

# Police brutality shocks Gweru

- *Cops cheer as 'visibly drunk' officer shoots, tortures suspects*
- *victim fights back, demands compensation from ZRP perpetrators*

GWERU-For the shooting and torture of a handcuffed suspect, four Zimbabwe Republic Police (ZRP) members could pay their victim up to \$40 000 in compensation, as human rights lawyers intensify the fight against impunity.

Intervention by Zimbabwe Lawyers for Human Rights (ZLHR) has forced several rogue law enforcement agents to pay compensation to victims of police brutality in recent years.

In the latest case, the four Gweru police officers' actions were so barbaric that the tortured suspect, Killian Maphosa, is lucky to be alive.

As part of its anti-impunity campaign, ZLHR is now assisting Killian Maphosa to sue the police officers to ensure that perpetrators of human rights violations within the ZRP pay for their actions.

ZLHR member, Takashinga Pamacheche of Dube and Gundu Legal Practitioners, has also filed a letter of complaint with the police, in addition to dispatching letters of demand to the rogue law enforcement agents.

Maphosa, through ZLHR member Pamacheche, is demanding \$10 000 in damages for cause of disability, pain and suffering, torture, inhuman and degrading treatment, trauma and humiliation.

"In the event of your failure to pay the demanded sum, we have further instructions to take legal proceedings against you and all legal costs incurred therein shall be borne by you," wrote Pamacheche.

Arrested on June 6, Maphosa and an alleged accomplice, Shadreck Ndlovu Chidhuza, were severely assaulted while in police custody.

The worst was still to come.

They were shot while in handcuffs and leg irons by one of the police officers, Detective Constable Jonathan Mudumha, who was "visibly drunk", according to Pamacheche.

The other three officers, Loveness Mapanzure, Amos Mushayavanhu and Fredrick Chiokoyo, joined in the torture, cheering Muduma on.

"The injuries sustained by our client are so severe that he needs clutches to aid him to walk," wrote Pamacheche.

"After the shooting, DC Jonathan Mudumha falsely claimed that our client was trying to escape from a lawful arrest. We wonder how a person in leg irons and handcuffs and seated in a motor vehicle can escape from arrest," she added.

"As if the illegal shootings were not enough, our client was assaulted on both knees with an empty beer bottle on both knees, elbows and all over the body by DC Jonathan Mudumha who was visibly drunk and in the process violent and reckless and you did not take any action to prevent the torture.

"As you might be aware, torture was condemned and outlawed a long time ago in our jurisdiction," wrote the human rights lawyer in her letters of demand.

Police pretended to be taking the suspects for scene indications before shooting them.

After being shot, the two were taken to Hwahwa Prison to await trial.

Pamacheche is now fighting to access medical records for her client after the officer-in-charge at Hwahwa Prison denied her access, insisting on a court order.

In her application to the Gweru Magistrates Court for the order, Pamacheche said her client was not receiving any meaningful medical attention.

ZLHR said the anti-impunity drive was important to ensure that law enforcement agents act within the confines of the law.

"This is part of our campaign to fight impunity, lawlessness and bring accountability to the state or state actors," said ZLHR.

## Know Your Rights

**Section 53 of Constitution of Zimbabwe**  
Freedom from torture or cruel, inhuman or degrading treatment or punishment

No person may be subjected to physical or psychological torture or to cruel, inhuman or degrading treatment or punishment.



Desperate times... Children scrounge for maize grain that might have spilled off a harvester at a farm in Mt Hampden on the outskirts of Harare. Even though the Right to Food is enshrined in the Constitution, millions of children are starving due to a devastating drought as well as government's failure to provide enough food assistance to vulnerable communities. Pic: Legal Monitor



# Mugabe insult laws fail to bite

HARARE - If the number of people who have been charged under Section 33 of the Criminal Law is anything to go by then President Robert Mugabe takes offence in anything.

Many have been brought to court for either attacking Mugabe's character or well, his physical appearance.

Even passing a comment on the wife Grace can land one in hot soup.

Thus at 92 Mugabe stands out as the most insulted person in the country as many are being hauled before the courts for the offence.

Lately, a number of people have found themselves condemned in prisons for passing a comment that either reprimands or challenges, or if the police feel like it, insults the president.

Although the Constitution guarantees freedom of expression, that right falls away the moment one has Mugabe in their statements.

Zimbabwe Lawyers for Human Rights (ZLHR), the civic rights which represents ordinary people in legal matters, says that since 2010 it has represented over 150 persons who would have been dragged to court charged with insulting Mugabe.

Still those are the lucky ones who would have access to the lawyers, for some are just arrested by the police and then released after some time behind bars.

MDC secretary-general Douglas Mwonozora ranks among the high profile personalities who have been caught in the snares of Section 33 of the Criminal Law, after he was accused of calling Mugabe a "goblin", during a Nyanga rally.

Mwonozora approached the Constitutional Court(Con-Court), challenging the constitutionality of the charges, arguing that the State was infringing upon his right to freedom of expression.

His lawyer then Tawanda Zhuwarara, who appeared with Nelson Chamisa said the statements did not constitute an offence and were subjective but meaningless at the same time, because Mugabe is not a goblin.

On the other hand, Edmore Nyazamba, representing the State, said an offence had been committed, adding that the importance lied on the effects of the statements.

However, chief justice Godfrey Chidyausiku asked if the State would simply prosecute an individual for making political statements.

"If someone is going to call the president "gamatox" or "weevil", are you going to prosecute him? Are these not reckless political statements.

"In politics, people call each other names. Why are you bringing it for prosecution?" Chidyausiku asked.

"Why should the law bother itself about it? You have to be an imbecile to believe that the president is a goblin," he said.

In a recent interview, Mwonozora castigated the State apparatus for the continued abuse of the criminal law.

"I have been a victim of that law," he said, "The State's conduct is certainly unconstitutional".

Mwonozora's sentiments were echoed by another ZLHR lawyer Obey Shava who said the charges defied the rule of law.

"Despite the strong sentiments against the insult law by the Constitutional Court, Section 33 remains part and parcel of our law. The presumption of validity says that every law is presumed valid until struck down by a competent court," Shava said.

"The observations which have been made by the court are a discouragement to law enforcement agents who keep abusing the insult law mainly as a weapon against the opposing voices to Mugabe's rule.

"It is quite disturbing that notwithstanding this clear message from the Con-Court the political players are not willing to do away with Section 33. It is a clear indication that Zimbabwe is not yet ready to embrace the rule of law."

In October 2010, Zebediah Mpofu a Harare resident found himself victimised under the same section.

Mpofu, a general hand at a private security firm had stated that "President Mugabe had ruined the country and that he was going to be dead by December 2010 then MDC leader Morgan Tsvangirai would take over as president of Zimbabwe."

The prosecutors charged that by uttering such statements Mpofu had undermined the authority or insulted Mugabe.

However, Mpofu's agony ended on Thursday, 20 October 2011 after magistrate Mudondo removed him from remand and ordered the State to proceed by way of summons.

In 2011, deputy chief justice Luke Malaba ruled that the State's facts which led to the arrest of a Bulawayo girl on allegations of sending Mugabe's "nude" picture on the social network, WhatsApp, were confused.

Malaba was commenting on the case of Shantel Rusike, who was charged under the same section after sending a WhatsApp picture depicting a nude Mugabe.

Underneath the picture was written, "Robert Mugabe turning 87 years on 21 February 2011. Happy birthday (Matibili Operation)."

An informant advised security agents who intercepted the picture, leading to Rusike's arrest. The girl then filed a Con-Court application, seeking to have the charges quashed.

"Your facts are confused. It makes no sense, it talks about the president turning 87 in 2011, when the message was sent in 2012," Malaba said.

He queried where Rusike could have managed to get Mugabe's "nude" picture.

"That is not a picture of the president in a nude state. It's the head of the president on the body of a child," Malaba said.

In 2012, a Beitbridge magistrate Auxillia Chiumburu freed a South Africa-based Zimbabwean vendor Benias Gwenhamo Madhakasi, who had been languishing in remand prison after he was arrested on April 29, 2012 at Beitbridge Border Post and charged with contravening Section 33.

He was found in possession of skeletal nude pictures portraying Mugabe's images in his mobile phone handset and one of the pictures had an inscription which read; "Happy 87th birthday (Operation Matibili) Robert Mugabe turning 87 years on February 21 2011."

Madhakasi was also charged with contravening Section 4 (5) (a) of the Protected Places/Areas for allegedly surveying or making sketches or taking photographs on protected premises.

The vendor also faced an additional charge of contravening Section 36 of the Immigration Act for unlawful possession of or making use of a permit or travel document issued to another person.

However, the case crumbled on July 24, 2012 after Chiumburu removed Madhakasi from remand and ruled that the State's antics were equivalent to a fishing expedition.

In May 2013, Bindura magistrate Tendayi Chifamba acquitted former Energy and Power Development minister Elton Mangoma who had been on trial on charges of undermining the authority of or insulting the president.

Mangoma had been on trial after he was arrested on October 10, 2013 when he allegedly uttered the words; "Chifa Mugabe chifa. Chibva Mugabe chibva," loosely translated to "Pass on Mugabe and go now" on May 18, 2012 at an MDC

political meeting he addressed at Manhenga Business Centre in Bindura, Mashonaland Central province.

In January 2014, then Attorney General Johannes Tomana conceded that facts forming criminal charges against Bulawayo-based artist Owen Maseko, who was accused of insulting Mugabe did not constitute an offence.

Maseko was accused of publishing "offensive" Gukurahundi paintings prompting the Con-Court to summon Justice minister Emmerson Mnangagwa, to justify the constitutionality of the offence.

Mnangagwa, through the Attorney General's office told the court that the law was justifiable in a democratic society.

"...insulting and undermining the president automatically has the corresponding effect of causing breach of public order and public safety," Mnangagwa said.

Early this year a cop attached to Police Reaction Group at Harare Central Thompson Joseph Mloyi, 44, of Tomlison Depot allegedly shouted "President Robert Mugabe is too old to rule and had married a prostitute Grace Mugabe".

Mloyie's case is still pending at the courts.

Presently, the courts are also seized with the case of former Zanu PF youth leader Acie Lumumba who insulted Mugabe using the 'F' word.

"...Mugabe f\*\*k you, I am drawing the red line our kids are in trouble so, it's a red line...and my name is Lumumba, Lumumba, Lumumba...", the court heard.

"...a war veteran's child...", he reportedly said, adding that Mugabe's children will be dealt with too.

During the Con-Court referral, the Viva Zimbabwe leader tore into Mugabe and challenged the nonagenarian to confront him personally about the insult.

"...Yes I said f\*\*k you to Robert Mugabe. He is a political party leader and I am too. I and him will exchange political differences and expressions," Lumumba said.

"It is just an expression and can mean what you want it to mean at that time. If you deem that me saying f\*\*k you is an insult it is just politics and we exchange expressions.

Meanwhile, Mugabe's friends-turned-foes like war veterans leaders Douglas Mahiya, Victor Matemadanda, Francis Nhando, Headman Moyo and Hoyini Samuel Bhila are also facing charges of undermining the president at the country's courts.

Source: DailyNews

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# Fall of Section 121-A seminal judgment for Zim's moribund democracy

By Kumbirai Mafunda

FOR years, Section 121 (3) of the Criminal Procedure and Evidence Act (CPEA) had been used to deny freedom to high-ranking politicians, lawyers and prominent human rights defenders.

Section 121 (3) of the CPEA gave prosecutors power to veto bail orders granted by the courts to accused persons for seven days without even being obliged to give reasons.

Junior and senior prosecutors had for years used and abused the provision to keep accused persons granted bail by the courts locked up in remand prison without giving reasons.

Fanuel Kamurendo, a 35 year-old municipal police officer employed by Chitungwiza Municipality and fellow Chitungwiza residents Shelton Masamba, Tendai Kamurendo and Wilbert Ndiweni - who are all unemployed - have emerged as heroes after their case contributed to the demise of the provision.

The four Chitungwiza residents were arrested in February 2013 and charged with malicious damage to property in terms of the Criminal Law (Codification and Reform) Act after they allegedly shredded some ZANU PF party political campaign posters.

They were acquitted after a full trial.

Granted bail by the late Chitungwiza Magistrate Kudakwashe Jarabini, the four residents were

forced to languish in custody for a further seven days after the prosecutors invoked Section 121 (3) of the Criminal Procedure and Evidence Act. In terms of that obnoxious provision, a bail award is revoked for seven working days in which time the State has the option to file its appeal, effectively suspending the operation of a judicial order granting freedom to an accused person.

In many of the cases, the prosecution did not follow up to appeal against the bail ruling or lost the appeals at the High Court, leading Zimbabwe Lawyers for Human Rights (ZLHR) to describe the use of the law as "spiteful, intransigent and groundless".

ZLHR, which represented the four Chitungwiza residents through Advocate Thabani Mpfu, who was instructed to argue the matter before the Constitutional Court by Marufu Mandevera and Kudzayi Kadzere of Kadzere, Hungwe and Mandevera Legal Practitioners, all members of ZLHR, challenged the constitutionality of the provision at the country's apex court.

The lawyers argued that the provision gives absolute and wide powers to the Prosecutor-General, who then was Johannes Tomana before he was suspended recently.

In the Magistrates Court, the lawyers challenged the invocation of this provision to the extent it undermined the twin rights of liberty and the presumption of innocence. The matter was referred to the Constitutional Court to determine the constitutional validity of Section 121 of the Criminal Procedure and Evidence Act (Chapter 9:07).

On 23 September 2015, the Constitutional Court ruled that the section was unconstitutional in that it was inconsistent with the rights to the presumption of innocence, protection of the law and the right to liberty.

So September 2015 turned out to be a good month for Zimbabwe's moribund "democracy" as people versus power came to the fore through the issuance of a judicious decision by the Constitutional Court.

This is one example of outcomes of strategic litigation, which can happen in a country when civic actors and citizens participate in the laws that that govern the State.



In granting the order declaring that Section 121 (3) of the Criminal Procedure and Evidence Act Chapter 9:07 is unconstitutional in that it is ultra vires Section 13 (1) and Section 18 (1) of the former Constitution of Zimbabwe, Chief Justice Godfrey Chidyausiku slammed prosecutors for abusing the provision and said their actions in invoking the legal provision was more "sadistic than legal."

According to Kadzere, the four Chitungwiza residents felt that they were victims of injustice and instructed their attorneys to challenge the constitutionality of the provision.

"It was not as if as lawyers we just decided to use their case to challenge this draconian provision. The clients themselves were also pushing us saying 'this provision is unfair'. They were active in making sure that this happens," said Kadzere, one of the lawyers. "They are what we would call grassroots people but they seemed acutely aware of their rights," he said.

It is all thanks to sustained legal and advocacy campaigns mounted by ZLHR with generous

support from DANIDA that the Constitutional Court last year relegated the provision to the archives, much to the relief of human rights lawyers and defenders who for years have tenaciously fought against the controversial law. DANIDA also supports various state and independent justice actors in the development of a responsive and efficient justice delivery system.

The Chitungwiza residents' case is an example of how the great work done by organisations such as ZLHR to raise human rights awareness among grassroots human rights defenders is changing to include those people who in the past had no idea about their rights.

Nonetheless, as observed by the Research and Advocacy Unit in its publication entitled Reluctant Reformers: Legislative Misalignment and the Constitution, there has been a shocking attempt by the government to interfere with pre-trial rights of suspects through proposing that the seven-day period to note an appeal against the granting of bail should be reduced to 72 hours. All this points to using subsidiary legislation to take away fundamental rights, which are already guaranteed in the new Governance Charter.

Of late, it is intriguing to note how citizens among them civil society representatives Mfundo Mlilo, Nixon Nyikadzino and Dirk Frey and recently Harare Mayor Councillor Bernard Manyenyeni have sought to protect their rights through invoking provisions of the country's new and progressive constitution which criminalises over detention of suspects.

Mlilo, Frey, Nyikadzino and Manyenyeni's lawyers successfully argued that their clients' rights were violated when they were arrested and detained beyond the prescribed 48-hour period as provided for in Section 50 (2) and (3) of the Constitution.

For ZLHR, the Kamurendo constitutional challenge is just but one of a number of success stories that the human rights organisation has recorded in recent months especially in litigation where citizens have already benefitted from its interventions targeted at asserting fundamental rights that come under threat from both state and non-state entities.

Kumbirai Mafunda is an information and communications specialist with Zimbabwe Lawyers for Human Rights.

## Police drop "WhatsApp" charges



Lawyer...Lizwe Jamela

HWANGE- A 28 year-old man, who had been charged with inciting violence using the WhatsApp platform, is now free following the intervention of Zimbabwe Lawyers for Human Rights (ZLHR).

Praise Moyo had been summoned over WhatsApp messages protesting the failure by traditional leaders to compel authorities at Hwange Colliery Company (HCC), the country's largest coal producer, to remunerate its employees.

Police in Hwange had summoned and accused the 28-year-old resident of inciting violence.

They claimed that Moyo sent messages via cross-platform instant messaging application, WhatsApp groups, questioning why traditional leaders such as chiefs in Hwange were not engaging and persuading the listed coal miner to pay its employees outstanding salaries.

But Moyo, who had secured legal representation from Lizwe Jamela of Zimbabwe Lawyers for Human Rights, was eventually set free by ZRP officers on Friday 12 August 2016.

Zimbabwean authorities have of late been intensifying a government-backed crackdown on social media platforms and applications.

## The General Laws Amendment Act falls short of expectations: ZESN

5 August 2016 – Harare - The Zimbabwe Election Support Network (ZESN) notes the gazetting of the General Laws Amendment Act (GLAA) which introduces some amendments to various laws including the Electoral Act to bring them into alignment with the Constitution. ZESN believes that the Act does not sufficiently address fundamental issues related to the Electoral Act such as the right to vote, the special vote, delimitation and media access among other issues.

ZESN notes with concern that the GLAA offers piecemeal reforms and fails to align the most substantive provisions related to the Electoral Act to fully comply with the Constitution. This appears to be a result of the omnibus approach taken by the legislature to amend more than one hundred legislative instruments via the GLAA. ZESN reiterates its previously stated position that there is need for a comprehensive process of amending all the Electoral Laws and bring them into conformity with the Constitution as well as regional guidelines on good governance and elections.

An analysis of the GLAA amendments relating to the Electoral Act shows that the Act still falls short of the constitutional provisions relating to conduct of elections. The amendments purport to transfer the responsibility of registering voters, compiling the voters' roll and ensuring the proper custody and maintenance of the voters' roll from the Registrar of Voters to the Zimbabwe Electoral Commission. However the amendments do not conform with the Constitution to the extent the Act requires the Commission to share responsibilities with the office

of the Registrar General of Votes, an office that is effectively abolished by the Constitution and the Act.

Furthermore, the amendments bring in the Executive into the election management processes by giving a significant role to the Minister in some of the electoral processes. This is contrary to the letter and spirit of the Constitution that establishes an electoral management body with exclusive mandate to manage elections, independent of any other legal person or arm of government.

ZESN is dismayed by the fact that despite conducting consultations and receiving input and submissions from civic society organizations and the general public, there was very little effort to factor those concerns into the Act. Furthermore, ZESN believes that the Act in its current state fails to fully capture a number of fundamental rights.

Section 67 of the Constitution states every Zimbabwean citizen has the right to vote and does not discriminate between citizens in Zimbabwe and those abroad. ZESN notes that the GLAA does not address the question of the right to vote for those in the diaspora and people in hospitals and jail thereby maintaining their disenfranchisement in exercising their political right to vote.

"The major concern and misgiving regarding the General Laws Amendment Act is the fact that it does not seem to vest the Commission with a clear and



Rindai Vava Chipfunde

exclusive mandate to manage elections in the letter and spirit of the constitution. Besides, the minor changes to the Electoral Act such as re-referencing and changing titles of offices, the general assessment is that the Act does not adequately align the most crucial and substantive provisions in order for it to fully comply with Constitutional guarantees and maintains the undesirable trend of taking a piecemeal approach to amending the electoral Act," said ZESN National Director, Rindai Chipfunde Vava.

ZESN continues to call for the full alignment of the electoral laws with the Constitution and for the creation of a conducive electoral environment as the country gears for the 2018 harmonised elections.



# ZBC ConCourt victory opens cans of worms

HARARE-Last month the Constitutional Court confirmed that it is constitutional for the Zimbabwe Broadcasting Corporation (ZBC) to collect compulsory licence fees from members of the public who have radio or television sets.

The ruling followed an application by Wekare & Another v The State & Others, (judgment No. CCZ 9-2016) who challenged various sections of the Broadcasting Services Act that give the ZBC power to collect listeners' licence fees from members of the public.

Below *The Legal Monitor* reproduces analyses of Veritas and Misa Zimbabwe on the development.

**Veritas:** The court held that listeners' licence fees were taxes levied by Parliament under its wide constitutional powers of taxation. That they were called "fees" did not alter their real nature, nor did the fact that the ZBC was empowered to fix their amount and to collect them for its own benefit. They were taxes and as such had to be paid. The court dismissed the applicants' argument that the ZBC's lack of editorial independence, low-quality programmes and lack of transparency rendered the fees illegal: even if the revenue from the licence fees were misused, the court said, that did not affect the validity of the statutory provisions authorising the collection of the revenue. To quote the judgment: "A law cannot be declared invalid simply because it is misused." [Comment: this means that a valid law does not become invalid simply because someone applies it wrongly; people who are aggrieved by the misuse of a law should challenge its misuse rather than try to challenge the validity of the law itself.]

On that basis the court dismissed the applications.

## Public Broadcasting and Freedom of Expression

Interesting though the judgment is on the question of taxation, its real interest from a human-rights perspective lies in what the court said about the duties of the ZBC as a public broadcaster in the light of the constitutional right to freedom of expression.

## Freedom of expression principles

The court held that the provisions of the Broadcasting Services Act providing for a public broadcasting service must be in line with fundamental principles behind freedom of expression guaranteed by the Constitution

**Note:** The case was filed in 2012, before the new Constitution came into force, so the constitutional provisions referred to in the judgment are those of the old Lancaster House Constitution. However what is said in the judgment applies equally to the provisions of the new Constitution.

The court summarised the principles of freedom of expression as the following:

- Everyone has the right to express himself or herself freely through the medium of his or her choice.
- This implies the right to access, receive and disseminate ideas, information and messages of all types through all communication systems and media - in this case electronic media.
- Public broadcasting media must in the public interest enjoy editorial independence from undue influence from both State and corporate actors.

Section 61(4) of the present Constitution reinforces the last of these principles in the following terms:

"All State-owned media of communication must-

- (a) be free to determine independently the editorial content of their broadcasts or other communications;
- (b) be impartial; and
- (c) afford fair opportunity for the presentation of divergent views and dissenting opinions."

So not only must the ZBC be independent, it must also be impartial and must fairly reflect different views and opinions. As the court said:

"When the ZBC as a public broadcaster speaks it should not be government speaking. The right to freedom of expression does not extend to protecting government from itself."

What the court meant by the second sentence quoted above was that the government's right to freedom of expression does not extend to using a public broadcaster, such as the ZBC, to express only government propaganda.

As the court explained: "What is paramount is the collective right of the viewers and listeners in receiving a balanced presentation of ideas and information on diverse matters of public concern by television and radio. The public's free speech interest in broadcasting is a collective and not an individual right in that the people as a whole retain their interest in free speech by radio and television."

This collective public right to freedom of speech in broadcasting is promoted by pluralism and diversity, by programmes which ensure that citizens have access

to a wide range of information and ideas on a variety of subjects. The court held that one of the fundamental requirements of freedom of expression is the need for a broad plurality of information.

## The Broadcasting Services Act and independence of the ZBC

The Broadcasting Services Act gives effect to these principles, the court said, by enacting a "complex statutory scheme" for a non-profit broadcasting service operated by the ZBC in the interest of the public and providing high-quality news, public affairs and other programmes. The scheme depended on the ZBC having institutional, financial and editorial independence. According to the court, the Act gives the ZBC:

- institutional independence by making it a company separate from the State,
- financial independence by allowing it to collect licence fees for its own benefit, and
- editorial independence by giving it power to decide on what programmes to broadcast, at what times, on which subjects and for what purposes.

The court pointed out, however, that the ZBC's editorial independence was not unlimited. Although it had power to decide on who participated in its programmes it could not exclude people because it disagreed with their points of view on matters of public interest. Its editorial decisions had to be reasonable and its viewpoint neutral. In other words, it had to be impartial.

## Significance of the Judgment

In setting out the principles of freedom of expression in relation to public broadcasting, and the duties of the ZBC to observe those principles, the Constitutional Court was not suggesting that the ZBC is actually observing the principles or carrying out its duties. What the court was doing was to show that the Broadcasting Services Act, under which the ZBC operates, largely conforms with the Constitution in so far as it lays down what the ZBC may and may not do. Hence, the court indicated, the applicants' case was misdirected: if the applicants were dissatisfied with the ZBC's programmes they should either have used the complaints procedure set out in section 40 of the Act or else approached a court for an order directing the ZBC to comply with the Act and the Constitution.

## What Can be Done

Whether intentionally or not, the Constitutional Court has pointed out the route to be followed by civil society organisations, political parties and individuals who feel aggrieved at political partisanship on the part of the ZBC in its radio and television broadcasts. Aggrieved parties should not challenge the levying of licence fees, or the constitutionality of the Broadcasting Services Act. Instead they should apply to the Constitutional Court or the High Court for either or both the following orders:

- directing the ZBC to comply with the Act by permitting a proper diversity of opinions to be aired in its news and public-interest broadcasts,
- prohibiting Ministers and government officials from interfering in any way with the editorial independence of the ZBC.

Applicants would have to provide clear evidence showing bias on the part of the ZBC, and suggesting that government interferes in its editorial independence. If the application is properly presented, however, the tone of the Constitutional Court's judgment in Wekare's case suggests the applicants may get a sympathetic hearing.

**Source:** [www.veritaszim.net](http://www.veritaszim.net)

## MISA - Zimbabwe analysis of Constitutional Court ruling on ZBC licences

On 20 July 2016 the Constitutional Court (ConCourt) clarified that it was mandatory for Zimbabweans in possession of a gadget capable of receiving broadcast services to pay ZBC licence fees.

The ruling was made in a matter dating back to 2012 involving two applicants, Bernard Wekare and Musangano Lodge. Both applicants were facing criminal charges under the Broadcasting Services Act (12:06) after they failed to pay licence fees.

The applicants challenged the constitutionality of the provisions of the Broadcasting Services Act on funding for the provision of public broadcasting services.

While the ruling triggered mixed reactions with obvious celebrations from ZBC and its governors and disgruntlement by those that feel they are being short-changed by the broadcaster, what escaped the attention of many observers is the court's strong affirmation of ZBC's public service mandate as a public broadcaster. In its ruling the court noted, among other pertinent observations:

There is no doubt that the ZBC is a "public broadcaster" incorporated to carry out the functions of providing

public broadcasting services. The primary purpose for the creation of a public broadcaster is to ensure that there is a balanced and consistent presentation to the public of a variety of ideas and information on diverse matters of public concern.

The communication is made through programmes broadcast on television and radio in accordance with the public's collective right of access to such ideas and information.

## It added:

A "public broadcaster" is indistinguishable from the other two types of broadcasters, namely commercial broadcaster and community broadcaster. The ZBC is not a State broadcaster. Incorporation of the ZBC in terms of the Companies Act gives it the mark of institutional independence as it is a legal persona distinct from its shareholder.

While the court's judgment appeared as having been based on the normative role of a public service broadcaster in characterising ZBC, what is clear is that the broadcaster has over the years abandoned its public service mandate.

Several reports, including those by successive parliamentary committees; ministry of information consultative processes such as IMPI; civil society and elections observer missions; have repeatedly pointed out ZBC's deficiencies as a public broadcaster resulting from its political capture and abuse by the ruling party and government.

It is a matter of public record that while ZBC is legally mandated to collect license fees from all Zimbabweans with broadcast service receivers, its governance structures and content reflect and represent the interest of those in power. Evidence of this abounds.

When juxtaposed against the ConCourt's observation, the broadcaster requires massive transformation that should be anchored on a revised broadcasting law in order to insulate it from continued political abuse and reposition it as a true public broadcaster.

Besides, this obligation is also buttressed by Section 61 (4) which stresses that all state owned media of communication must be free to determine independently the editorial content of their broadcasts or other communications.

Fundamentally, it stresses the need for state-controlled media to be impartial and afford fair opportunity for presentation of divergent views and dissenting opinions.

Noting the constitutional court's recommendations to ZBC on improving its content, accountability to the public and safeguarding its independence; and guided by its Model Public Broadcasting Framework and the African Charter on Broadcasting, MISA-Zimbabwe calls for the following in transforming ZBC:

## Purpose

ZBC must in practice be an independent body corporate, established to serve the overall public interest without interference from any quarter. In its bid to provide broadcasting services, it should ensure full respect for freedom of expression, promote the free flow of information and ideas, assist people to make informed decisions and facilitate and strengthen democracy.

## Mandate

As part of its mandate, ZBC should among other key issues:

- Provide universal access to its services with its signal seeking to reach all corners of the country and ensuring and making services available in all the official languages of the country.
- Provide access to a wide range of information and ideas from the various sectors of society and reflect, as comprehensively as possible, the range of opinions on matters of public interest and of social, political, philosophical, religious, scientific and artistic trends;
- Report on news and current affairs in a way which is not influenced by political, commercial or other special interests.
- Contribute to economic, social and cultural development in the country by providing a credible forum for democratic debate on how to meet common challenges.
- Provide credible, quality and varied programming for all interests, those of the general public as well as minority audiences, children, women, the youth and the disabled, irrespective of religious beliefs, political persuasion, culture, race and gender;
- Promote and develop local content.

Some of these responsibilities are clearly outlined in the Broadcasting Services Act's Part 1 of the Seventh Schedule outlining programming requirements for public broadcasters. ZBC should thus uphold the law.

## Independence

ZBC should have in place policies to ensure its protection from any form of outside interference or attempts to compromise its independence. This is particularly so in matters concerning the content of its

output, its editorial policy, the times and manner in which its output is supplied and in the management of all of its other affairs.

Over the years, the monitoring of the public broadcaster by media freedom lobby groups has indicated its lack of editorial independence, partisan coverage or complete censorship of national events, in violation of the broadcasting law in particular part 1(d) of the Seventh Schedule.

It compels ZBC to "provide news and public affairs programming which meets the highest standards of journalism, and which is fair and unbiased and independent from government, commercial or other interests".

Therefore, as the Constitutional Court noted, ZBC "is not permitted but required to exercise independent editorial discretion and judgment in the performance of the functions necessary for the fulfillment of its journalistic purpose and statutory obligations."

This can only happen if the broadcaster is liberated from state control and allowed to operate freely and accountable to the public. The court also noted the adverse effects of state ownership of ZBC in its exercise of duty.

It observed: "Being wholly owned by the state, the ZBC as a public broadcaster could be compromised by the pressures of operating with an inherent conflict of interest in the discharge of the dual responsibility of reporting information and bringing critical judgment to bear on public affairs".

## Governance

The governance of ZBC should be vested in a board of governors accountable to the public through parliament. The appointment process must be transparent and open and ensure participation by the public in the nomination of candidates.

The members of the board, when viewed collectively, should be persons who:

- (a) represent a broad cross-section of the population of the country
- (b) are suited to serve on the board by virtue of their qualifications, expertise and experience in the fields of broadcasting policy and technology, broadcasting regulation, media law, business practice and finance, marketing, journalism, entertainment and education, social and labour issues
- (c) are committed to fairness, freedom of expression, the right of the public to be informed, and openness and accountability on the part of those holding public office
- (d) are committed to the objectives and principles of the public broadcaster

Persons who are office bearers with the state or political parties or have business interests in the media industry should not be eligible for board membership.

To ensure participation of the public in and transparency of the appointment process:

- (a) the parliamentary committee responsible for broadcasting policy shall advertise the posts, call upon all relevant groups in society as well as individuals to nominate candidates, shortlist nominees and invite them for interviews in public hearings
- (b) an appointment panel of public as well as civil society representatives shall assist in the process of selecting members of the board
- (c) parliament should strive to reach consensus in order to appoint a board that is not partisan and avoid abuse of majority of one party

The governance of ZBC falls way far short when measured against most of these parameters as the current board appointment process is politically compromised and lacks full public participation.

## Public Complaints mechanism

While the Constitutional Court rightly noted that Section 40 of the broadcasting law establishes a public complaints mechanism members of the public can use to raise their grievances with the broadcaster, it is important that ZBC publicises and adheres to its code of conduct. This will restore the public's confidence in the broadcaster as a credible, ethical and professional source of information.

On the basis of its code, a public complaints unit, set up by the broadcaster, known and accessible to the public, should consider and resolve any complaints by members of the public against ZBC.

Most importantly, ZBC should be seen to comply with the findings of the complaints unit in order to inspire public confidence in the use of the complaints mechanism to address the broadcaster's shortcomings.

**Source:** [www.misazim.com](http://www.misazim.com)