



## CHALLENGING ZIMBABWE'S BLOATED EXECUTIVE

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On Friday 13 February 2009, at a ceremony at State House attended by various international dignitaries, 35 individuals from ZANU PF, MDC-T and MDC-M were purportedly sworn in as Ministers by the President. On Thursday 19 February 2009, the process was repeated, with a further six individuals taking the oath. The result was that a total of 41 persons took the oath of office as Government Ministers, swearing to abide by the Constitution and laws of Zimbabwe.

However, Article 20.1.6(5) of Schedule 8 to the Constitution provides that:

*There shall be **thirty-one (31)** Ministers, with **fifteen (15)** nominated by ZANU PF, **thirteen (13)** by MDC-T and **three (3)** by MDC-M.*

Accordingly, once 15 ZANU PF nominated Ministers, 13 MDC-T nominated Ministers and 3 MDC-M Ministers had entered into office, the constitutional quota of 15 ZANU PF, 13 MDC-T and 3 MDC-M Ministers (31 Minister in total) appeared to have been filled. The basis upon which 10 additional Ministers (referred to in what follows as “the extra Ministers”) were sworn in thus becomes questionable. These 10 Ministers were John Nkomo, Gibson Sibanda, Saviour Kasukuwere, Joseph Made, Walter Mzembe, Flora Bhuka, Sylvester Nguni, Henry Madzorera, Giles Mutswekwa and Sekai Holland.

Until recently, no formal objection appears to have been raised in any quarter about these questionable appointments. On the 7<sup>th</sup> May, 2010, however, one Moven Kufa (describing himself as a Zimbabwean citizen and civil society activist) and the Voice for Democracy Trust (which has amongst its objects the promotion of democracy in Zimbabwe) filed papers in the High Court challenging the constitutionality of the appointment of the extra Ministers. The Ministers cited as Respondents to the Application are eight of the 10 who subscribed to the oaths of office after the quotas set out in Section 8 had been reached. Two of the ten were not cited - John Nkomo, who has since taken up office as Vice-President and Gibson Sibanda, who ceased to be a Minister by virtue of having no seat in parliament within three months of his appointment (a constitutional requirement).

Various interesting issues relating to Zimbabwe's political terrain arise from this Court Application which largely have been ignored by the media. In fact, only the Financial Gazette

has even reported on the Court Application, a fact which is itself noteworthy and one can speculate on the reasons for this.

There are also various ironies which arise if the contentions within the Application are correct (and here we withhold comment on the merits of the Application as the matter is *sub judice*).

Firstly, the Respondents would have violated the Constitution in the very act of raising their right hands and swearing to uphold it. Secondly, the swearing-in of the extra Ministers appears to have had the blessing of the MDC-T party. The MDC-T has long campaigned on a platform which promises the restoration of the rule of law and constitutionality. Yet the very entry of party members to the halls of governance, if the contention in the application is valid, subverted the Constitution. Not an auspicious start, and which appears to have been a portent of what has followed.

While a political party violating its manifesto so early upon its entry into government is perhaps unremarkable, one is left to wonder why the numerous human rights NGOs, whose mandates include addressing such issues, did not immediately challenge this violation. It has been left to a concerned individual and the recently formed Voice for Democracy Trust to do something, over a year after the event. The impression created is that the human rights NGOs did nothing as MDC-T had not complained, thus tainting these NGOs' claims to independence from the MDC-T.

The Ministers cited as Respondents to the Application have not filed any opposing papers. The President, Robert Mugabe, and Prime Minister, Morgan Tsvangirai are cited as the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in addition to the Respondent Ministers. In a further irony, these two Respondents have not attested to any opposing affidavits. That task has been left to the Attorney-General who claims in his opposing papers to have the authority of both Respondents to attest an affidavit on their behalf and that he is constitutionally empowered to do so. So the very individual whose appointment is so hotly contested by Tsvangirai, Johannes Tomana, is now engaged by Tsvangirai to oppose what is stated as an attempt to compel compliance with the rule of law and the Constitution.

This situation becomes even more remarkable when one considers that the arguments advanced in the opposing affidavit by Tomana are, legally speaking, those of Tsvangirai and Mugabe. Supporters of Tsvangirai may then be astounded to learn what those arguments are and that Tsvangirai is prepared to be not merely associated with them, but to allow them to be advanced on his behalf.

Tomana, and thus Mugabe and Tsvangirai, contend that Moven Kufa is not entitled to bring the Application at all, as there has been no violation of his rights set out in the Declaration of Rights in the Constitution. They claim that Kufa has no legal right to complain that neither Mugabe nor Tsvangirai complied with the provisions of the Constitution when the appointments were made. Only parliament can do that, they claim. Parliament does indeed have the power to impeach the President for breaches of the Constitution. However, such impeachment requires a two-thirds majority of parliament in favour to succeed. Accordingly, if the contention of Tomana, Tsvangirai and Mugabe is correct, Tsvangirai and Mugabe are free to ignore the provisions of the

constitution so long as two-thirds of the members of parliament or more do not object to these violations.

Apart from this procedural objection, Tomana, Tsvangirai and Mugabe answer the substance of the complaint by claiming that when the Constitution says there “shall be 31 Ministers” what it means is that there shall be **at least** 31 Ministers. They also claim that Schedule 8 to the Constitution, which sets out this number of Ministers, is not really part of the Constitution but a political arrangement into which the court should not inquire. It is left to the reader to consider the merits of these arguments.

If Kufa’s argument is correct, the correct procedure would have been for the parties to agree to a further constitutional amendment increasing the number of Ministers – a path which is still open. Mugabe has a delicate task of balancing the various loci of power within his own party. It is thus likely that it is more important for Mugabe to be able to appoint more than 15 ZANU PF nominees as Ministers, than it is for Tsvangirai to exceed his quota. Indeed, that no tears will be shed by Tsvangirai over the loss of some of the extra MDC-T Ministers is indicated by the fact that one of them, Giles Mutsekwa, was one of three recently dismissed from government. This opens the possibility for MDC-T to agree to constitutional amendment 20 on conditions, such as the reversal of other contentious appointments, for example. However, in challenging Kufa’s argument and agreeing with Mugabe and Tomana, Tsvangirai shows no interest in pursuing this opportunity. The MDC-T continues with its policy of never missing an opportunity to miss an opportunity.

However, recent developments seem to suggest that Mugabe and Tsvangirai have come to a separate arrangement outside the Constitution in relation to the appointment of Ministers. In terms of the Constitution (not just the GPA), the Prime Minister must be consulted by the President and agree to all appointments by virtue of Article 20.1.3(p) of Schedule 8, which provides that the President:

*in consultation with the Prime Minister, makes key appointments the President is required to make under and in terms of the Constitution or any Act of Parliament.*

All ministerial appointments are appointments which Mugabe makes in terms of the Constitution. “In consultation with” is constitutionality defined as meaning “after securing the consent or agreement of”. Accordingly, Tsvangirai’s consent should be obtained for all such appointments and not merely the appointment of the MDC-T nominees. Yet Tsvangirai appears to have waived this right in respect of ZANU PF Ministers. Furthermore, under Zimbabwean law the person who has the legislative power to make appointments to particular positions, that is, to hire individuals, also has the power to fire individuals. This means that the power to fire ministers remains with Mugabe, though he is now obliged to comply with Schedule 8 to the Constitution which provides in 20.1.6.(7) that:

*Ministers and Deputy Ministers may be relieved of their duties only after consultation among the leaders of all the political parties participating in the Inclusive Government.*

In terms of the Constitution, the phrase “after consultation” does not bind Mugabe to the opinion of the leaders of the other political parties (unlike the phrase “in consultation with” which does). Accordingly, Mugabe must consult with the leaders of other political parties before firing Ministers, but can then do as he pleases. Yet, if press reports concerning the recent dismissal of three MDC-T Ministers are to be believed, Tsvangirai undertook their dismissal even though this power lies with Mugabe, and Mugabe alone, in terms of the Constitution.

The impression that one might gain from these events is that there is an agreement between Mugabe and Tsvangirai, outside the provisions of the Constitution, that Tsvangirai has full power over the hiring and firing of MDC-T Ministers and Mugabe has full power over the hiring and firing of ZANU PF Ministers. This impression would be wrong. Mugabe has exercised his power to withhold consent to the appointment of Roy Bennett as a Deputy Minister, even though he has been nominated as such by the MDC-T. He has full constitutional power to decline to accept a MDC-T nominee as a Minister, in the same way that Tsvangirai need not to accept the appointment of a ZANU PF nominee. Mugabe has chosen to exercise this power, relying on the Constitution. Tsvangirai has chosen not to and simultaneously claims that in refusing to swear in Bennett, Mugabe is somehow in violation of his obligations. If Mugabe has such an obligation it can only be in terms of some understanding that Mugabe and Tsvangirai have between each other. It is certainly not a breach of the Constitution or GPA. In fact, if Kufa’s argument is correct, it would be unconstitutional to swear in Bennett as the Constitution provides for only 15 Deputy-Ministers and 19 have been appointed already. Yet the “rule of law party” argues with aggrieved passion that Bennett must be sworn into office.

What is important to note here is that if Tsvangirai has decided to accept the position that the structure of government, and his and Mugabe’s respective powers of governance are to be determined, not by the Constitution, but by whatever arrangement they make between themselves from time to time, he cannot complain when Mugabe unilaterally decides to appoint judges without his consent. Tomana, Mugabe and Tsvangirai admit in their papers opposing the Application of Kufa and Voice for Democracy that all appointments in terms of the Constitution require Tsvangirai’s consent. The appointment of the Judge President of the High Court, and appointments to the Supreme Court are all constitutional appointments. But if Tsvangirai has abandoned the Constitution as a reference point as the determinant of his powers, he has but himself to blame if Mugabe does likewise. If the Constitution is the reference point, as it should be, the recent appointments of Judges has as much validity as those of the extra Ministers. This has several important repercussions – for example, when Justice Rita Makarau sits on Supreme Court bench, the Court may be held to be improperly constituted, thus possibly affecting the validity of its rulings.

Finally, a crucial point (if Kufa’s application has merit) which has not been highlighted to any extent in the media, is that Saviour Kasukwere is among the extra Ministers. If his appointment is ruled invalid, then he had no more right to make Regulations concerning “indigenisation” than you or I. The Indigenisation and Empowerment Regulations may thus be ruled invalid and the extensive brouhaha around them of little relevance – a point which may yet be taken by an affected company.

Kufa has brought his application partly on the basis that the bloated executive is unlawfully chewing up taxpayers’ money. But the application has significance outside the realm of the financial. It has important implications for the structure of Government, power relations between

the MDC formations and ZANU PF, the “unresolved issues” between the parties (the swearing in of Bennett etc) and the rule of law.

When Judges are faced with awkward cases with political connotations such as this, they are either avoided on the basis of some procedural point or judgment is only delivered years later once the point has become academic. Nonetheless, it is a case to watch carefully.