

Zambia Mission Report

May 16-19, 2012

Introduction

On April 30, 2012 His Excellency President Sata of Zambia suspended three judges. These are Justice Philip Musonda of the Supreme Court of Zambia, Judge Charles Kajimanga and Judge Nigel Kalonde Mutuna both of the High Court of Zambia on allegations of misconduct.

The International Commission of Jurists (ICJ) Africa Programme under its Rule of Law and Independence of the Judiciary Project commissioned a fact-finding mission to Lusaka, Zambia. The Mission was composed of the following:

1. Justice Moses Chinhengo formerly of the High Courts of Zimbabwe and Botswana and ICJ Commissioner), as Head of the Delegation;
2. Justice Qinisile Mabuza of the High Court of Swaziland;
3. Justice Thomas Masuku formerly of the High Courts of Botswana and Swaziland member of Advisory Group - Centre for Independence of Judges and Lawyers (CIJL) and interim coordinator of the African Judges Forum (AJF);
4. Thulani Maseko, a human rights lawyer and ICJ Consultant, and
5. Arnold Tsunga the Director of the ICJ Africa Regional Programme.

The objective of the Mission

The purpose of the Mission was to undertake a fact-finding and possibly thereafter, make recommendations on how the situation could be handled peacefully. This is informed by the ICJ's basic commitment to the promotion and defending the Rule of Law and the independence of the judiciary whenever and wherever it is under threat. The Head of the Mission Justice Moses Chinhengo emphasised this objective of the ICJ at all the meetings.

Methodology

The Mission arrived in Lusaka, Zambia on Wednesday May 16, 2012. The following day the Mission had several meetings. These included a meeting with the Chief Justice and other Judges of the Supreme Court of Zambia; the three Judges who have been suspended; Justice Wood who appears to be at the centre of the controversy that has now arisen; the Law Association of Zambia (LAZ); and the European Union Delegation in Zambia. The Mission also met with the Solicitor General as well as members of the official opposition political parties in the country.

The issue

The suspension of the three Judges arises from the transfer of some two files from Judge Wood, to other judges - one of the recipients being the now suspended Judge Mutuna. The file that led to the suspension of the Judges was the matter between the Development Bank of Zambia (DBZ) v JCN Holdings Limited and Two Others 2009/HPC/0322.

Brief facts around the file

Justice Phillip Musonda, before appointment to the Supreme Court was Judge-in-Charge of the Civil List at the High Court of Zambia, Commercial Registry. At that time the cases

were being handled by Judge Wood. According to Justice Musonda a complaint was made that Judge Wood was close to some of the parties in the matter suggesting that he had a conflict of interest, and therefore not suitable to adjudicate over it.

In his capacity as the Judge-in-Charge he mandated Judge Charles Kajimanga who was his deputy to attend to the complaint. Judge Kajimanga, who was in any case a close friend of Judge Wood, approached Judge Wood about the complaint. There is a dispute whether the two judges met to discuss the matter or spoke about it over the telephone. What is not in dispute, however, is that the two files were surrendered by Judge Wood who recused himself and were re-allocated. The DBZ case was re-allocated to Judge Mutuna while the other case was re-allocated to another Judge.

In recusing himself and surrendering the files, Judge Wood made no entry to show the reasons for his recusation. His failure to mention the reasons for the recusal is at the centre of the suspension as the Judges are accused of conspiracy.

The attorneys for the defendants in the DBZ case, who were not only litigants, but also directors, shareholders and legal representatives in the matter, complained about the movement of the file from Judge Wood to Judge Mutuna and suspected foul play. They allegedly wrote to the judicial structures including the Chief Justice who responded to their complaint. Apparently, not satisfied with the response from the administration of the Court the defendants complained to the Minister for Justice, who immediately forwarded a complaint to the President.

Section 98 of the Constitution

The President acting under the provisions of section 98 95) of the Constitution of Zambia, by letter addressed to each of them suspended the three judges. He did so without any form of preliminary inquiry. Neither did he inform them of the reasons for the suspension.

Court application

The two judges of the High Court, Judges Kajimanga and Mutuna filed an application before the court seeking relief that the tribunal process be stayed pending a review of the decision of the President suspending them from office. The court issued a provisional order and the matter will be heard on June 24. It is unclear whether the litigation will put to an end the controversy, which has given rise in public discourse to an onslaught on the judiciary. Apparently on June 24, 2012 the court confirmed the order staying the process of the tribunal. It is yet to be seen what steps the Government will take following the confirmation of the stay.

Concerns

While as a matter of Zambian law, the President has the prerogative and discretion to act under section 98 of the Constitution, there are serious concerns about the manner the suspension has been handled. Concerns arise under Zambian law, general principles, and international law and standards on the independence, impartiality and integrity of the judiciary.

In terms of process: First, the Judges were not informed of the reasons for the suspension. No formal communication was given to them stating the reasons for the suspension. This offends the basic principles of natural justice.

Second, there appears to be a provision within the Judiciary (through the Judicial Complaints Authority) which should have been followed before the Presidential powers could have been invoked, and third, it appears that the matter could have been within the structures of the judiciary before the intervention by the President.

The Tribunal

The Mission received a number of concerns expressed about the Tribunal, including the following: There is a general feeling that the Tribunal set up by the President is not suitable to conduct the inquiry in a fair, just and equitable manner. The judges who are the subject of the inquiry are not against being subjected to a process, if needs be, but such process must be fair, transparent and conducted by a credible tribunal. The concerns about the tribunal include the fact that the Chairperson is a Malawian High Court Judge yet Justice Musonda is a Supreme Court Judge. Further, there seem to be some close connections between the Malawian Judge and the President resulting in the Judges doubting his independence and impartiality in the matter. The other concern is that there are a number of retired Zambian judges with credibility who the President could have appointed.

Judicial reforms

It appears that at the centre of the controversy is the question of judicial reforms. It appears that since the new government took office there has been appetite for judicial reform. While the judiciary is not opposed to reforms, itself having taken the initiative to effect changes and all parties are not opposed to such judicial reforms, there is neither agreed definition nor agreement on the nature and character of the reforms. The judiciary on the one hand says that reform must be broad-based touching all players in the administration of justice; the Government on the other hand, seems to take the view that there is deep-seated corruption, incompetence and lack of accountability in the judiciary. This Government position has been compromised poisoned by the call by some members of the Executive, individual members of parliament as well as the Law Association of Zambia that some, if not all the members of the Court, including and in particular the Chief Justice must resign.

The judiciary, therefore, feel that there is a general plan on the part of the Executive and other individuals to remove all the current members of the Bench. As a result the tension between the two institutions of Government and between the Judiciary and the Law Association of Zambia is high. What has made the situation even more dangerous is the call by the LAZ made at the end of its Annual General Meeting (AGM) early this year for the Judiciary to be "constituted de novo."

Recommendations/Observations

The Mission makes the following initial observations:

1. There is need for greater engagement and dialogue between the Judiciary and the LAZ on the issue of the reforms which all the parties agree should be carried out. The only disconnect lies on the nature and form the reforms should take;
2. The relations between the Judiciary and the Executive are in an unhealthy state, and the independence of the judiciary under such an environment is under great threat;
3. The doctrine of separation of powers and the Rule of Law is threatened in such an environment as Ministers of State and Members of Parliament make statements which seem to attack the independence and integrity of the Judiciary without remorse;
4. While the Judiciary as an institution of State must be held accountable, there is need to carefully define and draw the line between calling for judicial accountability and interfering with the independence of the judiciary. It is significant that the situation in Zambia is assisted to strike the necessary balance between the two.

Conclusion

The LAZ, after being encouraged to dialogue with the Judiciary in particular the Chief Justice who is under severe pressure from the politicians, seems to have welcomed the advice provided by the Mission. It was impressed on them that the legal profession is the vanguard of an independent judiciary, and should be the first to defend and protect judicial independence even as a call is made for judicial accountability and reforms. At the end of the Mission the ICJ issued the attached statement which gives a clear summary of the issues at stake and the forces at play. Indeed, if not properly managed the situation is likely to escalate to a greater crisis.

May 23, 2012