

The LEGAL MONITOR

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16 January 2012

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

COST-FREE

Edition 126

New Year, old problems

...as Tomana guns for Muchadehama

HARARE-Attorney General (AG) Johannes Tomana is again gunning for Alec Muchadehama, a prominent human rights lawyer who has suffered repeated harassment at the hands of the State.

Tomana has asked the Supreme Court to allow a late appeal by his office against the freeing of Muchadehama and Constance Gambara, a clerk to High Court judge Justice Chinembiri Bhunu on charges of contempt of court under Section 182 (1) of the Criminal Law (Codification and Reform) Act (Chapter 9:23).

Gambara has another separate charge of criminal abuse of duty as a public officer.

The AG accuses Muchadehama and Gambara of facilitating the improper release of Shadreck Manyere, a freelance journalist and senior Movement for Democratic Change (MDC) officials Chris Dhlamini and Gandhi Mudzingwa. The three men were abducted and tortured by State security agents during the period they were in abduction in late 2008.

The three were later admitted to bail but the AG argued they were released when the bail granting was being appealed against.

High Court Judge Justice Joseph Musakwa in 2010 dismissed the AG's chamber application for leave to appeal against the Magistrates Court's acquittal of Muchadehama and Gambara.

The two were acquitted in December 2009.

The AG failed to appeal against Justice Musakwa's ruling on time, and has now filed an application for late noting of the appeal.

In his application to the Supreme Court, Tomana argues that he still has chances of getting the acquittal overturned.

"It is submitted that, the trial countered and misdirected itself in acquitting the Respondents (Muchadehama and Gambara) at the close of the State case when evidence placed before it clearly proved that the Respondents disobedience of the Order of the Court, manifested on actual disrespect for the court to the extent that it brought the due administration of justice into contempt," Tomana argues.

"It is respectfully submitted that, if the condonation is allowed to proceed through, it would not cause unnecessary delays in the administration of justice but would rather advance the interests of justice," he states in the application.

A prosecutor handling the case at the time Justice Musakwa dismissed the AG's application for leave to appeal stated in the Supreme Court application that he failed to file the appeal on time partly because he was fighting a messy divorce.

"From June 2011 to December 2011, six months have since elapsed and the delay is wholly attributed to my personal problems which have nothing to do with the Respondent," stated Roderick Kudakwashe Tokwe, a chief law officer, in papers supporting Tomana's Supreme Court application.

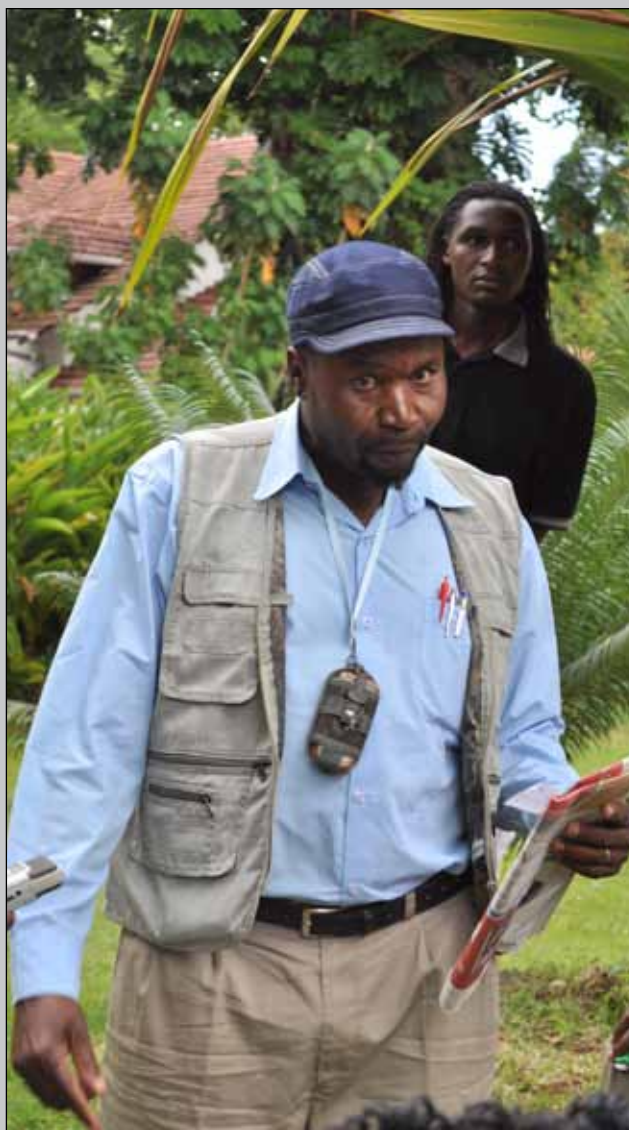
"I was embroiled in a bitter marital divorce which was published in Newsday through my ex-wife's lawyers, Mtetwa and Nyambirai Legal Practitioners in 2010. Against that background, I was battling to have

my late father treated through various doctors as he was suffering from hypertension, heart problems and acute renal failure," stated Tokwe, adding: "I therefore seek the indulgence of this Honourable Court to be sympathetic with my predicament on humanitarian grounds."

Muchadehama, who has won multiple awards for his human rights work, has repeatedly stated his innocence.

Police arrested him on the matter at the Harare Magistrates Court as he attended to other cases involving his clients.

His harassment caused uproar, with coalition government partner MDC, lawyers' bodies and international human groups voicing concern at the targeting of Muchadehama by State security and judicial apparatus.



War veterans and collaborators took charge as journalists were reduced to spectators at a Press conference convened by COPAC on progress regarding the constitution making process. (See story and more pictures on page 3)

Rasta victory

BULAWAYO—"Greetings in the name of the most high, Haile Selassie I, Sir!" That might become a style at Masiyephambili Junior School where a four-year old Rastafarian child will be attending Grade Zero this term following an interim High Court ruling in his favour on Friday.

High Court Judge Martin Makonese granted a provisional order allowing child Mbalenhle Dube to commence lessons at the school, which had barred him from classrooms citing his dreadlocks.

His father Khumbulani, with the assistance of Lizwe Jamela of Zimbabwe Lawyers for Human Rights (ZLHR) went to the High Court after the headmaster, only identified in court papers as R. Sibanda insisted that Mbalenhle cut his dreadlocks. Jamela successfully argued this was against freedom of religion, as enshrined in the Constitution.

"There is no lawful basis for the Respondents to interfere with the minor child's right to education based on his long hair that expresses his religious beliefs," said Justice Makonese, in his ruling.

The judge said Sibanda's verbal communication to Dube to have Mbalenhle's hair cut was "null and void and of no legal consequence".

He said the respondents, Sibanda and Hon. David Coltart, the Minister of Education, had no right to deny Dube's son his right to education.

"The respondents be and are hereby perpetually interdicted from interfering in any way with the child's access to education on the basis of his long hair," said Justice Makonese.

In his application, Dube said he was given all necessary paper work to fill in when looking for a grade zero place for his son.

He said he bought all the necessary school uniforms and books as well as paid all the required school fees.

"I was further furnished with a copy of the school rules and I picked issue with paragraph 3d of the said rules. The paragraph states that boys shall not keep long hair, but cut to a short length," said Dube in his founding affidavit.

"My family belongs to the Rastafarian religion and keeping of long hair is a manifestation of our religious beliefs thus I could not apprehend the paragraph mentioned above. I raised this issue before school opening with the administration staff and they were reluctant to deal with the matter and advised me that I should rather have a word with 3rd Respondent (Sibanda) on the opening day. I believe my son's long hair is not indiscipline or disobedience to the school staff as it is not related to his conduct," added Dube.

He said on the school opening day, Sibanda advised him that "in no uncertain terms" would his son be allowed in class if the hair was not cut.

"My son was in fact barred from joining his class mates and I was directed to leave with my child and comply with the said school rule if I still considered my son a student at the school. My religious pleas were not entertained at all and eventually left the school dejected with my son with me while his counterparts were in the classrooms enjoying their right to education." That resulted in Dube seeking the help of ZLHR.

"School rules should not go in so far as to violate constitutionally protected freedoms. I am advised that respondents' (Sibanda and Sen. Coltart)

actions are in violation of Section 19 of the Zimbabwean Constitution whose provisions give the right to protection of freedom of conscience and religion. I am also advised that respondents' actions are in contravention of the Education Act, especially Section 4 which provides for children's fundamental right to education," said Dube.

He mentioned a case in which the Supreme Court had dealt with a similar matter and ruled that schools could not infringe on religious freedoms.

Jamela wrote to Sibanda and the Ministry of Education seeking audience with the school.

After failing to get a favourable reply, Jamela made an urgent application which Justice Makonese granted.

Dube's son lost the entire opening week as the legal battle ensued.

"Now that the school term has already started it is impossible for me to start looking for a new place for my son at any other school and in any case I have already purchased the uniforms bearing the school logos and all the school fees were already paid, putting me in another prejudice," said Dube as he enforced his point that the matter was an urgent one.

"I believe the law is clear on this issue and respondents' actions are in serious violation of the law and their conduct cannot be counteracted in any way and this Honourable Court is at large to intervene in this violation on an urgent basis and also as the upper guardian of my son who in this case continue to suffer a prejudice in being discriminated on religious grounds."



Mbalenhle and Khumbulani Dube

Below is an abridged landmark Supreme Court judgment affirming students' right to religious freedom

REPORTABLE ZLR (25)

Judgment No. SC 26/07

Civil Application No. 291/06

F. DZVOVA v (1) MINISTER OF EDUCATION SPORTS AND CULTURE (2) RUVHENeko PRIMARY SCHOOL (3) F NYAHUYE

SUPREME COURT OF ZIMBABWE

CHIDYAUSIKU CJ, SANDURA JA, CHEDA JA, ZIYAMBI JA & MALABA JA

HARARE, JANUARY 25 & OCTOBER 10, 2007

Z Chadambuka, for the appellant

R Sweto, for the respondents

CONSTITUTIONAL APPLICATION IN TERMS OF SECTION 24(2) OF THE CONSTITUTION OF ZIMBABWE

CHEDA JA: The applicant is the father of a 6 year old child

F. B. Dzova,

The first respondent is the Government Minister responsible for Education, Sports and Culture, under whose Ministry the second respondent falls.

The second respondent is the Primary School in which the child was enrolled).

The third respondent is the Headmaster of the school.

At the beginning of March 2005 the child was enrolled in grade (0) at the school in line with the new education policy of the Ministry of Education which required that children's pre-schools be attached to primary schools so that the children would automatically attend the primary schools from pre-schools. The child graduated from the pre-school system and was then enrolled in the primary school system. The fees were paid and all necessary books and stationery were purchased.

The child's father said while in pre-school the child's hair was never cut and was kept what is commonly known as dread locks until the child graduated from pre-school.

The child's father was called to the school a few weeks into January 2006 to discuss the issue of the child's hair with the teacher-in-charge and asked to write a letter to explain. By then the child was being

detained and was no longer going to the classroom with other children. The father sent a letter from his church.

The applicant went and discussed the matter with the deputy headmaster and the teacher-in-charge who maintained that they could not accept the child's continued learning in the school so long as his hair was not cut to a length acceptable by the school.

A further discussion with the headmaster of the school and the Regional Education Officer did not resolve the matter. The applicant then made an application to the High Court and obtained the following provisional order:

"TERMS OF ORDER MADE

That you show cause to this Honourable Court why a final order should not be made in the following terms:

TERMS OF THE INTERIM RELIEF

BY CONSENT OF THE PARTIES:

1. Pending the resolution of this matter by the Supreme Court it is ordered that:
 - i) The respondents be and are hereby compelled to allow the minor F. B. D. to enter upon the second respondent school for purposes of education until the Supreme Court determines the matter.
 - ii) The respondents are hereby interdicted from in any way negatively interfering with the minor F. B. D.'s education, more particularly in that the respondents be and are hereby barred from:
 - a) separating F. B. D. from his classmates;
 - b) otherwise detaining F. B. D. in solitary or in the sole company of adults;
 - c) in any other way discriminating against F. B. D. on the basis of his hairstyle or his religious beliefs pending the determination of the matter by the Supreme Court.
2. The case is referred to the Supreme Court for the determination of:
 - i) whether the exclusion of the minor child F. B. D. was done under the authority of a law as envisaged in s 19(5) of the Constitution and in the event the court finds it was done under the authority of a law;
 - ii) whether such a law is reasonably justifiable in a democratic society."

In accordance with para 2 of the above order the application has now

been brought to this Court in terms s 24 of the Constitution alleging that the child's right guaranteed by s 19(1) of the constitution has been violated.

In his founding affidavit the applicant says he is a Rastafarian as well as his wife and they were customarily married in 1991. His wife Tambudzayi Chimedza is the mother of the child. They have been practising Rastafarianism for almost a decade. They initially attended Chaminuka Rastafarian House in St Mary's, Chitungwiza which is the Headquarters of the National Rastafarian Council. He said about four years ago in 2002 they opened a branch of the church in Glen Norah for which he is "Ilect of Priesthood".

He said they let their hair grow long and the twisting which eventually occurs is a natural result of African hair which is let to grow long. This is one of the visible distinguishing factors between genuine Rastafarian adherents and those who appear to have as a their hairstyle for fashion purposes actually twist it, which is forbidden by their religion.

He said in accordance with their religion, before, and during his days at pre-school, their son's hair was never cut and it was in the inevitable locks.

He then narrated the events from March 2005 which led to the order that was later obtained at the High Court.

Section 19(1) of the Constitution provides as follows:

"(1) Except with his own consent or by way of parental discipline, no person shall be hindered in the enjoyment of his freedom of conscience, that is to say freedom to change his religion or belief, and freedom, whether alone or in community with others, and whether in public or private, to manifest and propagate his religion or belief through worship, teaching, practice and observance."

In order to determine whether this application falls within the ambit of the above section, it is necessary to consider the following question:

Is Rastafarianism a religion?

The appellant submitted that Rastafarianism is a religion.

He further stated that the Rastafarian religion is based on the Bible which is a basis for many other religions.

The *New English Dictionary on Historical Principles*, VIII, gives the following definition of religion:

"1. A state of life bound monastic vows continued on page 4

Police begin New Year with torture

MUTARE-Zimbabwe police clearly underlined their modus operandi for 2012 by mercilessly torturing a Mutare man who was in police custody facing assault charges.

So brutal were the police that Nelson Zino, a commuter omnibus loader, discharged human waste after the torture.

Zino was only saved from further harm after the intervention of human rights lawyers, who have since raised a complaint against police officers involved.

In typical Zimbabwe police style, officers at Chisamba Police Station in Mutare's Sakubva high density suburb beat up Zino to force him to admit that he had assaulted a passenger. The court later threw out the case against Zino for lack of evidence.

The officer who picked up Zino and dragged him to the police station without notifying him of the charges as required by standard procedure has been identified only as "Mberi."

"The client was tortured at the police station, being forced to admit that he had assaulted a passenger at a commuter omnibus rank to which refused. It is the client's story that he was in a room which he strongly believes to be a torture room as there were torture apparatus like the one used to turn him upside down before experiencing brutality at the hands of the police officers. He was beaten till he discharged human waste and was almost subconscious," said Peggy Tavagadza from Zimbabwe Lawyers for Human Rights (ZLHR).

Tavagadza and ZLHR member David Tandiri from Tandiri Law chambers are handling the matter.

"The mother of our client witnessed her child in a pool of human waste as she was forced to run into the torture room as she could not bear to hear her child scream in police cells," said Tavagadza.

Police picked up Zino from his parents' home on 9 January at around midday and force-marched him to the police station without notifying him of the reasons of arrest.

Lawyers were only allowed access to Zino after "intense" threats of legal action.

"Lawyers have accessed the client who is in visible pain and is swollen and in need of urgent medical attention after a long struggle as the police at first disputed having such a person in their custody," said Tavagadza.

The lawyers have submitted a written complaint against the two police officers

"After intense submissions by lawyers and threats to make court applications, lawyers managed to have access to their client and the investigating officer. Together with the officer-in-charge (crime) they have acceded to sending our client to hospital.

"The accused was later taken to hospital around 8pm on 10 January where he was attended to. On 11 January the accused was recorded a warned and cautioned statement by the police in the presence of his lawyers and was taken to court on 12 January where prosecution was declined for want of evidence," said Tavagadza.

Torture is one of Zimbabwe police favourite methods for investigating cases, usually the aim being to force suspects to make confessions.

At a recently held 50th Session of the African Commission on Human and Peoples' Rights (ACHPR) in Banjul, Zimbabwe came under the spotlight for its rampant use of torture.

Aretha Dzingirai of the Zimbabwe Human Rights NGO Forum said torture, a crime prohibited under regional and international law, was still rampant in Zimbabwe despite a decline in the magnitude of levels of organised violence and torture in the country since the formation of the coalition government in 2009.

Human rights defenders such as journalists, lawyers and civil society actors as well as ordinary people have for decades remained victims of torture, a situation that keeps Zimbabwe among rogue states that have failed to move with the times.

Zimbabwe government committed itself to giving consideration to ratifying the United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment at the recently ended Universal Periodic Review.

But information availed in Banjul last year showed that on the ground; State institutions could take a while to wipe out torture, which hit a high during the 2008 election period.

"Organisations providing psycho-social, medical and legal assistance to victims of torture are still being inundated with requests for assistance from victims of the 2008 March harmonised elections and the June presidential runoff election," the Forum said in a position paper at the Banjul meeting.

"Perpetrators of torture remain largely immune to prosecution and the law does not criminalise torture. This encourages impunity."

Tense atmosphere as war veterans take over Copac press conference

HARARE-Over a dozen vocal war veterans on Friday took over a Zimbabwe Constitution Select Committee (COPAC) press conference and hurled insults at Copac co-chairpersons, accusing them of trying to smuggle gay rights into the new national charter and ignoring the views of the majority.

The war veterans were also accusing Copac of deliberately delaying the completion of the constitution making exercise to enjoy lucrative allowances they were allegedly being offered.

The press conference, which was held at the Copac offices in Harare's low density Milton Park suburb, was open to all stakeholders.

The war veterans also threatened to beat up the co-chairpersons accusing them of looking down upon the rural folk who thronged the outreach centres because of their educational inferiority.

One war veteran accused Copac of circulating a press statement that had not been signed.

"Atidi kutambiswa bhora rechikweshe panapa (stop taking us for a ride)," he said.

"Look at me. I am 63 years of age. My greying hair is a sign that I am older than you," said another war veteran to MDC-T Copac co-chair Douglas Mwonzora, "Please don't take us for granted. We fought to liberate this country so that you can sit on that chair and tell us what you want."

So tense was the atmosphere that even journalists who attended the Copac briefing refrained from asking questions.

A member of the civic society, the only person who gathered courage to ask a question, was shouted down by the angry war veterans who said his contributions were not valid because he did not have an idea of how bitter the liberation struggle was.

One woman who identified herself as Josephine Gandiya from the War Collaborators Association accused the Copac co-chairpersons of delaying the process.

"Hamudi kuti zvipere nekuti murikudya (you don't want this to end because you are benefiting financially)," she said.

For the better part of the hour long press conference, MDC-T politician Jessie Majome,

who was chairing the briefing and the other Copac co-chairpersons took pains to explain to the agitated former fighters the process was still ongoing and was a reflection of the views of the majority.

"We do not seek to delay this process because this is a hot seat I can assure you. Who would want to be subjected to such accusations and threats all the time? We have our own jobs and would indeed want this to end. Please bear with us. We are trying our best," said Zanu PF Copac co-chairperson Paul Mangwana.

Friday's fiasco happened hardly two days after hordes of war veterans again stormed Vumba Mountains where the Copac technical team has retreated for the drafting of the final document and demanded the halting of the process.

"Look at me. I am 63 years of age. My greying hair is a sign that I am older than you..."

"Please don't take us for granted. We fought to liberate this country so that you can sit on that chair and tell us what you want"

Meanwhile, during his main address, MDC-T copac co-chairperson Douglas Mwonzora said the drafting process was on going and that the three drafters have since submitted four chapters for review.

"Any judgement of these preliminary chapters is therefore premature as the Select Committee itself is seized with deliberating upon these drafts during which process they are subject to changes and continuous development until they reach the final form," he said.

Source: Radiovop.com



Judge attacks Tomana actions

BULAWAYO-A High Court judge has shredded State prosecutors for abusing their powers to keep accused persons admitted to bail in remand prison, saying such actions are putting the reputation of justice delivery into disrepute.

Justice Nicholas Mathonsi tore prosecutors to pieces in a judgement dismissing an appeal by the State seeking to overturn the granting of bail to two Media Monitoring Project of Zimbabwe (MMPZ) employees, Fadzai December and Molly Chimhanda and MMPZ member, Gilbert Mabusa.

The trio was arrested last year and accused of undermining the authority of President Robert Mugabe by distributing DVDs that police said carried offensive material. They were also charged with violating harsh security law Public Order and Security Act.

Gwanda Magistrate Douglas Zvenyika granted the trio bail of \$50 each in December last year with no reporting conditions.

But prosecutor Blessing Gundani, invoked the notorious Section 121 of the Criminal Evidence and Procedure Act (CPEA) to suspend the bail order which had been granted to December, Chimhanda and Mabusa.

The invocation of Section 121 of the CPEA suspends the bail order for seven days pending the filing of an appeal by the State in the High Court. Ruling on the State's appeal, Justice Mathonsi said

time had come for prosecutors to be schooled on the appropriate use of Section 121 of the CPEA.

"The grounds of appeal which the appellant relies upon are spectacularly devoid of merit. Section 121 of the Criminal Procedure and Evidence Act, gives the appellant power to veto the granting of bail to an accused person. It accords the appellant (AG's Office) a discretion to prevent the release of a person who has been granted bail in situations where he intends to appeal that decision. To the extent that it interferes with the liberty of a person who has been admitted to bail, that discretion should be exercised judiciously because the legislature, in its wisdom, entrusted the appellant with huge powers," said Justice Mathonsi.

"For that reason, it is unacceptable for any representative of the Attorney General to shoot up the moment bail is pronounced and invoke Section 121 without applying his/her mind to the basis of such invocation. I have said that there is no merit in the grounds for appeal which do not show any misdirection at all on the part of the court a quo. In fact those grounds are legendary by their lack of merit.

"One is therefore left wondering whether the appellant's representative did apply his mind at all. The abuse of Section 121 to keep persons in custody who have been granted bail has tended to bring the administration of justice into disrepute. It must be discouraged by all means and the time has come to announce to law officers prosecuting



Fadzai December

on behalf of the Attorney General that Section 121 should be invoked only in those situations where there is merit in the appeal," said Justice Mathonsi.

He added: "Persons who have been granted bail should not be kept longer in custody merely as a way of punishment. That is an improper exercise of the discretion given to the Attorney General by Section 121."

The Judge said it was improper for the AG to invoke Section 121 in a case in which the accused persons would at most get away with a fine if convicted.

Zimbabwe Lawyers for Human Rights has repeatedly criticised the AG's Office for abusing Section 121, especially in political cases.

Commenting on the invocation of Section 121 on the MMPZ trio, ZLHR described the State's action as "malicious and unwarranted".

"ZLHR is perturbed by the malicious and obdurate actions of the State in continuing to unnecessarily infringe upon the fundamental right to liberty of the MMPZ employees by bringing up Section 121 of the CPEA. This is despite the fact that the constitutionality of Section 121 of the CPEA is being challenged in numerous cases which are yet to be heard by the Supreme Court of Zimbabwe.

"The frequent abuse of this draconian piece of legislation is being used to the prejudice of suspects as prosecutors are clearly usurping the powers of the judiciary who in this case had safeguarded the fundamental right to liberty of December, Chimhanda and Mabusa. The pressing of a new charge against the MMPZ officials is sufficient confirmation that the State is determined to deprive these human rights defenders of their liberty and keep them in detention at all costs," ZLHR said when the State invoked Section 121 in December.

continued from page 2

2. A particular monastic or religious order or rule
 3. Action or conduct indicating a belief in, reverence for, and desire to please a divine ruling power, the exercise or practice of rites or observances implying this;
 4. A particular system of faith and worship;
 5. Recognition on the part of man of some higher or unseen power as having control of his destiny, and as being entitled to obedience, reverence and worship. The general mental and moral, attitude resulting from this belief, with reference to its effect upon the individual or the community; personal or general acceptance of the feeling as a standard of spiritual and practical life.
 6. Devotion to some principle, strict fidelity or faithfulness, conscientiousness; pious affection or attachment."
- What the applicant said about Rastafarianism falls within these descriptions, thus leaving no doubt that it is a religion.
- The applicant also referred to cases in other jurisdictions in which it was decided that Rastafarianism is a religion. The applicant's complaint is that the rules made by the respondent -
- "... are unlawful and in contravention of my son's rights under s 19 of the Constitution which provision gives the right to protection of freedom of conscience and religion."
- The rules referred to, are under the following heading: **"RUVHENEKO GOVERNMENT PRIMARY SCHOOL JANUARY 2005 SCHOOL RULES FOR ALL PUPILS"**

1. All pupils to be in school uniform all the time at the school.
 2. All pupils to have short brush hair regardless of sex, age, religion or race. 3.... 4....
- The protection of the rights of an individual rules bear the signature of the School Head. The applicant referred the Court to a number of cases from other jurisdictions which dealt with an issue similar to the one complained of in this case.
- The protection of the rights of the individual against discrimination on religious grounds are in s 19 of the Constitution of Zimbabwe.
- This case shows that it is important to respect one's genuine religious beliefs.
- The applicant referred to several useful international authorities based on similar provisions of the Human Rights Charter.
- The distinction between the authorities and referred to in

this case is that they inquired into the validity of regulations. This case deals with rules made by a school headmaster. The question is, on what authority did he make them. I now proceed to deal with this question.

As indicated earlier, the rules were issued and signed by the head master of the school.

The question is - Was the rule on the basis of which the applicant was barred from attending at the school made under the authority of a law? If it was, it would have been necessary to consider any derogations or justification provided in the Act. In this case it seems this was not done under a law since no law authorized such action.

It follows that the attempt by the school to bar the child from the school contravenes not only the Constitution, but the above provision of the Education Act as well.

There is nothing in the Act which confers similar powers on the headmaster of a school to make similar rules or regulations.

The respondents submitted that the Minister made regulations (Education (Disciplinary Powers) Regulations, 1998 S.I 362 if 1998). These regulations provide as follows:

- "2. Every pupil who enrolls in a Government or non-Government school shall conform to the standard of discipline enforced at that school, and shall render prompt obedience to the school staff".

The respondents concede that the school rules are not laws, but argue that they were made under the authority of a law.

The provisions of SI 362 of 1998 deal with discipline in the school and obedience to the school staff. It has not been suggested, nor can it be argued, that having long hair at the school is indiscipline or disobedience to the school staff.

It is only a manifestation of a religious belief and is not related to the child's conduct at school.

I therefore do not agree that these regulations are relevant to the matter complained of by the applicant.

In s 3 of the Interpretation Act [*Cap.1:0*], "law" means any enactment and the common law of Zimbabwe, 'Regulation', 'rule', 'by-law', 'order', or 'notice', means respectively a regulation, rule, by-law, order or notice in force under the enactment under which it was made. There is nothing to link the school rules with any enactment. The rules were not made under any enactment.

Section 26 of the Interpretation Act states as follows: "Holders of Offices

Where any enactment confers a power, jurisdiction or right,

or imposes a duty, on the holder of an office as such, then the power, jurisdiction or right may be exercised and the duty shall be performed, from time to time, by the holder for the time being of the office or the person lawfully acting in the capacity of such holder."

The question that follows then is: Was the head master authorized by the enactment to make rules?

Section 69 of the Education Act confers powers to make regulations on the Minister regarding discipline in schools and other related matters. It does not confer any powers to make regulations on the head master. It does not authorize the Minister to delegate to the headmaster the power to make regulations regarding the conditions of the admission of a child to a school.

The regulations clearly specify the powers the headmaster can exercise over a pupil in cases of serious acts of misconduct only.

The Minister made the Education (Disciplinary Powers) Regulations, 1998, SI 362/98 ("the Regulations").

Section 2 of the Regulations provide as follows:

- "Standard of discipline
2. Every pupil who enrolls in a Government or non Government school shall conform to the standard of discipline enforced at that school, and shall render prompt obedience to the school staff."

I understand this to refer to the conduct or behaviour of pupils and obedience to the school staff generally. I do not consider that asking pupils to conform to a standard of discipline would include an aspect that infringes on a pupil's manifestation of his religion. There is no suggestion by the respondents that keeping dreadlocks is an act of indiscipline or misconduct.

If the head master believed that he had authority to make such rules then he was wrong.

The Minister did not make regulations concerning the type of hair to be kept by the pupils. Neither did he delegate the making of regulations on that subject matter to the head master.

Further to that, s 26 of the Interpretation Act provides as follows:

"26 Where any enactment confers a power, jurisdiction or right, or imposes a duty, on the holder of an office as such, then the power, jurisdiction or right may be exercised and the duty shall be performed, from time to time, by the holder for the time being of the office or the person lawfully acting in the capacity of such holder."

Section 27 provides as follows:

"27 An appointment made under an enactment may be made either by name or by reference to the holder of an

office or post."

It is clear that the enactment appointed only the Minister, and not the headmaster, to make regulations.

It is also clear that the headmaster of the school was never appointed to the office held by the Minister, and he did not act in that post at all.

The Minister allowed the school to maintain certain standards at the school, but never authorized the school to make any regulations.

It follows that the submission by the respondent that the rules were made under the authority of a law cannot be correct.

The head teacher cannot make rules which constitute a derogation from the constitutional rights of the pupils. He exceeded his powers which are stipulated in the SI 362 of 1998 and used powers which he did not have.

In so doing he was wrong as such powers were never, and could never have been, lawfully delegated to him.

Having concluded that the rules by the school were not made under a law, it is not necessary to consider the issue of justification raised by the respondents.

In conclusion, the following order is made -

- a) The respondents be and are hereby compelled to allow the minor F. B. D. to enter upon the second respondent school for purposes of education.
- i) (b) The respondents are hereby interdicted from in any way negatively interfering with the minor F. B. D.'s education, more particularly in that the respondents be and are hereby barred from: separating F. B. D. from his classmates; otherwise detaining F. B. D. in solitary or in the sole company of adults;
- iii) in any other way discriminating against F. B. D. on the basis of his hairstyle or his religious beliefs.
- (c) It is hereby declared that expulsion of a Rastafarian from school on the basis of his expression of his religious belief through his hairstyle is a contravention of ss 19 and 23 of the Constitution of Zimbabwe.
- (d) The respondents shall pay the costs of this application.

CHIDYAUSIKU CJ: I agree.

SANDURA JA: I agree.

ZIYAMBI JA: I agree.

MALABA JA: I agree.

Zimbabwe Lawyers for Human Rights, applicant's legal practitioners

Civil Division of the Attorney General's Office, respondent's legal practitioners

Court throws out 'ridiculous' Mugabe cartoon charges

BULAWAYO-Magistrate Thobekile Mkhosana-Matimbe has acquitted three youths facing charges of being found in possession of paper cuttings with caricatures that prosecutors alleged mocked President Robert Mugabe, his wife Grace and Reserve Bank of Zimbabwe governor Gideon Gono.

Defence lawyer Lizwe Jamela of Zimbabwe Lawyers for Human Rights successfully applied for discharge at the close of the State case last week.

Police had alleged that they caught Calvin Ncube aged 22, Mpumelelo Donga (26) and Gift Mlala (22) of Emganwini and Nkulumane suburbs in Bulawayo with paper cuttings resembling bearer cheques with cartoon characters of naked people that prosecutors alleged depicted Gono, the First Lady and President Mugabe.

Ncube, Donga and Mlala denied contravening Section 33(2) (a) (ii) of the Criminal Law (Codification and Reform) Act. The law makes it an

offence to insult the President and has been used in several cases by the State to charge perceived critics of President Mugabe.

In her ruling, Magistrate Mkhosana-Matimbe stated that it was ridiculous for the State to allege that Ncube had publicly made a statement insulting Mugabe when he had been arrested by police in connection with a different matter. At the charge office police searched the accused and found him in possession of the alleged offensive materials.

The Magistrate further lambasted the State for opposing the application. The State had also promised to file a response to the application only to insist with the opposition without the said response and did not even attempt to analyse its own evidence.

Tinashe Dzipi prosecuted.

During cross-examination by Jamela after the State had led evidence, a police witness told the court that the bearer cheques were not written Mugabe's name.

Ncube, Donga and Mlala were arrested in February last year.

The case surfaced after Ncube was arrested on a different matter and was taken to Saurcetown Police Station. Upon arrival at the police station, he was searched and found in possession of three paper cuttings carrying "insulting and undesirable statements about the First Lady Grace Mugabe, Gono and the President."

The State further alleged that Ncube implicated Donga and Mlala after being questioned by the police.

"I am still baffled as to how this constitutes 'publicly making a statement' as contemplated by the relevant Section (33(2) (a) (ii) of the Criminal Law (Codification and Reform) Act)," said Jamela.