

The LEGAL MONITOR

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COST-FREE

Victory

Gukurahundi pictures case goes to Supreme Court

BULAWAYO-Visual artist Owen Maseko's trial on charges of unlawfully exhibiting Gukurahundi artistic images is now on hold.

This was after a Magistrate granted an application by Maseko's lawyers for the Supreme Court to determine whether criminalising creative arts infringes on the freedom of expression and freedom of conscience.

Magistrate Ntombizodwa Mazhandu made the ruling on Saturday, and said it was a fact that Gukurahundi--military killings of over 20 000 civilians in Matabeleland and Midlands--did happen in the early 80s.

In her ruling Magistrate Mazhandu referred the application filed by Maseko's lawyers Lizwe Jamela, Nosimilo Chanayiwa and Jeremiah Bamu of Zimbabwe Lawyers for Human Rights (ZLHR) to the Supreme Court after accepting that the application was not frivolous and vexatious.

"It is not a secret that Gukurahundi did happen. That it happened in Matabeleland is not a secret. I don't see how the application before me is frivolous and neither is it vexatious," she said.

"It follows within the restrictions and the requirements by the law. Therefore I am referring this matter to the Supreme Court to decide on the points that have been raised by the accused person," said Mazhandu, who on Thursday visited the Bulawayo National Art Gallery to carry out an inspection in loco of Maseko's exhibition.

The ruling means that Maseko's trial will be postponed indefinitely until the finalisation of the case in the Supreme Court.

The lawyers filed their application before Magistrate Mazhandu last Wednesday. State prosecutor Tawanda Zvekare was opposing the application.

Maseko's lawyers stated that the artist's fundamental rights, provided for in the Constitution of Zimbabwe and other International Human Rights Instruments to which Zimbabwe is a State party, were being violated.

The Supreme Court will now make a determination on the violation of the protection of the artist's freedom of expression as enshrined in Section 20 (1) of the Constitution of Zimbabwe, the protection of freedom of conscience, particularly freedom of thought guaranteed in terms of Section 19 (1) of the Constitution and the protection of the law as provided in terms of Section 18 (1) of the Constitution.

The Constitutional court will now determine whether or not bona fide works of artistic creativity can be subjected to prosecution under Section 31



Owen Maseko

and 33 of the Criminal Law (Codification and Reform) Act (Chapter 9:23) without infringing on the provisions of Sections 18 (1), 19 (1) and 20 (1) of the Constitution of Zimbabwe.

In their application Jamela, Chanayiwa and Bamu argued that Maseko's freedoms of expression and thought as guaranteed by Sections 20 (1) and 19 (1) of the Constitution of Zimbabwe respectively were violated repeatedly at various stages when he was arrested in March after the police outlawed his art works and when the government recently invoked the Censorship and Entertainment Control Act to ban his paintings at the Bulawayo National Art Gallery.

The lawyers alleged that these rights were still being violated and continued to be violated through pressing fresh charges against the artist.

The lawyers stated that art was a professional trade that could never lend itself to one conclusive interpretation and was an idea or thought that

was developed over time, and then presented in visible form for public scrutiny.

Maseko, the lawyers stated, only translated his thoughts (because he had the freedom of thought under the Constitution) into a visible form (because he had the freedom of expression). Like any artist, Maseko opened himself to legitimate comment and criticism.

They said Maseko's exhibition was an expression of his artistic abilities, to which all persons who had an appreciation of artistic value were entitled to scrutinise, comment on or criticise as they deemed fit.

The lawyers said the prosecution of the talented visual artist was calculated to curtail his freedom of thought (conscience) and expression.

Jamela, Chanayiwa and Bamu argued that the abrupt stopping and prohibition of Maseko's exhibition curtailed the artist's right to freely express his views and opinion through art.

Earlier in the week, Maseko's lawyers secured another victory when the State was forced to drop charges against the artist when he appeared in court.

Maseko's lawyers successfully challenged an attempt by Zvekare to introduce a new charge against the visual artist. Zvekare, who travelled 400 km from Harare to prosecute in Maseko's case at Tredgold Magistrates Court in Bulawayo, sought to put a new charge to Maseko, which was different from the one in respect of which he was placed on remand.

Maseko was placed on remand on charges of undermining the authority of or insulting the President and causing offence to persons of a particular race or religion.

But Zvekare sought to bring in new charges of breaching Section 31 of the Criminal Law (Codification and Reform) Act Chapter 9:23 by allegedly publishing or communicating falsehoods prejudicial to the State and an alternative charge of violating Section 33 of the Criminal Law (Codification and Reform) Act Chapter 9:23 by undermining the authority of insulting the President.

Maseko's lawyers objected to this, arguing that this was calculated to prejudice and embarrass their client.

In her ruling, Magistrate Mazhandu said the State could only bring new charges against Maseko if the first charges had been withdrawn before plea.

After Magistrate Mazhandu's ruling, the State withdrew the earlier charges and sought to prefer the new charge against Maseko. He was formally charged of the new charges after he signed a warned and cautioned statement at Bulawayo Central Police Station last Wednesday.

The visual artist was arrested in March for staging an exhibition in Bulawayo depicting the 1980's Matabeleland massacres carried out by troops loyal to President Robert Mugabe's previous government.

The exhibition, which showcased paintings that explored the torture and massacres that characterised the civil unrest known as Gukurahundi, was forcibly shut down and the artist arrested.

Recently, the government invoked the Censorship and Entertainment Control Act to ban the exhibition of Maseko's paintings at the Bulawayo National Art Gallery charging that they portrayed "the Gukurahundi era as a tribal biased event".

Tsvangirai, political violence victims square off

...activists want explanation on decision to ignore past crimes

HARARE-A decision by the coalition government to ignore rights violations, including political killings that happened before December 2008 is set to spark tempers when Prime Minister Morgan Tsvangirai meets some of the victims today.

Tsvangirai will be guest to a function organised by Heal Zimbabwe Trust, an organisation involved in healing projects to reconcile communities affected by the violent 2008 elections that left hundreds dead.

Survivors, doctors and civil society will tell experiences of the traumatic 2008 election period when supporters of President Robert Mugabe's ZANU PF party and state security agents launched a violent campaign on behalf of the 86-year old leader.

The Joint Monitoring and Implementation Committee (JOMIC), an organ set up by the coalition government to monitor compliance to the power sharing agreement, will be represented at today's function.

Tsvangirai, whose Movement for Democratic Change (MDC) party says the violence killed at least 200 of the party's supporters and displaced tens of thousands, is now in a coalition government led by President Mugabe. Both victims and rights groups accuse the coalition government of doing little to heal tensions that are still high, particularly in rural and farming areas.

Today's event comes barely a week after Justice Minister Patrick Chinamasa said the newly formed Zimbabwe Human Rights Commission (ZHRC) will only investigate and hear cases that occurred after December 2008.

"The commission will not investigate alleged violations which occurred before the enactment of Amendment No. 19 unless the violations continued after that enactment," Chinamasa told the press in the company of his permanent secretary David Mangota.

The ZHRC is a creation of the amendment, enacted in 2008 to enable long time rivals President Robert Mugabe and Prime Minister Morgan Tsvangirai to form a coalition government that they both admit is uncomfortable.

Civic society groups say the decision to ignore past abuses is tantamount to a blanket pardon. They argue that the majority of Zimbabwe's rights abuses, most of them State sponsored attacks on unarmed civilians, happened before this period.

"The recent announcement by the Ministry of Justice and Legal Affairs regarding the Human Rights Commission that the commission will only deal with cases of human rights violations that occurred after the inception of the Inclusive Government is a blow and an insult to victims of political violence who have been clamouring for justice as far back as 1980," said Heal Zimbabwe Trust at the weekend.



Justice Minister Hon. Patrick Chinamasa

"Proper healing can be attained if truth and justice mechanisms are dealt with and politicians should avoid the resurgence of violence as the nation might run a risk of creating a circle of violence where the victims become the perpetrators," the organisation said, adding that victims of the previous elections were still to be restituted as many were still living in squalid conditions after their homes were burnt down.

Some, the organisation said, were yet to receive proper medical attention for the injuries they sustained during the violence period.

Activists say they will use today's event to pressure Tsvangirai into pushing the coalition government into action on transitional justice matters.

Lawyers want consolidation of ministers trial

HARARE-Four ministers who are being sued by abductees tortured by State security agents two years ago want their trial to be consolidated for expediency.

Lawyers representing the four ministers and several top State security agents last week filed an application seeking an order to consolidate the various cases brought by the abductees into three clusters for purposes of trial.

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

Happyton Bonyongwe, the director-general of the Central Intelligence Organisation (CIO), Police Commissioner-General Augustine Chihuri and Paradzai Zimondi, the Commissioner of Prisons are being sued together with seven top police officers who include Chief Superintendent Peter Magwenzi, Chief Superintendent Chrispen Makedenge, Senior Assistant Commissioner Nyathi, Asher Walter Tapfumaneyi, Superintendent Joel Shasha Tenderere, Superintendent Regis Takaitei and Detective Chief Inspector Mpofu, Detective Assistant Inspector Chibaya, Detective Assistant Inspector Kelly and Detective Sergeant Murunya.

In his application, which was heard in Judge President George Chiweshe's chambers last week, Farai Mutamangira of Mutamangira and Associates, who is representing the four ministers and the State security agents said the cases brought up against the ministers and the security agents by 19 victims of enforced disappearances



Regis Mujeji and Mapfumo Garutsa

should be consolidated before trial can commence in the High Court.

Mutamangira argued that all of the various matters that were instituted by the abductees had already passed the pre-trial conference stage and awaited the set down before various judges with the exception of cases involving two Norton residents. Mapfumo Garutsa and Regis Mujeji's cases have been set down before Justice Chiweshe.

Mutamangira wants the matters of all the abductees who are suing the ministers and the State security agents for more than \$20 million

to be consolidated into three clusters according to the similarities of their circumstances. He said the matters to be consolidated involved the same parties and similar evidence would be led, which made it convenient for the matters to be consolidated.

Mutamangira said it would be expedient and convenient for the various matters to be set down in the clusters since the abductees alleged similar facts and all claim that their arrest was unlawful.

He argued that the abductees in the various matters were all represented by the same legal

teams and it would be unfortunate for the same legal counsel engaged in the same matter having so many parties thereto to come to court on an occasional or on record 18 or 19 times.

Mutamangira wants the first cluster to involve Fidelis Chiramba, Violet Mupfuranhewe, Nigel Mutemagawu, Collen Mutemagawu, Concillia Chinanzvavana, Emmanuel Chinanzvavana, Pieta Kaseke and Tawanda Bvumo while the second cluster should be made up of Jestina Mukoko, Broderick Takawira, Pascal Gonzo, Audrey Zimbudzana.

Mapfumo Garutsa, Regis Mujeji, Andrisson Manyere, Kisimusi Dhlamini, Gandhi Mudzingwa, Zacharia Nkomo and Chinoto Zulu should make up the third cluster.

Justice Chiweshe told Mutamangira and the abductees' lawyer Charles Kwaramba, who was assisted by Rose Hanzi of Zimbabwe Lawyers for Human Rights, that the ministers' application should be heard and determined within a month.

Kwaramba will soon file his response to Mutamangira's application

The abductees are demanding \$1.2 million each in damages which they suffered when they were abducted by State security agents and charged with committing acts of terrorism and banditry.

The abductees, who were accused of receiving training in Botswana and bombing police stations, were kept *incommunicado* during the period October 2008 until 22 December 2008 when they were brought to a police station.

Police savagery boomerangs

HARARE-A High Court Judge has ordered police to pay an elderly constitutional reform activist \$5 000 in damages for assault, in

a development that is likely to encourage other victims of State brutality to come forward and seek justice and compensation.

Justice Bharat Patel last week ruled in favour of National Constitutional Assembly (NCA) activist Bopoto Nyandoro, but reduced the quantum from the

US\$8 798.20 sought by the activist to US\$5 000.

Bopoto, 63, went to court after police beatings in 2005 left him suffering from severe pains in his chest, ribs and left leg. Bopoto walked on crutches for a year after the beatings. His left leg still aches and sometimes numbs and he walks with a severe limp as a result of the police brutality, according to Justice Patel's judgment.

"The plaintiff (Bopoto)'s uncontested evidence is that he suffered excruciating pain as a result of the assaults upon him and that he underwent a surgical operation to correct the effects of the leg injury that he sustained. Again, the fact that the plaintiff was hospitalised for a prolonged period demonstrates the gravity of his injury, while his relative age would have diminished his capacity to resist pain," said Justice Patel in awarding the damages suit.

Justice Patel however rejected Bopoto's claims for injuries to his chest and ribs, saying there was no medical evidence to substantiate the claim.

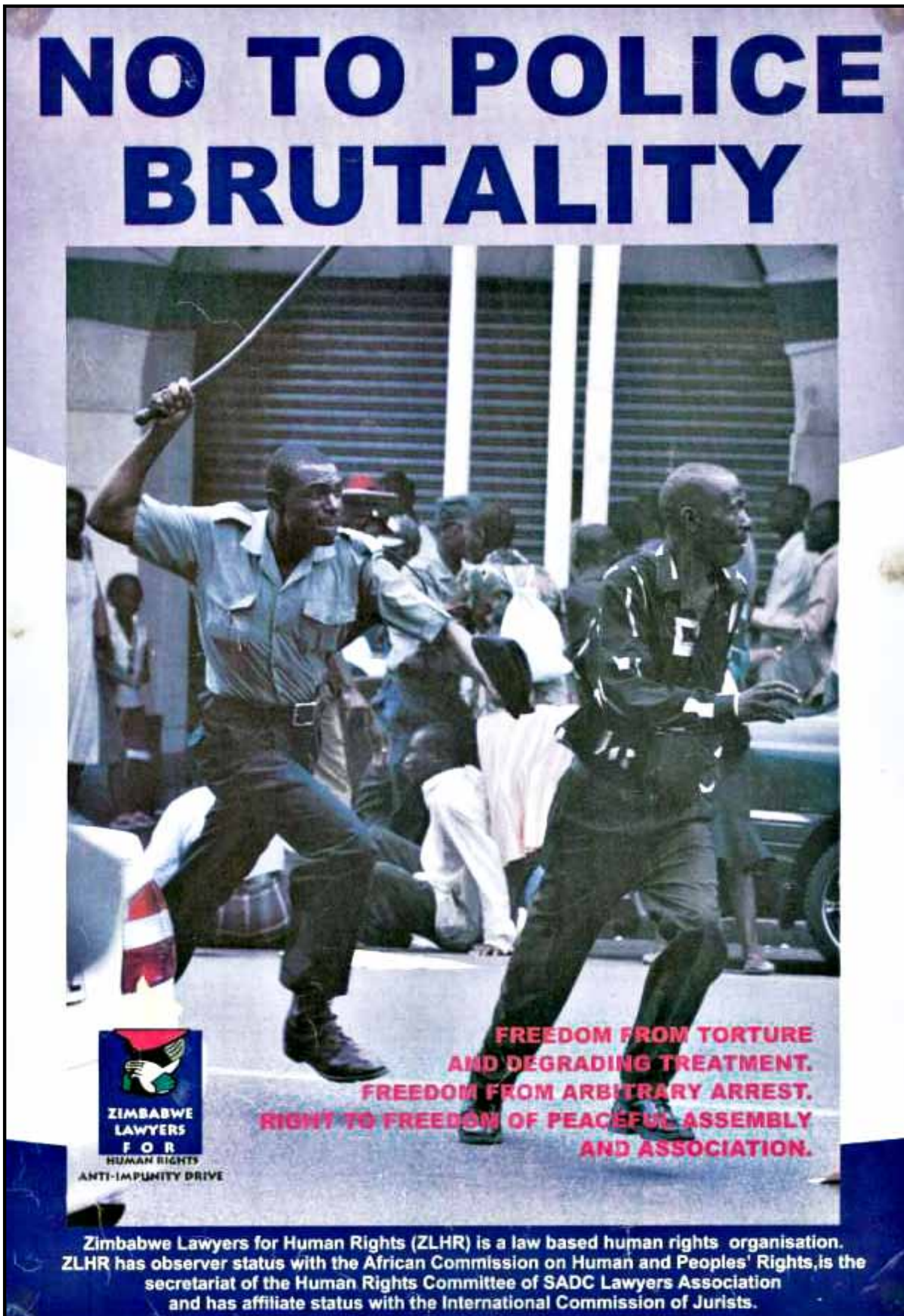
Bopoto told the court that police assaulted him after he joined about 300 other NCA activists for protests to demand people-driven constitutional reforms on 5 November 2005.

He said the NCA demonstrators were running and singing along the side of the road and dropping political fliers without obstructing traffic in central Harare. At the corner of Inez Terrace, members of the Zimbabwe Republic Police armed with baton sticks disembarked from about six lorries. Unlike other protestors, Bopoto failed to flee due to his advanced age.

"Most of the crowd ran away and dispersed, but the plaintiff was caught and assaulted by about 10 to 12 policemen. The plaintiff fell to the ground and continued to be assaulted. He was then lifted and shoved into one of the police lorries where he was trampled," read part of the judgment, which stated that Bopoto received further beatings at Harare Central police Station where he was detained for four days.

The Lovemore Madhuku-led NCA is famous for conscientising people about the need for a new democratic constitution and for mobilising activists to protest for a new people-driven constitution.

The constitutional reform body, the Zimbabwe Congress of Trade Unions and the Zimbabwe National Students Union (ZINASU) are opposed to the ongoing constitutional making process. The groups say they will campaign for the rejection of the draft that will come out of this process. A referendum on the constitutional draft is expected next year.



Bopoto (right) captured by award winning photo-journalist Tsvangirai Mukwachi with police in pursuit

Deputy Chief Justice tough on impartiality

VICTORIA FALLS-Deputy Chief Justice Luke Malaba has questioned the constant arrest of lawyers and the Attorney General (AG)'s abuse of laws to prolong the detention of accused persons, in a paper that highlights some of the shortfalls of the justice delivery system.

Justice Malaba warned that such actions could erode confidence in the justice system at a time when the country was recovering from a "traumatous period".

He said this while addressing a recently held joint Judicial-Legal Profession Colloquium organised by the Law Society of Zimbabwe in Victoria Falls. Lawyers, prosecutors, magistrates, judges, police, prison service staff and anti-corruption officials attended the Colloquium.

The Deputy Chief Justice spoke against the background of arrests of several human rights lawyers such as Mordecai Mahlangu, Alec Muchadehama, Rose Hanzu, and Tawanda Zhuwarara for carrying out their professional duties.

Civil society groups have consistently said these arrests and prosecutions are a ploy to intimidate lawyers from representing victims of State sponsored rights abuses.

"Of relevance to this gathering is why has there been an increase in incidences of arrests of lawyers, in circumstances that appear to involve the performance of their mandate," Justice Malaba said.

"Indeed recently we saw headlines accompanied by a picture of a senior lawyer reportedly arrested right outside the very court premises in which he was scheduled to represent a client. This naturally is a cause for concern," Justice Malaba told delegates, in one of the most frank comments on the state of the judiciary by a Supreme Court Judge.

He queried the zeal with which the AG's Office relied on Section 121 of the Criminal Evidence and Procedure Act (CPEA) to keep suspects in detention. This section of the law, according to human rights organisations, has particularly been used to target human rights defenders and political activists.

Justice Malaba said the AG's unnecessary over-reliance on this legislation was contributing to overcrowding in prisons.



Rose Hanzu (left) with Mapfumo Garutsa, one of the victims of State sponsored abduction

"It is an open secret that our prisons are overcrowded and yet we hear that opposing the granting of bail to suspects has become routine and where bail is granted the procedure of invoking of Section 121 of our Criminal Code, which has the effect of suspending bail for at least seven days, has become the norm rather than the exception. Does this not contribute to unnecessary overcrowding of our remand prisons-one wonders?" questioned the Judge.

He added: "In the criminal justice system, the police and government lawyers within the Attorney General's Office constitute the first line of defence in the fight against crime.

"In this regard, the second question I ask is: In waging the fight against crime and particularly the prosecution of suspects, to what extent do our government lawyers keep in mind those fundamental liberties guaranteed in our Constitution-Individual liberty, Presumption of innocence and Right to a speedy trial?"

Police, Justice Malaba said, needed to do more to improve their image as a key justice delivery system player in the eyes of the public.

"I am sure the majority of our people have a good idea of what the role of the police should be in society generally and the justice delivery system in particular. But, thinking aloud for a moment, I



Mordecai Mahlangu

wonder sometimes whether it is only a myth that generally when members of the public see the presence of the police they develop a sense of fear instead of feeling safe and protected. Needless to say public confidence is key to an effective justice delivery system," he said, urging police authorities to "stand guided" by a Supreme Court ruling that condemned some holding cells such as those at Matapi Police Station in Mbare, Harare.

He said prison conditions were deplorable: "I wait to hear some of the views of our Commissioner of Prisons and the Minister responsible for the administration of our prisons on what strategies, if any, have been put in place to avoid any past recurrence."

Coltart begs for funding

HARARE-Education, Sport, Culture and Arts Minister David Coltart has urged the transitional government to commit more funds towards his ministry so that it achieves its responsibility of providing the right to primary education to all Zimbabwean children. Because of poverty, education remains a dream to many children.

"Children are our future. Let us provide them with the education they need which is a basic human right and all the other Child Rights as enshrined in the Convention on the Rights of the Child. This position will enhance the government's capacity to achieve the Millennium Development Goals," Coltart said at the launch of the Education Transitional Fund (ETF).

"This must not be talked about but it must be done by providing adequate funds," he added.

ETF was established in 2009 to improve the quality of education in Zimbabwe



Senator David Coltart

after a decade of collapse of the country's social sector as it succumbed to the failing economy.

"You are aware that education was negatively affected by the social and economic downturn which prevailed since 2000. This was aggravated by the hyper-inflationary conditions of 2008-2009. As a result, delivery system in education deteriorated alarmingly. For instance: Pupil dropout increased; school infrastructure deteriorated; pupil: book ration increased to 1:15 on average. In other cases only the teacher had the textbook. Many children could not attend lessons due to hunger and poverty," said Coltart.

After the launch of the ETF, western donors pledged US\$50 million.

As a result ETF bought more than 13 million textbooks and stationery for use in primary schools.

United Nations Children Education Fund (UNICEF) head in Zimbabwe Peter Salama admitted that the country's education sector was still far from regaining its former status as the envy of most developing nations.

"We will be able to exceed the original target of bringing the textbook to pupil ratio down from one-to-10 to 1-to-2. Within a few weeks, every child in primary school will have a set of core textbooks. This may make Zimbabwe one of the only countries in sub-Saharan Africa with a 1-to-1 ratio of textbook to pupil. There are of course still major outstanding issues for which solutions must be found including the motivation and conditions of teachers as well as the need for the physical rehabilitation of schools," said Salama.

Zimbabwe's education sector is a shadow of its former self because of a severe economic crisis over the past decade blamed on President Robert Mugabe's previous administration that saw government fail to maintain schools or provide learning materials such as chalks and books.

Thousands of qualified teachers have fled the country as a result of poor salaries and frustrating working conditions.