

**SPEECH DELIVERED BY THE CHIEF JUSTICE,
THE HONOURABLE MR JUSTICE GODFREY GUWA
CHIDYAUSIKU,
ON THE OCCASION OF THE OFFICIAL OPENING OF THE 2017
LEGAL YEAR ON 16 JANUARY 2017**

Mr Attorney and Mr ...

Introduction

We gather here today to mark the official opening of the 2017 Legal Year.

For each year that I have presided over the official opening of the Legal Year, I have chosen a theme for my speech.

In 2016 I applauded the cordial relationship that has developed amongst the key players in the justice delivery system and which now characterises our interaction. I pray that this cordial relationship continues to grow from strength to strength.

The year before, that is 2015, the theme was effective justice delivery. In the course of that address I stepped on the toes of some Judges when I bemoaned the poor performance by some Judges who had delivered one or two judgments the entire previous year. I do not regret having said what I said, for the performance by all judicial officers, especially by High Court Judges, has since that date remarkably improved. In some instances, the performance of those Judges who had previously underperformed has even surpassed my expectations. There are, however, one or two Judges whose performance remains unacceptably poor. In one instance the Judicial Service Commission directed me to write a letter of reprimand to the Judge concerned. The Judicial Service Commission also made it clear that they did not accept flimsy excuses such as "I cleared all the work assigned to me". The Judicial Service Commission also emphasised that they expected Judges to write judgments and not simply make determinations. The Judge in question was warned of disciplinary action in the event of no improved performance.

In 2014 I had occasion to celebrate the coming into effect of the new Constitution of Zimbabwe in May and August 2013 and how the new Constitution had reshaped us as a Judiciary.

I could go on and on about the themes I have used in the immediate past. However, all I wish to do is to set the background for my departure from what has become my tradition. Today I crave your indulgence. I have no theme.

This is my valedictory speech. I have no theme. I intend to look back on a most satisfying career as Chief Justice of the Republic of Zimbabwe, pending my imminent retirement on 1 March 2017. I also wish to take this opportunity, if I may, to publicly speak to my successor on a number of issues.

Gratitude

On a personal level, I wish to thank His Excellency the President of the Republic of Zimbabwe, Comrade R G Mugabe, and, through him, the people of Zimbabwe from whom judicial authority is derived, for the trust reposed in me to serve in the highest judicial office in the land since 5 July 2001. A great honour was bestowed upon me and on my family when I was appointed to serve my country and my people as Chief Justice.

I also wish to express my appreciation and gratitude to the Deputy Chief Justice, all Judges, all magistrates, and all members of the Judicial Service who have helped to make my work as Chief Justice not only memorable but most rewarding. As I take my leave, I want to assure you all that I enjoyed my tenure as Chief Justice because of your efforts and support.

Assumption of Office in 2001

I leave office as a happy man and a satisfied Chief Justice because, on my part, I did my best to protect the Constitution and the laws of Zimbabwe. History will in due course judge my efforts. While I know that it will be fair in its judgment, I hope that it will equally be kind, as I assumed the position of Chief Justice during turbulent times after the people of Zimbabwe had decided to take back their land. This split the Judiciary into two. One school of thought maintained that it was unlawful to repossess the land. Another school of thought, to which I belonged, was of the view that whether the land should be repossessed or not was a political issue and had nothing to do with the Judiciary. Whether the land was repossessed and redistributed in accordance with the legal framework created for that purpose was the judicial issue. The Judiciary held the Government to account and ensured that repossession and redistribution was in accordance with the law. In these circumstances it fell on me as Head of the Judiciary to ensure that the credibility of the Judiciary remained intact by ensuring that

the Executive adhered to the rule of law in its exercise of repossession and redistribution of the land.

It was my role as Chief Justice to lead in the crafting of a solution that would uphold the independence of the Judiciary, restore faith in the rule of law as a guiding tenet of the State, and yet give expression to the aspirations of the people to fulfil one of the main reasons why they had waged the war of liberation. I look back with some degree of satisfaction that the solution that we offered collectively as a Judiciary was both a statement of our independence to form our own opinions on how the law should be interpreted to serve the interests of the people it seeks to govern and at the same time was reaffirmation that Zimbabwe is a nation where the rule of law prevails. Our solution was based on established legal principles and did not seek to distort any established legal tenets.

In that instance the Judiciary, under my leadership, was able to shape the jurisprudence of this country without violating the Constitution of the day.

May I take this opportunity to advise my successor that he or she must be faithful to the Constitution at all times and avoid distorting established legal principles to uphold the rule of law in the land even at personal cost to himself or herself.

The rulings in the Supreme Court on the land cases led to perceptions at home and abroad that the Judiciary in Zimbabwe was not independent. This became apparent at regional level as I met with colleagues from the region. I stood firm because I believed in the correctness of our decisions at law. My stance on constitutionalism then and today as I leave the Bench has not changed. Given the same situation, I would today make the same decisions that I made in 2001 on the land issue because I believe they are correct at law.

The Judicial Service Act

The promulgation of the Judicial Service Act [*Chapter 7:18*] in 2006 was one of the major milestone events to occur during my tenure as Chief Justice. Whilst it would take four years up to June 2010 for the Act to be brought into operation, one cannot deny that the judicial landscape in Zimbabwe has never been the same after the promulgation of the Act.

I must confess that when the idea of coming up with the Judicial Service Act was first mooted, I had no idea that it would transform the Judiciary in the manner that it has. The concept of separating the administration of the courts from the Ministry of Justice, Legal and Parliamentary Affairs, which was the main driver of this reform, has now become so commonplace and so acceptable across the board that one wonders why it took us so long to come up with the Act.

I am proud of the fact that the idea has also inspired others in the SADC region to establish similar arrangements for their Judiciaries. It has been a proud moment for me, as Chief Justice of Zimbabwe, to receive requests for assistance in this regard from my colleagues in the region.

Hosting the 2015 Chief Justices' Forum here in Zimbabwe was the cherry on the icing of my judicial cake when I had occasion to showcase the efficiency of the Judiciary in Zimbabwe to all of my colleagues in the region. I enjoyed every moment of it, especially when even those from jurisdictions that used to look down on the Zimbabwe Judiciary in the past had nothing but complimentary remarks for the hospitality and efficiency the Judiciary displayed during the event.

The coming into operation of the Judicial Service Act on its own would not have been the celebrated game changer that it has been were it not for the setting up of a Secretariat headed by Mrs Justice Makarau

which, within the past six years, has set up an effective and efficient administration rivalling most public administration bodies.

Looking back over the last six years, I still marvel at what my administration at the Judicial Service Commission has managed to achieve over such a very short space of time.

To those looking from the outside in, it might not appear to be difficult to administer the courts. The difficulty in this instance was to amalgamate the different levels of the courts and streamline them into a united Judiciary, with the Chief Justice as leader. Prior to 2010, all these courts operated as autonomous bodies. A culture of unaccountability had developed and was flourishing. Up to now, some heads of court believe that they are autonomous and can do as they please without any interference from the Chief Justice. They do not believe that they are accountable to anyone.

Gone are the days when Judiciaries were not accountable to the people whom they serve. Our Constitution makes it clear that not only is judicial authority derived from the people but that the Judiciary is accountable to the people of Zimbabwe for its performance as an institution. On my part, I have publicly made my stance on judicial performance known and will continue to do so as I leave the Bench. It is one of the values that I live by. I offer no apologies to all those who do not share my values in this regard.

Achievements of the Judicial Service Commission

As I have indicated earlier, 2010 saw the operationalisation of the Judicial Service Act and the establishment of a Secretariat dedicated to administering all the courts in the land.

The resuscitation of a justice delivery system that had almost collapsed is one of the good memories that I take away with me. The opening of all circuit courts and the resultant reduction of the case

backlog in the courts are hallmarks that I have talked about and will continue to talk about as something that was achieved during my tenure as Chief Justice.

I recommend to my successor that he or she needs to closely monitor the performance of all courts and to continue to roll back the backlogs that had become characteristic of all our courts. I leave at a time when, although all courts still have some backlogs, they have turned the corner and are starting to eat back into the backlogs in meaningful ways.

Inheriting the administration of the courts from the Ministry of Justice, Legal and Parliamentary Affairs also entailed inheriting the infrastructure from which justice is dispensed. This posed one of the greatest challenges that I had to face as Chief Justice. Most courts, especially in the rural areas, were courts in name only and operated from inappropriate structures ranging from general dealers' stores to disused council halls. As I retire, again I dust off my hands with great

satisfaction. I can look back at a string of thirty new and modern magisterial courthouses, a refurbished Mashonganyika Building housing the new Supreme Court, and the refurbished and newly opened Masvingo High Court. My gratitude always goes to Danida, Treasury and the Department of Public Works for these milestone developments, achieved as they were in a very challenging economic environment.

Again, I recommend to my successor to keep the momentum going. The development and maintenance of court infrastructure is as important as the judgments that we hand down in the courthouses. They all contribute towards access to quality justice by our people. I therefore encourage my successor to build on the trust that my administration has generated and to fruitfully engage with co-operating partners and Treasury for the purposes of further improving on the infrastructure and administration of the courts.

2013 saw the adoption of the new Constitution of Zimbabwe. My administration embraced the new Constitution and put in place the

necessary mechanisms to give effect to the letter and spirit of the supreme law of the land as early as May 2013. Additional Judges were appointed to the Supreme Court to cater for the increased number of Judges required for the newly created Constitutional Court.

The Constitution also saw the expansion of the Judicial Service Commission to its current strength. Whilst there remain two vacancies on the Judicial Service Commission, I wish to express my gratitude to the Ministry of Justice, Legal and Parliamentary Affairs for promptly overseeing the process of appointing members to the Judicial Service Commission.

I wish to take this opportunity to thank each and every member of the Judicial Service Commission for their good work in the past three years, especially in the appointment of Judges to the Supreme and High Courts using the newly provided procedures. From the reports that I receive on the performance of Judges, I am happy to share with Commissioners and the public that this new procedure has enabled us

to select some very good Judges whose output and quality of work is rivalling and in some instances surpassing that of their seniors.

Jurisprudential Growth

The new Constitution initially spurred increased litigation in the Constitutional Court, where the figures show a steady increase before declining in 2016. In 2014 a total of eighty-eight constitutional applications were filed with the Court. This peaked to one hundred and one in 2015, before dropping to seventy-eight applications in 2016. Prior to the new Constitution, on average the Constitutional Court would deal with less than twenty cases per year.

Jurisprudentially, the Constitutional Court has done fairly well and I wish to thank all Supreme Court Judges who double up as Constitutional Court Judges for a job well done. A few of our cases have been well received both in the region and beyond.

Needless to say, my successor should keep the momentum going in this regard. The development of a sound jurisprudence demands both hard work and competence. It cannot and does not happen on its own. The application that has been shown by our Supreme Court Judges in the manner they craft and reason through in their judgments must not only be applauded but must be complemented by a leadership that will work equally hard and competently to keep them motivated. A Chief Justice is different from a farm foreman who need not dirty or soil his hands together with the farm labourers but can give directions from the sidelines. A Chief Justice sits in a panel of Judges and cannot write a Supreme Court judgment or a Constitutional Court judgment on his or her own. He or she must take the lead in developing the country's jurisprudence in all respects, inspiring confidence in his or her colleagues and have them concurring with his or her legal position for a binding judgment. He or she cannot command a judgment. Concurrence only occurs after vigorous jurisprudential debate and even then it is not guaranteed. After each Court hearing, the panel of Judges engage

in a very robust discussion among members of the panel. A Chief Justice plays a crucial role in building consensus among Judges. This requires steadfast jurisprudential acumen to avoid numerous dissenting judgments. Dissenting judgments are good in that they demonstrate judicial independence. The downside is that they contribute to uncertainty in the law. Certainty in law is very important.

Decentralisation of the High Court

The High Court in Zimbabwe has since time immemorial been associated with the cities of Harare and Bulawayo. During my tenure as Chief Justice, and in an effort to enhance access to the Superior Courts by the majority of Zimbabweans, a deliberate decision was taken to decentralise the High Court.

In 2016 Zimbabwe opened its third High Court in Masvingo after one hundred and twenty-two years. This marked the beginning of a process to decentralise the High Court. The Judicial Service Commission has

acquired a building in Mutare which it is renovating with the assistance of the Department of Public Works. A new High Court in Mutare is scheduled for opening in June 2017 if everything goes according to plan.

I urge my successor to keep a steady hand on the tiller in this regard and continue to improve on access to justice for the people of Zimbabwe. After Mutare, please do not wait another one hundred and twenty-two years before you open another High Court!

Gender Balance

I also wish to say that, looking back, I am happy with the progress that we have made as a Judiciary in terms of gender balance, especially in the Superior Courts. When I was appointed Chief Justice, there was not a single woman in the Supreme Court. I then recommended the appointments of Justices Ziyambi and Gwaunza to the Supreme Court.

As I leave the Bench, there are six women Judges and six male Judges in the Supreme and Constitutional Courts.

I have pleaded the case of women Judges whenever the opportunity has arisen and I am happy with the result and the gender balance in all the courts. Our records indicate that in the magistrates' courts we have one hundred and four male magistrates and ninety-four female magistrates. In the Labour Court, we have tipped the gender balance over. We have eleven female Judges and only four male Judges.

I again urge my successor to keep an eye on the need to promote and motivate deserving women at every opportunity and not to reverse the gains made in the Labour Court!

Challenges Ahead

Whilst I have largely dwelt on the milestone achievements of the Judiciary and of the Judicial Service Commission during my tenure as Chief Justice, a few challenges remain.

I have spoken of the need to keep judicial officers and courts always accountable to the people and this is a challenge that will remain for my successor.

Whilst my administration has made great strides in getting support from co-operating partners, the funding of the operations of the Judiciary will remain a challenge under the prevailing economic atmosphere. I recommend to my successor to utilise all available resources effectively, to maintain a clean record on how his or her administration utilises public funds, as I have, for the Judiciary must always lead by example, and to cultivate a fruitful relationship with co-operating partners. Earn their trust, but never lose sight of the need to keep the Judiciary independent at all times to determine its own needs and strategic priorities.

The need to always protect the independence of the Judiciary is one of the major roles of any Chief Justice.

Having said this, I wish to digress a bit and speak briefly about the events of the past few weeks concerning the selection of my successor.

I wish to assure the profession and the public at large that, in my view, the debate has assumed regrettable proportions which can only do more harm than good to the Judiciary as a whole. It is also my view that the debate is much ado about nothing. It has obscured the one very important fact, that whatever method is used to appoint my successor, the appointment shall be made by His Excellency the President of the Republic of Zimbabwe. Currently, the law provides for him to make his selection from three nominees submitted to him by the Judicial Service Commission. In the proposed amendment, he will be at large to choose the next Chief Justice from the Bench. Thus, whichever method is used, in the final analysis it is the President's choice that will prevail.

We as the Judiciary and the Judicial Service Commission accept that it is the prerogative of the Executive to decide what procedure is to be adopted for the appointment of a Chief Justice.

However, as guardians of the Constitution and as people who have sworn to uphold the laws of Zimbabwe, we insist that whatever process the Executive comes up with and enacts into a law, that process must be upheld and must be respected at all times. This is what the rule of law demands of us.

Our stance as a Commission is not about the identification of my successor but about the observance of the Constitution as the supreme law of the land at all times.

I also wish to detail the events leading to the holding of the interviews for the post of Chief Justice on 12 December 2016.

When the Constitution came into force in 2013, it was quite clear that the method of selecting and appointing Judges had radically changed.

So had the procedure of appointing the Chief Justice and the Deputy Chief Justice. The Judicial Service Commission successfully utilised the new procedure to fill vacancies that had occurred in both the High and Supreme Courts in 2014 and 2015. My sixth sense, however, told me that the impact of the new procedure, because of its drastic departure from the past process, might have escaped the attention of the Executive in as far as it relates to the appointment of the Chief Justice. As a cautionary move, I alerted the Executive to this new procedure in the appointment of the Chief Justice as early as March 2016. I did not get a response. I inferred from this conduct that the Executive was comfortable with the new procedure. In October 2016, as is required by the Constitution, the Judicial Service Commission Secretariat informed the Executive that the Judicial Service Commission had declared the office of the Chief Justice vacant with effect from 1 March 2017 and was initiating procedures to fill the vacancy in accordance with the provisions of the Constitution.

In light of the above, I was surprised to receive communication a few days before the interviews were due to commence that an Executive order had been issued ordering the Judicial Service Commission to stop the interviews for filling the post of Chief Justice. I responded to the communication, advising that the Executive's directive could not be complied with without breaking the Constitution and that the interviews would proceed as planned and in terms of the Constitution. I have since established that the President never issued the alleged Executive order to stop the interviews.

Ever since adopting our stance to abide by the Constitution, a segment of the media has sought to impugn the integrity of the Judicial Service Commission. This is most regrettable.

This is all I wish to say on this unfortunate debate. In this regard, I am inspired by Michelle Obama's words of wisdom " ... when your detractors go low you go higher". You do not follow them into the gutter.

As to whether or not the Judicial Service Commission's decision to proceed with the interviews despite a High Court interdict, against which it had appealed, was correct, is something that is *sub judice* and we are all awaiting the outcome.

Launch of the Judicial Service Commission Law Reports

I have earlier on in my address outlined some of the milestone achievements of the Judiciary during my tenure as Chief Justice. I have saved what I believe to be the best for last.

The Judiciary in Zimbabwe has up to last year never produced its own Law Reports. Judges write judgments which others take for free because they are public documents. These third parties compile the judgments into Law Reports which are then sold back to the Judges.

In 2016 I made the bold decision that the Judicial Service Commission must take over the process of compiling Law Reports on behalf of the

Judiciary. I set up an Editorial Board, chaired by myself, deputised by the Deputy Chief Justice, and on which sit the Judge President of the High Court, the Senior Judge in the Labour Court, and the President of the Law Society.

The Editorial Board in turn appointed an editorial team, which has produced the first edition of the Judicial Service Commission Law Reports, covering judgments handed down during the period 1 July 2015 to 31 December 2015. This edition has a total of one hundred and twenty-four judgments and, in my view, is truly world class. I wish to thank the editorial team for a job well done.

I have quickly perused through the Law Reports and note that it lists cases from other jurisdictions which were either applied or referred to in the reported decisions. I was impressed to learn that Judges in the preparation of their judgments went as far afield as Scotland, New Zealand, Canada, Namibia and The Netherlands, among other countries, in their search for the correct position at law in deciding

the matters that were placed before them. Congratulations to those Judges whose judgments found their way into the Judicial Service Commission Law Reports. This is how you make your name or distinguish yourself as a Judge. *Ex tempore* judgments do not find their way into Law Reports. If you specialise in that, no-one will ever know that you were a Judge, except your relatives.

Once again well done and thank you to all who have worked tirelessly to make the production of the first Judicial Service Commission Law Reports possible.

With these remarks, I hereby declare the 2016 Legal Year officially open!

I also officially launch the 2015 (2) Zimbabwe Law Reports!

ADDENDUM

On 7 December 2013 Mrs Justice Vernanda Ziyambi retired from the Supreme and Constitutional Court Benches. She had reached the

peremptory retirement age of seventy. Mrs Justice Vernanda Ziyambi joined the High Court Bench on 29 August 1992. On 30 July 2001 she was appointed as a Judge of Appeal in the Supreme Court and in that capacity she also doubled up as a Constitutional Court Judge.

During her tenure as a Supreme and Constitutional Court Judge, Mrs Justice Vernanda Ziyambi contributed immensely to the jurisprudence of this country. Her judgments will continue to inspire and guide many generations of lawyers and Judges to come.

On 11 November 2016 Mr Justice November Mtshiya retired from the High Court Bench. Mr Justice November Mtshiya joined the High Court Bench on 27 December 2007. Prior to that he was the Senior President of the Labour Court, a position he held for four years. Mr Justice November Mtshiya earned himself the name "*Malume*" in the High Court due to his wisdom and his avuncular outlook to all who worked with him in the High Court.

I wish both Judges a happy retirement.

May we all rise as Bishop Trevor Manganga leads us in prayer.

(After the prayer)

COURT IS ADJOURNED!