

The LEGAL MONITOR

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27 May 2013

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

COST-FREE

Edition 194

Distributed without any inserts

Dabengwa fumes ...shoots at ZEC conduct, doubts credible polls

HARARE - ZAPU President Dumiso Dabengwa is taking aim at the Zimbabwe Electoral Commission (ZEC), whose conduct he says compromises the holding of a free and fair election.

Dabengwa, who says he is planning to contest the upcoming presidential election, has been trying to get an electronic copy of the voters roll since November last year. But despite promises by ZEC, nothing has materialised.

This has forced the liberation war hero to approach the High Court seeking an order to compel ZEC to provide him with the Consolidated National Voters Roll in an electronic format which makes it possible for him to analyse the document.

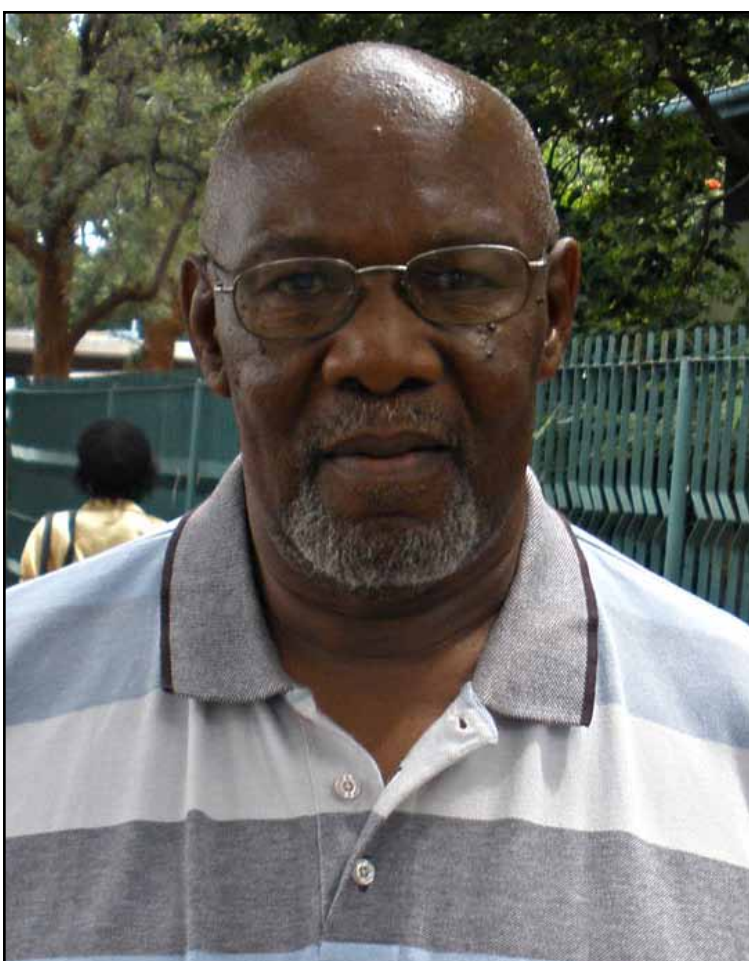
In his application lodged at the High Court this month, Dabengwa states that the failure by ZEC to fulfil its promise to provide him with a copy of the voters roll compromises prospects of a credible election.

"The fact that the voters roll is not, even at this stage, in effect and in accordance with the law, readily available in the proper electronic format and at a 'reasonable cost', I respectfully submit, casts an enormous shadow over having what can objectively be considered to be efficient, free, fair and transparent elections in accordance with the law," Dabengwa states in court papers.

He cites provisions of Section 3 of the Electoral Act, which outline the general principles of democratic elections and state that every election shall be conducted in a way that is consistent with the principle that every citizen has the right to participate in government directly or through freely chosen representatives.

On the voters roll, Section 21 (3) of the Electoral Act states that: "The Commission shall within a reasonable time provide any person who requests it, and who pays the prescribed fee, with a copy of any voters roll, either in printed or in electronic form as the person may request."

But this has not happened despite repeated requests by Dabengwa and his ZAPU party.



Taking on ZEC... Dumiso Dabengwa

"I respectfully submit that by, in effect, withholding the voters roll, these provisions are being breached," Dabengwa states in his application.

Resorting to courts was a last option for Dabengwa, who, through his lawyer Bryant Elliot of Zimbabwe Lawyers for Human Rights (ZLHR), tried to engage ZEC. But correspondence shows that Dabengwa was getting frustrated with the waiting game.

His lawyers wrote to ZEC requesting a copy of the consolidated national voters roll in electronic format in accordance with the Act and at a reasonable cost on 20 November.

ZEC, through then Acting Chairperson Joyce Kazembe, responded nine days later acknowledging receipt of Dabengwa's letter and promising that "the Commission will revert to you at the earliest possible time".

Despite the contents of the letter, nothing further was heard from the Commission, and therefore, on 18 December 2012, Dabengwa's lawyer addressed a reminder to ZEC. The reminder was ignored.

Consequently, the lawyer wrote another letter to ZEC on 17 January this year. In a response dated 29 January 2013, Kazembe stated: "All the issues you raised are being attended to with the urgency they deserve and you should be getting a full response from us by 10 February 2013."

On 13 February, a letter signed by the ZEC Chief Elections Officer and addressed to ZLHR read: "We wish to apologise for the fact that we have not been able to fulfil our promise to answer your queries by 10 February 2013. We however advise that we are still attending to your queries and that we shall come back to you in due course."

By April, ZEC had not honoured its pledge, forcing Elliot to write to the Commission's new chairperson Justice Rita Makarau on 11 April alerting her to the issues.

It was only then that ZEC responded to Dabengwa, stating that while the commission had an electronic copy of the voters roll. But it was "not in a form that can be analysed or on which you can use a search facility".

Justice Makarau stated that the commission was engaging Registrar General of Voters Tobaiwa Mudede on the issue.

Dabengwa said ZEC's conduct was unacceptable.

"It has therefore taken some five months for the Commission to reply to the original letter from our legal practitioners with regard to issues which the then Acting Chairperson admitted were urgent in her letter dated 29 January 2013," said Dabengwa in court papers.

"I respectfully submit that this extraordinary delay is absolutely unsatisfactory and shows a gross dereliction of duty on the part of the Commission, especially when dealing with such an important subject matter as the voters roll," Dabengwa stated.



The trial of ZLHR board member Beatrice Mterwa commences today at Harare Magistrates Court. Mterwa was arrested on 17 March and charged with contravening Section 184 (1) (g) of the Criminal Law (Codification and Reform) Act for allegedly defeating or obstructing the course of justice. Her arrest while executing her professional duties sparked global outrage.

Nightmare

- *arrests, chaos mar voter registration exercise*
- *let us help, civil society says*

HARARE-A highly anticipated voter registration exercise has become a nightmare, with arrests and chaotic scenes at registration centres leaving huge question marks on the whole process.

that there shall be a special and intensive voter registration and inspection exercise for at least 30 days after the publication of the new Constitution. This does not have to start immediately after the

But government seems to have its own ideas. Instead of embracing civil society efforts, it has unleashed State agents on bonafide groups trying to assist in voter education.

Civil society groups say such actions by State agents are not in the spirit of reforms agreed to by coalition partners at the inception of the government in 2009.

With elections expected this year, the voter registration exercise is a key step to credible polls.

But members of the public, civil society organisations and political parties are crying foul, with some calling for the resignation of Registrar General Tobaiwa Mudede.

Civil society bodies are now calling on government to allow them to assist in voter education programmes after realising authorities are overwhelmed.

Fifty civil society organisations last week released a damning report card of the exercise, and demanded a fresh exercise, in line with the new constitution.

In a joint statement, the organisations – ranging from student bodies, churches, trade unions and women's groups to journalists and artists – said the exercise was hampered by a dearth of information, publicity and limited voter education.

Special needs groups such as youths, the elderly, women, workers and people living with disabilities were not specially catered for, the groups said in the statement.

Some centres failed to adhere to stipulated opening and closing times resulting in prospective voters being turned away while requirements were too stringent, the groups said.

This has resulted in the organisations demanding a fresh mobile voter registration exercise.

According to Zimbabwe Lawyers for Human Rights (ZLHR), the law provides for such an exercise.

“Section 6(3) of the Sixth Schedule specifically states



Civil Society leaders at a press briefing on the voter registration exercise

Picture by Kevin Maenzanise of ZESN



Tawanda Chimhini

publication date, and will also be dependent on preparedness, as well as adequate human and financial resourcing of ZEC, which will supervise the Registrar-General's (RG) office during this exercise.

“There is also a possibility of extending this 30-day period if it does not satisfy the needs of people wishing to register to vote or inspect the voters roll. The 30-day exercise is mandatory and failure to carry out this exercise after the new Constitution comes into effect will be a violation of the new Constitution by ZEC and the RG's office,” said ZLHR in a statement last week.

ZLHR and other civil society organisations say government should allow them to assist in voter education.

This month, police charged the Electoral Resource Centre (ERC), represented by the organisation's director Tawanda Chimhini with contravening Section 40 (C) (1) (g) of the Electoral Act for allegedly conducting a voter education exercise without authority/permission from the Zimbabwe Electoral Commission.

Three volunteers arrested over the weekend while allegedly conducting a voter education exercise have now been turned into State witnesses. Lawyers from ZLHR are representing ERC. In Bulawayo, three Movement for Democratic Change members were arrested after they were found in possession of about 23 receipts from people who had registered to vote.

ZLHR, which has been representing most of those arrested in connection with voter education and registration, says Zimbabwe will be unable to hold a credible election if the arrests and harassment continue.



Leo Chamahwinya

Since December, State agents have been targeting organisations involved in voter education. Police in December arrested Zimbabwe Human Rights Association (ZimRights) officials Leo Chamahwinya, Dorcas Shereni, Farai Bhani and Tatenda Chinaka. They were accused of contravening Section 31, 136 and 137 of the Criminal Law (Codification and Reform) Act for allegedly attempting to defraud the Registrar General's Office by forging and manufacturing counterfeit copies of certificates of voter registration.

The following month ZimRights director Okay Machisa was arrested on similar charges. The courts later threw out the cases.

In February, police in Lupane, Matabeleland North Province, arrested two National Youth Development Trust members and charged them with contravening Section 40 of the Criminal Law (Codification and Reform) Act (Chapter 9:23) for allegedly possessing voter registration receipts.

ZLHR executive director Irene Petras last week said law enforcement agents must allow civil society groups (CSOs) to do their legitimate work without hindrance.

Petras said some of the activities that CSOs are currently being harassed for undertaking are not necessarily voter education. She called for more interaction between CSOs and ZEC to make sure that the process of registration and accreditation for voter education is speedily done.



Position Paper
22 May 2013

Know your Rights

Clearing the mist: ZLHR position paper on elections and the new constitution

WHICH CONSTITUTION WILL GUIDE US ON ELECTORAL PROCESSES?

On 22 May 2013, President Robert Mugabe assented to the Constitution of Zimbabwe (Amendment No.20) Bill (hereafter referred to as “the new Constitution”). It was gazetted on the same day. This is the “publication day” of the new Constitution, on which various of its Chapters have come into operation. This includes Chapter 7, which deals with elections. The only sections of Chapter 7 which have not become operational, are section 158 (timing of elections), section 160 (number of constituencies and wards), and section 161 (delimitation of electoral boundaries).

In all matters relating to the upcoming electoral process, therefore, Chapter 7 of the new Constitution will be the supreme and binding law. However the timing of elections will be done in terms of the current Lancaster House Constitution (hereafter referred to as “the old Constitution”), whilst constituency and ward boundaries will remain as they were for the 2008 elections, and there will not be a fresh delimitation exercise.

So the new Constitution and the old Constitution will be operating simultaneously for purposes of the timing of elections. They must be read together with the Sixth Schedule of the new Constitution which contains provisions to assist during the transition from the old Constitution to the new Constitution.

TIMING OF ELECTIONS

The timing of elections is difficult to estimate and essentially depends on when Parliament will complete election-related amendments and when those amendments become operational (when the President assents to the amendments), as well as when the voter registration and inspection exercise is carried out. What follows is the minimum time-frame for various processes.

1. President Limited in when he can Announce the Date of an Election

Part 3, Section 8 of the Sixth Schedule stipulates that the first elections must be conducted in terms of the Electoral Law in conformity with the new Constitution. All action taken must therefore comply with the provisions of the new Constitution. As certain electoral processes have changed in the new Constitution, the current Electoral Act, regulations, and other laws and regulations related to elections must be amended so that they comply with the new Constitution.

Additionally, there will be need to amend the Local Government Act and the Provincial Councils Act. It would also be folly to proceed to elections without addressing key reforms of legislation relating to media, access to information, public order, criminal procedure and the justice delivery system (including the mandate and operations of the Electoral Court). All of these relate to elections and have been affected by the new Constitution.

The new Constitution clearly sets out in section 157(5) that all amendments to the Electoral Law and any other law relating to elections must be made before an election date is proclaimed. Once an election date is announced, absolutely no amendments can be made to the Electoral Law or other laws relating to elections, either by Parliament, or by the President using his executive powers under the Presidential Powers (Temporary Measures) Act. The President therefore has to wait for all electoral amendments to be adopted by both Houses of Parliament and he must sign them into law before he can announce an election date. It should be noted that the Zimbabwe Electoral Commission (ZEC) must be consulted on all proposed amendments relating to elections. If this process is not followed, the President will be violating the new Constitution.

2. Mandatory Voter Registration and Inspection Exercise

Section 6(3) of the Sixth Schedule specifically states that there shall be a special and intensive voter registration and inspection exercise for at least 30 days after the publication of the new Constitution. This does not have to start immediately after the publication date, and will also be dependent on preparedness, as well as adequate human and financial resourcing of ZEC, which will supervise the Registrar-General’s (RG) office during this exercise. There is also a possibility of extending this 30-day period if it does not satisfy the needs of people wishing to register to vote or inspect the voters’ roll. The 30-day exercise is mandatory and failure to carry out this exercise after the new Constitution comes into effect will be a violation of the new Constitution by ZEC and the RG’s office.

3. Proclaiming an Election Date

At the very earliest, the President could proclaim the date of the election 15 days before the end of the voter registration and inspection exercise, but only if all the amendments to the Electoral Law and other related laws have been finalised and are operational. This would mean that, the day after the exercise ends, the voters’ roll would close and 14 days later, Nomination Court could sit in terms of section 157(3) of the new Constitution. Polling can then occur – at the very

earliest – 30 days after Nomination Court has sat.

4. Date by which Elections must be Held

Section 58(1) of the Old Constitution states that a general election must be held within a period not exceeding 4 months after Parliament is dissolved. If Parliament runs its full course, an election would therefore have to be held before 29 October 2013. If Parliament is dissolved earlier by the President, elections must be held within 4 months of the date on which he dissolves Parliament. In other words the country has four months to announce an election date, convene nomination courts, and hold the polls.

THE PREREQUISITES BEFORE AN ELECTION DATE IS ANNOUNCED

Particular national processes must occur in terms of the new Constitution before an election date can be announced.

- (a) All amendments to the Electoral Law and election-related legislation must be finalised and operational.
- (b) A 30-day voter registration and inspection exercise has been carried out. [If a date is announced after (a) but still during the voter registration exercise, the announcement can only be done 15 days before the end of the voter registration exercise.]
- (c) Once an election date is proclaimed, a minimum of 44 days (14 days between proclamation of the date and the sitting of the Nomination Court, and a further 30 days between the sitting of the Nomination Court and Polling Day) must elapse before actual voting.
- (d) The polls must be held within 4 months of the dissolution of Parliament. [At the latest elections must be held by 29 October 2013, if Parliament runs its full course, or alternatively within 4 months of the date on which the President dissolves Parliament.]

For Parliament to extend its life, and/or for the current government to extend itself beyond 29 October 2013, there will be need for a constitutional amendment, possibly together with a new political agreement.

If the above processes are not complied with there will be a constitutional crisis that would give rise to the real probability of protracted constitutional litigation.

Court drops Electoral Act charges against Jamba as AI hails adoption of constitution

KAROI-Magistrate Nyaradzo Ringisayi has freed a man who was being charged for alleged contravention of Section 149 of the Electoral Act as read with Section 10 of the Referendums Act.

Nhau Jamba of Hurungwe in Mashonaland West Province was on 9 May found not guilty and acquitted after the State, which had led one witness at trial, withdrew charges after plea.

The prosecution said it had withdrawn the case because the witness, who was also the complainant in the matter, failed to produce evidence of a commission of the offence of obstructing voters.

“In any event her evidence under cross examination completely exonerated Jamba,” said Zimbabwe Lawyers for Human Rights lawyer Kennedy Masiye, who was representing Jamba.

Jamba was arrested on 16 March at Chikova Primary School Polling Station in Hurungwe North constituency. The State accused him of willfully obstructing voters who were voting for the draft constitution, which was recently gazetted as the country’s new governance charter.

He was also charged with unlawfully compelling or attempting to compel people who attended the Referendum voting process by recording the number of people who were casting votes in his notebook in contravention

of Section 113B (d) of the Electoral Act as read with Section 10 of the Referendums Act. Meanwhile, Amnesty International (AI) says the new constitution can usher in new culture of human rights.

In a statement released soon after the adoption of the new governance charter, the global human rights group said Zimbabwe’s new constitution presents a golden opportunity for the country to break away from a culture of impunity.

President Robert Mugabe on Wednesday signed into law a new constitution, following a three-year constitution-making process to replace the Lancaster House constitution adopted at independence in 1980.

“The new constitution is a positive development with the potential to increase ordinary people’s enjoyment of their basic rights,” said Noel Kututwa, Amnesty International’s Africa deputy director.

“Not only is the world watching whether the country has truly turned the corner on this historic day, but millions of people in Zimbabwe hope that this new constitution will usher in a new political order where human rights are respected and protected.”

The constitution-making process suffered ongoing delays and controversy, but March’s referendum

on the new constitution passed off relatively peacefully and resulted in an overwhelming ‘yes’ vote.

Amnesty International said repressive laws that have been used to stifle government critics are expected to be repealed, or at least amended, under the new constitution.

“Zimbabwe’s lawmakers are now expected to realign laws such as the Public Order and Security Act, which have been used in the past to deny people their civil and political rights,” said Kututwa.

There has been an increase in human rights violations in Zimbabwe since the political crisis that started in 2000 and led to millions fleeing the country to escape political persecution and economic hardship.

According to Prime Minister Morgan Tsvangirai’s MDC-T party, more than 200 people were killed in state-sponsored violence in 2008 during the second round of the presidential elections, while thousands were tortured and injured.

The adoption of a new constitution is expected to lead to an election of a new government, following more than four years of a coalition government established under a political deal brokered by the Southern Africa Development Community.

“The next election in Zimbabwe presents a real test for the authorities to prove their commitment to the declaration of rights in the new constitution,” said Kututwa. “The real test is whether all political parties and civil society organisations will enjoy their rights to freedom of expression, association and peaceful assembly,” he added.

In recent months, a number of high profile civil society organisations in Zimbabwe have had their offices raided by police, while human rights defenders have been arbitrarily arrested.

“More attacks on human rights defenders will cast doubt on the government’s commitment to uphold the declaration of rights in the new constitution,” Kututwa said.

“The police authorities must speed up human rights education, starting with officers in the Law and Order Section of the Zimbabwe Republic Police who have been at the forefront of restricting fundamental freedoms.”

Amnesty International also called on the government to provide adequate funding to the Zimbabwe Human Rights Commission, as well as urging the next parliament to seriously consider total abolition of the death penalty.

“The death penalty is one of the colonial legacies haunting a free Zimbabwe today,” said Kututwa.

Zim Lawyers FC trounce Unifreight

Unifreight 0: Zim Lawyers FC 5:

The Mighty Zim Lawyers FC won away from home on Saturday 18 May playing against Unifreight. Goals from Wellington Cheya (1) Benjamin Dube (2), Terrence Sibanda (1), Makanaka (1) demolished the highly competitive Unifreight which had more than

30 players on the day. Zim Lawyers FC proved to be too powerful for an otherwise well organised Unifreight. Zim Lawyers FC lies fourth on the log despite playing one game less than all teams in the top half.

Match results for Zim Lawyers FC's last three matches:

11 May: Zim Lawyers FC 2: Bak Logistics 0
4 May: Tren Tryers FC 1: Zim Lawyers FC 5
27 April: Zim Lawyers FC 4: Socials (Zifa) 3

Harare Professionals Soccer League Log

	P	W	D	L	F	A	Pts
Obama Boyz	6	4	2	0	23	9	14
Crowne Plaza	6	4	1	1	15	7	13
H-Metro	6	4	1	1	12	8	13
Zim Lawyers	5	4	0	1	17	6	12
Social	6	3	1	2	13	9	10
Red Rose	6	3	0	3	10	4	9
Bak Logistics	6	2	3	1	9	8	9
Fresh Pro	6	2	2	2	13	15	8
Joma	6	2	1	3	10	11	7
FC Triton	6	2	1	3	11	13	7
Star FM	5	1	3	1	11	9	6
Unifreight	6	2	0	4	8	15	6
Wolves	5	1	2	2	10	13	5
Unilever	6	1	1	4	7	15	4
Holiday Inn	5	1	0	4	3	13	3
Tren Tyres	6	0	2	4	7	24	2

Chivhu teacher's battle for children

CHIVHU-Edwin Maseva, a teacher at Makumimavi Primary School, says his eviction from a farmhouse situated at the school will negatively affect young kids whose future depends on his services.

Maseva is in a prolonged court battle with a senior prison officer who is seeking to evict him from the farmhouse at Doornkasteel Farm, which she got under the government's land reform programme.

The farmhouse is currently used to house teachers who work at the farm school.

But the prison officer, Angela Christwish Chisora, wants the teachers out, meaning they will have to seek alternative accommodation or leave the school completely.

In a Notice of Appeal against the eviction, Maseva argues that not only will his rights be violated if he is kicked out, but scores of children will suffer from the ripple effects.

These include Chisora's own dependants, he states in court papers.

"This will have a detrimental effect on their future because I won't be having anywhere to stay and therefore won't be able to discharge my professional duties to them," argues the Grade 7 teacher, who has improved students' grades since arriving at the school.

Makumimavi Primary School is located at the farm and teachers would have to travel long distances to execute their duties if Chisora has her way and evicts them from the farmhouse.

"I find it strange that Applicant (Chisora) is willing to sacrifice the future of this nation, embodied in these children, for her selfish ends, and I also find it quite disturbing that some elements within the Ministry of Lands will be willing accomplices in the subversion of the rights of the children yet they should be the custodians of these rights," argues Maseva.

On 17 April, Magistrate Archie Wochiunga, sitting at Chivhu Magistrates Court, ordered that Maseva be evicted from the homestead.

It is this ruling which Maseva, represented by Jeremiah Bamu of Zimbabwe Lawyers for Human Rights, wants overturned.

"The ruling constitutes a gross misdirection and error at law, no further issues arise. The balance of equities is certainly in my favour. I have good prospects of success on appeal," Maseva argues.

Maseva argues that he is occupying the homestead because he is an employee of the Ministry of Education, Sports, Art and Culture.

"I do not occupy the said piece of land in my individual right. I derive the right to occupy from my employer, the government, and the government is the one with title over Gazetted land. It is sheer mischief to require the government to issue itself with an offer letter,



Still fighting... Maseva

lease or permit with respect to its property. I am not an occupier within the contemplation of the Act. I was not on the piece of land prior to

it being Gazetted. I was also not there even after the expiration of the specific time frames stated in the Act. These are very clear and simple issues which the court a quo chose to turn a blind eye to," added Maseva.

Over the past few years, Maseva has had more headaches on how to defend himself in the courts of law than planning his classroom work.

He has faced one charge after another since refusing to vacate the farmhouse to make way for Chisora and her workers.

Recently, he told The Legal Monitor that his legal battles are now affecting the children he is teaching at Makumimavi Primary School.

Besides the eviction wars, Maseva has another charge hanging over his head.

Last month he was served with fresh summons to appear at Chivhu Magistrates Court to answer to two charges of contravening Section 60 of the Electricity Act for allegedly tempering with electricity connections.



Bindura Magistrate Tendayi Chifamba on Friday acquitted Energy and Power Development Minister and MDC-T Deputy Treasurer 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 Wednesday 10 October 2012 and charged with contravening Section 33 (2) (a) of the Criminal Law (Codification and Reform) Act when he allegedly uttered the words: "Chifa Mugabe chifa. Chibva Mugabe chibva," loosely translated to "Pass on Mugabe and go now". The rally had been held on 18 May 2012 at Manhenga Business Centre in Bindura, Mashonaland Central Province.