human Rights (ZLHR) to assist her to ensure that the VID and the government account for its actions.

The lawyer said he is now preparing for pre-trial conference processes.

The rights lawyers group has for years represented Zimbabweans who have resorted to courts to fight impunity which the State has enjoyed for many years before ZLHR came into being 20 years ago.

## Student takes Morgan Zintec head on

HARARE- Morgan Zintec Teachers College has been embroiled in a legal dispute after it turned away a female student it had initially admitted and started training.

Twenty-year-old Miriam Shamu successfully applied for admission into the teacher training program at the college this year.

During orientation week, she was instructed to drop out of the primary school training program because she did not have a pass in Integrated Science at Ordinary Level.



Bellinda Chinowawa

She then approached Zimbabwe Lawyers for Human Rights (ZLHR) to intervene to hold the public institution accountable to the principle of administrative justice.

Last month Bellinda Chinowawa from the rights lawyers’ group took instructions from Shamu and sent a letter of demand to Morgan Zintec College demanding her immediate reinstatement.

The office of the principal of the Ministry of Higher and Tertiary Education-owned institution refused to sign to acknowledge receipt

and instead ranted about how ZLHR is forcing the college to admit students it had rejected.

ZLHR is now working on an application to the High Court to rescue the situation.

Morgan Zintec Teachers College was established in 1981 and is one of Zimbabwe’s first Teacher training institutions that produces Primary School level teachers in the form of a University of Zimbabwe issued Diploma.