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**SPEECH DELIVERED BY THE DEPUTY CHIEF JUSTICE, THE
HONOURABLE MR JUSTICE L. MALABA AT THE OPENING OF THE 2012
LEGAL YEAR: 9 JANUARY 2012**

On behalf of the Judiciary and the Judicial Service Commission, I welcome you to this ceremony to mark the official opening of 2012 Legal Year. Your presence here at a time when you could have been attending to other matters of immediate interest in your lives adds invaluable significance to the occasion and attests to the respect the judicial system enjoys in the country.

No country can prosper without peace and stability. A trusted and trustworthy system of the administration of justice in which people have confidence is an indispensable guarantee for peace and stability in any society governed by the rule of law.

The fact that the ceremony is graced by the presence of senior officials from the executive and legislative branches of government is a happy reminder to us that the three organs of State exist for the singular and common purpose of providing efficient, effective and expeditious service to the people in accordance with the requirements of the Constitution and the law. They therefore share with us a common vision of a good administration of justice based on high standards of professional conduct.

For the Judiciary to retain public confidence it must be a judiciary of its times. It must take account of the needs of the changing society within which it holds office. It must absorb the light from the society it serves whilst remaining strong, transparent and humble in its operations. The Judiciary has occasionally to account to the people by giving information on changes that have taken place in the administration of justice, highlighting the problems encountered in the past year and suggesting solutions for them.

Motivating us is the desire to make the judicial system work in the way it is intended to work to deliver justice at the lowest cost possible and within the shortest time possible. We cannot achieve this noble objective by words. Whilst we may need time and freshness of mind to reflect on issues, there is need for the judiciary and the legal profession to demonstrate commitment to making the system work in an effective and efficient manner.

This time gives the judiciary and the legal profession as the bodies entrusted by society with the responsibility of using the methods and procedures prescribed for the sole purpose of the delivery of prompt justice, the opportunity to re-affirm our commitment to the basic principles on which the administration of justice is founded and start the new legal year with a greater readiness to serve the people with the humility and fortitude expected of us under the law.

The Judicial Service Commission gained control of the budget for the Judicial Service in January 2011. There has been a marked improvement in the funding of court operations. Prioritization of the funding of court operations under the budget during the past year saw improved provision of stationery and office furniture to the courts. Circuit Magistrates Courts which had closed due to financial constraints have re-opened. The Judicial Service Commission could have wished for a more generous financial background against which to commence its statutory responsibility and chart the course for the new unified organization. It, however, has had to discharge its duties on a restrained budget.

To ensure the well-being and good administration of the Judicial Service and its maintenance in a high state of efficiency, the Judicial Service Commission initiated a process of developing a strategic plan to guide it in the discharge of the administrative functions in the coming five years. The strategic plan was to set out the vision, mission, values and activities to be undertaken to achieve the short and long term objectives.

The Judicial Service Commission requested a team of experts to conduct the process of the development of the strategic plan after securing funding from the Danish Embassy. The project started with an analysis of the Judicial Service to identify gaps in the performance of administrative tasks between the current situation and the desired outcomes. For a period of eight months the experts consulted a large section of internal and external stakeholders. The work to set the direction for the judicially led service culminated in a multi-stakeholders meeting at the end of September 2011. After debate and discussion a draft strategic plan was drawn up. In all, nine workshops were conducted by the consultants. Stakeholders included representatives of interests of such groups as law enforcement agents, non-governmental organizations, chiefs, universities, the Law Society, business and labour associations, Development Partners and the Judicial Service itself. The draft strategic plan was placed before another multi-stakeholder meeting held on 4 to 6 November 2011. The draft was finally adopted with some amendments. It is now to be publicly launched before implementation.

Discipline is an indispensable requirement of an efficient judicial system. Section 18 of the Judicial Service Act provides that service regulations may prescribe one or more Judicial Service codes of ethics providing for:

- (a) the requirement of strict impartiality of judicial officers when performing their duties;
- (b) the requirement of judicial officers to discharge duties with propriety without being influenced by –
 - (i) any partisan interest, or public clamour or fear;
 - (ii) family, personal, social, political or other interests.
- (c) the requirement of judicial officers not to make any public comment that may affect or may reasonably be construed to affect the outcome of any proceedings or impair their fairness, or make any comment that might compromise a fair trial or hearing;

- (d) The prohibition or limitation of gifts to judicial officers or to members of their families residing with them that may influence or reasonably be construed to influence the execution of the duties of judicial officers.
- (e) The definition of any other corrupt practices or act of improper behaviour on the part of judicial officers.

Ethics is a concept which is central to a judicial officer's role. It refers to a body of written or unwritten rules relative to the conduct of a judicial officer and intended to guide him or her in the maintenance of certain basic standards of behaviour. The extraordinary power a judicial officer has to affect the life and future of an individual and society demands ethical standards of conduct for a judicial officer that the ordinary citizen is not required to meet. Yet despite the importance of ethical behaviour there was no written code of conduct in our jurisdiction for the guidance of judicial officers of higher courts about what is appropriate behaviour.

For a long time the belief held was that Judges were capable of regulating their own behaviour and that a code of ethics was unnecessary. It was argued in relation to their judicial functions that Judges were subject to a higher degree of accountability and transparency than any other public officer – or indeed, any holder of political office. Society was reminded of the fact that judicial officers do their work in public. They are required to give reasons for their decisions. The decisions and their conduct in court can be subjected to public scrutiny and criticism in the media. The contention was that the commitment to uphold the law and to do so in an impartial and unbiased manner affirmed by a Judge in the oath of office was an effective security for ethical conduct on the part of the Judge.

The flaw in the argument was that a Judge may not be aware of how his or her activities are perceived. It could be argued that whilst justice has a face, it should not have a personality. A code of conduct reassures the public that decisions are not the result of an individual judge's personal preferences and biases. Justice must not only be blind but also appear to be blind. It also became clear that despite the affirmations by judicial officers of the fundamental principles to uphold the law and to do so in an impartial and unbiased manner these principles were not always adhered to. It became clear that despite the high expectations the public had of Judges, they were after all human beings with the attendant strengths and weaknesses sometimes shaped by their background and life experiences. The numerous judicial scandals which broke out in many jurisdictions gave support to the realization of the fact that an undisciplined and unregulated judiciary cannot maintain public confidence in the justice delivery system.

From about 1990 judiciaries' world over began to accept the necessity of having written codes of ethics to guide and regulate judicial conduct. After many years of debate on the matter the judiciary in Zimbabwe finally adopted a code of ethics in terms of Section 18 of the Act on 2 December 2011.

The Code of Ethics will apply to “Judicial Officers”. The term “Judicial Officer” as defined includes the Judges of the Supreme Court, Judges of the High Court, Presidents of the Labour Court and Presidents of the Administrative Court.

The code contains detailed specific rules of conduct. It is a definitive code of personal behaviour to ensure civility in courts and outside court. Its greatest achievement is that it is a regulation of the judiciary by the judiciary. Whilst the code of ethics provides a standard against which to assess judicial behaviour, it also serves as a guide to the Judicial Officers about what is and is not acceptable conduct. Secure in the knowledge that they can avoid unethical behaviour by following set standards, the judicial officers may make decisions in their judicial role or in their private lives that will accord with what people expect of a judicial officer. The standards of conduct are now objectified by the code.

The code also provides a procedure for receiving, investigating, hearing and determining complaints of misconduct by the judicial officers made against them by members of the public.

There is no conflict between judicial independence and accountability arising from the creation or enforcement of the judicial Code of ethics. The judiciary does not exist in isolation. It is an institution of a particular society. To be effective, judicial officers require the respect and faith of the communities they serve. Public confidence is critical to the administration of justice. Making judicial officers accountable for their conduct is one way of maintaining public respect for the judiciary.

Independence of the judiciary is important in so far as its absence would put at risk the impartiality of a judicial officer in hearing and determining court cases. It is guaranteed in the Constitution for the benefit of members of the public facing the exercise of judicial power. The premise underlying the grant and protection of the right to judicial independence is that it is in the interest of justice. It is also vital that the independence be vested in persons who will behave in an ethical manner in their judicial and personal lives. The code of conduct is therefore intended to promote and not inhibit the independence of the judicial officers in the discharge of their judicial functions. To be respected, the independence must be seen as existing to protect the impartiality of judicial decisions and not the personal interest of the judicial officers.

I now come to the work done by the Supreme Court, the High Court, the Labour Court and the Administrative Court in the past year. I intend to use the statistics on the cases filed, those disposed of and backlogs in these courts to identify the problems afflicting the system of justice whilst suggesting possible solutions. The question I would like to answer is whether we in the judiciary made reasonable effort to keep the promises we made at the beginning of 2011 Legal Year to discharge our judicial functions in accordance with the fundamental principles on which the administration of justice is founded.

The work for the Supreme Court involves the hearing and determination of appeals from the High Court, Labour Court and Administrative Court, applications made to Judges in chambers for condonation of late noting of appeals and

extension of time within which to appeal and applications for the redress of violations of fundamental rights and freedoms guaranteed under the Constitution. Criminal appeals from the High Court dropped in 2011 from 29 cases in 2010 to 9. Of these only three (3) were set down for hearing as the rest were not yet ready for set down. Those set down for hearing were disposed of. There was also a drop in the number of appeals in civil cases from 134 in 2010 to 103. The 34 that were set down for hearing were heard and disposed of. The number of appeal cases from the Labour Court increased slightly to 38 in 2011 from 34 in 2010. The 12 cases that were set down for hearing were heard and disposed of.

Constitutional applications dropped from 31 in 2010 to 22 in 2011. The (eight) 8 that were set down for hearing were heard and disposed of. Chamber applications increased from 126 in 2010 to 156 in 2011. The 49 that were set down were heard and completed. There are outstanding judgments in respect of some of the applications.

The Supreme Court has adopted a practice for the speedy disposition of cases. It is based on the principle that if upon deliberation the court is unanimous on as to the outcome of the hearing and determination of the case, judgment and reasons should be delivered on the day of the hearing unless the complexity of the legal questions involved requires that more time be taken for reflection and collation of reasons for judgment. In that case judgment would be reserved for delivery at a future date. Reserved judgments are now an exception rather than the norm in the Supreme Court. As a result of this practice the Supreme Court has been able to clear cases set down for hearing except for situations where the parties themselves ask for postponement.

The success of the practice adopted by the Supreme Court has depended on the hard work which the Judges and legal practitioners have been prepared to put into the pre-hearing preparations. The Judge involved in the hearing of the case is under a duty to carefully study the file and take time to reflect on the factual and legal questions raised by the case. Mere perusal of the file would not equip the judge with the disposition to the clarity of mind on the issues required for a unanimous decision. We are fortunate enough at the Supreme Court to have members of the de facto bar and experienced senior legal practitioners appearing regularly to argue cases for their clients. We also have two legal research assistants who contribute to the elucidation of the issues.

The increase in the number of chamber applications attests to failure by legal practitioners to comply with the time – limits for noting appeals. Time limits are an important aspect of the requirements of procedures put in place for the purposes of ensuring expeditious disposition of cases and bringing finality to litigation. The cases that give rise to chamber applications for condonation of non-compliance with the rules and extensions of time within which to appeal do not only add to the delay in the finalization of cases, they clog the system. Legal practitioners must study the rules and act timeously in accordance with the procedures prescribed.

The situation regarding the High Court sitting in Harare is a cause for concern. New cases that were filed with the Registrar increased in 2011 by 3

157 from 9 577 in 2010 to 12 734. The increase of 33% in the growth of civil litigation put a severe burden on the judges. It reflects changes taking place in the conditions of social, political and economic relationships in society. It also attests to the willingness of our people to seek redress of violations of their private and public rights in the courts. The increase may also be a reflection of the need for measures to be taken to balance the jurisdiction of the High Court with that of the lower courts to ensure that only those cases that deservedly fall within the jurisdiction of the High Court find their way there.

Sadly, the disposition rate at the High Court sitting in Harare is disappointing. It is apparent from the figures that the number of cases representing the unfinished work is too high attesting to the grave problem of delays in the delivery of justice. It must not be forgotten that the quality of justice is at any given time a function of costs, time and effort of men and women who serve in the system. The impression one gets from the examination of the figures representing the disposition rate is that not much time was spent hearing and determining cases. A disproportionate number of cases were either postponed without a hearing or those heard had decisions deferred for long periods.

There were 2 104 chamber applications of which 1 083 were disposed of leaving a backlog of 1 021. The clearance rate was 51%. The procedure of pre-trial conferences which was devised for the purposes securing settlements of disputes was not used effectively. A total of 1 007 case were earmarked for this procedure. Of these 612 actually became subjects of pre-trial conferences. Only 198 cases were cleared through the procedure. There may be need to train judges on modern techniques of mediation and dispute resolution.

Of the 2 201 unopposed matters set down for hearing, 988 were disposed of representing a disposition rate of 45%. A large number of cases were postponed. Of the 475 opposed matters set down for hearing, only 92 were completed leaving a backlog of 383 cases. The disposition rate was 19%. Of the 1 145 divorce cases set down for hearing, 356 were completed whilst 590 were postponed. The disposition rate was 31% whilst the postponed cases represented 51% of the case load.

Of the 608 urgent chamber applications made, 216 representing 35% of the cases were granted. There were 133 cases pending the outcome of the hearing. There was also evidence of possible abuse of this process because 208 of the cases were declared not to have been urgent and 73 were dismissed. This suggests that legal practitioners used the procedure of urgent chamber application for a purpose it was not intended. As a result, valuable judge time was taken which could have been used to hear deserving cases.

Of the civil appeals from the Magistrates Court, 522 were received and 96 set down for hearing. Of these 31 were completed representing a 32% disposition rate.

Disposition of bail applications was an exception to the low disposition rates characteristic of the other categories of cases. Of the 1 308 bail applications made, 951 were disposed of representing a disposition rate of 72%.

There were 152 criminal cases set down for hearing of which 38 were disposed of representing a disposition rate of 25%. The criminal appeals from the Magistrates Court did not fare any better. Of the 890 noted, 103 were set down for hearing of which 44 were completed representing a disposition rate of 43%. Of the 6 065 criminal cases received from the Magistrates Courts for review 2 558 were disposed of representing a rate of 42%.

The level of disposition of cases suggests that the judicial system failed to do what it is intended to do. Judicial power is guaranteed under the Constitution so that it is used fairly to deliver justice within a reasonable time at a reasonable cost. We cannot escape the charge that a system that functions slowly and allows decisions on cases to be postponed without good cause has defeated one of its primary objectives at the very door of the judicial process. Unnecessary postponements of the hearing of cases consume the time of lawyers and court staff.

It has been suggested in the report on the work of the High Court sitting in Harare that consideration be given to having additional judges appointed as a solution to the problem. I think the figures make it clear that the urgent solution is to have all those involved in litigation to put more hours in the hearing and determination of cases. Until we can show that no other group of men and women assembled could put any better effort to clear the backlog of the cases it would be difficult to justify the appointment of additional judges whilst maintaining the low disposition rates revealed by the statistics.

Although there was an increase in the number of new cases filed with the Assistant Registrar at the High Court in Bulawayo, the disposition rates there were fairly high. I do not intend going through all the figures in detail as I did in the case of the High Court in Harare because the situation in Bulawayo is not a cause for concern. For example, 406 divorce cases were received, 324 set down for hearing and 202 disposed of representing a disposition rate of 62%. Of 353 unopposed applications, 259 were disposed of representing a disposition rate of 73%. Of the 419 urgent chamber applications received, 339 were disposed of representing a disposition rate of 80%. Of 686 ordinary chamber applications, 534 were granted and 152 refused representing a 100% disposition. Of the 473 opposed court applications, 153 were set down for hearing of which 79 were disposed of representing a disposition rate of 53%. Of the 57 civil cases set down for trial, 18 were disposed of whilst 12 had reserved judgments.

The high disposition rates were registered in criminal cases. Of the 72 criminal cases set downs for trial, 41 were disposed of representing a disposition rate of 56%. Of the 319 bail applications heard, 247 were disposed of representing a disposition rate of 77%. Of the 1994 criminal review, 1 330 were disposed of representing a disposition rate of 66%.

All I can say in respect of the situation at the High Court sitting in Bulawayo is that there is ample evidence that the judges there spent time hearing and determining the cases brought before them.

The same is true of the Labour Court with the exception of Gweru. Of all the 1 450 cases received by the Labour Court sitting in Harare, Bulawayo and

Gweru, 1 020 appeals were disposed of representing a disposition rate of 70%. The Labour Court accumulated a backlog of cases since 2005. The figures show that whilst the Presidents have been cutting into the deficits for the previous years through high disposition rates they have failed to clear the backlog of cases. The exception was the Labour Court in Bulawayo which has been able to clear all the cases set down for hearing since 2008 whilst cutting into the backlog carried over from previous years. The Labour Court in Gweru has been registering low disposition rates since 2008.

An appeal has been made for appointment of additional Presidents of the Labour Court to alleviate the burden of the ever increasing case load which the current number of Presidents is clearly unable to control. It is clear from the statistics that the Presidents spent time hearing the cases and making decisions. They were not postponing the cases. We must face up to the reality that when the demands of the court in all cases exceed the finite capacity of any twelve human beings who could be assembled, they cannot perform the task to the standards the people of this country have a right to expect. In that case there is justification for a request for the appointment of additional Presidents of the Labour Court. There is little activity taking place at the Administrative Court.

Before I leave the question of delays, comprising one or two representatives of the Judiciary, the Law Society, the Registrar or Assistant Registrar, the Attorney-General's Civil and Criminal Divisions, the Police and Prisons be set up at each court depending on the nature of the work done to meet say quarterly to review the case load, identify causes of delays in having cases set down for hearing and postponements. The committee should compile a report with proposed solutions to be submitted to the heads of the interests represented and the Chief Justice. Such committees can be constituted without further delay to ensure that those concerned with the administration of justice are aware of the problems and work together to find solutions as part of an ongoing administrative mechanism.

May I, on behalf of you all take this opportunity to formally congratulate Justices Makonese,imba-Dube and Mwayera on their well deserved appointments to the bench. I welcome them to the bench of honourable men and women dedicated to the service of their fellow men and women without fear or favour in accordance with the Constitution and law. I speak not only for myself but for all my brother and sister judges when I say that in bidding the three Justices a warm welcome to the bench, we do so secure in the knowledge that the qualifications and experience which they possess will equip them for the tasks which lie ahead.

May I also take this opportunity on your behalf to pay tribute to the Honourable Mr Justice Wilson Sandura who retired from the Supreme Court Bench on 29 July 2011. Although Mr Justice Sandura may occasionally be called to serve on the High Court or Supreme Court Bench for fixed periods of not more than four months, his retirement at the age of 70 marked the close of a long and brilliant judicial career of just over twenty eight years.

During the period of his judicial career Mr Justice Sandura delivered many judgments of importance. The judgments which are contained in the Law reports are testimony to his fine qualities as a judge. They reveal lucid exposition of often complex legal questions by an application of an analytical mind conscious of the duty to do justice to all manner of man without fear or favour.

It is a mark of judicial independence that Mr Justice Sandura like any judge worth the honour bestowed on him or her by society would not hesitate arriving at a decision contrary to that of the majority of his brother and sister judges if he felt that the conclusion was justified by his view of the law and its application to the facts of the case. There are, however, many judgments of the Supreme Court in which Mr Justice Sandura shared the unanimous view of the legal problems with his brothers and sisters. All that can be said after a fair and objective assessment of the impact of Mr Justice Sandura's judicial career is that he has contributed immensely to the development of our jurisprudence. The good fellowship so essential to the administration of justice by the Supreme Court was the richer in having as one of its own Mr Justice Sandura.

We regret therefore that by the application of the rule on retirement at 70 Mr Justice Sandura although in good health and in full possession of all his faculties had to retire from active service. We wish that in his retirement Mr Justice Sandura may enjoy in good health the leisure which he has so richly earned.

On a sad note, I would also like to take this opportunity to express on behalf of the judiciary, our heartfelt condolences to the family of Mr Nyandoro who died on the 1st of January 2012. We want to say to the family they should find solace in the fact that Mr Nyandoro rendered conscientious service as an assessor at the High Court. He was always mindful, in the performance of his duty, of the oath he took to give a true verdict in the case according to the evidence adduced. May his soul rest in peace.

Finally, I wish publicly to record my appreciation of the selfless contributions which have been made by judicial colleagues, by the Judicial Service Commission secretariat, by the assessors, by the Office of the Registrar, by the court interpreters, by the Judges clerks, by the Attorney-General's personnel, by the legal practitioners and last but by no means least, by the police and the prisons. It would be remiss of me were I not to acknowledge and express gratitude for the financial support the Judicial Service has received from some of our co-operating partners particularly the Danish Government and the United Nations Development Programme. We appreciate the invaluable support.

For now, I pronounce the commencement of the 2012 Legal Year.

Before this formal session closes, I shall call upon Bishop Mutendi of Zion Christian Church to lead us in prayer for wisdom, compassion and guidance in our work in the year ahead.

The court will now stand and following the prayer will adjourn.